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BARRISTER-AT-LAW

18 August 2023

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Att: Ms Watson

OPINION

***EX PARTE* DEPARTMENT OF PREMIER AND CABINET**

***RE* REVIEW OF EMAIL TO TMR**

I	Executive Summary	2
II	Meaning of “Direct” or “Attempt to Direct”	3
III	Factual Context	10
IV	Analysis and Conclusion	14

I EXECUTIVE SUMMARY

1. This opinion concerns an email (**Email**), which was sent on Monday 3 July 2023 at 4:23pm, by a Ministerial staff member (**Sender**) in the office of the Minister for Transport and Main Roads (**Minister**), to a public service employee (**Recipient**) in the Department of Transport and Main Roads (**TMR**).

2. The full text of the Email is as follows:

“Subject: FW Briefs for Action – Com 1195 – QTMP Contract Award

Key messages

Please update so that messaging is consistent with what was announced on Friday. Couple of things to consider:

- The Queensland Government is investing \$9.5 billion in the program, making it the largest investment in rail in Queensland’s history.

Delete reference to \$9.5 billion and the largest investment in rail in Qld’s history. Talk about the \$4.6 billion contract with Downer, what it does (factory then maintenance over 15 years) and the \$4.89 b (? check budget papers) capital investment over the forward estimates. Can talk biggest investment in rollingstock.

- The program will bring train manufacturing back to Queensland, supporting more than 1300 jobs over the term of the contract.

To date we have referred to 800 jobs in Maryborough. Consistency is good. We can add other jobs when we are getting going on Ormeau, for example. People will understandably think of these two things separately.

Also I’m chasing down photos of Acting DG and Downer CEO from Friday for TMR internal comms.

Happy to discuss.”

3. The question to be considered is whether it could reasonably be said that the Sender, by way of the content of the Email, “directed” any public service employee, or “attempted to direct” any public service employee, in breach of the ministerial code of conduct.

4. This question arises because, under the Code of Conduct for Ministerial Staff dated 6 April 2022 (**Code of Conduct**), ministerial staff are required to:

“not direct, or attempt to direct, a public service employee...”.

5. The factual context in which the Email was sent was that:

- by June 2023, it was anticipated that a major Design, Build and Maintain Contract would be entered into with Downer, pursuant to the Queensland Train Manufacturing Program.

- on Tuesday, 27 June 2023, TMR finalised a communications plan (“Com1195”) in anticipation of this announcement, which included a short list of “Key Messages”. These messages including the two dot points quoted in the Email.
 - on Thursday, 29 June 2023, the Downer contract was executed.
 - on Friday, 30 June 2023, the signing of this contract was announced by TMR and the Minister – but in terms which did not consistently convey these two dot points.
 - on Monday, 2 July 2023, the Email was sent to TMR to ask for changes in the “Key Messages” in the communications plan. In summary, the key changes proposed were:
 - to express the total sum of \$9.5 billion by reference to its two components – being a \$4.6 billion contract with Downer and a \$4.89 billion capital investment over the forward estimates.
 - to refer to 800 jobs to be created at Maryborough in the more immediate future, rather than 1300 jobs to be created in the longer term.
6. The first question to be considered concerns the meaning of the requirement to not “direct, or attempt to direct” a public service employee.
 7. In my view, it is clear that the Code does not operate to prevent Ministerial staff from *requesting* or *suggesting* actions by departmental staff. It operates to prevent Ministerial staff from “directing” departmental staff in the performance of their duties. In this context, a “direction” is a command, requirement, order or instruction. An “attempt” to give a direction arises where steps are taken towards giving a direction, but are not completed.
 8. The second question to be considered is whether the Email should, in fact, be characterised as a “direction”.
 9. In my view, a reasonable recipient of the Email would understand the Email to be merely *requesting* that changes to the communication plan be considered (“Couple of things to consider...”) – rather than issuing a *direction* as to actions which were required.
 10. This view is strongly confirmed by the fact that, only three minutes after the Email was received, the Recipient actually described it as a “request” from the Minister’s office when distributing it by email to others at TMR.
 11. Accordingly, in my view, it could not reasonably be said that the Sender, by way of the content of the Email, “directed” any public service employee, or “attempted to direct” any public service employee, in breach of the ministerial code of conduct.
 12. The detail of my reasons for reaching this conclusion are set out below.

