Sentencing Remarks & Judgments

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ICAC
Independent Commissioner
Against Corruption
SOUTH AUSTRALIA

DISTRICT COURT OF SOUTH AUSTRALIA

(Criminal)

R v MICHAELIS
Criminal Trial by Judge Alone

[2018] SADC 118

Reasons for the Verdict of Her Honour Judge Chapman

23 November 2018

CRIMINAL LAW - PARTICULAR OFFENCES - OFFENCES AGAINST THE GOVERNMENT - OTHER OFFENCES

The accused is charged with the offence of Abuse of Public Office alleged to have been committed in his role as Chief Executive of Bio Innovation SA - on 13 June 2012 he met with the Minister for Science and Information Technology and put forward a written proposal for government funding to purchase a building for bioscience companies, including a company in which he had a pecuniary interest - whether he failed to disclose his pecuniary interest in that company at that meeting - whether there was a legal obligation requiring him to disclose that interest at that time - whether he acted improperly in failing to disclose that interest.

Held: Verdict of not guilty. The accused did not disclose his pecuniary interest to the Minister on 13 June 2012. There was no legal obligation requiring him to make the disclosure in the written proposal. Even if there had been a legal obligation, the accused did not act improperly in failing to make disclosure in the circumstances of this case.

Criminal Law Consolidation Act 1935 s 251, s 238; *Public Sector Act 2009* s 5; *Public Sector (Honestly and Accountability) Act 1995* (SA) s 17; *Public Sector (Honesty and Accountability) Regulations 2010* s 17; *Social Security (Administration) Act 1999 (Cth)* s 74; *Criminal Code (Cth) 1995* s 135.2, referred to.
Commonwealth DPP v Poniatowska (2011) 244 CLR 408; *Poniatowska v DPP (Cth)* (2010) 107 SASR 578; *R v Iannelli* (2003) 56 NSWLR 247; *DPP (Cth) v Keating* (2013) 248 CLR 459; *Nicholson v Department of Social Welfare* [1999] 3 NZLR 50; *The Queen v Quach* (2010) 27 VR 310; *Attorney General's Reference No 3 of 2003* [2016] 1 All ER 1065; *R v Sabey* [2016] 1 All ER 1065; *R v Trimboli* (1979) 21 SASR 577, considered.

Prosecution: R Counsel: MR P LONGSON WITH MS A MOFFA - Solicitor: DIRECTOR OF PUBLIC PROSECUTIONS
Accused: JURGEN MICHAELIS Counsel: MR D EDWARDSON QC WITH MR M SELLEY - Solicitor: ILES SELLEY
Hearing Date/s: 16/07/2018, 17/07/2018, 19/07/2018
File No/s: DCCRM-17-1246
B

R v MICHAELIS
[2018] SADC 118

1 Dr Jurgen Michaelis is charged with committing the offence of Abuse of Public Office[1]. The particulars of the offence are that between the 1st day of April 2012 and the 14th day of June 2012 at Adelaide and other places, being a public officer, namely Chief Executive of Bio Innovation SA, he improperly exercised power or influence that he as a public officer had by virtue of his public office, with the intention of securing a benefit for himself.

2 The prosecution case is that on 13 June 2012, the accused, in his role as Chief Executive of Bio Innovation SA (Bio SA), met with Minister Tom Kenyon who was then the Minister for Science and Information Economy. The accused provided a Minute to the Minister putting forward a proposal which included government funding for a company, Nano-Nouvelle Pty Ltd. He failed to disclose his pecuniary interest in Nano-Nouvelle in the Minute or during the meeting. By making that omission, he improperly exercised influence he had by virtue of his role as CE of Bio SA with the intention of securing a benefit for himself.

3 The defence does not dispute that the accused was a public officer or had a pecuniary interest in Nano-Nouvelle at the time of his meeting with the Minister. The defence case is the prosecution evidence does not establish that the accused in fact failed to disclose his financial interest at that meeting. Even if there was such an omission, the defence submits there was no corresponding legal duty to make disclosure at that time. Alternatively, if there was such a duty, the prosecution has not proved any omission was improper or made by the accused with the intention of securing a benefit for himself.

4 Before turning to the alleged offence itself, it is necessary to address the public funding of businesses in the bioscience industry by Bio SA; the funding of such businesses by the private sector; the funding proposal put forward by the accused to the Minister at the meeting on 13 June 2012; the nature of the accused's pecuniary interest in Nano-Nouvelle at the time of the proposal; and the progress of the proposal following the meeting on 13 June 2012.

Bio Innovation SA (Bio SA)

5 On 11 June 2001, the accused was appointed CE of Bio SA. He was selected as a person highly experienced in the bioscience industry to perform the role.

6 The charter for Bio SA described the strategic direction as being 'to drive the achievement of the South Australian Government's vision of building a world class bioscience industry that creates and attracts major bioscience companies for

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[1] Section 251(1) of the *Criminal Law Consolidation Act 1935* (SA).

state economic and social development'[2]. Bio SA was in the business of enabling organisations to generate an income, jobs and exports for the South Australian economy. The operations of Bio SA were predominantly non-commercial. One of its functions was to provide business support, including grants, to companies or persons involved in, or commencing involvement in, the bioscience industry.

7 Bio SA was an instrumentality of the Crown. Government funding to Bio SA was approximately $6m per year which was to cover operational costs as well as grants to relevant organisations.

Funding from the private sector

8 In about 2005, the accused was involved in negotiations with the Motor Trades Association of Australia Superannuation Fund (MTAA Super) with the aim of securing a private source of funding for the bio technology sector in South Australia. Mr Mutton (Chair of the Bio SA Board) gave evidence the accused was a very successful prime driver of that initiative. It was considered by many to be an extremely positive move.

9 In 2006, a Memorandum of Understanding between the MTAA Superannuation Fund and Bio SA[3] was approved. It established the South Australian Life Science Advancement Partnership which would operate a fund (SALSA Fund) to which the MTAA Superannuation Fund would contribute its funds. The agreement was that the MTAA Superannuation Fund would provide a total of $35m over 10 years for the purpose of investing in the development of companies associated with the bio tech industry. An independent company called Terra Rossa Capital (TRC) was set up to manage the SALSA Fund. The TRC investment committee determined what investments TRC would make from the SALSA Fund.

10 In 2006, the accused was appointed the Chair of the TRC investment committee. He took up that appointment in his personal capacity, that is, not connected with his role at Bio SA. In 2008, he was appointed a director of TRC. Both appointments were with the approval and knowledge of the Bio SA Board and the relevant Minister.

