



Ministerial Conflicts of Interests

**A paper by the Hon. Ann Vanstone KC,
Commissioner**

September 2024

Introduction

A conflict of interests is simply a clash of competing interests; in this context, the public interest in a Minister exercising his or her decision making power impartially, in accordance with his or her public duty, as against private interests of the Minister which might be advanced by the decision.

Recent history shows that there is significant confusion about how to deal with a conflict of interests held by a Minister.

In November 2021 a Parliamentary Committee found that the former Attorney-General and Minister for Planning “was in a position of perceived conflict” and “in a position of actual conflict” in considering the assessment reports prepared by the State Planning Commission related to a proposal to develop a deep water port at Smith Bay, Kangaroo Island.¹ Six months later the Ombudsman considered the same matter and came to the opposite conclusion.²

Understandably this caused consternation among parliamentarians and other public officers.

In May 2022 the Premier was reported as saying the difference between the Ombudsman’s and Select Committee’s findings was “extraordinarily difficult” for any cabinet minister or other member to interpret and asked the Chief Executive of the Department of Premier and Cabinet to review the findings and Ministerial Code of Conduct with a view to providing a better and clearer framework.³ That review is yet to be completed. Part of the reason for the delay has been difficulty in satisfactorily defining a conflict of interests.⁴

It is essential that South Australia has a clear and effective framework for identifying and managing Ministerial conflicts of interests.

Ministers need to be able to make difficult decisions knowing there is a clear and comprehensible integrity framework against which any complaints will be judged. Ministers amass substantial expertise in their portfolios. It is not in the community’s interests for a Minister to recuse himself or herself from a decision out of excessive caution or the fear of being unfairly criticised.

In this paper I seek to assist in resolving these issues. It contains suggestions about a framework for regulating Ministerial conflicts of interests and, importantly, proposes what I hope is a workable definition.

During my term as Commissioner my views about how conflicts of interests are best defined and explained have altered, and I think matured.⁵ I hope this paper will provide clarity about the concept, not only for Ministers, but for all public officers.

Because of the importance of the issue I consider it is in the public interest to publish this paper on the Commission’s website.

¹ Final Report, Select Committee on the Conduct of the Hon Vickie Chapman MP regarding the Kangaroo Island Port Application, 18 November 2021, pp.14-16

² Report, [Investigation of a referral by the Select Committee on the Conduct of the Hon Vickie Chapman MP](#), May 2022

³ Tom Richardson, [Ombudsman’s Chapman Finding ‘extraordinary’: Premier](#), 25 May 2022

⁴ Andrew Hough and Kathryn Bermingham, [‘Labor agrees to ICAC recommendations after mystery minister bombshells’](#), The Advertiser, 8 March 2023

⁵ Accordingly, I prefer that my approach as reflected in this paper be referenced, rather than the paper entitled *Identify, Disclose and Manage* published in June 2021, or the *Integrity Spotlight* dated December 2022.

Why regulating a conflict of interests is important

Ministers, like all public officers, exercise powers entrusted to them by the public. A fundamental condition of that trust is that the Minister will exercise power impartially and for the purposes it was conferred. Further, a Minister “has a *duty to serve*, and in serving, to act with fidelity and with a single-mindedness for the welfare of the community”.⁶ The content of that duty includes “an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations”.⁷ Where extraneous considerations bear on the Minister, impartial decision making is compromised. This clash or tension or conflict between the public’s interest in seeing the Minister exercise powers and fulfil duties with regard only to the public benefit, as against some private interest of the Minister, can be termed a conflict of interests. An effective regime for managing conflicts of interests can reassure the community that decisions made in its name are being made impartially and for proper purposes.

Whether there is a private interest is a question of judgement. In a sense we all – as members of the community – have an interest in every decision made by all Ministers. Ministers, as community members, share those interests with us. If the interest in issue is merely that of a diligent community member it will plainly not amount to a relevant interest, such as to give rise to a conflict.

