

**Conflict of interest by an Executive Officer in the
Department of Education and Training**

September 2015

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Letter to the Legislative Council and the Legislative Assembly

To

The Honourable the President of the Legislative Council

and

The Honourable the Speaker of the Legislative Assembly

Pursuant to sections 25 and 25AA of the *Ombudsman Act 1973*, I present to Parliament my report into a *Conflict of interest by an Executive Officer in the Department of Education and Training*.



Deborah Glass OBE

Ombudsman

2 September 2015

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Foreword

The public sector is rightly proud of the values it espouses. They are demonstrated daily by the many dedicated individuals working in departments and agencies, motivated by the desire to help others. Integrity is one of the core public sector values – necessarily so, as public acceptance of government actions is firmly rooted in the belief that officials act in the public interest, not in their own private interests. When evidence comes to light, such as in the recent IBAC hearings, that public officials are feathering their own nests, it shakes our confidence in honest officialdom to the core.

This investigation continues a long Ombudsman tradition of exposing conflicts of interest in the Victorian public service. A myriad of Ombudsman reports have made the point that those who work in the public interest should not receive an undisclosed private benefit: at worst, this is corrupt, potentially criminal conduct. At best, it is wrong.

The investigation began as a result of a protected disclosure referred by IBAC, alleging that an Executive Officer in the Department of Education and Early Childhood Development negotiated and accepted a job with a company while he was responsible for investigating it.

The investigation found the allegation to be substantiated. But the executive is no longer a public servant, and is therefore beyond the reach of public service disciplinary measures.

I am therefore providing this report to Parliament in the public interest, both to expose unacceptable conduct, and to serve as a warning to others that such conduct is wrong.

This case, and the many preceding Ombudsman cases highlighting repeated instances of failures to understand or manage conflicts of interest, serves yet again to make the point that there are cultural issues within the public sector that must be addressed. While much work has been done to develop consistent policies on dealing with conflicts of interest, clearly more needs to be done to embed those principles in practice.

While the report makes recommendations, there is no panacea to this problem, no simple recommendation I can make to achieve cultural change. Leadership is critical. The leaders of the public service must demonstrate a personal commitment to the issue, to lead by example, to ensure their staff understand the importance of declaring and managing conflicts and to take action when such conflicts become apparent.

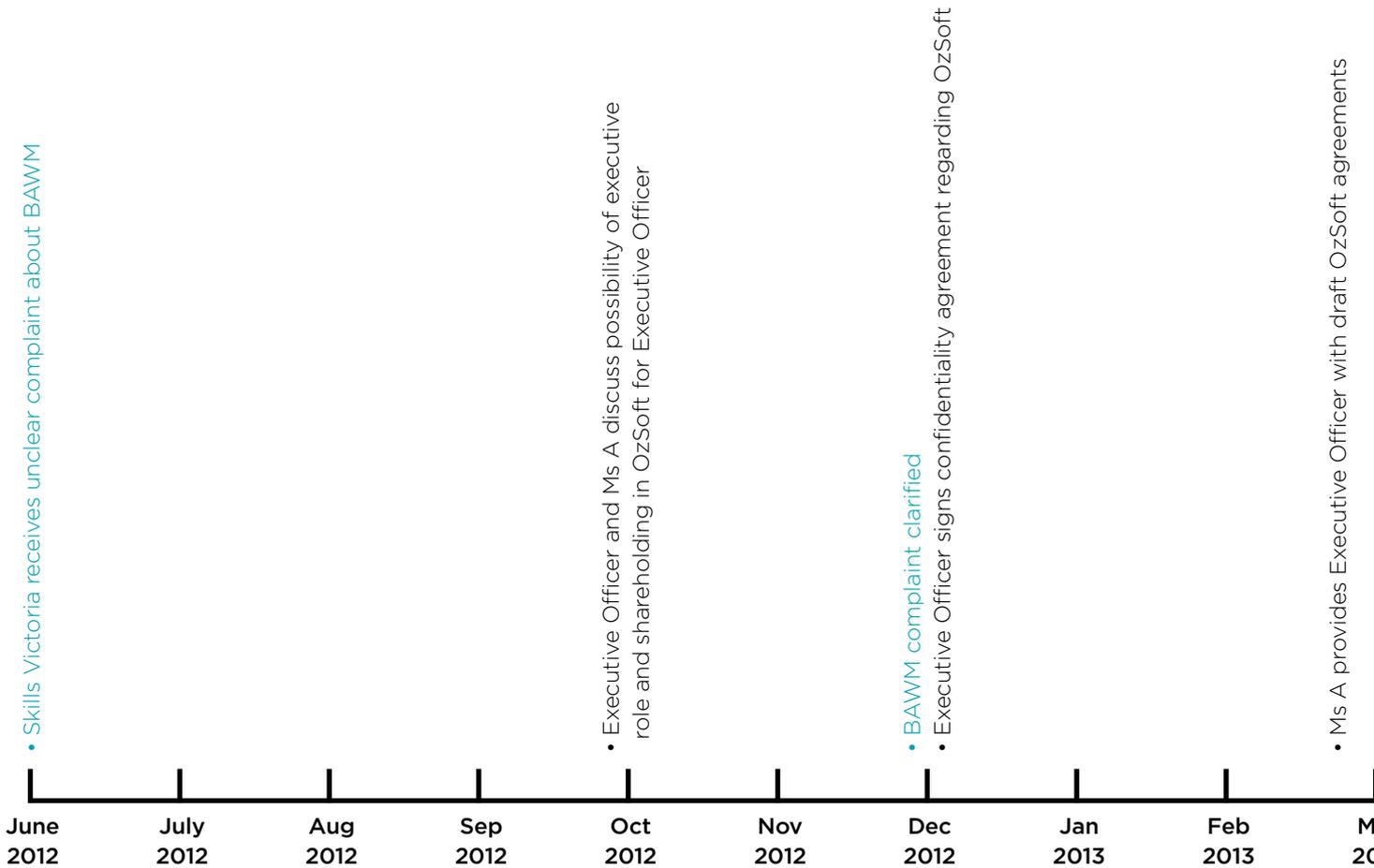
The recent announcement of the Victorian Secretaries Board, committing to corruption prevention and integrity champions to implement stronger integrity frameworks, is a good start. Time will tell whether further Ombudsman reports will be needed on this issue.

Deborah Glass
Ombudsman

Background

1. On 15 September 2014, Mr Stephen O’Byrne QC, Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC) referred a complaint to this office for investigation under section 73 of the *Independent Broad-based Anti-corruption Commission Act 2011*. IBAC had determined the matter to be a protected disclosure complaint under the *Protected Disclosure Act 2012*.
2. The complaint alleged a conflict of interest by an Executive Officer (EO) in Skills Victoria, which was part of the then Department of Education and Early Childhood Development, now the Department of Education and Training (the department).

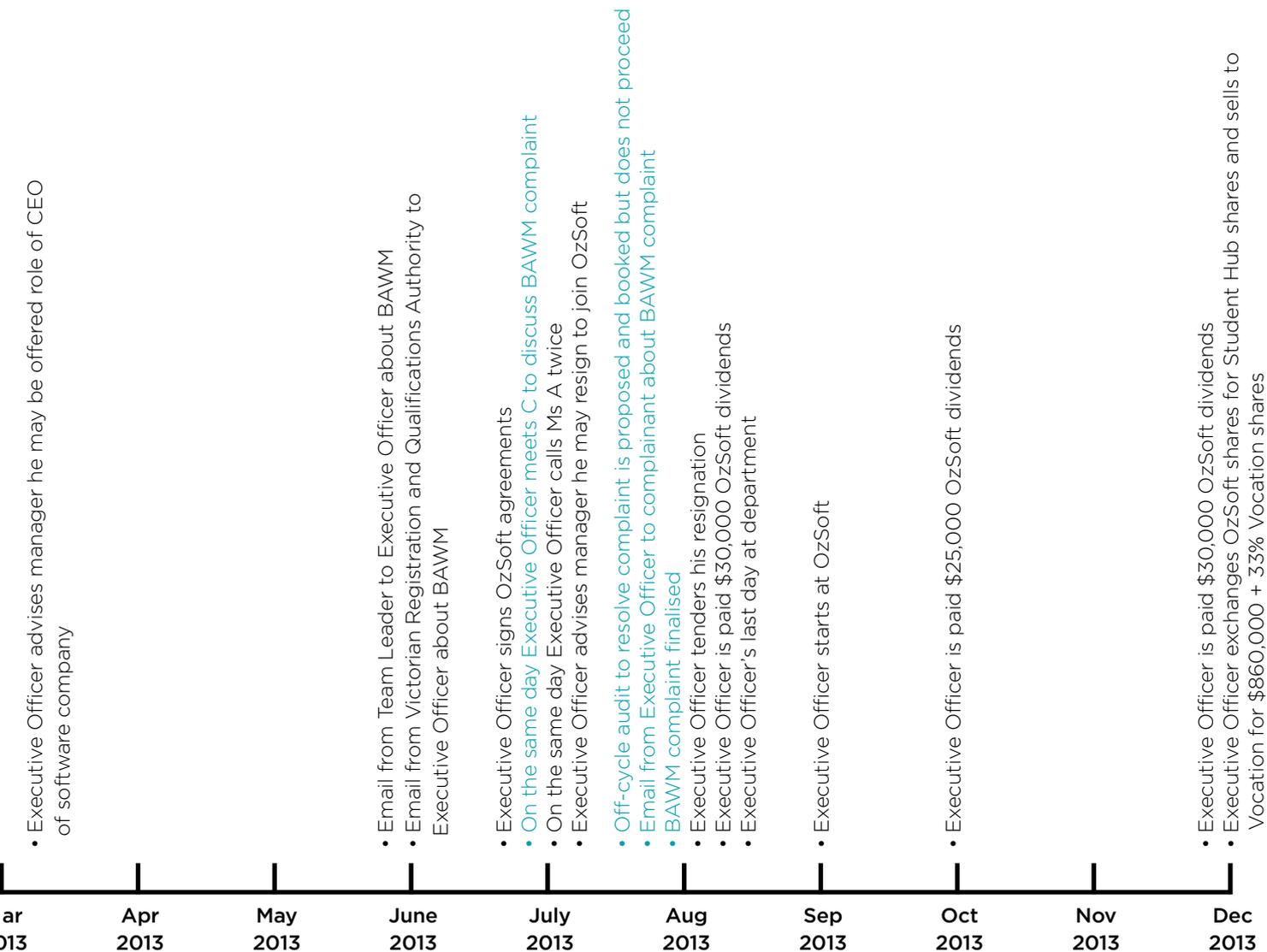
Figure 1: Timeline



- Executive Officer advises manager he may be offered role of CEO of software company

3. The conduct alleged was that the EO had considered, negotiated and accepted a high level managerial job within the BAWM group of companies while employed with Skills Victoria and having responsibility for funding decisions concerning BAWM Pty Ltd, a Registered Training Organisation (RTO). It was alleged that during this period, he also dealt with a complaint about BAWM.