11 From that point on, the accused had potential conflict as the CE and member of the Board of Bio SA. In that role, he was involved in the approval of publicly funded grants to organisations to promote the bioscience industry in South Australia. However, he could not participate in deliberations of the Bio SA Board with respect to any TRC investee company because, in his capacity as a member of the TRC Investment Committee, he had a duty to advance the interests of the SALSA fund. TRC and Bio SA operated independently of each other, but shared the same premises and operational staff.

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[2] Exhibit P3.
[3] Exhibit P5.

The incubator

12 Part of the proposal put forward by the accused to the Minister on 13 June 2012 was for new premises to be available for organisations involved in the bioscience industry. In 2006, a building known as the 'incubator' was opened. It was purpose-built for Bio SA. The tenants were generally small companies requiring small laboratory and office space to start and/or develop their work. The concept was that the tenants would be fairly short term and once established would go into another facility or their own facility. During the period from 2006 and 2012, the incubator was full.

13 That led Bio SA to consider there was a need for another building. Initially there was land behind the incubator on which it was planned to construct a building to be used as an 'accelerator'. The idea was for there to be a natural progression for the tenants out of the incubator, through an accelerator and then into a Tech Park or own premises as the businesses grew. Funding from the government needed to be obtained to build the 'accelerator'. By 2012 the plan changed from constructing a new building to instead buying an existing building (the Novozymes building) which was close to the existing incubator. Funding for the purchase of the Novozymes building formed part of the proposal on 13 June 2012.

Nano-Nouvelle Pty Ltd

14 The second part of the proposal put forward by the accused to the Minister on 13 June 2012 was that Nano-Nouvelle be funded to move to South Australia and become a tenant of the Novozymes building. Nano-Nouvelle was a South Australian registered company, incorporated in Victoria and based in Queensland. Its initial work involved membranes as mediums for medical applications as well as batteries, biosensors and renewable energy.

15 In 2011, TRC became the major and controlling shareholder of Nano-Nouvelle. As a result of that investment by TRC, the accused was appointed Chairman of the Board of Nano-Nouvelle.

16 In 2011 and 2012, Nano-Nouvelle received a number of grants from Bio SA. On 7 April 2011 and 10 February 2012, the Board made grants of $200,000 and $50,000 respectively. On each occasion the minutes of the Board meeting record the accused left the meeting due to conflict of interest.

17 Mr Mutton gave evidence the Board was collectively excited by the work that Nano-Nouvelle was doing because it had significant benefits to industry and business and met the Bio SA charter.

Pecuniary interest in Nano-Nouvelle Pty Ltd

18 There was no dispute that as at 13 June 2012 the accused had a pecuniary interest in Nano-Nouvelle.

19 On 1 July 2010, at the request of the accused, the Research Innovation Trust No 2 (RIT2) was set up by an accountant. The purpose was to invest in Nano-Nouvelle. It was a fixed unit trust. One of the unitholders was the accused in his capacity as trustee of the Michaelis Family Trust (MFT), a discretionary trust. The other unitholders of the RIT2 were all related to other members of the TRC Investment Committee. There was no other evidence about the RIT2, including the circumstances in which the members of the TRC Investment Committee or their relatives came to have a financial interest in one of the companies the subject of investment by that Committee. The prosecution submitted there was nothing improper in the setting up of a trust such as RIT2 in and of itself. Because of the paucity of evidence about that arrangement, I am not able to make an assessment of that arrangement and have not been asked to do so.

20 Between May 2011 and May 2012, the MFT contributed $70,000 from bank accounts in the name of the accused to RIT2 which were then used by RIT2 to acquire shares in, and to make loans to, Nano-Nouvelle. The accused was one of two potential beneficiaries of the MFT. He was the sole trustee with power to pay to himself or the other beneficiary the whole of the capital or net income from the MFT.

Meeting with the Minister on 13 June 2012

21 On 13 June 2012, the accused (in his capacity as CE of Bio SA) and Mr Mutton (in his capacity as the Chairman of the Board of Bio SA) met with Minister Tom Kenyon. The accused had prepared a written Minute to the Minister dated 13 June 2012[4], a summary of which is as follows:

- A funding proposal for consideration by the government.

  It was proposed that Bio SA, in conjunction with TRC, facilitate the permanent move of Nano-Nouvelle to South Australia at an approximate cost of $5m, facilitated via a grant over three years to the business, with an additional $7.5m over the next two years to purchase the vacant Novozymes building in Thebarton and to refurbish that building to suit Nano-Nouvelle and five other early stage companies. The building was vacant, had the required infrastructure, clean rooms and could be easily modified to suit Nano-Nouvelle's needs. Bio SA had completed an analysis and budget for the building purchase and conversion. It was said that Nano-Nouvelle could make substantial contributions to the local economy.

- TRC had invested in Nano-Nouvelle in April 2011. As lead investor, TRC had effective control of the company at both Board and shareholder level.

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[4] Exhibit P12.

- The accused did not refer to his own pecuniary interest in Nano-Nouvelle.

- The accused was managing TRC in an executive chairman role and as the chairman of the investment committee.

- The accused was chairman of the Board of Nano-Nouvelle. The Board of Directors, executive management and staff of Nano-Nouvelle was said to have considerable expertise in the areas of technology development and commercialisation.

- The close public-private partnership between Bio SA and TRC had delivered significant results for the State.

22 Mr Mutton gave evidence about meetings with the Minister in his capacity as Chair of the Board of Bio SA. He would meet on an as needs basis. There would be times when the accused would meet with the Minister when Mr Mutton would not be present. There would be other times when both of them would be present with the Minister. In relation to the meeting on 13 June 2012, Mr Mutton said his memory was a bit vague. Based on the formal documentation he had seen, he was comfortable in saying he was there. Although he has some recall of the matters that were discussed, he does not really recall the meeting at all. It was one of many, many meetings.

23 Mr Thomas Kenyon gave evidence that in 2012 he was made the Minister for Science and Information Economy. The Government was supportive of the work of Bio SA. He would meet with the accused, usually monthly. Sometimes Mr Mutton would be there too. Given the passage of time since the meeting on 13 June 2012 Mr Kenyon did not have much of a memory, if any, in regard to what occurred. It was possible the accused brought the Minute with him to the meeting. No record of the meeting had been produced to Mr Kenyon (who at the time of trial was no longer a Minister) by the investigators during the course of the investigation.

24 Mr Kenyon described the accused as a highly intelligent professional who understood the workings of government. He did not have the impression from the accused that he was there at the meeting expecting the Government to pull out a cheque book. Rather, he described the meeting as 'the starting conversation and we should go from here'[5]. He supported the work of Bio SA and thought Nano-Nouvelle was the type of company the Government should be assisting through Bio SA. He considered the sort of work that Nano-Nouvelle was doing had potential to assist the economy of the State.

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[5] Transcript, p 87.