II MEANING OF “DIRECT” OR “ATTEMPT TO DIRECT”

13. To analyse the present issue, the starting point is to consider the meaning of the relevant statutory requirements.

14. The position of Ministerial staff is governed by the ***Ministerial and Other Office Holder Staff Act 2010*** (Qld) (***MSA***).
15. Section 15(1) of the MSA provides that:

“A public service employee is not subject to the direction of a staff member [in the office of a Minister]”. (emphasis added)
16. Section 19 of the MSA then authorises a code of conduct to be issued governing Ministerial staff. Its purpose is to “provide standards of conduct for the staff members to whom it applies”: ***MSA*** s 20. Staff members must comply with the Code of Conduct: ***MSA*** s 22(1). Contravention of the Code of Conduct may give rise to disciplinary action under the staff member’s contract of employment: ***MSA*** s 22(2).
17. Pursuant to this authority, the Code of Conduct was issued.
18. Under the Code of Conduct, all ministerial staff members must comply with the standards of conduct in the Code: ***Code*** page 4.
19. For present purposes, the relevant standard of conduct requires that ministerial staff members:

“not direct, or attempt to direct, a public service employee...”: ***Code of Conduct*** page 11 (emphasis added).
20. The key terms – “direct” and “attempt to direct” - are not defined in the MSA or the Code of Conduct.
21. Accordingly, the first issue to be considered is the meaning of these concepts in the present statutory context.
22. As was explained in ***R v A2*** (2019) 269 CLR 507, context is critical:

“[32] The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.

[33] Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. ‘Mischief’ is an old expression. It may be understood to refer

to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.” (emphasis added)

23. In the present case, the context to be considered arises from the common law of employment and the statutory arrangements for the administration of the public service in Queensland.

Common Law of Employment

24. Contracts of employment are generally construed as containing an implied term that an employee will obey “directions” about the performance of the relevant work, provided that they are lawful, reasonable, and consistent with the contract: ***McManus v Scott-Charlton*** (1996) 70 FCR 16 at 21.
25. In this context, the concept of a “direction” is in the nature of a “command”, “requirement”, “order”, or “instruction”: ***R v Darling Island Stevedoring & Lighterage Co Ltd*** (1938) 60 CLR 601 at 621-622; ***McManus v Scott-Charlton*** (1996) 70 FCR 16 at 21; ***One Key Workforce Pty Ltd v CFMEU*** (2018) 262 FCR 527 at 564; ***Finlay v Commissioner of Police*** [2022] WASC 272 at [21].
26. A “direction” is conceptually different from a mere request: eg ***R v Macdonald (No 17)*** [2021] NSWSC 858 at [1037]-[1038]; ***Director of Public Prosecutions (SA) v Jaunay*** (2020)136 SASR 112 (FC) at [19], [42]; ***Walker v Zurich Australia Insurance Ltd*** [2000] QSC 345 at [47]; ***Howard v Pilkington (Australia) Ltd*** [2008] VSC 491 at [89]-[91].
27. To constitute a “direction”, there is no need for this precise term to be used – the communication must be construed and characterised as a matter of substance: eg ***Melbourne Stadiums Ltd v Sautner*** (2015) 317 ALR 665 (Full Fed Ct) at [68]-[69].

Statutory Arrangements for the Public Service

28. This common law concept of employees being subject to “direction” is fundamental to the statutory arrangements for the management of the public service in Queensland.
29. At the time of the enactment of the MSA, the statute which created this framework was the ***Public Service Act 2008*** (Qld).
30. Under this statute:
- the Queensland Public Service was to consist of the persons employed under the Act (s 4) – with the statute contemplating that all members of the public service would be engaged under contracts of employment.
 - these “public service employees” were to include general employees, temporary employees or more senior “public service officers” (ss 8, 9) – all of whom were subject to the obligations contained in their contracts of employment.
 - all public servant employees were to be employed within departments or public service offices (s 6).