4. On 7 October 2014, I notified the Hon Nick Wakeling MP, the then Minister for Higher Education and Skills, and Mr Richard Bolt, the then Secretary of the department, of my intention to investigate this matter under the *Ombudsman Act 1973*.



Investigation

5. The complaint was investigated in the context of:
 - other investigations into BAWM by the department and the Victorian Registration and Qualifications Authority (VRQA)
 - the demise of BAWM and the impact of this on its parent company, Vocation Limited (Vocation), an ASX-listed company with operations in the education and training sectors
 - announcements by state and federal governments of concerns about RTOs, and proposed reforms
 - the announcement of a Senate inquiry into RTOs.
6. The investigation included:
 - reviewing documentation provided by the department including policies and procedures
 - reviewing departmental audits of BAWM and related companies
 - reviewing BAWM's service agreements and funding contracts with the department
 - reviewing agreements entered into between the EO and BAWM directors
 - examining the EO's departmental emails and telephone records, and personal financial records.
7. Ten people were interviewed as part of the investigation. My officers conducted eight voluntary interviews and two compulsory interviews. Each interviewee was provided with the opportunity to attend with a support person or a legal representative. Three witnesses attended with legal representatives.
8. This report includes adverse comments in relation to the EO, who was provided with the relevant sections of a draft report prior to finalising its contents. A copy of the draft report was also provided to the department for comment. The responses from both are set out in this report, where relevant.
9. The EO is no longer employed within the Victorian Public Service. Accordingly, I make no recommendation in relation to him.
10. In accordance with section 25A(3) of the Ombudsman Act, I advise that any other persons who are identifiable, or may be identifiable from the information in this report, are not the subject of any adverse comment or opinion. They are named or identified in this report, as:
 - I am satisfied that it is necessary or desirable to do so in the public interest and
 - I am satisfied that identifying those persons will not cause unreasonable damage to those persons' reputations, safety or wellbeing.

Context

State government funding for education

11. Each year the Victorian government earmarks considerable money in its budget for skills, education and training. For the 2013-14 financial year, the department's education budget was \$11.6 billion¹.
12. These funds are allocated within the department in accordance with government strategy and priorities. In the 2014-15 budget, \$1.2 billion was allocated to vocational education and training².
13. Executive officers, including those responsible for allocating funding, are subject to the codes, policies and procedures that apply to all Victorian public servants, requiring them to act responsibly and ethically, with accountability for their actions and decisions.

Skills Victoria

14. Skills Victoria, now the Higher Education and Skills Group³, is part of the department.
15. Since 2009, Skills Victoria has provided funding to RTOs to enable people to access vocational education and training (VET), and to assist RTOs to deliver training when and where it is needed, through the administration of the Victorian Training Guarantee Program (VTG). Funding is made available to those who meet citizenship or residency requirements, and are:

- under 20 years of age at the start of the training year
- over 20 years of age at the start of the training year and seeking to enrol in:
 - training at a higher level than the highest qualification they already hold
 - an apprenticeship
 - the Victorian Certificate of Education or the Victorian Certificate of Applied Learning
 - a course from the 'Foundation Skills List' (a specific list of courses which provide a foundation to vocational training)⁴.

16. In 2014, there were more than 300,000 students enrolled in government-subsidised training. In 2014, approximately \$1.2 billion in subsidies was allocated to support eligible students to undertake vocational education and training. The Training Market Operations Division, within the Higher Education and Skills Group, comprises 22 full time employees and manages the contracts of the government-subsidised VET market (approximately 500 RTOs in 2014).

The Executive Officer, Skills Victoria

17. The EO was employed by the department from 2005 until 2013. From 2009 he was primarily employed in executive roles relating to the contracting and funding of RTOs to deliver training in Victoria, including through the VTG from 2009. The EO told my officers that:

... at its peak, the function I sat across contracted 600 RTOs and sat across payments to the tune of \$1.2 billion of Victorian government funding.

1 Budget Overview, Victorian Budget 2013-14 @ <www.dtf.vic.gov.au/Publications/State-Budget-publications/2013-14-State-Budget/2013-14-Budget-Papers> page 1.

2 Victorian Budget 2014-15 @ <www.dtf.vic.gov.au/Publications/State-Budget-publications/2014-15-State-Budget/2014-15-Budget-Papers> page 1.

3 In 2014 Skills Victoria underwent a name change to the Higher Education and Skills Group; however the functions of supporting and facilitating access to training and tertiary education opportunities did not change.

4 Schedule 1, Section 2: *Victorian Training Guarantee Eligibility Criteria of the VET Funding Contract; Guidelines about Determining Student Eligibility Criteria and Supporting Evidence.*

18. In the position he held as EO from April 2012 until the conclusion of his employment at the department, the EO described his role at interview as sitting across an 'end to end' process which included:

- requesting and evaluating funding applications from RTOs
- contracting RTOs
- receiving data and monitoring the performance of RTOs including the operation of a contract compliance audit program
- creating payments for RTOs.

19. In response to my draft report, the EO's lawyers stated:

Our client instructs that his role was one of management and overseeing matters and investigations by his team as a whole rather than 'end to end duties'.

20. The EO reported to an Executive Director who reported to the Deputy Secretary of the department.

21. Team Leaders in the department's areas of Compliance and Audit, Operational Policy, and Contract Program Management Stakeholder Relations reported to the EO. In relation to complaints, a Senior Project Officer in the Case Management Team had direct contact with the EO, although her direct report was to the Team Leader, Operational Policy.

22. The EO tendered his resignation to the department on 1 August 2013 and departed on 30 August 2013. He commenced as Managing Director of OzSoft Solutions Pty Ltd (OzSoft) on 2 September 2013. OzSoft is an education and training data management software company which markets the product VETtrak to many of the RTOs in relation to which the EO was making funding decisions.

Legislation, policies and procedures

23. At the relevant time, officers in Skills Victoria were bound by relevant legislation and numerous policies and procedures. These include the Code of Conduct for Victorian Public Sector Employees (Code of Conduct) issued by the Victorian Public Sector Standards Commissioner pursuant to the *Public Administration Act 2004*, and the department's policies in relation to conflict of interest; and gifts, benefits and hospitality.

Public Administration Act 2004

24. Pursuant to section 63 of the *Public Administration Act 2004* that applied during the EO's employment:

- (1) The Public Sector Standards Commissioner may prepare and issue codes of conduct based on the public sector values.
- (2) The purpose of a code of conduct is to promote adherence to the public sector values.
- (3) A code of conduct is binding on any public official or class of public official to whom it applies.
...
- (5) A contravention of a code of conduct by a public official who is bound by the code is capable of constituting misconduct.

25. 'Misconduct' is defined in section 4 of the Act as including:

- (a) a contravention of a provision of this Act, the regulations or a binding code of conduct;
- (b) improper conduct in an official capacity;
...
- (e) an employee making improper use of his or her position for personal gain.

Code of conduct

26. The code of conduct that applied during the EO's employment was the *Code of Conduct for Victorian Public Sector Employees (No 1) 2007*. The purpose of the code was to promote adherence to the public sector values prescribed in the *Public Administration Act 2004*. It was a public statement of values against which Victorian public officers were measured. These values included demonstrating:
- integrity, including honesty at work, avoiding conflicts of interest, avoiding conflicting employment and maintaining public trust
 - accountability, including being responsible for decisions and actions, and acting in an open and transparent manner by maintaining accurate and reliable records
 - leadership, including leading by example.
27. Section 3.2 of the Code of Conduct states that:
- Public sector employees use their power in a responsible way. They do not use their power to provide a private benefit to themselves, their family, friends or associates. They exercise power in a way that is fair and reasonable.
28. Section 3.7 of the Code of Conduct states that:
- Public sector employees declare and avoid conflicts of interest to help maintain community trust and confidence.
- A conflict of interest can be actual, potential or perceived. This relates to circumstances where the employee is or could be directly influenced or where it is perceived the employee might be influenced.
- Public sector employees ensure their personal or financial interests do not influence or interfere with the performance of their role. They seek to ensure the interests of family members, friends, or associates do not influence or could be perceived to influence their performance in the job.
- If an employee is unsure about a possible conflict of interest, they seek advice from their manager.

Conflict of interest policy

29. The department had its own conflict of interest policy which adopted the Code of Conduct's general principles.
30. The policy that applied during the EO's employment has been provided by the department. It states:
- Employees of the Victorian Public Sector are required by the Public Administration Act 2004 and the Code of Conduct for Victorian Public Sector Employees to declare and avoid any real or perceived conflicts of interest ...
- A conflict of interest in the public sector exists where there is a conflict between an employee's public duties and responsibilities, and their private interests. It may be actual, potential or perceived.
- Private interests include the personal or financial interests of an employee and the interests of family members, friends, or associates of an employee.
- A conflict of interest may arise where employees engage in other employment such as a second job, conducting a trade or business, active involvement with other organisations (paid employment or voluntary work) or perform more than one official role.
- ...
- Concerns regarding a perceived conflict of interest may arise during the management of complaints, misconduct or unsatisfactory performance. A perceived conflict of interest exists where a reasonable person with knowledge of the relevant facts could form the view that an employee's private interest could improperly influence the performance of their duties, now or in the future.
- Where any actual, potential or perceived conflict of interest is identified and cannot be avoided, reasonable steps should be taken to manage it.
- If an employee is unsure about a possible conflict of interest or how to handle a possible conflict of interest they should seek advice from their Principal/Manager.

