

## LEGAL IMPLICATIONS OF VALUES-BASED MANAGEMENT—OBSERVATIONS ON *HOT HOLDINGS PTY LTD V CREASY*<sup>1</sup>

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### **Introduction**

At the outset let me just note that Max Spry will be dealing with the legal analysis of *Hot Holdings Pty Ltd v Creasy*<sup>2</sup> while I will discuss more broadly some of the ethical issues raised and how the case illustrates that statements of values and codes of conduct should be taken seriously by government agencies, and not be seen merely as rhetoric.

### **The facts and what the High Court decided**

This case concerned a decision by the Western Australian Minister for Mines to grant an exploration licence.

The Minister took advice from a number of sources, including from the Department of Minerals and Energy of Western Australia. That advice was contained in a minute signed by the Director General of the Department. This minute was prepared following discussions between two senior public servants in the Department, in the presence of a third, who was asked to prepare a minute reflecting their views. He did so (although the minute was actually drafted by his subordinate), and after some changes were made to its contents, not altering the substance of its recommendation, the Director General considered it, agreed with it, signed it, and sent it to the Minister. The Minister, before agreeing to the recommendation to grant the licence, discussed the matter with two other public servants, including a senior legal advisor.

The Minister's decision was challenged by some unsuccessful applicants, on the basis that it was tainted by a reasonable apprehension of bias, through the pecuniary interests of two of the public servants involved in preparing the Department's advice to the Minister.

The son of one of the senior public servants involved in the discussion held shares in a company that had an option to buy an interest in any exploration licence, as did the public servant who was asked to prepare the minute. Neither of these interests was declared.

It is perhaps useful to remember that the case involves a minister in the Government of Western Australia, and when considering the issues involved, it is against the background of past concerns about the conduct of public and corporate officers in that State in the 1980s and 1990s. Those concerns produced demands in WA, as elsewhere in Australia, for higher standards, including in respect of financial probity and the avoidance of conflicts of interest and duty by those entrusted to exercise power on behalf of others.

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The application by the unsuccessful applicants for the licence to quash the Minister's decision failed in the first instance before the Supreme Court of Western Australia, but succeeded on appeal to the full Supreme Court on the basis that the decision of the Minister gave rise to a reasonable apprehension of bias. On appeal, the majority of the High Court of Australia reversed that decision, finding that the involvement of the advisors in this case was peripheral and so there was no reasonable apprehension of bias.

It is worth noting that several eminent Judges of the WA Supreme Court were of the opinion that the facts here warranted the setting aside of the Minister's decision. As it turned out, a majority of the High Court found on the facts that there was no reasonable apprehension of bias because the involvement of one official in the preparation of the minute was at most peripheral and the shareholding of his adult son was not enough to disqualify the other official.

### **Justice Kirby's minority judgment**

Although Justice Kirby was in the minority, in my role of promoting the APS Values and Code of Conduct, I share with him concern for upholding the integrity of public administration and many of his comments resonated with me. His judgment demonstrates that the courts may draw directly on statements of values and codes of conduct. I suspect this is particularly likely in the Commonwealth arena where the values and code of conduct is written into legislation.<sup>3</sup>

The main difference between the majority of the High Court and Justice Kirby was in how they applied the test as to whether a fair-minded observer would have decided there was a reasonable apprehension of bias. Would such a fair-minded observer have had regard to the peripheral role of the official who had a direct pecuniary interest - which is what the majority said? Or would a fair-minded member of the public have taken a more global approach, influenced by the same concerns about the integrity of public administration as Justice Kirby?

Of course it is better to act in a way that avoids the need to debate whether a fair-minded observer has short focus or distance lenses on their glasses. The whole expensive business - and four years of costly delay in resolving the rights of the parties - could have been avoided had the officials involved declared the relevant interests.