A competing private interest creates a risk that:

1. the Minister will exercise the power to favour the private interest, and thus undermine the fundamental basis on which the power has been entrusted by the public. This could occur because the Minister intentionally decides to favour the private interest, or because that interest subconsciously influences the Minister’s decision; and
2. others will form the view the Minister is exercising the power to favour the private interest and that the fundamental condition of the conferral of power is being breached.

A process which ensures that any private interest is identified and declared and, if possible, appropriately managed, mitigates these risks by ensuring that the following occurs.

1. The conflicting private interest is identified and brought to the attention of an independent third party. In the case of a Minister, this will be the Premier. If the Premier’s private interests are in issue, it will be Cabinet.
2. The Premier and the Minister can consider whether the private interest poses a risk to the Minister’s impartiality and take steps to protect the public’s interest.
3. Community confidence in public administration is maintained by demonstrating that steps are being taken to prevent the conflicting private interest from affecting the impartial exercise of public power or duty.

⁶ *R v Boston* (1923) 33 CLR 386 at 400 per Isaacs and Rich JJ (emphasis in original)

⁷ *Re Day (No 2)* (2017) 263 CLR 201 at [49] per Kiefel CJ, Bell and Edelman JJ; see also *Berejiklian v Independent Commission Against Corruption* [2024] NSWCA 177 at [255] per Bell CJ & Meagher JA (Ward P dissenting on a different point)

Key features of an effective conflict of interests framework

The essence of an effective regime to address conflicts of interests is that it protects against both the misuse of power and the perception of misuse, maintaining the integrity of public administration and the confidence the community places in it.

It needs to be practical and to place realistic expectations on those to whom it applies and those who will be required to administer it. There is little use in requiring Ministers to disclose a conflicting interest if what needs to be disclosed is vague, colourable or difficult to interpret.

Against that background the following features of a framework are important.

It is easy to understand

A conflict of interests occurs in circumstances where a private interest *could* conflict with the impartial exercise of the Minister's duties. The Minister's own views about whether there is a conflict are important, but will not always determine the issue. That is because the decision must be made objectively. Therefore the Minister should step back from his or her own convictions and take an objective approach. Similarly, what decision the Minister might plan to make in the face of the conflict is beside the point.

Any regime for addressing a conflict of interests must be clear and accessible, and leave little room for confusion or argument.

The use of the vague and overlapping labels *actual*, *potential* and *perceived* conflicts of interests leads to confusion and tends to distract from the underlying issue. I maintain that they should be avoided. I say that for these reasons.

Use of the term *actual* conflict of interest is apt to mislead. It sets up a false dichotomy with a conflict that is other than actual. It could give the incorrect impression that there is no conflict until the private interest is favoured.

The concept of a *potential* conflict of interests is similarly confusing. It is not clear what is meant by it. If use of the adjective *potential* is intended to connote a private interest which, for the moment, is not relevant to a decision but might be in the future, then it adds nothing to the definition set out above, and there is no conflict. (On the other hand, if a prospective Minister had, for example, extensive interests in land development, that might provide good reason not to appoint them Minister for Planning in the first place.)

The term *perceived* as applied to a conflict of interests can lead to a variety of missteps. It can throw emphasis onto the views of uninformed outsiders, suggesting that those views can determine the issue; whereas the first question is always whether there is any relevant competing private interest *at all*. It is also used as a 'fudge' to depersonalise the issue, the thinking apparently being that to have a conflict is somehow blameworthy. It is sometimes used to draw attention to the fact that the assessment of the Minister about whether an accepted private interest could influence him or her is not the key and that, rather, it is the *capacity* of the interest to influence the Minister which matters. This is correct. However, this point can be better addressed by using the simple and concise definition I propose later in this paper.

To encapsulate my criticism of these labels in another way, the concepts they embody might be useful in determining whether there is, objectively, a conflict of interests; but they are not species of, or subsets of conflicts.