25 Mr Kenyon's evidence was that as at 2012, he did not know the accused had a pecuniary interest in Nano-Nouvelle. As the Minister, he said he would need to know that because part of the whole culture of government is that every interest needs to be declared; motives for every proposal involving the expenditure of public money need to be understood. If he had known the accused held a pecuniary interest in Nano-Nouvelle, the proposal would not have been abandoned. Rather, a declaration of interest would have meant the accused could not be involved in any of the decision making around that company and the provision of funds for that company.

26 Mr Kenyon said he had no memory of the accused disclosing a financial interest in Nano-Nouvelle during that meeting. He confirmed the correctness of an initial statement he gave during this investigation that 'I cannot remember if Jurgen disclosed having a financial interest in Nano-Nouvelle. I would not have been surprised because with these start-up companies, you often take equity rather than a payment'[6].

27 At the time of the meeting, Mr Kenyon did not think the Government would be able to find the funds; he was not at all hopeful. Based on how things normally operate, he thinks he would have said to the accused he would talk to the Treasurer to see if there was any appetite to spend that sort of money and if there was not, then there was no point in going any further with it. He did not have any specific memory of saying that at the meeting. He had no recollection whether he spoke to the Treasurer or not.

Events post 13 June 2012

28 On 15 June 2012, the accused sent Mr Mutton and others an email entitled 'Minister Meeting Follow Up'[7]. He referred to a quick update on the discussion with the Minister following a telephone call with Mr Cameron (the Minister's advisor). In the email it was stated that the Minister really likes the concept. 'The anchor argument should be the building, overflow for the current incubator; if things go wrong with NN, there are still other companies in the building...'. He said 'they are aware of my apparent conflict and are on the other hand not concerned about it, they understand that these things only emerge because of my various activities. In order to protect me, they wish to run it through the Bio SA board as discussed briefly at the meeting'.

29 Board Meeting Agenda Item 4[8] (undated, but likely to be for a meeting of the Board of Bio SA on 25 June 2012) referred to the proposal which had been put to the Minister on 13 June 21012. The action required was set out as follows: 'Endorse the proposal to the SA Government to assist Bio SA to purchase and refurbish the vacant Novozymes building in Thebarton and to secure an anchor tenant, Nano-Nouvelle, which will relocate from Queensland into the facility by

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6 Transcript, p 104.
7 Exhibit P14.
8 Exhibit P15.

the end of 2012-13'. It was proposed that Bio SA seek to buy and refurbish the building by requesting $7m from the SA Government over a two year period. It was stated that in order to secure Nano-Nouvelle as an anchor tenant, a further $5m would be needed to attract the company to relocate by the end of the 2012 calendar year. TRC was said to be the major investor in Nano-Nouvelle and instrumental in facilitating the relocation of the company from Queensland.

30 Minutes of the Board of Bio SA record a meeting of the Board on 25 June 2012[9]. One of the items of business was the Thebarton/Novozymes proposal. The minutes record that 'the CE declared a conflict as he is the chairman of Nano-Nouvelle Pty Ltd which is subject of discussion. The chair of Bio SA invited the CE to remain in the room to answer any questions and leave for the decision making discussions'.

31 The discussion was based on the two intertwined proposals. They were, first, the purchase of the building with modifications to serve as stage 2 of the Bio SA incubator building; and second, the opportunity for Nano-Nouvelle to relocate to Adelaide as a tenant of that building. It was stated that Nano-Nouvelle should be the case study of how to attract businesses into South Australia and into the building as it already had strong ties with South Australian universities and was a good fit for the State's manufacturing strategy. Mr Mutton gave evidence the proposal was not ratified, nor was it rejected. He said all members of the Board were enthusiastic about the proposal.

32 In a Minute from the accused to the Minister dated 19 July 2012[10], a modified proposal was put forward. There was no mention of Nano-Nouvelle in that Minute at all. The proposal was a request for the Minister to explore the option of purchasing the vacant Novozymes building in Thebarton as a stage 2 business incubator. The budget to achieve that purpose was $9m over two years from the Government. It was proposed that the Government purchase the building and assign the head lease to Bio SA. It was further proposed that Bio SA would then in turn sublease and manage the building.

33 The proposal in the Minute dated 19 July 2012 did not proceed. Ultimately, a private investor purchased the Novozymes building at the instigation of the accused. The funding proposal involving Nano-Nouvelle which was the subject of the meeting on 13 June 2012 went no further.

Elements of the offence

34 The offence of Abuse of Public Office is set out at s 251 of the *Criminal Law Consolidation Act 1935* (SA) (CLCA) as follows:

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9 Exhibit P17.
10 Exhibit P18.

251—Abuse of public office

(1) A public officer who improperly—

(a) exercises power or influence that the public officer has by virtue of his or her public office; or

(b) refuses or fails to discharge or perform an official duty or function; or

(c) uses information that the public officer has gained by virtue of his or her public office,

with the intention of—

(d) securing a benefit for himself or herself or for another person; or

(e) causing injury or detriment to another person

is guilty of an offence

35 The concept of acting 'improperly' is set out in s 238 of the CLCA as follows:

238—Acting improperly

(1) For the purposes of this Part, a public officer acts improperly, or a person acts improperly in relation to a public officer or public office, if the officer or person knowingly or recklessly acts contrary to the standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed by public officers of the relevant kind, or by others in relation to public officers or public offices of the relevant kind.

(2) A person will not be taken to have acted improperly for the purposes of this Part unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted.

(3) Without limiting the effect of subsection (2), a person will not be taken to have acted improperly for the purposes of this Part if—

(a) the person acted in the honest and reasonable belief that he or she was lawfully entitled to act in the relevant manner; or

(b) there was lawful authority or a reasonable excuse for the act; or

(c) the act was of a trivial character and caused no significant detriment to the public interest.

(4) In this section— act includes omission or refusal or failure to act; public officer includes a former public officer.

36 The elements of the offence of Abuse of Public Office are:

1. That the accused was at the relevant time a public officer.

2. That the accused exercised influence that he had by virtue of his public office.

3. That the accused exercised that influence improperly, namely,

   3.1 he acted contrary to standards of propriety generally and reasonably expected by ordinary decent members of the community to be observed such public officers;

   3.2 he knew he was acting improperly or was reckless in acting improperly;

   3.3 having regard to the circumstances, the conduct warrants the imposition of a criminal sanction. It would not warrant a criminal sanction, if for example,

      3.3.1 the accused acted in the honest and reasonable belief that he was lawfully entitled to act in the relevant manner;

      3.3.2 the accused had lawful authority or a reasonable excuse for the act;

      3.3.3 the act was of a trivial character and caused no significant detriment to the public interest.