- within any department, all public service employees were “responsible” to the chief executive in relation to their employment (s 11, 98).
- whilst there was no express statutory obligation for public service employees to act in accordance with the “directions” of the chief executive, it was contemplated that this obligation would arise from their contract of employment (eg s 187(1)(d)).
- the chief executive was, in turn, generally subject to the “directions” given by the departmental Minister (s 100).

31. This legislation has since been replaced by the **Public Sector Act 2022** (Qld).

32. In broad terms, this statute adopts a similar structure for the public service – but expressly confirms that all public sector employees are potentially subject to disciplinary action if they have:

“contravened, without reasonable excuse, a direction given to the employee as a public sector employee by a responsible person [being a person with authority to give the direction]”: s 91. (emphasis added)

33. In this legislation, the term “direction” is not defined – but would seem to be used in the same sense as in the common law of employment.

Ministerial Staff Members

34. Prior to 2010, no express provision was made in the legislation to deal with the position of Ministerial staff members.

35. At the time, these staff were formally engaged as public service employees, within the Department of Premier and Cabinet. In practice, however, they were subject to direction by their Minister – and worked closely with the public service employees in the Minister’s department – but without any clear description of the nature of these legal relationships.

36. In 2009, this situation became a focus of attention, when the Crime and Misconduct Commission (**CMC**) undertook an investigation into allegations that public monies were misused through the actions of a Ministerial staff member: **Report on an Investigation into the Alleged Misuse of Public Monies and a Former Ministerial Adviser** (December 2010).

37. Whilst the allegations did not result in disciplinary or criminal action being recommended, it provided the impetus for the Queensland government to take a number of steps to more clearly define the role of members of the Ministerial staff.

38. In January 2010, the policy response of the State Government was explained in a submission to the CMC. In essence, the submission:

- recognised the important role which Ministerial staff serve as a “conduit between the work performed by the public service and the valid interests and demands placed on Ministers” - including in the areas of communications, policy and co-ordination (at 4-5, 7-8).

- confirmed that “Ministerial staff do not have any executive power or other legal authority to direct public service officers, unless they are communicating a direction on behalf of the Minister” (at 7).
- accepted the importance of ensuring that the “boundaries of the relationships must be clearly understood so that officers employed in these positions are apprised of their respective roles and obligations” (at 8).
- proposed to reform this area of public administration, through clearer terms of employment, changes to the legislative framework, new codes of conduct and better training (at 15 ff).

39. This submission was followed by a formal communique from the Premier of the time, which confirmed that:

“Ministerial staff do not have any executive power or other legal authority to direct public service employees in their own right. However, they perform a critical role in facilitating communication of Ministerial priorities to departments and acting as a conduit between Ministers the public service employees...

Directions given by Ministerial staff to the public service on behalf of a Minister should be provided directly to Directors-General in accordance with the public service management and accountability framework set out in the Public Service Act 2008...” (emphasis added)

40. In 2010, the new legislation framework was enacted under the MSA – with the State’s submission and the Premier’s communique being expressly noted as explaining the statutory purpose of the MSA in the ***Explanatory Note***.

MSA

41. The object of the MSA was to create a “new stand-alone framework for the employment of staff members to support Ministers..”: ***Explanatory Note – MSA*** at 1.

42. This new framework was also designed to clarify the legal relationship between Ministerial staff and public service employees:

“The Bill includes a specific provision that Ministerial staff are not empowered to direct public servants in their own right, thus acknowledging the limitations on powers of Ministerial staff members.”: ***Explanatory Note – MSA*** at 2) (emphasis added)

43. The new framework was not designed to prevent Ministerial staff “working with public service employees to implement government policies” or “preparing communications materials”: ***Explanatory Note – MSA*** at 5.

44. The purpose of prohibition on giving “directions” to public service employees was explained in this way:

“*Clause 15* states that public service employees are not subject to the direction of a staff member. However, this does not prevent a staff member from giving a direction to a public service employee on behalf of another

person who may lawfully give the direction. The primary mechanism through which this would occur would be a direction from a Minister to the chief executive of their department under the *Public Service Act 2008*.