Gifts, benefits and hospitality policy

31. The department's current Gifts, Benefits and Hospitality Policy⁵ applied during the EO's employment. It states that:

... [Victorian Public Sector Employees] must not accept or make offers of gifts, benefits or hospitality that influence, or give the impression to influence, any decision unfairly.

...

Benefits are the privileged treatment, privileged access, favours or other advantage offered to an individual. They include invitations to sporting, cultural or social events, access to discounts and loyalty programs and promises of a new job. While their value may sometimes be difficult to quantify in dollars, they may be highly valued by the intended recipient and therefore used to influence behaviour.

32. The EO was bound by the Public Administration Act, the Code of Conduct, and the department's Conflict of Interest Policy and the Gifts, Benefits and Hospitality Policy.

33. In response to my draft report of this investigation, the EO's lawyers stated:

Our client confirms that he was aware of the code of conduct for Victorian Public Service Employees which states specifically that employees must not use their power to provide a private benefit to themselves, their family, their friends or associates and that Officers are to declare and avoid actual, potential or perceived conflicts of interest to help maintain community trust and confidence in public decision making. Our client confirms that not only was he aware of this code of conduct but applied it religiously throughout his employment at the Department.

Registered Training Organisations⁶

34. RTOs deliver vocational education and training. They include TAFEs, universities and private training providers. Victorian RTOs enter into VET funding contracts with the department. The department considers their registration by the Australian Skills Quality Authority (ASQA) or the VRQA, both of which are regulators. The department also considers RTOs' financial viability and their previous contractual compliance. RTOs determine the fees and students pay any gap between these fees and VTG funding provided by the state government, which on average is 15 per cent.
35. RTOs are paid government subsidies for training, assessment and related services based on hourly rates, depending on the qualification. Subsidies are calculated by multiplying the reported number of 'nominal hours' to complete each qualification, up to a maximum, by an hourly subsidy rate. RTOs estimate the number of student contact hours necessary to achieve competence⁷. RTOs also assess student competency and capability in the workplace.
36. Courses offered by RTOs are practical and vocational. They vary in length from short courses to apprenticeships that take up to four years to complete. Training packages describe the anticipated outcomes for qualifications and are endorsed by relevant industry bodies or registration authorities.
37. RTOs are required to deliver training in accordance with their VET funding contract, which sets out the obligations and standards under which funding is made available by the department and accepted by the RTO. This includes maintaining registration with a registration body and delivering high quality training that meets regulatory standards.

5 <www.education.vic.gov.au/school/principals/spag/governance/Documents/Gifts,BenefitsandHospitalityPolicy.pdf>.

6 <www.education.vic.gov.au/training/providers/rto/pages/default.aspx> and additional information provided by the department.

7 2013 Service Agreement VTG Program, section 12.

38. To ensure the integrity of its subsidised training system, the department has responsibility for the oversight of the performance of RTOs. In 2012, the VTG Compliance Framework was established. It contains compliance strategies based on risk or non-compliance, including:

- entry standards for RTOs
- supporting RTOs to understand their obligations and comply with contracts
- monitoring RTO behaviour and performance including by routine audits
- where RTOs at risk are identified, there may be additional audits, the suspension of payments or an investigation.

Auditing RTOs

39. The department uses audits to ensure compliance with the VTG and to monitor contractual compliance by RTOs. RTOs are subject to:

- departmental audits in accordance with the Contract Compliance Audit Program⁸
- annual audits by the National Centre for Vocational Education Research for the federal government
- Australian Quality Training Framework audits by the regulators, the VRQA and ASQA. The VRQA and ASQA do not audit the contractual compliance of RTOs.

Departmental audits

40. The department has two audit programs: 'core audits' (conducted annually into high, moderate and low risk RTOs and based on risk factors such as the size of the funding allocation) and 'off-cycle audits' (conducted in response to issues, usually complaints, and monitoring of performance on an ongoing basis as they arise). The RTOs to be audited are determined by the Team Leader of Compliance and Audit in conjunction with the EO position, that is, the position occupied by the subject of this investigation. They assess RTOs as low, moderate or high risk.
41. I understand that the highest risk RTOs include those that receive the largest amounts of funding and that these RTOs are strongly represented in the annual core audit work. In 2012 there were 231 core audits and in 2013 there were 206.
42. A high-risk RTO undergoes⁹:
- a business process audit where evidence is required to show that the business processes in relation to two students comply with the contract including their eligibility, participation and the creation of a training plan
 - a transactional compliance audit which has a larger sample of 30 to 40 students and may lead to more intensive audits called 'evidence of participation', 'evidence of eligibility', 'evidence of concession' or 'follow up' audits.
43. The off-cycle audit program consists of audits conducted in response to risks identified by monitoring or complaints. In 2012 there were 67 off-cycle audits and in 2013 there were 64.

⁸ Skills Victoria Contract Compliance Audit Manual (version 3), dated 1 June 2012, applied during the EO's employment. The Victorian Training Guarantee Contract Compliance Audit Manual (version 4), dated September 2013, is currently in use.

⁹ Skills Victoria Contract Compliance Audit Manual Version 3 approved on 1 June 2012.

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44. The department's officers do not conduct the audits, but outsource them to independent auditors engaged by tender. After an RTO is audited, the auditor provides a draft report to the RTO for a response and then forwards it to the department.

BAWM and OzSoft

45. BAWM is an RTO. BAWM's predecessor Taylored Gardens was also an RTO which traded from 7 May 1997 until 29 January 2013. After this time, BAWM traded as Buildit Learning, RTO Edge, and Diverse Learning.
46. On 18 January 2012, Ms A, Ms B and others were appointed Directors of BAWM. On 31 July 2013, Ms A, Mr B and the EO were appointed Directors of OzSoft. On 6 December 2013, OzSoft was purchased by Student Hub (owned by BAWM), and BAWM and Student Hub were purchased by Vocation.
47. As outlined above, the EO had responsibilities in relation to RTOs including Taylored Gardens and BAWM.
48. In response to the draft report, the EO's lawyers stated:
- ... OzSoft was majority owned by BAWM from either 31 July 2013 or 1 August 2013 until 6 December 2013. OzSoft and BAWM had no relationship prior to 1 August 2013.
49. From 2012, BAWM became one of the largest providers of government-subsidised training for the state government by funding volume in Victoria. In the period 2010 to 2014, BAWM (and its predecessor Taylored Gardens) experienced significant growth, reflected in the increased funding it received as follows:
- in 2010 - \$781,201.05
 - in 2011 - \$9,558,946.36
 - in 2012 - \$35,462,512.44
 - in 2013 - \$55,861,857.93
 - in 2014 - \$46,419,029.95.

Investigation

Allegations

50. The EO considered, negotiated and accepted a high level managerial job within the BAWM group of companies while employed as an EO at Skills Victoria. At the same time, he dealt with a complaint regarding BAWM.

Evidence

The EO and BAWM

51. From 2011 until 2013, the EO met with BAWM Director, Ms A, with whom he negotiated the joint purchase of OzSoft by the EO, Ms A and others. The EO negotiated an executive role and a \$234,090 loan to enable him to obtain a 10 per cent shareholding in OzSoft via his company which was registered with the Australian Securities and Investments Commission on 14 June 2013.
 52. The EO entered into the contracts for his employment with OzSoft, and his loan and shareholding in OzSoft on 31 July 2013, which was the day he allegedly met a complainant to discuss a complaint about BAWM. The EO, BAWM Director Ms A, and Mr B were also appointed OzSoft Directors on 31 July 2013.
 53. The complaint did not proceed. The EO was not able to recall the complaint at interview.
- ### *Discussions with BAWM Director from 2011*
54. At interview, the EO recalled first meeting BAWM Director Ms A, and also Mr B, in relation to BAWM's RTO predecessor, Taylored Gardens Pty Ltd. The EO signed the 2010 funding agreement with Taylored Gardens on behalf of the department in 2009.
 55. The EO stated that the department provided him with professional development opportunities including an executive coach, through whom he met Ms A. He told my officers that as a result he met Ms A 'once' for 'a brief conversation'. At this time he was an EO with Skills Victoria and Ms A was a Director of BAWM, having been appointed on 18 January 2012.
 56. In response to my draft report, the EO's lawyers stated:

... [Ms A] was employed at another organisation at the time. The EO was not aware that [Ms A] had any interest in BAWM or a predecessor at that time.
 57. In contrast, Ms A told my officers that the EO contacted her as early as 2011 to discuss his career progression and she viewed her role as a coach. Ms A said she then met the EO for coffee every two or three months to discuss the industry.
 58. At interview, when Ms A's comments were put to the EO, he responded as follows:

... from time to time we did catch up for coffee and we did have a conversation about any possibilities but ... she was absolutely not my mentor ... and there was absolutely no coaching either ... We did have a conversation broadly about the sector but there was no specific information about anything that was exchanged in that regard ...

...

I recall maybe on two or three occasions we met ... but there was nothing specific spoken about in terms of my work and any responsibility I had for [BAWM].

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59. In response to my draft report, the EO's lawyers stated:

Our client confirms that he did know Ms [A] at the time he took the position with OzSoft as he was referred to her by an Executive Coach in 2010 to make contact with her. This program was one that the Department was aware of and fostered with its employees. Our client instructs that he met with Ms [A] once or twice in 2010 and then not again until 2012. Our client further instructs that he met with two other Consultants in similar positions to Ms [A] in 2010. Our client instructs that he later knew Ms [A] had a role with BAWM but did not know the precise details;

Our client disputes that Ms [A] was a mentor or provided him with coaching;

Our client further confirms that he had no desire to work for an RTO at any time when he was employed with the Department;

Moreover our client confirms that he spoke with his manager ... whilst employed at the Department and advised her that he did not want to work for an RTO or directly for an Education Service Provider;

Our client confirms that Ms [A] was a point of contact for him whilst he was employed with OzSoft.