4. That the accused exercised the influence with the intention of securing a benefit for himself.

37 The prosecution must prove each element of the offence beyond reasonable doubt. In these reasons, when I refer to something that must be proved or established or needing to be satisfied of something, then that is reference to the relevant standard of proof beyond reasonable doubt.

38 The accused did not give evidence or call evidence in his defence. He was not obliged to do so. He is presumed innocent unless and until the prosecution has proved his guilt beyond reasonable doubt. The accused bears no burden of proof at all.

First element of the offence – 'public officer'

39 There was no dispute that as at 13 June 2012, the accused, as CE of Bio SA, was a 'public officer' for the purpose of s 251 of the CLCA.

Second element of the offence – 'exercises influence' by virtue of public office

40 On 13 June 2012, the accused met with the Minister in his capacity as CE of Bio SA and put forward his written proposal in the Minute of the same date.

41 There is no definition of 'influence' in the CLCA. In the *Oxford English Dictionary*, it is defined as 'to affect the mind or action of; to move or induce by influence; to affect the condition of, to have an effect on'. I find that the accused exercised influence by virtue of his role as CE of Bio SA by putting forward the proposal to the Minister so as to affect the mind or action of the Minister in regard to it. There is nothing necessarily sinister in that at all. In fact it was an important and necessary part of the accused's role if he was to be an effective CE of Bio SA. All of the evidence suggests he was very capable in that regard.

42 I find this second element proved beyond reasonable doubt.

Third element of the offence – acted improperly

43 This element was in dispute. The prosecution must prove that the accused improperly exercised influence he had by virtue of his position as CE of Bio SA. The prosecution case was that he acted improperly because he knowingly or recklessly acted contrary to standards of propriety by failing to disclose his pecuniary interest in Nano-Nouvelle when he put forward the proposal on 13 June 2012. The prosecution says his conduct warrants criminal sanction.

Did the accused fail to disclose his pecuniary interest in Nano-Nouvelle?

44 The prosecution made no suggestion there was anything at all improper in the accused having a pecuniary interest in Nano-Nouvelle. The impropriety was said to be in his failure to disclose it to the Minister on 13 June 2012. The prosecution submitted the accused did not make the disclosure either orally during the meeting or in his Minute to the Minister.

45 The defence submitted the prosecution had failed to exclude the reasonable possibility the accused orally disclosed his financial interest in Nano-Nouvelle during the meeting. The defence relied heavily upon Mr Kenyon's evidence that he could not remember if the accused disclosed a financial interest in Nano-Nouvelle at the meeting.

46 Although both Mr Kenyon and Mr Mutton lacked memory about the meeting itself, each gave evidence they did not know around that time that the accused had a pecuniary interest in Nano-Nouvelle. I accept their evidence about that.

47 In assessing Mr Mutton's evidence regarding knowledge of the accused's pecuniary interest around the time of the meeting, the various minutes of the meetings of the Board of Bio SA[11] and the Register of Conflicts of Interest for Bio SA[12] have not been of assistance. The minutes record that when Nano-Nouvelle was an agenda item, the accused would excuse himself because of a conflict of interest. There is no detail in those minutes as to what, if any, reasons were given by the accused on those occasions.

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[11] Exhibits P7, P9 and P17.
[12] Exhibit P24.

48 The Register of Conflicts of Interest for Bio SA records the accused as having a conflict with TRC (describing him as the Chair of the Investment Committee of TRC, Director of TRC and a "responsible manager") and with Nano-Nouvelle (describing him as director/chairman of Nano-Nouvelle nominated by TRC which is a major shareholder). There is no mention in the Register of the accused having a pecuniary interest in Nano-Nouvelle. The Register was first prepared in September 2012 and post-dates the alleged offence. There was no evidence about who compiled it or the process adopted for so doing.

49 There is no doubt the accused did not disclose his pecuniary interest in Nano-Nouvelle in his Minute to the Minister dated 13 June 2012. I think it highly unlikely he would have disclosed that information orally but not put it in the detailed and lengthy written Minute. I am satisfied beyond reasonable doubt that the accused did not orally disclose his pecuniary interest in Nano-Nouvelle during his meeting with the Minister on 13 June 2012.

Was there a legal obligation to disclose the pecuniary interest in Nano-Nouvelle on 13 June 2012?

50 Pursuant to s 238(4) of the CLCA, an omission or refusal or failure to act can be an improper act for the purpose of the offence of Abuse of Public Office.

51 It is an established legal principle that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform.[13] The defence submitted that non-disclosure of the pecuniary interest per se cannot amount to an abuse of public office. I agree. The prosecution must identify a relevant duty or obligation arising under the general law or statute and prove there has been a breach by way of omission.

52 The established legal principle regarding criminal liability for omissions was referenced by Handley JA in *R v Iannelli*[14] as follows:

> [20] ….Criminal liability for mere omissions in Anglo-Australian law is exceptional unless it has been expressly imposed by statute. Glanville Williams, *Criminal Law. The General Part*, 2nd ed (1961) London, Stevens & Sons Ltd, at 3-5 states:
>
> > "In some instances an omission will create criminal responsibility without any positive act … In law, as in morals, the concept of culpable omission presupposes a duty to act; and a rule penalising an omission must state to whom this duty belongs … the criminal law does not impose a duty upon someone to act to prevent a consequence whenever it imposes a duty not to bring about the consequence. The law relating to omissions is not co-extensive with the law relating to

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13 *Commonwealth DPP v Poniatowska* (2011) 244 CLR 408, [29]; *Poniatowska v DPP (Cth*) (2010) 107 SASR 578 [13].

14 (2003) 56 NSWLR 247 [20] – [21].

> acts. It is partly coincident in manslaughter and murder, but here the event of death leads the law to look upon the omission with special severity. Most crimes, particularly those at common law, are defined to need a positive act …."

[21] Lord Hailsham, ed, *Halsbury's Laws of England,* 4th ed, Vol 11 (1976) London, Butterworths, at 15 is to the same effect:

> **"9. Omissions.** As a rule the criminal law imposes no obligation on persons to act so as to prevent the occurrence of harm or wrongdoing. There is no general duty to prevent the commission of crime; nor does a person commit a crime or become a party to it solely because he might reasonably have prevented its commission. Omission to act in a particular way will give rise to criminal liability only where a duty so to act arises at common law or is imposed by statute. Such a duty is exceptional and the criminal law does not ordinarily require a man to be his brother's keeper."

53 In regard to a duty or obligation on the accused to disclose his pecuniary interest in Nano-Nouvelle to the Minister on 13 June 2012, the prosecution referred to what was described as the accused's contractual, statutory and regulatory obligations.