This clause is not intended to preclude communications between Ministerial staff and public service employees that would usually occur in the course of normal day-to-day interactions necessary for the administration of government business. Ministerial staff perform a critical role in facilitating communication of Ministerial priorities to departments and acting as a conduit between Ministers and public service employees, including communicating Ministerial views and decisions or requesting advice or other work to be undertaken to assist the Minister in the performance of their duties and responsibilities. For example, it would be appropriate for Ministerial staff to request that briefing notes be prepared on particular issues or by specific timeframes, but not appropriate to give directions on matters that could affect the giving of objective and accurate advice, such as the nature of the content or recommendations in the advice.

Clause 15 reiterates the commitment outlined in the Government's response to the Crime and Misconduct Commission's inquiry into the issue of interactions between Ministers, Ministerial staff and public servants. Consistent with this response, the Premier issued a communiqué on 2 August 2010 setting out expected standards of conduct in interactions between Ministers, Ministerial staff and public service employees. Contracts of employment have also been amended to clearly stipulate that Ministerial staff do not have the power or authority to direct public service officers. This clause ensures that the Government's commitment is enshrined in legislation as well as being contained in individual contracts." **Explanatory Note – MSA** at 8-9 (emphasis added).

45. A similar explanation of the purpose of the MSA was given by the Premier, when introducing the Bill to the Legislative Assembly: **Hansard**, 3 August 2010 at 2304-2305.
46. In the MSA itself, the topic of who may give "directions" to Ministerial staff members and public service employees is the subject of both ss 14 and 15.
47. In my view, the text, context and purpose of s 15 make it clear that:
 - the term "direction" is used in these provisions to refer to the legal power or authority of a person to command, instruct or require an employee to take action.
 - the term does not extend to mere requests or suggestions for action.
48. In my view, the term "direction" is used in the same sense in the Code of Conduct issued under the authority of the MSA.

Protocols and Practice

49. The extrinsic materials also make it clear that, in practice, any direction, made on behalf of a Minister by a member of his or her staff, should be made to the Director-General of the department.

50. This practice was confirmed by the ***Protocols for Communication Between Ministerial Staff Members and Public Service Employees*** which was issued in March 2015.

51. These protocols relevantly state that:

“5.3 Ministerial staff members facilitate communication of ministerial priorities to departments and act as a conduit between Ministers and public service employees, for example, by communicating ministerial views or decisions and requesting information or briefing notes....

5.5. However, consistent with the legislation and contracts of employment of ministerial staff members, ministerial staff members do not have the power to direct public service employees or to make policy or administrative decisions in their own right without specific and direct authorisation from the Minister.

5.7. Unless otherwise legislatively prescribed, if there is any doubt about the authority of a direction conveyed by a ministerial staff member, public service employees are expected to confirm that the direction has ministerial authority. Public service employees should do so by asking the ministerial staff member for confirmation that a direction is being relayed with the authority of a Minister.

5.8. Unless otherwise legislatively prescribed, a formal ministerial direction should be provided in writing to the Director-General where practical. In the event of urgency, the direction may be provided verbally and confirmed in writing. If the Director-General is not available to receive the direction, the direction can be provided to an alternative Senior Officer and confirmed in writing to the Director-General.” (emphasis added)

Attempt to Direct

52. The prohibition in the Code extends to any “attempt to direct” a public service employee.

53. Again, the term “attempt” is not relevantly defined.

54. However, the term “attempt” is a concept which has a common law meaning, derived from the criminal law, which has been applied to non-criminal statutory contexts.