For those who have not had the opportunity to read the High Court judgement in the *Hot Holdings* case, and Justice Kirby's minority judgement, it might help if I illustrate some of the flavour, and its relevance to the values-based environment now operating in the APS, and to some of the themes and directions being promoted by the Commission.

Justice Kirby draws heavily on the institution of the public service in Australia, derived from the British heritage. The first APS Value of being apolitical, impartial and professional underlies this feature of uncorrupted administration, as does the APS Code of Conduct's references to honesty and integrity and compliance with the law. And, of course, disclosure and avoidance of conflict of interest.

Justice Kirby refers several times to the responsibilities of public officials exercising public power. For example: 'Officials authorised and required to exercise public power are sometimes said to be the public's trustees.'<sup>4</sup>

In our promotion of the APS Values, we in the Commission frequently make a similar point. The requirement to have the highest ethical standards is not just rhetoric that might be mouthed by anyone, in any organisation, but reflects in particular the fact that most APS employees are funded by the taxpayer and very many exercise public power through

delegations authorised by the Parliament. The public has the right to expect its power to be exercised according to the highest ethical standards.

At another point in his judgement, Justice Kirby refers to a separate case, in which he also delivered a minority judgment. In that case he said the law of imputed bias does not operate by a lawyerly dissection of events, rather, he says, '[B]eing concerned primarily with the impact of events upon the persons affected and upon reasonable members of the public, what is involved is the general impression derived from the evidence.'<sup>5</sup>

This has a resonance in the realpolitik that we frequently face in the APS. It is not always possible to say with precision what is the appropriate ethical behaviour in every case. In the *Hot Holdings* case, none of the judgments were based on the view that a public servant whose son held shares in a relevant company, of itself represents an unacceptable conflict of interest. The different views expressed all had regard to some broader appreciation of the circumstances. In our advice, we frequently refer to the 'Bronwyn Bishop test': if you were called upon to justify your decision before a Senate Estimates Committee, would you fear embarrassment? If so, the appropriate decision is usually staring you in the face. (I hasten to add; sometimes it is important for a public servant to stand their ground against possible populist and unreasonable views taken by honourable Senators.)

Discussing whether an appearance of bias should be capable of determination in advance, Justice Kirby suggests that if the public servants had disclosed their respective interest and association to the Minister: 'the Minister, in such a sensitive area of decision-making would have said - and rightly said - "Well you had better have nothing to do with this matter. And please record that you informed me and that I gave you that instruction"'.<sup>6</sup>

This point is also interesting. It goes to the importance of transparency. Note that the provision in our Code of Conduct says that an APS employee '**must** disclose' any conflict of interest, real or apparent. It has a caveat on the requirement to avoid any conflict of interest ('take reasonable steps to avoid'), but not on the requirement to disclose.

This gives you the broad flavour of Justice Kirby's judgement, and its relevance to our environment, based on Values. His concluding paragraph, in which he quotes Professor Carney, and says he would like to endorse his words, again highlights that the perception of conflicts of interests, as well as actual conflicts, may be damaging:

Public integrity as an ideal which must be nurtured and safeguarded, describes the obligation of all public officials to act always and exclusively in the public interest and not in furtherance of their own personal interests. ... [C]onduct less heinous than that of corruption may ... betray this trust... The dangers posed for the public interest by the existence of conflicts of interest on the part of public officials, whether the conflicts of interests are real or perceived to be real, demand the adoption of mechanisms which prevent such conflicts arising or which resolve them if they do arise.<sup>7</sup>

### **Decision making in a values-based environment**

Although it is interesting to be aware that there can be legal or political consequences if things go wrong, it is important to remember that our focus as administrators should be on preventing reasonable apprehension of bias from arising in the first place in order to ensure public confidence in our decisions.

Today I would like to focus on situations where, as in *Hot Holdings*, the reasonable possibility of apprehension of bias relates to conflict of interest. There are of course other circumstances where questions of reasonable apprehension of bias might arise. I will also talk a little more generally about the values-based environment in which we operate.