Contractual obligations

54 The accused signed an agreement with Bio SA on 24 September 2010[15]. The agreement came into effect on 1 July 2011.

55 The prosecution first relied upon Recital C and paragraph 3.6 of the contractual agreement which states that Part 3 of the *Public Sector Act 2009* (SA) applies to the accused. The relevant section of Part 3 is as follows:

> 5—Public sector principles
>
> ……
>
> (6) **Ethical behaviour and professional integrity**
>
> Public sector employees are to—
>
> - be honest;
> - promptly report and deal with improper conduct;
> - avoid conflicts of interest, nepotism and patronage;
> - treat the public and public sector employees with respect and courtesy;

[15] Exhibit P6.

- make decisions and provide advice fairly and without bias, caprice, favouritism or self interest;
- deal with agency information in accordance with law and agency requirements;
- avoid conduct that will reflect adversely on the public sector;
- accept responsibility for decisions and actions;
- submit to appropriate scrutiny.

56 The prosecution submitted that none of those matters listed are optional; they are all mandatory. It was said that by failing to disclose his pecuniary interest in Nano-Nouvelle, the accused was not honest with either the Board of Bio SA or the Minister. I do not consider any of the matters set out in s 5(6) of the *Public Sector Act 2009* (SA) to be capable of creating legal obligations for the purpose of an offence provision such as s 251(1) of the CLCA. Section 5(6) sets out general statements of principle. They are too broad and imprecise to create legal obligations such that failure to act would result in criminal liability pursuant to an offence provision.

57 Second, the prosecution relied upon clause 8 of the contract under the heading 'Disclosure of Interest':

> The CEO must
>
> …
>
> 8.1.3 if a pecuniary interest or other personal interest of the CEO conflict or may conflict with his official duties he must:
>
> (a) disclose the nature of that interest and the conflict or potential conflict to the Board; and
>
> (b) not take action or any further action in relation to the matter except as authorised by the Board.

58 In the event of a conflict of interest in the nature of a pecuniary interest, clause 8.1.3 places an obligation upon the accused to make disclosure to the Board of Bio SA, not to the Minister. Clause 8 does not therefore assist the prosecution in regard to proof of this element of the offence. The prosecution must establish there was a legal obligation upon the accused to make the disclosure to the Minister on 13 June 2012.

Statutory and regulatory obligation

59 The prosecution relied upon section 17(1) of the *Public Sector (Honesty and Accountability) Act 1995* (SA) (the PSHA Act) to submit there was a legal obligation on the accused to disclose his pecuniary interest in Nano-Nouvelle at the meeting on 13 June 2012.

17—Duty of senior officials with respect to conflict of interest

(1) A senior official must—

(a) on appointment as a senior official, disclose his or her pecuniary interests to the relevant Minister in writing in accordance with the regulations; and

(b) on acquiring any further pecuniary interest of a kind specified in the regulations, disclose the pecuniary interest to the relevant Minister in writing in accordance with the regulations; and

(c) if a pecuniary interest (whether or not required to be disclosed under paragraph (a) or (b)) or other personal interest of the senior official conflicts or may conflict with his or her duties—

(i) disclose in writing to the relevant Minister the nature of the interest and the conflict or potential conflict; and

(ii) not take action or further action in relation to the matter except as authorised in writing by the relevant Minister.

Penalty: Division 4 fine.

60 At the relevant time, the accused was a 'senior official' because he was the chief executive of a public sector agency.[16] Mr Kenyon was the relevant Minister.

61 In order to prove the commission of an offence contrary to s 17(1) of the PSHA Act, the prosecution would need to prove the matters set out in (a), (b) and (c), where applicable. The accused was not charged with committing an offence contrary to s 17(1) of the PSHA Act, however, the prosecution relied upon s 17(1)(b) as establishing the relevant obligation for the purpose of the s 251(1) offence. I will focus upon s 17(1)(b) and then address s 17(1)(c). Section 17(1)(a) is not applicable because the accused did not have the pecuniary interest at the time of his appointment as CE of Bio SA.

62 For the purpose of s 17(1)(b), regulation 4 of the *Public Sector (Honesty and Accountability) Regulations 2010* listed the kinds of pecuniary interests that had to be disclosed to the Minister and the information required to be disclosed about them. The prosecution relied upon the pecuniary interests listed in the table at numbers three and five as follows:

4—Disclosure of pecuniary interests (section 17 of Act)

(1) The table below specifies—

(a) the pecuniary interests to be disclosed by a senior official for the purposes of section 17 of the Act; and

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[16] Section 2 of the *Public Sector (Honesty and Accountability) Act 1995* (SA) defines 'senior official' as the chief executive of a public sector agency and 'public sector agency' as having the same meaning as the *Public Sector Act 2009*; section 3 of the *Public Sector Act 2009* (SA) defines 'public sector agency' to mean a body corporate subject to the control of the Minister; Regulation 5 of the *Public Corporations (Bio Innovation SA) Regulations 2001* (SA) holds that Bio SA is a subsidiary of the Minister which is a 'body corporate'.

(b) the information that must be disclosed by the senior official in respect of any such pecuniary interest.

	Pecuniary interest	Information required
	……..	
3	A company, partnership, association or other body in which the person is an investor.	The name and address or description of the company, partnership, association or other body.
…….		
5	A trust (other than a testamentary trust) of which the person is a beneficiary or trustee.	A description of the trust and the name and address of each trustee.

63 The prosecution submitted the accused had a statutory and regulatory obligation to disclose to the Minister on 13 June 2012 his:

(1) sole trusteeship of the MFT,

(2) beneficial interest in the MFT; and

(3) investment of $70,000 by the MFT via RIT2 from bank accounts in his name to acquire shares in and make loans to Nano-Nouvelle.

64 Is s 17(b) of the PSHA Act a legislative provision which identifies an omission in such a way as to create a legal duty to perform a relevant act? I consider that it is. In *Poniatowska v DPP (Cth)*[17], the majority of the Court of Criminal Appeal (SA) quashed the Respondent's convictions for 17 counts of obtaining a financial advantage contrary to s 135.2 of the *Criminal Code (Cth)* by failing to disclose payments from her employer to Centrelink. In so doing, the majority said:

> The concept of an "omission" must be read as referring to a law which identifies the omission in question in such a way as to create a duty to perform the omitted act. An example of such a law is a law which makes it an offence for a person to refuse or fail to produce a driver's licence on request by a police officer. The refusal or failure to produce the driver's licence is an identified or specific omission, and it is an omission to perform an act which the person in question is obliged to perform, having regard to the terms of the offence creating provision. An omission to file a tax return provides another example. [18]

65 The terms of s 17(b) of the PSHA Act are such that it creates a legal duty upon a senior official to make written disclosure of a prescribed pecuniary interest to the relevant Minister on acquiring that pecuniary interest. It identifies a specific act which must be performed having regard to the terms of the provision itself.

