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RESEARCH NOTE

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Post-separation Employment of Ministers

Ministers hold positions of power and influence. Some of the knowledge they acquire might be of a confidential nature, or could confer on them advantages if subsequently, as private citizens, they were to work in an area related to their former responsibilities. It has been suggested that Australia is 'way behind contemporary democratic practice'[1] in regulating these situations, a sentiment recently echoed in parliamentary debate.[2]

This Research Note examines examples elsewhere of the regulation of post-separation employment of ministers. This issue has gained currency following publicity surrounding the careers of recently-retired ministers, particularly the appointment of former Health Minister Michael Wooldridge as a consultant to the Royal Australian College of General Practitioners. Other examples have included former:

- Liberal Defence Minister, Peter Reith, working for defence contractor Tenix
- Liberal Finance Minister, John Fahey, working for investment bank J.P. Morgan
- Labor Environment Minister, Ros Kelly, working for environment consultants Dames and Moore, and[3]
- Queensland Labor Deputy Premier, Jim Elder, working on tenders for projects on which he may have had ministerial involvement.[4]

The State of Play in Other Jurisdictions

Restricting the conduct of ministers after they leave office is becoming increasingly common. Summarised below are the conditions in:

- the United States
- Canada
- the United Kingdom, and
- Western Australia.

The United States (US)

In the US the heads of executive agencies are not members of Congress but appointees of the President. Those appointees are governed by Title 18 Section 207 of the US Code, in which they are referred to as 'very senior personnel'. The US system is multi-tiered: there are limited restrictions to which every government employee is subject, which become progressively more onerous as staff become more senior.

Very senior personnel must comply with several restrictions:

- a lifetime ban (which covers all executive employees) on 'switching sides' to represent any organisation on a matter on which they directly worked as an executive employee
- a two-year ban in cases on which they may not have directly worked but for which they had 'direct responsibility'
- a one-year ban on representing any organisation to any current representative of the executive, regardless of what portfolio they are with, and
- a one-year ban on representing a foreign entity 'before any department or agency of the United States' and on aiding or advising a foreign entity.[5]

A statutory agency, the Office of Government Ethics, advises executive employees to ensure compliance with this law.

Canada

The Conflict of Interest and Post-employment Code for Public Office Holders was established in June 1994.[6] It is an executive instrument rather than a statute, but it is administered by a statutory office, the Office of the Ethics Counsellor. The Code governs ministers. Its stated aims for what it terms post-employment compliance measures are to:

'minimise the possibilities of:

(a) allowing prospects of outside employment to create a real, potential or apparent conflict of interest for public office holders while in public office
(b) obtaining preferential treatment or privileged access to government after leaving public office
(c) taking personal advantage of information obtained in the course of official duties and responsibilities until it has become generally available to the public, and
(d) using public office to unfair advantage in obtaining opportunities for outside employment.' (s. 27)

The Canadian arrangement is similar to that in the US in the creation of tiers of restrictions. It contains a permanent ban on a public office holder 'changing sides' in any 'ongoing specific proceeding, transaction, negotiation or case… where the former public office holder acted for or advised the Government.' (s. 29(1))

The key provision, however, is a two-year ban preventing ministers from:

(a) '[accepting] appointment to a board of directors of, or employment with, an entity with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office, or
(b) [making] representations for or on behalf of any other person or entity to any department with which they had direct and significant official dealings during the period of one year immediately prior to the termination of their service in public office.' (s. 30)

Unlike in the US, in Canada the Prime Minister has a discretionary power to reduce the two-year waiting period, subject to consideration of a range of factors.