Those of us who are part of the APS have an obligation to behave, at all times, in a way that upholds the Values and the integrity and good reputation of the APS, and we must comply with the provisions of the Code of Conduct. The Values and the Code are not merely aspirational. Our obligations to meet the behavioural requirements they embody are real and legally binding. A failure to meet them can have serious consequences, both for individuals - in that breaches of the Code may result in action being taken under the *Public Service Act 1999* (Cth) (the PS Act), including termination of employment - and also for the Service as a whole. When corrupt or inappropriate conduct comes to the attention of the public, by way of the courts or through the media, public confidence in the integrity of the APS may suffer, and legal remedies may be open to address unlawful decisions.

SES employees have an additional, and even more active obligation in terms of ethical behaviour. The role of the SES is defined in section 35 of the PS Act. In part, it says that the SES 'by personal example, and other appropriate means, promotes the APS Values and compliance with the Code of Conduct'. Not only must they uphold the Values and comply with the Code; as leaders, the SES must educate others about the importance of ethical behaviour and act as role models for the rest of the service.

And of course Agency Heads have a vital role to play in promoting values-based cultures in their agencies, both by ensuring that the Values are 'hardwired' into their agency corporate governance systems, and through personal example, such as encouraging discussion and awareness of ethical issues in their dealings with people in their agencies.

The Code of Conduct is also binding on Agency Heads. Added to this, they have a responsibility to ensure that procedures are in place to determine whether an employee in their agency may have breached the Code. (And of course, as Public Service Commissioner, I am empowered to evaluate the adequacy of systems and procedures agencies use to ensure compliance with the Code, as well as the extent to which agencies incorporate and uphold the Values.)

In my view there are particular Values and elements of the Code of Conduct that define the institution of the Public Service. They also set the principles for relationships with the Government and the Parliament, the public and other external stakeholders and within the workplace, and guide personal behaviour.

The five Values which I think reflect core principles of public administration and the role of the APS as an institution of Australia's democratic system of government are:

- the *apolitical nature* of the APS;
- the *merit principle* governing employment decisions;
- the *ethical standards* required;
- *accountability* within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public; and
- *responsiveness* to the elected Government.

One element in particular of the Code of Conduct is also a foundation stone of the Service, and that is *compliance with the law*.

The apolitical nature of the service and its impartiality and professionalism are crucial to our interaction with Government. This does not mean that the APS is independent of the Government. The APS must help Ministers to develop and implement policies, recognising their authority to determine the public interest and their concern to achieve better outcomes for the Australian community. The APS provides advice to, and gives effect to, the policies of the government elected by the Australian people. Professional commitment is owed by the

APS to the Government, not to the political party or parties to whom the members of the Government belong.

In our dealings with Government we are also required to be responsive, and critical to meeting this obligation in building a high level of trust between the Agency and the Minister and the Minister's Office. Trust requires, in particular, confidential handling of information, knowledge and expertise on the part of the APS, and a sense of partnership. That said, APS responsibilities are distinguishable from those of the Minister and the Minister's Office, and open appreciation of this is important to a relationship of genuine trust and cooperation.

In our dealings with the public, we must have regard to the Value that requires services to be delivered fairly, effectively, impartially and courteously and with sensitivity to the diversity of the Australian public. The Code of Conduct also requires public servants to act with care and diligence and to treat people with respect and courtesy and to declare (and if possible avoid) conflict of interest. These are key principles behind decision-making affecting the public.

In the guidance that the Commission provides to agencies about managing conflict of interest, we make the point that public confidence in the integrity of the APS is vital to the proper operation of government. Where the community perceives a conflict of interest, that confidence is jeopardised. Public servants need to be aware that their private interests, both financial and personal, could conflict at times with their official duties. While it will not always be possible to avoid conflict of interest, the disclosure of any interest that may involve a conflict is crucial. Possible conflicts **must** be disclosed. Once this has been done, steps can be taken to manage the situation, but it is identifying situations where a conflict might occur, or might be **seen** to occur, prior to the event, upon which these matters can turn. In the present case, for example, if the employees concerned had been mindful that their interests, even if they thought them to be peripheral, had the potential to create at least an appearance of partiality, and had disclosed them, we would very likely not be here talking about the case today.