It excludes irrelevant matters

The following are irrelevant to any assessment of whether a conflict of interests in fact exists. An effective regime should reflect this.

1. **The Minister's subjective view** - A Minister's perception of whether a private interest will *in fact* influence the required judgement is irrelevant. Whether there is a clash of interests is a matter of fact, to be assessed objectively and using common sense.
2. **Whether action has been taken to favour the private interest** - Whether there is a conflict of interests does not depend on whether a Minister has taken action to favour the interest (which is likely to be a more serious matter). Again, it is the simple existence of the relevant competing interest which constitutes the conflict.
3. **Whether the private interest and the public duties coincide** - It is no answer to say the private and public interests point one way.

It defines "private interest" with an appropriate scope

"Private interest" should be defined so that it encompasses not only the private interests of the Minister but also the interests of those with whom he or she is in a close personal relationship including a spouse, children, parents and business associates.

It should exclude a private interest that arises merely because the Minister is a member of the public at large, or a member of a broad demographic group of the public, and the interest is held in common with other members of the public or group.

It describes the appropriate process

The first and fundamental question will be whether the private interest identified is a relevant private interest. If it is not, that is the end of the matter.

If a Minister considers he or she has or might have a conflict of interests the Premier should be advised in writing. Details should be provided so that the Premier can form a view. If such a disclosure is made, careful attention should be paid to whether the private interest is of a kind that gives rise to a conflict in accordance with the proposed definition. As I have said, needless recusals should be avoided and the public should not be unnecessarily deprived of a Minister's expertise.

If, upon examination, there is a conflict the Premier can determine the most appropriate course of action.

Whatever the Premier decides, the Minister's disclosure and the action to be taken in respect of a it (including if the disclosure has been assessed as not giving rise to a conflict) must be properly documented. The record must include detail which enables someone reviewing it to easily see what has been declared, the actions that have been taken and the reasons it was determined those actions were appropriate and proportionate.

The Premier may wish to consider what, if any, public statement ought be made about the matter, particularly if the matter is public knowledge or has been the subject of some controversy.

It provides guidance on what should be done when a conflict of interests exists

Once a conflict of interests has been declared by a Minister the Premier should decide what action to take.

The guiding principle is that the action taken must adequately address the risk that the Minister's private interest will influence the impartial exercise of public duties or functions, as well as the risk the community's confidence in public administration will be undermined.

If a Minister, or a close personal associate of a Minister, could benefit from a decision the Minister is going to make or be involved in, then the appropriate action for the Premier to take is to require recusal of the Minister from the decision making process.⁸ While this will usually occur in the case of a potential financial benefit for the Minister, it will also be the appropriate course of action if the private interest gives the prospect of some non-pecuniary benefit for the Minister. For example, if a Minister has a close personal relationship with an individual who could benefit from a decision the Minister is to make, the private interest the Minister has in maintaining and not damaging that relationship will require recusal.

There may be rare circumstances where action short of recusal can be taken in respect of a conflicting private interest. However, given the definition of private interest I propose, I see these cases as being the exception. To fall within that definition the private interest would not be remote or diffuse, or held by the Minister in common with a significant part of the community.

It does not contain general exceptions

Because the nature of private interests can vary greatly, the regime should not provide general exceptions, for example, an exclusion for interests arising from membership of sporting, industrial or community groups. General exceptions can be confusing.

It avoids unnecessary recusals

As has been stated, there is a public interest in Ministers making decisions in their portfolios. This ensures their experience and expertise can be employed to make the best decisions. An effective regime for assessing conflicts should avoid Ministers unnecessarily recusing themselves from matters. As mentioned, Ministers bring special skills to decision making in their portfolios. They should not recuse themselves on a flimsy basis or acting out of excessive caution or fear of political repercussions.

It is hoped that the definition which follows reflects most of these features.

⁸ Unless the Minister decides instead to divest the private interest

Recommendations relating to the Ministerial Code of Conduct

I make the following recommendations.

Recommendation 1

The parts of the current Ministerial Code of Conduct relating to conflicts of interests be removed and rewritten.