BAWM Director offers EO role with OzSoft in October 2012

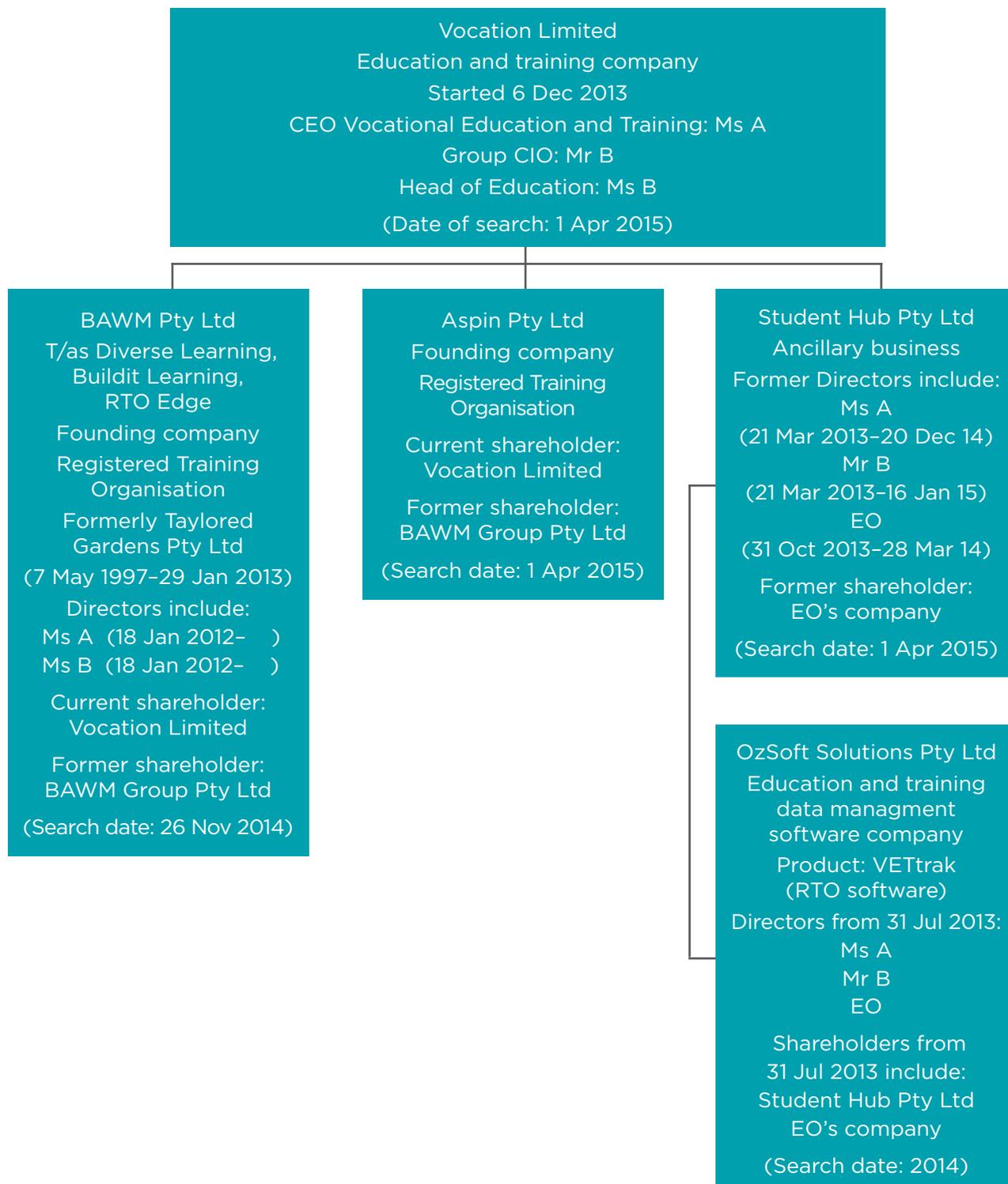
60. The EO told my officers that by 2012 he was 'looking for other opportunities because I'd done everything I was going to do within ... the Victorian Government'. He said that in October or November 2012 Ms A invited him to be involved in a purchase of OzSoft.
61. Ms A stated she met with the EO in mid-October 2012 and offered him the role of Chief Executive Officer of OzSoft, if the purchase of OzSoft by Ms A, Mr B, the EO and others proceeded. Ms A said lawyers were engaged as the EO had also sought equity in OzSoft.

62. In response to my draft report, the EO's lawyers stated:

... our client confirms that he did not commence negotiations with Ms [A] in 2012.

63. Ms A said the offer became serious in March 2013 when BAWM made a conditional offer to OzSoft, and negotiations between the EO, Mr B and Ms A commenced when the offer was approved by OzSoft and continued until the purchase on 31 July 2013. Ms A said that although the bid was made by BAWM, the founders of BAWM established Student Hub Pty Ltd which acquired a majority shareholding in OzSoft. Ms A provided my officers with copies of emails of her negotiations with the EO and copies of both draft and final employment, loan and share contracts to which the EO was a party.
64. On 31 July 2013, Ms A, Mr B and the EO were appointed Directors of OzSoft, and the EO's company and Student Hub Pty Ltd were two of six shareholders.
65. In response to my draft report, the EO's lawyers stated:
- Our client never had an interest in BAWM - nor was he involved in the corporate governance of BAWM.

Figure 2: Organisational chart of companies referred to in the report



Sources: Australian Securities and Investments Commission Company Services; Vocation Annual Report 2014.

Financial interests in OzSoft from 31 July 2013

66. On 31 July 2013 while the EO was still employed by the department, he entered into a number of contracts:
- an employment agreement with OzSoft to become Managing Director, with Ms A signing for OzSoft, followed by his appointment as Director of OzSoft with fellow Directors Ms A and Mr B
 - a loan agreement with Student Hub for \$234,090 with Mr B and Ms A signing for Student Hub enabling the purchase of a 10 per cent share in OzSoft by his company
 - a Share Purchase Agreement between the EO's company and Student Hub by which his company purchased a shareholding in OzSoft, with Mr B and Ms A signing for Student Hub
 - a Shareholders' Agreement between the EO, his company, Student Hub, OzSoft and others, with Mr B and Ms A signing for Student Hub.
67. In response to my draft report, the EO's lawyers responded:
- Our client entered into an employment agreement with OzSoft and a subsequent agreement for the OzSoft acquisition by BAWM. Our client further confirmed that he forwarded almost \$500,000 to assist him in the acquisition of shares in OzSoft which included signing a loan facility for his company ... with Student Hub Pty Ltd in the sum of \$250,000;
- Our client confirms that he signed the above mentioned documents on 31 July 2013 and tendered his formal resignation with the Department the following day.
68. On 1 August 2013, the EO tendered his resignation to the department, providing the usual government-required four weeks' notice.
69. On 21 August 2013, while still employed by the department, the EO received \$30,000 in OzSoft dividends. In October and December 2013 after he had left the department, he received further dividends totalling \$55,000 from contracts he had signed while he was employed by the department.
70. In response to my draft report, the EO's lawyers stated:
- ... our client confirms that he was still employed with the Department of Education when OzSoft issued the original dividends in August 2013 to its shareholders.
71. On 6 December 2013 Vocation was listed on the Australian Stock Exchange as a public company with founding companies BAWM and RTO Aspin Pty Ltd and was valued at approximately \$253 million. Ms A told my officers that on that date, OzSoft shares were exchanged for Student Hub shares and the EO became a Director of Student Hub, the owner of OzSoft.
72. On the same day, the EO sold 67 per cent of his shareholding to Vocation for \$860,376 and retained the balance as Vocation shares which were held in escrow. The EO's bank records show that on 6 December 2013 \$879,988 was paid into his bank account by Indue Pty Ltd, a financial payment product and settlement service. Vocation also acquired Student Hub with Directors being the EO, Ms A and Mr B.
73. The EO told my officers he was 'completely unaware of' any possibilities for BAWM in relation to Vocation when he was considering his contract with and purchase of shares in OzSoft.

-
74. In response to my draft report, the EO's lawyers stated:

[The EO] did not know or have any information at the time of taking up the role in OzSoft that OzSoft would be involved in an IPO [Initial Public Offering] or acquired by Vocation ...

...

Our client instructs that he did not have any knowledge of the sale proposed IPO of Vocation at the time of the sale or acquisition of shares in OzSoft. Our client instructs that an information memorandum ("IM") was issued in or about October/November 2012 in relation to OzSoft and there were a number of meetings during the due diligence period where he looked at options as to how to fund the purchase of the shares in OzSoft, if the acquisition materialised.

75. While the investigation established that the EO ultimately received a large financial reward from his negotiations and his entering into contracts with OzSoft, it did not establish that the EO's conduct, while employed by the department, impacted on the success of BAWM and Vocation.
76. However, relationships between BAWM, OzSoft and Vocation and the commonality of Directors and executive officers are apparent.

2012 complaint about BAWM

77. In June 2012, the department received a complaint concerning BAWM's compliance with the VTG, although initially it was unclear that the complaint related to BAWM because another RTO was named in the complaint. BAWM's involvement was clear by December 2012. The complaint alleged a discrepancy between the number of hours of training actually provided by BAWM and those claimed.

78. A Team Leader at Skills Victoria (Team Leader 1) said at interview that he provided a copy of the complaint to the EO '... certainly within the month that we received it'. He said initially that the complaint had been confusing and it was not until December 2012 that the department and the EO became aware that BAWM was involved.