55. Section 76 of the ***Competition and Consumer Act 2010*** (Cth), for example, imposes civil penalties on a person who has “attempt to contravene” a relevant provision. The elements of an “attempt” were described by the Full Federal Court in ***ACCC v Australian Egg Corp Ltd*** (2017) 254 FCR 311:

“[92] In order to establish an attempt, an applicant must prove both intention and conduct. The intention is to bring about the proscribed result which in this case is the making of an arrangement or the reaching of an understanding within s 44ZZRJ (*Trade Practices Commission v Tubemakers of Australia Ltd* [1983] FCA 99; (1983) 47 ALR 719 (*Tubemakers*) at 737 and 743 per Toohey J). It is not necessary in order to establish the relevant intention to prove that it was accompanied by or included an expectation of success or a belief that the purpose would be achieved (*Tubemakers* at 736 per Toohey J).

[93] The conduct which is necessary to constitute an attempt is a step towards the commission of a contravention, which is immediately and not merely remotely connected with it (*Tubemakers* at 736 per Toohey J referring to *Archbold's Pleading Evidence & Practice* 36th, para 4101). The Full Court of this Court in *Trade Practices Commission v Parkfield Operations Pty Ltd* (1985) 7 FCR 534 (*Parkfield Operations*) at 538–539 made a similar point when it said that an attempt must involve taking a step towards the commission of contravening conduct and that it is not sufficient that it be merely remotely connected or preparatory to the commission of it. In *Australian Competition and Consumer Commission v SIP Australia Pty Ltd* (2002) ATPR 41-877 (*ACCC v SIP Australia*) at 45-015, Goldberg J made the point that what is required for an inducement is that “there be an affirmative or positive act or course of conduct directed to the person who is said to be the object of the inducement”. In addition to that point, his Honour also referred to the decision of the Full Court of this Court in the *Heating Centre Pty Ltd v Trade Practices Commission* (1986) 9 FCR 153 at 164 where it was said that mere persuasion, with no promise or threat, may well be an attempt to induce.” (emphasis added)

56. In my view, a similar meaning is likely to be applied to the Code. Accordingly, an “attempt to direct” an employee would involve actions, with an intention to direct conduct, which are not merely preparation but an immediate step towards carrying that intention into effect (eg by issuing a direction which was not in fact communicated).

III FACTUAL CONTEXT

57. The next step is to consider whether the relevant Email can be characterised as conveying a “direction” – or involving an attempt to give such a direction.
58. Emails of this kind cannot be construed in isolation. As with any communication, emails should be construed in their factual context.
59. In part, this context includes the general practices which apply to dealings between the members of Ministerial staff and the departmental staff in TMR.
60. Secondly, it includes the more specific context in which this particular Email was sent and received.
61. Finally, it requires some consideration of how, in fact, the Email was understood by the Recipient. This can be a useful way of testing how the Email should reasonably be construed.
62. This factual context appears from a number of sources: (a) the general description of the relevant practices in public documents; (b) the key documents referred to below; (c) the evidence given by the Acting Director-General of TMR at the Estimates Committee hearing on 8 August 2023; and (d) subsequent interviews with the Acting Director-General which were conducted by Crown Law.

General Practices

63. Regular communications between Ministerial staff and the public service employees of the department are part of the “normal day-to-day interactions necessary for the administration of government business”: **Explanatory Note – MSA** at 8.
64. These interactions involve a variety of matters, including matters relating to communications. They involve a wide variety of requests from Ministerial staff, including requests for information and requests which seek to co-ordinate their respective efforts.
65. Within TMR, there is a small team of departmental staff (including the Recipient) who are responsible for formal liaison with the Minister’s staff.
66. Within this team, there is a clear understanding that Ministerial staff have no authority to give directions to public service employees of the department. It is clearly understood that only the Minister has authority to give directions.
67. In practice, the Minister makes decisions on an almost daily basis relating to the conduct of the department – mostly in response to briefing notes from the department. The practice is for any directions to be given by the Minister personally and in writing to the Director-General – who is then responsible for their implementation.
68. In this way, there is a clear distinction between “directions” to the department and the routine requests made by members of the Ministerial staff to the department on a day-to-day basis.