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[17] (2010) 107 SASR 578; upheld by the High Court in *Commonwealth DPP v Poniatowska* (2011) 244 CLR 408.

[18] *Poniatowska v DPP (Cth)* (2010) 107 SASR 578 [30].

66 The defence submitted the accused is not charged with committing an offence contrary to s 17 of the PSHA Act. Whilst that is correct, in my view that does not preclude a duty created by that provision from being a relevant statutory duty for a s 251(1) offence said to be committed by way of an omission.

67 In *DPP (Cth) v Keating*[19], the High Court considered the duty on a person to comply with Centrelink notices imposed under s 74 of the *Social Security (Administration) Act 1999* (Cth) in the context of criminal charges for failing to comply with Centrelink notices pursuant to s 135.2(1) of the *Criminal Code* (Cth). One of the submissions made on appeal was that the existence of the lesser offence under the *Administration Act* for a failure to comply with the notice was inconsistent with the same omission attracting criminal responsibility for the more serious offence under the *Code*. The High Court rejected that submission.[20] A conviction for a s 135.2(1) offence may bar a subsequent prosecution for an offence under s 74(1) of the *Administration Act* for the same omission. However, the imposition of criminal liability under s 135.2(1) based on the duty created by s 74(1) of the *Administration Act* does not 'subvert' the scheme of the *Administration Act*. That is because each of the two offences contains different elements. The recipient of a notice is under a legal duty to comply with the notice. An intentional failure to comply with the notice is an offence contrary to s 135.2(1) of the *Code* if the other elements of that offence are established.

68 I find that the duty created by s 17(b) of the PSHA Act is capable of being a relevant legal obligation for the purpose of an offence contrary to s 251(1) of the CLCA. A conviction for the latter offence may bar a subsequent prosecution for the former offence. That position does not subvert the scheme of the PSHA Act because each offence contains different elements. A failure to disclose a pecuniary interest on acquisition is an offence contrary to s 251(1) of the CLCA if the other elements of that offence are established.

69 The next consideration is the scope of the duty created by s 17(b) of the PSHA Act. The defence submitted that the terms of s 17(b) suggest the disclosure obligation it creates is independent of the circumstances of the meeting with the Minister.

70 The legal duty created by s 17(b) is imposed upon the senior official *on acquiring* the prescribed pecuniary interest. The only evidence touching upon when the accused may have acquired the pecuniary interest was an agreed fact. It was agreed that between May 2011 and May 2012, the Michaelis Family Trust contributed $70,000 from bank accounts in the name of the accused to RIT2 which were then used by RIT2 to acquire shares in, and to make loans to, Nano-Nouvelle.

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19 (2013) 248 CLR 459.

20 *Keating* [34].

71 In *Nicholson v Department of Social Welfare*[21], the Court of Appeal (NZ) considered s 80A of the *Social Security Act 1964* (NZ) which created a duty upon a recipient of a social security benefit to advise an officer of the relevant Department *forthwith* of any change in circumstances which affects the right of the beneficiary to receive the benefit. The appellant had been in receipt of the benefit and upon obtaining a teaching position, she contacted the Department and advised of her employment. Despite that contact, the benefit continued to be paid and was retained by her. The appellant was charged with an offence pursuant to s 127 of that Act for failing to comply with the duty created by s 80A in regard to the subsequent payments. The majority of the Court concluded that s 80A did not establish the relevant duty:

> In this class of case an omission has significance only where there was a legal obligation to act and not to omit, so that the omission is a breach of the legal duty to act. It is necessary to determine what circumstances must occur for the obligation to arise, how long the person on whom the obligation rests had to comply, what steps will discharge that obligation and, finally, when the failure to advise was complete.[22]

72 The majority of the Court found that s 80A was directed at a single obligation to 'forthwith advise'. If the specific obligation imposed by s 80A was discharged, there remained no obligation to do or say anything to which the s 127 offence could attach.

73 Here, the specific obligation under s 17(1)(b) is to disclose the further pecuniary interest *on acquisition*. By the time of the meeting on 13 June 2012, the accused had acquired the pecuniary interest. I am unable to be satisfied precisely when the interest had been acquired by him. I am able to find that the interest that existed as at 13 June 2012 had been acquired by him at some stage in May 2012.

74 In light of the evidence of Mr Kenyon that he did not know of the interest around that time (which I have accepted), it is implicit on the prosecution case that the accused had not made any written disclosure of the interest to the Minister in May 2012 when he acquired the interest or at least prior to the meeting on 13 June 2012 in accordance with the duty imposed upon him under s 17(1)(b) of the PSHA Act. The prosecution has not strictly proved there was no such written disclosure made by the accused to the Minister prior to 13 June 2012. There was no evidence about what, if any, processes were in place or records kept by the Minister's office upon receipt of written disclosures made pursuant to s 17(1)(b) of the PSHA Act. If he had made disclosure prior to 13 June 2012, then s 17 of the PSHA Act would not be a source of a legal obligation upon the accused to disclose that information again in his Minute to the Minister dated 13 June 2012. Although it has been left open as a possibility on the evidence that no disclosure in accordance with s 17(1)(b) was made prior to 13 June 2012, I am able to exclude it as a reasonable possibility. I am

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[21] [1999] 3 NZLR 50.

[22] *Nicholson* [26].

prepared to rely upon Mr Kenyon's memory in that regard. It is something I would have expected he would recall.

75 Nevertheless, I do not consider the s 17(1)(b) obligation was an obligation which required the accused to disclose the pecuniary interest in the context of his Minute to the Minister dated 13 June 2012. No doubt, if the accused had disclosed his pecuniary interest in that way, then he would not be facing this prosecution. However, it is a different question as to what it is that the s 17(1)(b) obligation requires. That question as to what is required by a relevant legal obligation must be identified precisely. In *Poniatowska*, the plurality of the High Court stated that:

> The principles of criminal responsibility stated in the Code proceed from the view that the criminal law should be certain and that its reach should be able to be ascertained by those who are the subject of it…The exceptions to the general principle that it states do not extend to criminalising the omission of any act which is able to be causally related to a result of conduct.[23]

76 Section 17 requires senior officials to notify the Minister of important and specific information. That brings with it a degree of formality. In my view, s 17 contemplates a written notice in a context which has that disclosure as its focus and purpose. I do not consider that it contemplates disclosure being made in some incidental way. I agree with the defence submission that the s 17(1)(b) disclosure obligation is a statutory legal obligation independent of the circumstances of the meeting with the Minister for which the accused prepared the Minute dated 13 June 2012. The purpose of the Minute was to put forward a two pronged proposal to the Minister for funding for a dedicated building and the relocation of Nano-Nouvelle to South Australia as one of the tenants of that building. Its purpose was not that to which s 17(1)(b) is directed. It would have been preferable if the accused had referenced his pecuniary interest in that Minute, however, I do not consider s 17(b) of the PSHA Act imposed a legal obligation upon him to do so.