79. Team Leader 1 said that from the outset, the EO's view was that there was no basis for the complaint. Team Leader 1 said both he and the EO considered that the conduct alleged was permissible under the VTG, telling my officers:

... it's what happens and it's allowed but [the EO] did share the view that there's obviously something going on but not to an extent that we could do much unless we could find something in the data.

80. A Senior Project Officer at Skills Victoria confirmed this to my officers. She said that the EO considered the complaint could not be made out against the terms of BAWM's contract with the department. She said the EO's view was that this was a quality matter for the regulators.

81. Team Leader 1 said he analysed the data and thought 'there was something there'. He was concerned because the complainant had told him that if the practice complained about was acceptable, the complainant, who was associated with another RTO, intended to implement it. Team Leader 1 told my officers:

... whilst it's acceptable, if it was to happen wholesale which I think to some extent it is ... it would blow the market up.

82. Another Team Leader at Skills Victoria (Team Leader 2) also told my officers that the conduct identified by the complaint was:

... highly possible ... but we try to stamp it out as much as we can ... we've got 500 contracted RTOs and we have to choose where we put our efforts'.

83. In terms of the complaint, Team Leader 2 stated:

We were doing funding assurance which was 'Show me documents that prove the thousand hours you claimed actually occurred' ... our evidentiary requirements in our contracts state 'If you claim [this] ... you've got to have a piece of evidence' ... It's within the rules. The system allows it. They can do it. It's not right and we're doing crackdowns at the moment ... but the system allows it.

84. In February 2013, Team Leader 1 approached other officers including Team Leader 3 to assist him to resolve the complaint.

85. Team Leader 3 told my officers that she acted in the EO's role when he was on leave from 8 July 2013 until 26 July 2013. Team Leader 3 said that as part of the handover process, Team Leader 1 told her about the complaint and she approached the Senior Project Officer to assist. Team Leader 3, unaware of the EO's relationship with OzSoft, arranged a meeting between the EO and the complainant in the EO's absence.

86. In response to my draft report, the EO's lawyers stated:

Our client confirms that he was a Department Director at the time the Department received a complaint concerning BAWM;

Our client instructs that there was a team of approximately 20 employees in the Department whose responsibilities included investigation of complaints into RTOs and that the Department was responsible for overseeing contracts with approximately 600 RTOs with \$1.2 billion in funding for approximately 700,000 students;

Our client further instructs that he would attend a substantial number of meetings with lots of different teams within the Department and RTOs. As such he does not specifically recall the complaint concerning BAWM in June 2012 and further advises that it may have in fact be actioned to someone else in his team as the team worked in a collegiate manner and often delegated work to other people ...

Our client does not recall any detail of the meeting arranged by [Team Leader 3] between our client and the complainant as alleged.

Meeting with BAWM complainant on 31 July 2013

87. On 31 July 2013, the date the EO was appointed Managing Director of OzSoft and his company a shareholder in OzSoft, he met with the complainant to discuss the complaint involving BAWM.
88. Team Leader 3 said she briefed the EO about the complaint and meeting when he returned from leave, and he had not raised any concerns about attending.
89. The Senior Project Officer attended the meeting with the complainant and the EO on 31 July 2013. At interview, the Senior Project Officer said she had been frustrated at the time taken to resolve the complaint which was 'confusing'. She said it had been difficult to link the complaint to any contractual non-compliance; nonetheless, she held concerns. Her contemporaneous handwritten notes of the meeting refer to BAWM and contain details of the complaint.

-
90. The Senior Project Officer told my officers there had been 'a lot of activity' regarding the complaint between May and August 2013. She said the EO was 'definitely' involved in the complaint in July and August 2013, possibly before, and he knew BAWM was involved. She said that in addition to meeting the complainant, the EO had sat in on case management meetings where the complaint was discussed. The EO had read the complainant's documentation and was involved in determining how the complaint would proceed. The Senior Project Officer said the EO sent the complainant an email following the meeting.
91. My officers obtained a copy of the EO's email dated 13 August 2013 in which the EO stated:
- ... [The company initially complained about] is not a Registered Training Organisation and does not hold a Service Agreement with the Department ...
- ...
- I confirm that the Department is nonetheless continuing to follow up any relationship between [the company initially complained about] and BAWM and or BAWM directly with the RTOs. I note however that the particulars of this process must remain confidential and details of any final outcome of a review by the Department may not be provided.
- Please be otherwise advised that both RTOs are scheduled for audits within the current year's audit program.
- ... as your concerns relate largely to quality ... they fall within the jurisdiction of the regulators... Should your concerns in this space persist, we recommend you contact the relevant regulator.
92. In response to my draft report, the EO's lawyers stated:
- Our client confirms that he does not recall the meeting despite [the Senior Project Officer] ... saying ... that our client was definitely involved in the complaint and that he knew of BAWM's involvement.
93. In response to my draft report, the department stated:
- During 2012 and 2013 there was quite a sharp distinction in the respective roles of the Department and training regulators. At that time, the regulator was viewed as responsible for matters relating to ... quality ...
- I note that both our core and off cycle audits were focussed on ... eligibility and attendance, not ... quality.
94. At interview, Team Leader 3 said she discussed the complaint with the EO after the meeting but that the department did not keep records of such discussions.
95. Team Leader 1 and Team Leader 3 considered the complaint to be a minor one but they, Team Leader 2 and the Senior Project Officer told my officers that the EO would have been aware of the complaint. Team Leader 1 and Team Leader 3 told my officers that the EO or his manager would have made decisions about how to deal with the complaint.
96. At interview, the EO could not recall the complaint, nor meeting with the complainant, even when my officers provided him with a copy of the email dated 13 August 2013 he wrote to the complainant following the meeting. However, the EO agreed he would have been briefed about the complaint.
97. In response to my draft report, the EO's lawyers stated:
- Our client instructs that he does not recall the complaint about BAWM and does not recall the meeting with BAWM as alleged ... Our client instructs that he had just returned from leave after the period referred to in the report. Our client located and reviewed his notes after the interview. It was then that he was able to recall a meeting with the complainant.
98. The EO was also unable to recall any details concerning an off-cycle audit proposed to resolve the complaint concerning BAWM, but which did not ultimately take place.

Proposed off-cycle audit of BAWM

99. My officers have identified from the EO's departmental emails that by 6 August 2013 the Senior Project Officer was preparing documentation to enable an off-cycle audit of BAWM to resolve the complaint. There are no records of who proposed the audit. However, Team Leader 3 told my officers that the idea had been 'washing around in the mix'; it may have been proposed by her or the Senior Project Officer; and it was 'important to be seen to be doing something'. She said she discussed the audit with the EO when he returned from leave on 29 July 2013.
100. The Senior Project Officer prepared the justification document for the audit, and in her view it was:
- ... the only avenue that could have been pursued to ... take the matter further and if nothing came of it we could have said we've done an audit and nothing came of it.
101. The Senior Project Officer said that the EO knew about the off-cycle audit in 'possibly June but July, August definitely' and that he knew the off-cycle audit was being prepared and that he had signed off on the briefing to Team Leader 2. She said the EO was involved in the decisions about the audit, including the decision to conduct it. This decision was taken during a case management meeting before the EO met the complainant on 31 July 2013. She said the EO would have approved the audit; she would have discussed its parameters with him, and he would have had to approve it and sign a brief. The Senior Project Officer said the EO and his manager would have made the decision before the work was done. However, she did not have any recollection of any action taken by the EO.
102. Team Leader 3 said she approved a justification for the off-cycle audit and forwarded it to Team Leader 2 to prepare the brief and liaise with the third party auditors. Team Leader 3's view was that if a justification was prepared, the decision to conduct the audit would have already been made. In an email to Team Leader 3 dated 6 August 2013, the Senior Project Officer stated:
- [Team Leader 2] has advised that this request will form the basis of the brief to [the EO] for the audit, and also instructions to the auditor.
103. By email dated 8 August 2013, the Senior Project Officer forwarded the justification to Team Leader 2.
104. Team Leader 2 also told my officers that he would 'be surprised if [the EO] didn't know' that the audit was proposed, and that a justification was being prepared. He stated:
- [The EO] would have been in the case management meetings when we would have all discussed it. At a high level between him and [his manager] they were the decision makers on what the ... immediate action was. You would get people like myself or [Team Leader 1] or [the Senior Project Officer] ... who would go 'Why don't we go do an audit?' It's discussed amongst the group and then ... ultimately if someone like [the EO] or [his manager] said 'Yep let's go ahead and do that' then that's what we do.
- ...
- Because [the Case Management Area] reported to [the EO] as well they were often talking to [the EO] about those sort of audits and what sort of action they should take in regards to the complaint.

105. At interview the EO agreed that he had responsibility to authorise off-cycle audits but he told my officers that his manager or the Deputy Secretary would sometimes make the decision. He could not recall any details about the proposed audit. He stated:

... I have no recollection of being told ... I was absolutely not involved in any of the decision making ...

...

The usual process is that a brief will be prepared for me and that's the vehicle for making decisions. So it's not that a brief was prepared and put in front of me and I've said 'No' ... Typically I would annotate a brief and send it back if I'm saying no or we'd have a discussion about that and get the brief modified ...

106. In response to the draft report, the EO's lawyers stated:

... our client ... states that he is not sure who proposed the audit. He presumes it would have been [his manager]. Notwithstanding this our client confirms that he had tendered his resignation by that stage. Moreover our client confirms that whilst on leave [Team Leader 3] acted in his position and consequently she would have approved any such off-cycle auditing. As such our client has no recollection of who instigated the audit given he was on leave. Our client notes that he would have received a briefing in relation to any off-cycle audit and that his Executive Assistant would have recorded receipt of these. Our client does not have any notes in relation to any such briefs and further states that once he resigned he had nothing to do with the audit process whatsoever.

Off-cycle audit of BAWM does not proceed

107. The proposed off-cycle audit did not take place. Officers told the investigation that records are not kept of decisions at case management meetings, including decisions not to proceed with off-cycle audits.