Recommendation 2

The new Code include an obligation on Ministers to disclose to the Premier any conflict of interests. There can be no recusal without the Premier's knowledge.

That obligation extends to the Ministers providing to the Premier any information he requires to consider and manage the conflict.

If the Minister is the Premier then any reference to "Premier" should be read as relating to Cabinet or a sub-committee of Cabinet.

Recommendation 3

The new Code contain prohibitions on:

1. A Minister concealing a conflict of interests from the Premier, and
2. A Minister exercising a power, participating in a decision, exercising influence or otherwise taking action in relation to a matter in which the Minister has a conflict of interests, unless the Minister has written approval of the Premier to do so.

Recommendation 4

There should be no general exclusions for memberships of sporting groups, trade unions or other associations. For example, the mere fact that a development or other government spending is planned for the Minister's electorate would not ordinarily require recusal of the Minister. However, if, in a particular instance, such an interest fulfils the relevant criteria it should be declared and managed.

Recommendation 5

The new Code use the following definition:

Conflict of interests

A conflict of interests is simply the clash of two competing interests: the public interest in the Minister performing his or her duties impartially as against a personal or private interest the Minister or a person closely associated with the Minister has in the outcome of the Ministerial decision.

1. A Minister has a conflict of interests if he or she has a private interest which could undermine the impartial exercise of his or her public duties or responsibilities.
2. The definition in clause 1 should be applied objectively, and without regard to any view the Minister has about whether he or she will in fact be influenced by the private interest.

3. Without limiting clause 1, a Minister will be taken to have a conflict of interests in a particular matter if the Minister's decision (including a decision to take no action) will:
 - 3.1 result in the Minister, a close personal associate of the Minister or an associated entity of the Minister receiving a benefit; or
 - 3.2 make it more likely that such a benefit will be received.
- 4 For the purposes of clause 3:
 - 4.1 *associated entity of the Minister* includes an organisation, company, association or other organisation in which the Minister is an officeholder, patron or member.
 - 4.2 *benefit* means any financial or other advantage (including avoiding a loss) to a person but does not include:
 - 4.2.1 a benefit a person receives only because he is a member of the public or group of the public which is defined by broad demographic or geographic criteria and the benefit received by the person is the same as that received by other members of the public or group; or
 - 4.2.2 an improvement in a person's or a political party's popular standing.
 - 4.3 *close personal associate* means a Minister's child, sibling, parent, spouse, de facto partner or a person with whom the Minister has an intimate or longstanding personal or business relationship.
 - 4.4 The performance of public duties by a Minister includes the exercise of any influence the Minister has because of his or her office.

Recommendation 6

The Code require the Premier (or, if the Premier's private interests are in issue, Cabinet or a sub-committee of Cabinet) to determine what action should be taken when a Minister has a conflict of interests. As I have noted, that action will almost invariably be recusal from the relevant decision.

The Code should also require that any disclosures made, action taken as a result of the disclosure and the reasons for that action are documented. A record should also be made where the Premier has determined that a private interest a Minister has disclosed does not give rise to a conflict.

Support for Ministers

Given the importance of conflict of interests management it is appropriate that Ministers are supported to identify and declare conflicts of interests. Accordingly, the Commission makes the following further recommendations.

Recommendation 7

The Government consider developing an education program which ensures Ministers receive training on the identification, disclosure and management of a conflict of interests. Such training should be received on being appointed to office, with additional, refresher, training also being offered.

Recommendation 8

The Government consider creating a resource or appointing an officer from whom Ministers can seek confidential guidance about whether they have a conflict of interests which should be raised with the Premier.

Other matters

Part 3.4 and 4 of the current Code deals with a series of particular types of interests which are subject to specific regulation. It is appropriate that these interests are subject to the kind of special arrangements detailed in this part of the Code. As such, the Commission recommends the substantive effect of Part 3.4 and 4 be repeated in any new Code.