Email and its Context

69. Turning to the Email, its subject was stated to be: “Brief for Action – Com 1195”.
70. This was a reference to a communications plan (“Com1195”) which had been prepared by departmental officers in advance of the award of the Design, Build and Maintain Contract to Downer to deliver the Queensland Train Manufacturing Program.
71. On 27 June 2023, a brief had been submitted to the Acting Director-General for approval of this communication plan. After it had been approved, it was forwarded to the Minister’s office “for noting”.
72. The communications plan provided for a range of different communications to be issued, including: (a) updates to the departmental website; and (b) a media statement to be issued by the Minister.
73. The communications plan did not include drafts of any of these communications, but included a page entitled “Key Messages” which contained a number of dot points.
74. The dot points included:
 - “The Queensland Government is investing \$9.5 billion in the program, making it the largest investment in rail in Queensland’s history.”
 - “The program will bring train manufacturing back to Queensland, supporting more than 1300 jobs over the term of the contract.”

75. The communications plan was prepared on the understanding that:
- the new contract with Downer was to be for a contract price of \$4.6 billion.
 - the total investment in the project, over the next 35 years, was currently estimated to be \$9.5 billion (inclusive of the \$4.6 billion).
76. On 29 June 2023, as anticipated, the contract with Downer was executed.
77. On Friday, 30 June 2023, officers of the department carried into effect the proposed update of the TMR website. This update announced the awarding of the contract to Downer. It did not refer specifically to the contract price or the number of jobs expected to be created, but described the “total investment” in the train manufacturing program as being \$9.5 billion: <https://www.tmr.qld.gov.au/projects/programs/queensland-train-manufacturing-program>.
78. On Friday, 30 June 2023, the Minister’s office issued a media statement, which:
- announced the entry into the new contract with Downer.
 - referred to the contract sum of \$4.6 billion.
 - stated that “the \$7.1 billion Queensland Train Manufacturing Program is now in motion with a \$4.6 billion contract now officially signed for Downer Group to design and manufacture these trains”.
 - stated that “rail manufacturing jobs would be returned to Maryborough, with this investment set to support 800 construction and manufacturing jobs”.
79. On the following Monday, 3 July 2023, the Email was sent.
80. It was sent not only to the Recipient, but also copied to others – the Acting Director-General of the department, two departmental officers, and other Ministerial staff.
81. The Email contained the heading “**Key messages**” – which would seem to be a reference to the Key Messages page in the communications plan.
82. The Email commenced with the request “Please update...” – which would seem to be a request to update this part of the communications plan.
83. The reason given for this request was “so that messaging is consistent with what was announced on Friday” – which would seem to be a reference to the various media announcements which had been issued that day.
84. The next sentence in the Email begins: “Couple of things to consider:” – which would seem to be inviting the departmental officers to consider the specific points which followed.
85. The first “thing to consider” was a quotation of the first dot point in the communications plan which is mentioned above (“The Queensland Government is investing...”).
86. This first “thing to consider” was explained both negatively and positively:

- in negative terms, the Email struck through the original expression “~~investing \$9.5 billion in the program, making it the largest investment in rail in Queensland’s history~~” – with the accompanying statement “Delete reference to \$9.5 billion and the largest investment in rail in Qld’s history”.
 - in positive terms, the Email stated: “Talk about the \$4.6 billion contract with Downer, what it does (factory then maintenance over 15 years) and the \$4.89 b (? check budget papers) capital investment over the forward estimates. Can talk biggest investment in rollingstock.”
87. It is significant that what was to be “talked about” was not the \$7.1 billion figure which had been mentioned in the Ministerial media statement, but the two components which made up the \$9.5 billion which had been referred to by the department’s website.
88. The second “thing to consider” was a quotation of the second dot point in the communications plan which is mentioned above (“The program will bring train manufacturing back to Queensland...”).
89. Again, the “thing to consider” was identified both negatively and positively:
- in negative terms, the Email simply struck through the expression “~~supporting more than 1300 jobs over the term of the contract~~”.
 - in positive terms, it stated: “To date we have referred to 800 jobs in Maryborough. Consistency is good. We can add other jobs when we are getting going on Ormeau, for example. People will understandably think of these two things separately.”