108. The Senior Project Officer said when Team Leader 3 told her the audit was not proceeding she had questioned the decision. For her part, Team Leader 3 said the decision to stop the audit:

... would have been the Director's decision which would mean [the EO]. However, the decision was probably made as a round table discussion, involving [Team Leader 1] and [the EO]. There is a strong collegiate approach to things.

109. In response to the draft report the EO's lawyers stated that if there were 'significant issues' raised in the core audit program, an off-cycle audit would have been automatically ordered.

110. At interview, the EO responded:

I can't recall making that decision and I don't think that I would have made that decision...

...

I understand ... what you're saying and how that looks but ... I was not there. I was not engaged in it during that time in July and I've literally come back and resigned and everyone knew that ... I was disconnected from these decisions...

...

... [T]here's no evidence there that I made a decision to not do it.

111. The EO also told my officers that he and his manager would 'bring every person who was relevant to any decision or process into the room to make that decision' and that they operated in a 'very collegiate ... highly effective operation'.

112. Team Leader 2 provided my officers with a copy of his draft brief to the EO dated only 'August 2013' seeking the EO's approval to conduct the audit. The document describes the complaint and notes that the audit was scheduled to be conducted by an independent third party auditor on 26 August 2013. Team Leader 2 said he would have requested the audit between 2 and 9 August 2013.

113. However, Team Leader 2 did not submit the brief to the EO because the audit did not proceed. He could not recall who called off the audit, and he did not keep records of audits that did not proceed. Team Leader 2's view was that the audit may have 'partially' resolved the complaint. He said:

... audit is probably the main tool that is used in these difficult issues

...

... we had suspicions that a lot of RTOs were fudging documents ... it's always very hard to prove ... it could have given us the answer ... at that point one of the big strategic issues we were grappling with was trying to prove fraudulent activity like that because fraud is such a hard thing to prove. We never knew if audit was going to give us the answer we needed.

...

I know with this particular one, audit was a decision at one point to do it and I got the request in. I got a draft of it [from the Senior Project Officer by email] ...

I had actually requested the auditors to schedule it in their schedule ... but we didn't go ahead with it in the end ... I don't recall being part of any meeting as to why we didn't go ahead ... All I know is there's an email I've got there from [the Senior Project Officer] one day that says '[Team Leader2], we're no longer doing the off-cycle audit. I'll come and chat to you later about why'. And she would have come and chatted to me and I would have accepted that ...

114. Team Leader 1 could not recall who proposed the audit but stated:

I can't imagine the decision not to progress would have occurred without [the EO's] input.

115. The EO's manager informed my officers that the EO had an oversight role regarding the complaint and had met the complainant to determine if the complaint should be investigated. She said she had not discussed the audit with the EO but that:

As the manager of the audit and case management teams it is unlikely that [the EO] would not have known that the teams had discussed whether or not to conduct an off-cycle audit.

116. The decision not to proceed with the off-cycle audit appears to have been taken around 27 August 2013, days before the EO left the department.

117. In response to my draft report, the department stated that it had not received any other complaints and its data did not suggest BAWM was claiming for training over 'an abbreviated period'.

118. The department also told my officers that:

... an off-cycle audit would have been unlikely to have led to significant contractual action against BAWM in 2013.

119. The EO's manager informed my officers that it had been her decision not to pursue the complaint.

Telephone calls to BAWM Director

120. My officers identified that at approximately 8am on 31 July 2013, the day he met with the complainant regarding the BAWM complaint, the EO made two calls by mobile phone to Ms A, a Director of BAWM. He had also called her four times the day before. At interview, the EO stated he had done so '[b]ecause ... we were in the process of executing the offer for OzSoft'.

121. My officers also identified that the EO similarly contacted Ms A on 27 August 2013, the date the Senior Project Officer created a file note closing down the BAWM complaint. The EO told my officers that this was 'just a coincidence' because his conversation with Ms A was again in relation to the purchase of OzSoft.

122. When my officers asked the EO how his telephone calls with Ms A could be perceived in terms of conflict of interest, he stated:

Yeah yeah I get it all. Of course it looks appalling but at that point I'm out the door, my head's somewhere else. I'm worried ... I'm there buying an interest in a business and having conversations making sure that goes through.

-
123. In response to my draft report, the EO's lawyers stated:

Our client denies that any of the telephone calls between him and Ms [A] related to any conduct which could be perceived as a conflict of interest. The phone calls referred to on 31 July 2013 and 27 August 2013 related to the execution of employment documents in respect of our client's new position with OzSoft.

Involvement in other matters related to BAWM

124. Documentation identified by my officers shows that the EO was involved in other matters related to BAWM during his negotiations with Ms A between October 2012 and August 2013. In this period BAWM and its predecessor Taylored Gardens were both audited as part of the department's core audit program.

Letters from BAWM and Aspin auditors

125. Auditors employed by Skills Victoria were addressing correspondence regarding core audits of BAWM and Aspin (a related company) to the EO, as late as August 2013. My officers have obtained outcome letters from auditors dated 22 October 2012, February 2013 and August 2013 concerning audits of BAWM and Aspin. These are template letters and both Team Leader 2 and the EO's manager told my officers that the letters would have been emailed to Team Leader 2. Team Leader 2 said he would have then provided them to the EO as part of a briefing.
126. At interview the EO agreed he would have been the decision-maker in such routine matters but stated:

I never ... made unilateral decisions about RTOs and it was not my practice to do that. My practice was highly consultative and to bring everybody else into the conversation ...

...

I was not involved in these audits but the standard process for [the auditor] would be that they would provide a letter to me in regards to the outcome of audits ... They were not to know ... that there were some [audits] that I was not responsible for ... in the last few weeks of me being in the department I was not actively engaged with any work ... in terms of my responsibilities purely because of these issues of conflict of interest. And in regard to this stuff around BAWM ... it was common knowledge then. I had nothing to do with it.

127. In response to my draft report, the EO's lawyers stated:

Our client ... states that he was informed of hundreds of audit letters as was the ordinary process during his position. Our client refutes any connection that you seek to make in respect of his employment with OzSoft and his alleged knowledge of the investigations into BAWM.

Email from Team Leader about BAWM

128. In an email dated 5 June 2013 Team Leader 1 told the EO about 'continued noise about BAWM'. Team Leader 1 told my officers that this was in relation to other RTOs complaining that BAWM was getting bigger and encroaching on their areas. He suggested referring the issue to the department's Market Monitoring Unit for investigation but received no response to his email.
129. At interview the EO agreed it would have been appropriate for him to inform Team Leader 1 that he could not be involved in this matter and to refer the matter to another officer. The EO said:

At this point maybe [Team Leader 1] was not aware that I was not responsible for, not dealing with BAWM ... not exercising responsibility for BAWM.

Email from Market Monitoring Unit about BAWM

130. In an email dated 21 August 2013, the Market Monitoring Unit within the department advised the EO of a number of investigations proposed by the unit into RTOs including BAWM. When my officers asked the EO whether there was any reason he should not have received this email, he responded:

Oh because it ... goes to conflict of interest which I'd advised up the line ... and I'd probably not advised as broadly or as well as we should have in that regard. But in regard to all the critical decisions I was removed from those. What you're seeing here is the tail end of an administrative machine that's just going through its routine and that's what it is. It's nothing else.

131. When asked about this email, Team Leader 2's response was:

I can see that there is a perception of a conflict of interest which is what our conflict of interest policy states ... but ... every time I had a discussion with him about BAWM and every other RTO I think he acted with the highest integrity ... If [the EO] did make a decision I don't know if it was influenced by [his interests in OzSoft] ... but I don't have a reason to doubt him.

Email from the VRQA about BAWM

132. In an email dated 28 June 2013, the VRQA informed the EO of concerns about 'significant increases in claims from Buildit (BAWM Pty Ltd)' brought to its attention by a third party and based on information provided to the third party by the department.

133. At interview the EO responded:

... I probably should just have gone to ... [EO's manager], 'You can deal with that'

... and I should have advised [the VRQA] perhaps that I was not receiving any of that information. Within the department at the time I was not involved in any of that analysis and this was just a curve ball that came to me which raised a process issue and I was responding purely to the process issue ...

I know what you're saying is it looks like I'm shutting down a legitimate avenue. It was not a legitimate avenue. It was something [the third party] shouldn't be doing with that [information].

134. At interview, Team Leader 2 commented on the email:

There's a clear conflict of interest policy ... and if there's any potential for that then people should follow it. I still have no reason to doubt any decision he made and I have no reason to think that he would have acted other than what I observe to be someone who acted with a lot of integrity all the time ... yeah there's potentially a conflict of interest ...

135. In response to my draft report, the EO's lawyers stated:

Our client instructs that such conduct alleged by you ... would be a clear breach of process. Our client specifically instructs that in or around August 2013 an individual from a TAFE Institute breached privacy regulations and advised the Regulator of BAWM's alleged breaches. Our client instructs that he told the auditor that it was inappropriate to investigate this as the individual had breached a number of privacy regulations.

Our client's motivation for advising the auditor that it was inappropriate was not based on taking the new role with OzSoft. Our client confirms his motivation for making this decision was based upon his desire to uphold Departmental values and ensure privacy was not breached. In retrospect, our client acknowledges that he ought to have advised [his manager] of the issue as he remembers feeling somewhat uncomfortable at the time and did not think it was appropriate that he deal with it given he had tendered his resignation and was taking a new position which could be viewed as a direct conflict with his role in the Department.

No concerns about BAWM

136. At interview the EO told my officers that the only concern he had about BAWM while he was employed by the department was that it was 'growing quickly'. He said this was a significant indicator of risk in relation to escalating RTOs for audit.
137. In response to my draft report, the EO's lawyers stated:
- As acknowledged by our client during the interview, it would not have been appropriate for him to be involved in any investigation regarding BAWM however it was unrealistic that he would not see any complaints regarding BAWM given he received a number of complaints about RTOs whilst employed by the Department.