Conflict of interest is not an isolated issue facing a minority of the APS in a few agencies. With the breadth of decisions that the APS is now involved in, and increased interaction with business and the community, the risk of conflict is widely spread. There are many contexts in which conflict of interest can be an issue. Following the MRI 'scan scam', the Department of Health added to their Chief Executive Instructions some interesting and useful provisions on conflict of interest. The Health Instruction deals with a range of issues, including staff with partners in the Department; conflict of duty; employees serving on Boards or Committees; procurement or tender assessment processes; selection advisory committees; privacy; outside employment and post-separation employment (ie, where employees are contemplating taking up employment after leaving the APS in industries that are closely aligned with their departmental responsibilities).

While avoiding conflicting interests is generally preferable, in practice there are some situations in which conflicts of interest cannot be wholly avoided. It is important for agencies to have in place processes to manage such situations that will withstand public scrutiny. Processes must include declaration of the interests, and full and open communication to all stakeholders of the way in which the actual or potential conflict is to be managed. Agency Heads, in their own case, need to declare to their Minister any personal involvement in a situation where there is actual or potential conflict of interests.

In the APS, SES employees and above, as well as those acting in SES positions for more than three months, are required to provide written statements of their private interests and those of their immediate family. This stems from a Government decision in 1983 that Ministers, Ministerial staff, senior APS employees including those working in statutory authorities, and statutory office holders would be required to provide a written statement of

their private interests. The practice is intended to draw attention to those actual or potential situations where a conflict of interest could arise. Agency Heads are responsible for implementing this government decision in respect of staff in their Agency.

The *Hot Holdings* case illustrates a critical limitation, and even risk, of this policy. No regular bureaucratic process of declaring interests will meet every circumstance of possible real or apparent conflict. The specific circumstances may well require declaration of interests not mentioned in the regular statements. Moreover, and possibly more importantly, no declaration obviates the individual's personal responsibility to draw attention to, and avoid if possible, conflict in a particular circumstance. Just because an employee has informed his or her Agency Head in the past, even recently, responsibility is not shifted to the Agency Head if an issue arises. It is still up to the individual concerned to declare any interest when it becomes relevant.

In the late seventies, the possible conflict between public duty and private interests was the subject of a Committee of Inquiry chaired by Sir Nigel Bowen. The Committee's Report included a code of conduct, for application to public servants and statutory office-holders, which was endorsed by the Government of the day. The introduction of the PS Act has not changed the Government's position in relation to the Bowen Code. It is important that agencies continue to advise statutory office holders within their portfolios of their obligations in relation to these Principles.

### **Some requirements for good decision-making**

In my view, the first requirement of good decision-making is *compliance with the law*. As I have discussed already, public servants are bound by the APS Values and Code of Conduct set out in the PS Act and compliance with the law is specifically required in the Code of Conduct. Other key words in the Values and the Code are *impartial, professional, ethical, accountable, fair, effective, courteous, honesty and integrity*.

Apart from the PS Act, public servants are bound by financial legislation (eg the Financial Management and Accountability Act 1997 (FMA Act) and the Commonwealth Authorities and Companies Act 1997 (CAC Act)) and by any other legislation governing the programs they administer.

In reflecting on this case it is important to consider also the body of administrative law, both in statute and from common law, that sets out a range of principles for decision-making, including:

- appropriate use of powers exercised by those properly authorised;
- provision of reasons to explain and justify decisions, ensuring fairness, transparency, consistency and accountability; and
- 'fair and reasonable' approaches to decisions, and 'natural justice' or 'procedural fairness' for anyone impacted by a decision.