77 Section 17(c) of the PSHA Act requires a senior official to make written disclosure to the relevant Minister of a pecuniary interest that conflicts or may conflict with his duties and to not take action or further action except as authorised in writing by the relevant Minister. I doubt that this is a legislative provision which identifies an omission in such a way as to create a legal duty to perform a relevant act for the purpose of s 251(1) of the CLCA. It lacks precision because of the concept of a conflict with the senior official's 'duties'. In any event, the prosecution did not identify the duty or duties of the accused with which his pecuniary interest in Nano-Nouvelle was said to be in conflict. Additionally, for the same reason as discussed for s 17(1)(b), I do not consider that the purpose of the Minute dated 13 June 2012 was that to which

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[23] (2011) 244 CLR 408 [44].

s 17(1)(c) is directed. I therefore do not consider s 17(c) of the PSHA Act imposed a legal obligation upon the accused to make disclosure of the pecuniary interest in that Minute.

Was the failure by the accused to disclose his pecuniary interest improper?

78 If I am wrong and s 17(1)(b) and/or s 17(1)(c) of the PSHA Act created a duty upon the accused to disclose his pecuniary interest in Nano-Nouvelle in his Minute to the Minister dated 13 June 2012 the prosecution must go on to prove that in so failing to inform the Minister, the accused acted improperly. I need to consider whether he knowingly or recklessly acted contrary to the standards of propriety generally and reasonably expected by ordinary and decent members of the community to be observed by someone in his position. That is to be determined having regard to reasonable contemporary standards.

79 Further s 238(2) of the CLCA states that a person will not be taken to have acted improperly unless the person's act was such that in the circumstances of the case the imposition of a criminal sanction is warranted. The specific examples set out in s 238(3) of the CLCA do not limit the effect of s 238(2).

80 In *The Queen v Quach*[24], the Victorian Court of Appeal considered the question of when a criminal sanction is warranted in the context of the common law offence of Misconduct in Public Office:

> It will generally be desirable that the trial judge emphasise the notion that the conduct must be so far below acceptable standards as to amount to an abuse of the public's trust in the office holder. As in the case of criminal negligence, and offences such as culpable driving and dangerous driving, it is recognised that it is necessary to distinguish the conduct sufficient to attract criminal sanction from less serious forms of conduct which may give rise to civil proceedings.[25] Accordingly it would be desirable if the trial judge explained that in stating that the conduct must be sufficient to attract criminal punishment, a distinction is being drawn from less serious forms of conduct which may give rise to civil proceedings.

81 In *Attorney General's Reference No 3 of 2003*[26], the Court of Appeal (Criminal Division) of England and Wales also considered the common law offence of Misconduct in a Public Office and stated:

> …there must be a serious departure from proper standards before the criminal offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.[27]

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[24] (2010) 27 VR 310 [47].
[25] *R v Boulanger* [2006] 2 SCR 49 [54].
[26] [2004] EWCA 868.
[27] *Attorney General's Reference No 3 of 2003* [56].

82 More recently in *R v Chapman and others; R v Sabey*[28], the Court of Appeal stated that misconduct at the level of breach of duty, neglect of duty or breach of trust is insufficient. In that regard, reference was made to the observation in *R v Borron*[29] that to condemn anyone who had fallen into error or made a mistake, belonged only to the law of a despotic state. The conduct must be of such seriousness as to call for condemnation and punishment. The threshold is a high one.

83 In my view, the intention of Parliament in enacting s 238(2) was to incorporate that aspect of the common law offence in the s 251(1) offence. The following was stated by the Attorney-General during debate on this proposed addition to s 238 of the CLCA:

> …a jury must explicitly consider not only whether there was impropriety but also whether the impropriety was such as to warrant the imposition of the criminal sanctions. I am sure all members will be aware that in the rough and tumble of public life things happen which we would call improper, but which are part and parcel of the job and while we might disprove of them, they should not attract the severe penalty here enacted.
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> Certainly, it is not the intention of the Bill to escalate minor improprieties into major criminal offences, so this amendment seeks to provide just that. This sort of definition is not new or unprecedented. The analogy drawn here is with the concept of criminal negligence as it has been interpreted to apply, particularly in relation to the offence of manslaughter…The offence does not escalate mere negligence to a very serious offence. So it is necessary to distinguish between mere negligence on the one hand and criminal negligence on the other. The analogy with what is proposed by this amendment is obvious. …It provides an additional assurance that the offence as proposed in the Bill will be so interpreted so as to accord with the realities of ordinary public life.[30]

84 The prosecution submitted it is open to find that ordinary decent members of the community would expect that persons holding such a position and receiving a large public salary, would comply with contractual obligations, statutory and regulatory requirements set out by Parliament. I do not think anyone would quarrel with that submission as a general proposition. Whether a person in that position has in fact acted contrary to the relevant standards of propriety will always depend on the circumstances of each particular case. Even if a person had so acted, that is not enough in order to establish the person acted improperly. The prosecution must also prove the person knowingly or recklessly acted contrary to the relevant standards of propriety and that the imposition of a criminal sanction is warranted. The prosecution submitted that *deliberate* failure to comply with statutory and regulatory requirements would warrant a criminal sanction. That must also depend on the circumstances of each particular case.

85 The prosecution submitted it is open to find the accused deliberately made the partial disclosure of his chairmanship to the Minister, but deliberately kept

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[28] [2016] 1 All ER 1065.

[29] (1820) 3 B & Ald 432, (1820) 106 ER 721.

[30] Debate in the Legislative Council on the *Statutes Amendment and Repeal (Public Offences) Bill*, 31 March 1992, p 3671 – 3672.

his pecuniary interest hidden to protect his investment in Nano-Nouvelle, in the hope that one day he would receive a return of the $70,000 investment made via RT2. Based on the evidence presented, I am unable to make factual findings or draw inferences to reach that conclusion beyond reasonable doubt. First, I am not satisfied that the failure by the accused to refer to the pecuniary interest on 13 June 2012 was a *deliberate* failure on his part. Second, I am not satisfied he knowingly or recklessly acted contrary to the relevant standards of propriety in failing to disclose his pecuniary interest. Third, I am not satisfied the imposition of a criminal sanction is warranted in the circumstances of this case.