Conflict of interest

138. It is not always possible to prevent conflicts of interest from arising. State government policy states that conflicts must be declared and avoided by the person conflicted, or who may be perceived as having a conflict. The EO claims he declared his conflict in a timely manner. My officers found that on 1 August 2013, after he had signed his contracts in relation to OzSoft and tendered his resignation to the department, the EO declared he was leaving the department to accept the position of Managing Director 'of a small software company'.

EO claims conflict of interest declaration made in October 2012

139. At interview the EO told my officers he was aware of the Code of Conduct for Victorian Public Sector Employees and the department's Conflict of Interest Policy.
140. The EO acknowledged that due to his negotiations with OzSoft from October 2012, it was not appropriate for him to be involved in BAWM-related matters from that time. He told my officers that in November or December 2012, the possibility of purchasing OzSoft and his moving to OzSoft 'became apparent'. He stated that at this time:
- ... obviously the engagement with [BAWM Director Ms A] and [Mr B] ...

clearly presented a possible conflict of interest so at that point I spoke to [my manager] about it and indeed I had always been speaking to [my manager] about my potential next move ...

... and I'm absolutely sure that at that point I raised that conversation with [my manager] and ... I advised her that I couldn't have anything to do with BAWM and at that point all of my responsibilities for having anything to do with BAWM ceased.

141. The EO told my officers that by 31 July 2013:
- ... the Directors of BAWM were also the majority shareholders of OzSoft which I had purchased an interest in ...
- ... I had no interest in BAWM.

142. BAWM Directors Ms A and Ms B told my officers that they understood the EO had spoken to his manager and had been removed or had removed himself from BAWM matters from October or November 2012.

143. The EO said he had a number of conversations with the Acting Deputy Secretary in December 2012 or January 2013, while his manager was on leave and that the Acting Deputy Secretary 'made representations' to him regarding an Executive Director role at the department. The EO's manager was on leave in January 2013.

144. In this regard, the department provided my officers with an email dated 18 June 2013 between the then Secretary of the department and the Deputy Secretary. In the email the Secretary stated:

A plausible inference is that the opportunity he's [the EO's] been sounded out for is a small or start-up venture. Do you know?

... My inclination remains to confirm the counter-offer but not to agree to LWOP [Leave Without Pay].

There was no other documentation provided to my officers in relation to this issue.

145. In response to my draft report, the EO's lawyers stated:

Our client instructs that he spoke with the Deputy Secretary ... in or around June/ July 2013. Our client instructs that [the Deputy Secretary] advised him to manage any conflict of interest issues accordingly. Consequently our client was of the view that he was to deal with any conflict of interest issues by directly discussing it with [his manager].

146. In response to my draft report, the department stated:

... I would like to reinforce our experience of [the EO's] frame of mind during June 2013. When [the EO] spoke to the Acting Deputy Secretary, it was clear that he was genuinely weighing up his options. There were several discussions about alternative options in the department. [The EO] appeared genuine in his belief that OzSoft was a small start-up and he did not make a clear decision about taking the role with OzSoft until June/July.

147. The Deputy Secretary provided the following statement to my officers:

... [the EO] did not declare a conflict of interest to me. We had a conversation about his plans in the context of exploring the possibility he was staying. He told me he was going to work for a small start-up.

148. In response to my draft report, the EO's lawyers stated:

During May/June 2013 ... the EO met with [the Acting Deputy Secretary] on two (2) occasions to discuss the possibility of leaving the department and taking up the role as a Managing Director of a software company that made software for RTOs, following discussions with the EO's manager ... There was no discussion about the role being with a "start-up". The discussion had by EO with the Deputy Secretary was on the basis of an acquisition of a share of an existing business and running the company. Discussions were also centred around the nature of the software business and disclosures had been made about the EO's proposed future role and position.

149. In any event, the EO's Declarations of Private Interests in 2012 and 2013 make no reference to his negotiations and agreements in relation to OzSoft, although in those declarations he undertook:

... to advise the responsible Agency Head in writing if an actual potential or perceived conflict arises in the future and to stand down in any decision making process in which I may be compromised.

150. The EO agreed that at this time BAWM and OzSoft had 'substantially' the same Directors; he told my officers:

I am disconnected with work at this point. I had come back from leave and resigned and ... after eight years ... I was absolutely out the door. I understand how that looks but there was absolutely nothing going on in that regard. It's ridiculous to even imagine that that was the case ... [W]hat's the benefit for me in that regard which is the whole point of conflict of interest. The short answer is there's maybe something somewhere at some point. But that's about as good as it gets ... [T]here was nothing going on here. If anything I'm just getting excited about being out the door and ... I'm moving on.

151. At interview my officers asked the EO why he was attending a meeting concerning BAWM when on his evidence he had verbally disclosed an interest in OzSoft to his manager in November or December 2012. The EO responded:

Well I shouldn't have been [at the meeting] ... Except that it's a ... quality issue and outside of our remit so on one level it doesn't matter.

The EO's manager and colleagues recall conflict of interest declaration made in July 2013

152. The EO's manager told my officers that the EO informed her 'at the end of the first quarter in 2013' he may be offered the role of Chief Executive Officer of a software company but did not name the company. She said he only informed her of his intention to resign and join OzSoft in June or July 2013. She said the EO had asked her if he should resign before obtaining the executive role and she had encouraged him to speak to the Deputy Secretary.
153. The EO tendered his resignation on 1 August 2013. His written resignation advises that he has 'accepted the position of Managing Director of a small software company'.
154. In response to my draft report the EO's lawyers stated that the EO had provided a resignation letter to the Deputy Secretary which:
- ... referred to a small software company involved in the production of software for RTOs with no reference to the name "OzSoft" which would not have held any meaning to the Deputy Secretary.
155. The EO's manager said she understood there was discussion and correspondence between the EO and the Deputy Secretary regarding an actual or perceived conflict with the EO's OzSoft appointment and conduct during his notice period, and that 'a separation and segregation of duties [was] put in place from that period'.
156. When my officers told the EO's manager that the EO had been negotiating an executive role with OzSoft from October 2012, she stated she would have expected a conversation in October 2012. When my officers informed her that when the EO met the complainant on 31 July 2013 he was a Director of OzSoft, and his company was a shareholder in OzSoft, his manager stated: 'It's not appropriate'.
157. The EO's manager told my officers she had become aware of the EO's shareholding in OzSoft in December 2013 after he had left the department, but believed he had purchased the shares after he resigned. My officers informed her that the EO's company had obtained a loan of \$234,090 from Student Hub while he was employed by the department to fund the purchase of a shareholding in OzSoft. His manager responded: 'Well I've been duped, haven't I?'
158. The evidence of key Skills Victoria officers working with the EO from 2012 to 2013 is as follows:
- Team Leader 3 was not aware of the EO's OzSoft interests when he met the complainant on 31 July 2013. She learned the EO was resigning to manage 'a software company associated with BAWM's Directors' in June 2013 but not that it was OzSoft.
 - Team Leader 2 first heard that the EO was joining OzSoft when his manager announced it in the weeks before the EO left.
 - Team Leader 1 learned that the EO was joining OzSoft when the EO announced it 'two weeks or three weeks or four weeks' before he left. A few weeks later the EO's manager told Team Leader 1 that the manager and Team Leader 1 were taking over BAWM matters for the EO.
 - The Senior Project Officer was not aware of the EO's interest in OzSoft when she and the EO met the complainant. She understood the EO was going to an IT software company and did not believe anyone at the department knew he was joining OzSoft.

159. Team Leader 2 told my officers that on the day the EO resigned the EO told him about his conflict with BAWM. Team Leader 2 stated:

I'm pretty sure I had a meeting with [the EO] that day ... and he said to me he had removed himself from some decisions around BAWM recently ... something along the lines of I've made a point of not being involved in some decisions ... he said him and [his manager] had discussed that and they chose to remove him from some decisions around BAWM ... to avoid any conflict.

160. In relation to the EO meeting with the complainant, Team Leader 1 stated:

... we weren't aware of it and [he] would have had to have given us that information ... if we had that information in our hand we probably would have ... advised [him] to potentially get even [his manager] to have the meeting ...

...
I am surprised ... and probably a little disappointed but not because I think anything untowards [happened] but just in terms of it's a bit of an idiot move... It's a shame that he didn't [opt out] but at the same time ... other than reducing the appearance of conflict ... there would have been no other benefit to him.

161. When my officers asked the Senior Project Manager why she considered that the EO meeting with the complainant was not appropriate, she stated:

... [because] one of the organisations allegedly involved in the complaint was BAWM ... OzSoft is under the Vocation Group and BAWM is under the Vocation Group.

162. In response to my draft report, the EO's lawyers stated:

Our client confirms that not only was he aware of this code of conduct but applied it religiously throughout his employment at the Department ...

...

Our client maintains his position that he declared his conflict in a timely manner. Moreover he confirms that his Manager ... was aware of the sensitivities regarding any conflict issues in respect of our client and believes there would have been some formal record of this in the Deputy Secretary's diary.

163. The Deputy Secretary responded in a statement to my officers that:

There is no record of a conflict of interest being declared because he [the EO] did not declare a conflict of interest to me.

Managing conflict of interest

164. The department's policy requires that reasonable steps should be taken to manage conflicts of interest that are identified and cannot be avoided.

165. At interview the EO's manager told my officers that her staff completed annual Declarations of Private Interests, and she had discussions with them around the Code of Conduct. She considered their performance to be 'anchored in the Code' which she described as more than a document and something that 'lived and breathed'. This is supported by emails including the minutes of a meeting attended by the EO in June 2013 regarding conflict of interest training for Executives.

166. When the EO informed his manager of his resignation and conflict of interest a month before he left the department, his manager told my officers that she:

- formally verbally directed the EO and Team Leaders 'that [the EO] was not to be involved in any matter that could be perceived to be of value to OzSoft or any other related third party'

-
- reminded the EO of his contractual duties within the notice period and when his employment ended, including that he could not disclose or use information not already in the public domain relating to RTOs, which he acknowledged and accepted
 - removed the EO from any meetings where it could be perceived it was inappropriate for him to attend including monthly monitoring and payment discussions, case management meetings, individual meetings with providers and audit meetings.