The United Kingdom (UK)

As in Canada, post-separation ministerial employment in the UK is

governed by executive instrument, not statute. Chapter Nine of the *Ministerial Code* (Ministers' Private Interests) guides post-separation employment:

> On leaving office, Ministers should seek advice from the independent Advisory Committee on Business Appointments about any appointments they wish to take up within two years of leaving office, other than unpaid appointments … If therefore the Advisory Committee considers that an appointment could lead to public concern that the statements and decisions of the Minister, when in Government, have been influenced by the hope or expectation of future employment with the firm or organisation concerned, or that an employer could make improper use of official information to which a former Minister has had access, it may recommend a delay of up to two years before the appointment is taken up ...[7]

Similar arrangements exist in Scotland and Wales. Whereas in Canada there is a two-year bar unless the Prime Minister makes an exception, in the UK former ministers are merely restricted if, after seeking advice from the Advisory Committee, it is recommended that they delay their activities.

Western Australia

In Western Australia some guidance is contained in the Ministerial Code of Conduct. Section 15 of the Code covers post-separation employment.[8] It contains no time frame and establishes no advisory bodies. It recommends that former ministers 'take care' in their choice of employment, not abuse confidential information, and ensure their new employer does not receive preferential treatment.

South Australia

On May 16, the South Australian government announced a new ministerial code which

> places a two year restriction on the type of employment activities, consultancies and directorships that ministers can take up after they have ceased to be a minister.[9]

A Recent Commonwealth Proposal

The Australian Democrats recently proposed that a two-year ban be enshrined in legislation. It would prevent ministers from providing 'advice for personal profit or for commercial advantage on any aspect of the work of any department or agency for which the former Minister had ministerial responsibility for any period of time during the last two years of service as a Minister …'[10]

The Labor Opposition proposed a twelve-month ban, and that it be located in a prime ministerial code of conduct rather than in legislation.[11]

Criticising both approaches, the Prime Minister argued that people leaving public life should be able to use their talents, and that 'most of the insights that people bring is an understanding of the climate and the working, not secrets.'[12] He also argued against a framework as rigid as those in the US and proposed by the Australian Democrats.

Whether a legislated solution (as in the US) is best practice is a matter of opinion. On the one hand, it is questionable whether a ministerial code of conduct can effectively bind former ministers, as they are private citizens. Enforcement thus is only indirect, based on the assumption that no one would want to employ a former minister if they knew it would breach the guidelines. On the other hand many argue that there should be more flexibility than the US system provides, both to avoid depriving former ministers from legitimately using their skills and to ensure the community reaps the benefits of those skills being available.

Nevertheless, in terms of international best practice, Australia appears deficient in two respects:

- post-separation employment is not addressed at all in any ministerial code, and
- there is no standing advisory body to assist ministers in complying with any guidelines that might address post-separation employment.

The latter feature is common to legislative and executive ethics instruments internationally (not just for dealing with post-separation employment), but has been resisted in Australia.

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Endnotes

1. John Uhr, quoted in 'The conflict of interest gap', *The Australian*, 16 March 2002.
2. Senate, *Debates*, 21 March 2002, p. 863.
3. 'Life after politics', *The Age*, 12 March 2002.
4. 'The conflict of interest gap', *The Australian*, 16 March 2002.
5. Office of Government Ethics, Memorandum Regarding Revised Post-Employment Restrictions, 26 October 1990.
6. Office of the Ethics Counsellor website, http://strategis.ic.gc.ca/SSG/oe00001e.html
7. S.140 *Ministerial Code: A Code of Conduct and Guidance on Procedures for Ministers*, Cabinet Office, July 2001.
8. Western Australia Department of Premier and Cabinet, *Ministerial Code of Conduct*, http://www.premier.wa.gov.au/accountability/MinisterialCodeofConduct.pdf
9. South Australia. Legislative Assembly, *Debates*, 16 May 2002, p. 240.
10. Senate, *Debates*, 21 March 2002, p. 858. A similar but less onerous regulatory framework had been recommended some years earlier by an Australian National University research project. See Paul Finn, *Abuse of Official Trust*, Integrity in Government Project, Second Report, ANU, Canberra, 1993, pp.117–51.
11. ibid., p. 864.
12. Interview with Jon Faine, 3LO Melbourne, 18 February 2002.