Application to a set of facts

In my introduction I mentioned the decision of the former Attorney-General and Minister for Planning regarding the deep water port at Smith Bay. Whether the Minister was conflicted and should have stood aside from the decision was hotly debated in Parliament, the media and the community.

I propose to apply my analysis to parts of the former Ombudsman's decision by way of illustration.

The starting point is to examine the facts of the suggested private interest. I rely on the facts as found by the Ombudsman in his report.

- i. The Minister grew up on Kangaroo Island but had not lived there since 1974.⁹
- ii. She owned a property referred to a "Gum Valley" on Western River Road. She visited it a couple of times a year.¹⁰
- iii. The property was used for agistment, and the house on it sometimes occupied by volunteers, workers employed by others, or (a few) short term renters.¹¹
- iv. The property is about 50 kilometres from Smith Bay.¹²
- v. The proponent of the Smith Bay port, Kangaroo Island Plantation Timbers (KIPT) had entered a memorandum of understanding with the owner of a plantation nearby to the Gum Valley Property, but, contrary to public speculation, KIPT had no contractual entitlement to it.¹³
- vi. When the nearby plantation was harvested in the future it was likely the logs would be carted away to the south, or away from the direction of the Gum Valley property. Anyway, the timber would inevitably be harvested irrespective of whether the Smith Bay port development went ahead.¹⁴
- vii. Heavy vehicles travel past the Gum Bay property (and indeed throughout the island) for many reasons.¹⁵

⁹ Report, [Investigation of a referral by the Select Committee on the Conduct of the Hon Vickie Chapman MP](#), May 2022 [148]

¹⁰ *ibid*, [148]

¹¹ *ibid*, [149]–[154]

¹² *ibid*, [207]

¹³ *ibid*, [174] – [175]

¹⁴ *Ibid*, [204]; [207]; [212]

¹⁵ *ibid*, [207]

The Ombudsman found that, since the Minister had no plan to reside at Gum Valley, the issue of whether there was a relevant private interest devolved to one of whether there would be a benefit or detriment to the value, amenity, enjoyment or commercial operation of it. He found that the Minister was entitled to answer those questions in the negative.¹⁶

The Ombudsman therefore concluded that the Minister had good reason to consider that she had no relevant conflicting private interest.¹⁷

The Ombudsman then went on to consider whether there was a 'perceived' conflict of interests.¹⁸

In doing so he used the device of the 'reasonable observer' and weighed questions of what knowledge would be imputed to that person. My analysis does not invite this process. However, again, he concluded that there was no conflict.¹⁹

The framework I have put forward would have led to the same ultimate conclusion, but via different steps.

On my analysis, the Minister's reading of the planning assessment reports coupled with her own knowledge of her property and the relevant topography would have led her (as it did) to the conclusion that the port proposal would have had no direct or indirect impact on her enjoyment of her property or on its value.

The Minister might then have placed herself into a class of persons who are Kangaroo Island landholders, or absent landholders: the diligent community members I have mentioned. The question to be asked would be: 'Could my membership of such a group – viewed objectively – conflict with my impartial exercise of my duties?' That question would have been answered in the negative. If the Minister had doubt about the answer or determined that she did have a conflict, then she should have advised and consulted with the Premier. Here, there was no need to do so.

Perhaps too much emphasis was placed by commentators on the fact that the proposal concerned an island. If the proposal were for a port at Victor Harbor, would ownership of a property 50 kilometres away seriously be said to raise the question of a conflict?

Suffice to say I respectfully agree with the former Ombudsman's painstaking analysis of the facts of the matter – which in that unusual case was required – and with his ultimate conclusion. I would hope that the framework I suggest would readily lead to the same point, with less controversy.

¹⁶ *ibid*, [203]; [208]

¹⁷ *ibid*, [209]

¹⁸ *ibid*, [210] ff

¹⁹ *ibid*, [210]–[211]



ICAC

Independent Commission
Against Corruption
SOUTH AUSTRALIA