86 In reaching those views, I have considered the evidence regarding the nature of the pecuniary interest held by the accused to be important. I agree with the defence submission that it was an indirect potential interest in shares in Nano-Nouvelle through a family trust of which the accused was a potential beneficiary. There was not an obvious benefit that would flow to the accused from the proposal he was putting forward at that time. Whilst the prosecution does not need to establish an actual benefit in order to prove the offence, the indirect nature of the pecuniary interest and speculative nature of any resulting benefit to the accused from the proposal [see paragraphs 100 to 102 below] does not favour a finding that his pecuniary interest was then on his mind. It does not favour an inference being drawn that the accused deliberately kept his pecuniary interest hidden to protect his investment in Nano-Nouvelle in the hope of a later return on the investment.

87 I have taken into account the evidence of Mr Kenyon that the accused understood the workings of government. The prosecution submitted the accused had been in his position since 2001 and was a sophisticated man. On three occasions in the past he declared a conflict and absented himself from Board discussions. The prosecution relied upon that evidence to support an inference the accused well knew about his obligation and deliberately failed to comply with it on 13 June 2012.

88 I consider the evidence that the accused understood the workings of government to be equally consistent with the accused being aware the proposal was in its infancy. After the meeting on 13 June 2012, the next step was likely to be Mr Kenyon informally running it past the Treasurer. If the Treasurer said he was prepared to entertain it, then there would need to be a formal proposal from the Board of Bio SA, which would have then been turned into a Cabinet submission by Mr Kenyon's office. That would need to be circulated amongst other Government departments and then formally go to Cabinet for discussion and decision. The proposal was a long way from any significant decision making process.

89 The past conduct of the accused in regard to declaring a conflict of interest and absenting himself from decision-making discussions does show he was aware of the need to make relevant people aware of the existence of a conflict.

There is no evidence that in the past he gave detail of the conflict, or that further detail was required of him. In his Minute to the Minister, the accused did refer to the various roles he had within TRC and Nano-Nouvelle. That was appropriate. It was consistent with his past conduct.

90 Assessed objectively, it would have been ideal, best practice or preferable for the accused to have stated in the Minute that he had a pecuniary interest in Nano-Nouvelle. But that is not the test for a finding that a public official has acted improperly. The accused's state of mind at the time of the non-disclosure must be assessed. In that regard, I am not able to draw the inferences sought by the prosecution.

91 In considering whether the accused deliberately failed to comply with his statutory/regulatory obligation and whether he knowingly or recklessly acted contrary to the relevant standards of propriety, I have also taken into account the evidence of his good character. I should bear that evidence in mind when considering whether I am prepared to draw from the prosecution evidence the conclusion of his guilt; it is a factor affecting the likelihood of the accused having committed the crime charged.[31]

92 Mr Mutton gave evidence the accused had a very high reputation as CE of Bio SA in terms of his skills, knowledge and network. Bioscience was his specialty and passion. He was conscientious and diligent in the way he sought to achieve the strategic direction for Bio SA as set out in the Charter.

93 Mr Kenyon gave evidence the accused was an excellent CE. He was 'one of those rare breed of people in government who get things done – efficient and hardworking and highly motivated….when you're in government and you come across that, it's a joy'[32]. He described the accused as highly intelligent, professional, held in very high regard and skilled. His reputation was beyond reproach.

94 Ms Brown was a member of the Bio SA Board from 2004 until 2015. She described the accused as having the reputation of a high-performing CE who conducted himself properly. He was hardworking, passionate about bioscience, highly trusted, intelligent and regarded as a man of integrity.

95 In summary, the accused was a conscientious, committed and ethical CE of Bio SA who was highly regarded. Because of his commitment to the promotion of bioscience in South Australia, the indirect nature of his pecuniary interest in Nano-Nouvelle and the speculative nature of any benefit, I am not satisfied the accused turned his mind to his pecuniary interest when he wrote the Minute to the Minister dated 13 June 2012. The prosecution has not excluded the reasonable possibility his focus was on the advancement of biosciences by

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31 *R v Trimboli* (1979) 21 SASR 577, 578.
32 Transcript, p 83.

advocating for another dedicated building and securing tenants for that building rather than on his own interests. Further, the evidence about how the accused conducted himself generally does not support a finding to the necessary standard that he knowingly or recklessly acted dishonestly in not disclosing his pecuniary interest at the relevant time.

96 At its highest, the accused fell into error or made a mistake by not referring to the existence of a pecuniary interest in the Minute to the Minister dated 13 June 2012. I agree with the defence submission that the disclosure the accused did make in his Minute to the Minister made it plain he was compromised in respect of Nano-Nouvelle. With the benefit of hindsight, it would have been better if he had mentioned the existence of a pecuniary interest in Nano-Nouvelle. Whilst his failure to do so may warrant some disapproval, it does not reach the threshold required to warrant criminal sanction.

97 The third element of the offence has not been proved by the prosecution.

Fourth element of the offence - the intention of securing a benefit for himself.

98 Even if I had been satisfied of the third element of the offence, I would not have found the fourth element of the offence to have been proved.

99 It was not the prosecution case that the accused in fact received any benefit for himself. Such a consequence is not required in order to prove the commission of this offence.

100 The prosecution did not readily identify the benefit the accused was said to have intended to secure for himself. The prosecution relied upon the reasoning process that if Nano-Nouvelle was to receive a grant of $5m over a period of three years then there must be a benefit to the shareholders. In his opening address, the prosecutor stated the following:- 'If Nano-Nouvelle developed a commercially successful nano battery or bio censor, then the share price would increase and Dr Michaelis indirectly via his beneficial interest in the discretionary Michael Family Trust would receive a benefit if he exercised his discretion as the sole trustee in his own interest'[33]. The benefit was by way of his 'beneficial interest in the trust'[34] .

101 There was a paucity of evidence on this aspect.

102 The major and controlling shareholder in Nano-Nouvelle was TRC. The RIT2 was also a shareholder. There was no evidence about the nature of the shareholding that RIT2 had in Nano-Nouvelle. One of the unitholders in RIT2 was the accused in his capacity as trustee of the MFT. There was no evidence as to how many other unit holders there were in the RIT2. If there was a benefit to

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[33] Transcript, p 7.
[34] Transcript, p 10.

each of the unitholders, including the MFT, the accused may benefit if he exercised his discretion as the trustee of the MFT to distribute the benefit to himself.

103 On the evidence presented, any benefit to the accused from the terms and stage of the proposal as at 13 June 2012 was remote, vague and speculative. For that reason alone, the prosecution case that the accused intended at the time of providing the Minute to the Minister dated 13 June 2012 to secure a benefit for himself is unlikely. That is reinforced by the good character evidence I have heard, including his focussed determination to promote bioscience technology in South Australia. I do not consider he had himself in mind. It has not been established that he intended securing a benefit for himself.

Finding

104 I find the accused not guilty of the offence of Abuse of Public Office.