For example, the Administrative Decisions (Judicial Review) Act 1977 identifies a number of improper uses of powers that should be avoided. When making a decision under an enactment, decision-makers, including public servants, must not:

- take account of an irrelevant consideration in exercising a power,
- fail to take account of a relevant consideration in exercising a power,
- exercise a power for purposes other than that for which it was conferred,
- exercise a discretionary power in bad faith,
- exercise a discretionary power at the direction of another person,

- exercise a discretionary power in accordance with a rule or policy without regard to the merits of the particular case,
- exercise a power that is so unreasonable that no reasonable person could have so exercised the power,
- exercise a power in such a way that the result is uncertain, or
- exercise a power in a way that constitutes abuse of power

I should also emphasise that the financial legislation, like the PS Act, is based on principle, in that a Chief Executive must manage the affairs of his or her Agency in a way that promotes the *efficient, effective and ethical* use of Commonwealth resources.

The ethical emphasis is again important. The public which has vested power and authority in public servants rightly expects that power and authority to be exercised in the highest ethical manner.

### Conclusion

This case leaves open the possibility that, if an advisor with **more than a peripheral role** in a decision has a personal interest in a decision, or has a close family member with such an interest, the decision could be set aside in administrative law on the ground of reasonable apprehension of bias. Whether such a challenge would succeed would depend on the nature of the decision being made and of the personal interest and the level of involvement of the advisor.

Also, regardless of the likelihood of a successful challenge in administrative law, the involvement in a decision of a public servant with an undisclosed interest:

- might give rise to grounds for disciplinary action for breach of ethical codes – as pointed out by Justice Gleeson;
- can damage public confidence in the integrity of the institutions of public administration – as pointed out by Justice Kirby; and
- can lead to protracted and expensive legal challenges with serious effects on the rights of third parties – in this case, the decision in question was made in June 1998, over four years before the High Court case was finally settled.

A key lesson I take from the case is that the APS Values and Code of Conduct are not just rhetoric – if public servants do not act in accordance with the relevant values and code of conduct there may be serious legal consequences.

Finally, I'd just like to mention a couple of initiatives that the Commission is undertaking that are relevant to the issues we are discussing today.

The first is the Values in Agencies project, begun in September 2002. The project is examining how six Commonwealth agencies are applying the APS Values, integrating the Values into systems and procedures and ensuring compliance with the Code of Conduct.

Fieldwork for the project is complete and conclusions are being developed based on the findings of the study and a literature search. The results will provide material for a good practice guide for service-wide use to be published later this year. The results of the project may also feed into the next State of the Service Report. The new guide will assist agencies to embed the Values and Code of Conduct into their governance arrangements and suggest ways of using the employment framework to best effect.

The second initiative is the revision of the Guidelines on Official Conduct. I am conscious that this is taking longer than I had hoped, but I am determined to have a product that is authoritative and widely agreed. It will be structured around the working relationships that the Values help to shape: of the APS with Government, with the public and other external stakeholders, and amongst APS employees in the workplace. They will include a focus on the meaning of impartiality, both in our dealings with Government and in decision-making, and on managing conflicts of interest, including in the context of post-separation employment. I think they will contain valuable advice for all public servants, and particularly those at more senior levels, for whom issues like the perception of bias in decision-making and the need to disclose and if possible avoid conflicts of interests are real and serious considerations. The document is still a little away from finalisation, but it will provide an important aid to values-based management.

#### Endnotes

- 1 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70; 193 ALR 90.
- 2 See below p xx.
- 3 See Public Service Act 1999 (Cth) ss 10 and 13.
- 4 *Hot Holdings Pty Ltd v Creasy* (2002) 77 ALJR 70, at 93 ([135]).
- 5 *Ibid* at 92 ([131]).
- 6 *Ibid* at 96 ([150]).
- 7 *Ibid* at 97 ([156]).