How the Email Was Understood

90. The best evidence of how this Email was understood by the Recipient is to be found in a subsequent email which the Recipient sent only 3 minutes later (4:26pm).
91. The subsequent email, which was sent to other departmental officers, stated:
- “Hi team
- MO [Minister’s Office] is requesting this one be updated please.
- Thanks” (emphasis added)
92. As the Acting Director-General explained to the Estimates Committee, the Email from the Ministerial staff member was understood as simply conveying “advice and suggestions” or “feedback” for consideration. It was not understood as conveying a direction.
93. In the following days, departmental officers considered the request and made proposed changes to the communications plan in a tracked-changes format, with the result that:
- the first dot point mentioned was tracked as deleted – as were other references to dollar figures in the plan.

- the second dot point mentioned above was tracked as amended to read: “The program will bring train manufacturing back to Queensland, supporting jobs now and into the future, bringing a pipeline of training and development opportunities”.

94. No changes were made to the department’s website or other communications.
95. On 17 July 2023, the amended brief with tracked changes was received by the Acting Director-General.
96. On 21 July 2023, the amended brief was not approved by the Acting Director-General. Given it was mid-July and the key communications within the plan had been actioned, it was determined that no further action was required on the brief and it was marked “NFA” accordingly.

IV ANALYSIS AND CONCLUSION

97. The key question is whether the Email should be objectively construed as containing a “direction” to the Recipient - in the sense of a command, requirement, order or instruction - or merely as conveying a request or suggestion for consideration.
98. In considering this question, the Email should be construed in the way it would reasonably be understood by any recipient with a general background knowledge of the practices of the department.
99. The main factors which bear on this question are as follows.
100. *First*, the principal sentences in the Email do not use the term “direction” or any similarly mandatory language. In structure, there are only three operative sentences. The first begins: “Please update...” The second begins: “Couple of things to consider...” The third states: “Happy to discuss”. In my view, this language would reasonably be construed as a request or suggestion – not a mandatory direction.
101. *Secondly*, it is true that there are two subordinate sentences in the Email which are expressed more tersely (eg “Delete reference...”, “Talk about...”). However, in any ordinary reading of the Email, the role of these sentences is to identify the matters which the email invites the Recipient “to consider”. In short, the Email is asking the Recipient to *consider* whether to “delete” the specified references and to “talk about” the two components.
102. *Thirdly*, there is the subject, timing, rationale, and contents of the Email to be considered. The subject of the Email was the department’s *integrated* communications plan – which sought to co-ordinate communications from both the Minister and TMR. The timing of the Email was *after* the main announcements had already been made. The reason given for the Email was to ensure that messaging is *consistent* with what had been already announced. The content of the suggested changes which were made were matters of *no consequence*. In short, the email asked that the sum of \$9.5 billion be broken up into two components - \$4.6 billion + \$4.89 billion – and that a more conservative number of jobs be mentioned - 800 rather than 1300. All these factors support the view that this Email was seeking to co-operatively develop a consistent approach to the communications plan. They do not suggest any reason for a direction to be given.

- 103.** *Fourthly*, there is the wider context in which this Email was sent. In this area of government, there was no practice of Ministerial staff members issuing directions to departmental employees. Indeed, all parties knew that Ministerial staff members had no such authority. In this context, the natural construction of the Email is as a valid request – not as an unauthorised direction.
- 104.** *Fifthly*, the correctness of this construction is confirmed by the response of the department. Within 3 minutes of the Email arriving, the Recipient characterised it as a mere “request”. It was then consistently treated as such – with the department considering the request, deciding to take no further action in respect of the communications plan, and making no changes to the publications which had issued.
- 105.** As this is a case where the actions of the Sender were fully carried into effect, by the sending and receipt of the Email, the only question to be considered is whether these actions involve “directing” a public service employee. This is not a case where a partially executed action can potentially be characterised as an “attempt” to direct a public service employee.

Conclusion

- 106.** For these reasons, in my view, it cannot reasonably be said that the Sender, by way of the content of the Email, “directed” any public service employee, or “attempted to direct” any public service employee, in breach of the ministerial code of conduct.

With compliments,



John McKenna KC

Chambers, 18.viii.2023.