167. The EO's manager stated that from July 2013, the EO 'had nothing to do with the audit program at all with any provider' and was not involved in 'key decision points' including case management meetings nor in 'any matters of sensitivity that related to any of the companies that potentially his new relationship may have been with'.

Gifts, benefits and hospitality

168. The EO did not declare his potential role with OzSoft and the \$30,000 of OzSoft dividends which he received while he was employed by the department.

169. At interview he agreed he should have declared the dividends 'because of BAWM's involvement' but stated he 'hadn't ever thought about that like that'. He said:

... I probably should have put that on ...
[the Declaration of Private Interests] ...
I was of the opinion and understanding that it was about directorships ... I probably should have been more clear there now with the benefit of hindsight ...
I understand how all of that looks but it's absolutely not the case that there was any favour going on in that regard.

170. At interview, in the context of declaring that he had received a dividend, the EO stated:

I just hadn't thought it was for that purpose ... I didn't think it was in scope.

Findings

171. I now set out my findings and recommendations in accordance with section 23(2A) of the Ombudsman Act. I am also reporting this matter pursuant to section 17(6) of the Ombudsman Act because I consider that there is evidence of a breach of duty or misconduct by the EO.

Allegation substantiated

172. The investigation established that the EO started meeting with Ms A in 2011 to discuss his career progression and the RTO industry. At interview and subsequently, the EO has attempted to minimise this relationship.
173. Further, between October 2012 and July 2013, while employed as a Director of Skills Victoria, the EO negotiated an executive role and equity in OzSoft with BAWM Director, Ms A. He initially received draft contracts from Ms A in March 2013.
174. During this period, the EO was involved in a complaint and other matters concerning BAWM and companies related to BAWM.
175. On 31 July 2013 while employed by the department, the EO accepted not only an executive role with OzSoft and was appointed Director, but also a 10 per cent shareholding in OzSoft through his company. This was made possible by a \$234,090 loan from Student Hub, a company owned by BAWM whose Directors also included Ms A and Mr B. The EO tendered his resignation to the department on 1 August 2013. He received dividends of \$30,000 in August 2013 while still employed by the department in his notice period, which he failed to declare.
176. As a result of his contracts with OzSoft, the EO received a significant financial benefit. When he sold his shareholding to Student Hub and then to Vocation in December 2013, he received \$860,376 in addition to Vocation shares held in escrow.

Meeting with complainant

177. The EO was aware of the complaint against BAWM from December 2012 and staff have said his view was that the complaint was a quality issue for the regulator, the VRQA.
178. I am satisfied that the EO met with the complainant on 31 July 2013 to discuss a complaint involving BAWM. This was also the date he was appointed a Director of and obtained a substantial equity in OzSoft, a company related to BAWM. The purpose of the meeting was to determine if the complaint against BAWM should be investigated.

The off-cycle audit that did not proceed

179. An off-cycle audit may have been helpful in resolving the complaint. Even if it did not resolve all the concerns, doing one would have confirmed that all options to resolve the complaint had been explored. The EO was in a position to influence a decision not to proceed with the off-cycle audit of BAWM which had been proposed by 6 August 2013, before he left the department.

Failure to recall complaint

180. I do not accept the EO's evidence that he could not recall the complaint, his meeting with the complainant or any aspect of the proposed off-cycle audit. He maintained his position even when provided with documentation including an email he had written to the complainant following the meeting. Given that the EO was negotiating with a BAWM Director for a role in OzSoft and that those negotiations involved the purchase of OzSoft by himself and a BAWM Director, I consider that the EO would have been sensitive to any matters concerning BAWM. In contrast, the other departmental officers involved in the complaint were able to recall the complaint.

181. I accept the evidence of the EO's staff that the EO was involved in all aspects of the complaint.

182. In response to my draft report, the department stated:

The Department fully supports your finding that [the EO] should have disclosed his discussions with BAWM directors from 2012 and his purchase of shares in OzSoft Pty Ltd. Further, [the EO] should not have participated in the meeting with the complainant or any discussions regarding an off-cycle audit of BAWM Pty Ltd.

Involvement in other matters related to BAWM

183. The EO was also involved in other matters related to BAWM during his negotiations with BAWM Director, Ms A, from October 2012. Further evidence is that he was receiving information from both internal and external stakeholders regarding concerns about BAWM. Taken separately, these may not have been significant, but when viewed together demonstrate a pattern of conduct.

184. The EO decided not to refer concerns about BAWM raised by a Team Leader to the Market Monitoring Unit and also failed to take action regarding concerns about BAWM raised by the VRQA. The EO has characterised these as 'tail end' matters of little significance. However the EO's response entirely misses the point of the Code of Conduct and the department's policies. A reasonable person would conclude the EO was conflicted.

185. The EO's evidence is that he did not have any particular concerns about BAWM while he was employed at the department, and he did not take any action to investigate BAWM. He held this view despite concerns having been raised with him by persons both within the department and external to it.

Failure to declare conflict of interest

186. Conflicts of interest arise for officers in government and are a fact of working life. Government policy requires that they must be identified, declared and managed to maintain transparency and accountability, and to promote public trust and confidence in public officers. This is of particular importance in areas of government such as those involved in the allocation of public funds including to RTOs. This requires honest and timely declarations by staff to enable management of conflicts of interest.

187. The EO was a senior executive with eight years' experience in government. He told my officers he was aware of the Code of Conduct and the department's Conflict of Interest Policy.

188. By virtue of his seniority in the RTO funding and audit areas, the EO was in a position to make decisions to favour BAWM.

189. There is no documentary evidence that the EO made a written declaration of his interests in OzSoft to the department at any time. The EO was in breach of the Code of Conduct in terms of a lack of integrity, honesty, and accountability. He also breached the department's policy regarding conflict of interest. His conflict was actual, potential and perceived. Yet he failed to formally declare the conflict of interest until shortly before he resigned. Even his formal resignation failed to refer to OzSoft, referring only to 'a small software company'.

190. There is no persuasive evidence to support the view that the EO made a verbal declaration to his manager and to the Acting Deputy Secretary in December 2012. The only support for this claim comes from BAWM Directors Ms A and Ms B who could not have had any direct knowledge.

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191. I accept the evidence of the EO's manager that the EO verbally informed her of his intention to resign and join OzSoft in June or July 2013. The EO tendered his resignation to the department on 1 August 2013. Her evidence is supported by the other officers interviewed and a departmental email between the Secretary and the Deputy Secretary.
192. It is reasonable to suggest that the EO was in a position to inform BAWM about the complaint and other related matters, to influence decisions and omit to take action which could disadvantage BAWM. His failure to disclose his interests enabled him to continue to be involved in matters related to BAWM.
193. My investigation has identified that the EO was involved in a number of matters related to BAWM in this period, including a complaint involving BAWM which was closed down.
194. At the time, under section 63 of the *Public Administration Act 2004*, a contravention of the Code of Conduct by a public official constituted misconduct. In my view, if the EO was still a public officer, his failure to disclose his conflicts of interest would have been a contravention of the Code of Conduct and could constitute misconduct. As he is no longer employed by the department, these consequences have been avoided.
195. At interview the EO did not initially accept that he had responsibility for decisions. Instead he attempted to deflect responsibility onto his team and his manager. It was only when my officers pointed out his role and responsibility as an executive officer that he acknowledged that he was the ultimate decision maker regarding routine matters.
196. This office has raised concerns about conflicts of interest in many reports to Parliament, most recently in my *Investigation into allegations of improper conduct in the Office of Living Victoria*. My investigation demonstrates that sound departmental policies and procedures will not necessarily ensure that officers will declare perceived or actual conflicts of interest.
197. This investigation considered the conduct of an Executive Officer responsible for funding decisions within the department. However, there is clearly potential for the same conduct to occur in other areas in state government departments which involve individuals making decisions about funding to private companies. These roles carry a high risk for potential conflicts of interest to arise. For all Victorian public servants with such responsibilities, the Code of Conduct and departmental conflict of interest policies are of critical importance.
198. There are currently no penalties that can be imposed upon Victorian public servants who breach conflict of interest policies and then leave the public service before their behaviour is detected. If their behaviour is detected prior to their resignation from the public service, they can be dealt with through misconduct proceedings, with dismissal as a possible penalty.
199. In public servant roles where there is a high risk for potential conflicts of interest to arise, departments may need to consider requiring public servants to sign statutory declarations when declaring their personal interests and any conflict of interest. If false statements are included in statutory declarations, then a criminal offence may have been committed, with penalties attaching, if proved. My recommendations address this issue.

Managing the conflict of interest

200. The department's Conflict of Interest Policy required that reasonable steps be taken to manage actual, potential or perceived conflicts that had been identified.
201. The EO's manager told my officers that she took measures to manage the EO's conflict when he told her about it in July 2013. However, given that she was only aware of his conflict with BAWM a month before he left the department, the impact of her management was limited and any action that she may have taken would not have affected the EO's conduct prior to July 2013.
202. In my view it was not possible for the EO's manager to manage a conflict that was not declared to her in a timely fashion.
203. In response to the draft report, the department stated:
- We will ... roll out further training on management of conflicts of interest to our managers and executives.

Failure to declare benefits

204. The department's Gifts, Benefits and Hospitality Policy requires that officers must not accept benefits, including the offer of jobs, that influence or appear to influence any decision unfairly.
205. In failing to declare his potential role with OzSoft and also failing to declare the \$30,000 of OzSoft dividends received while the EO was employed by the department, the EO was in breach of the department's Gifts, Benefits and Hospitality Policy.

Poor record keeping

206. Decisions relevant to my investigation were routinely not recorded by officers in the Higher Education and Skills Group. These included decisions made at case management meetings, and not recording who decided that the off-cycle audit into BAWM would not be proceeding.

207. As a result, key decisions in the audit and complaint processes outlined in the report were not documented. This hindered my investigation as I was unable to determine who was responsible for decisions.

208. In response to my draft report, the department stated:

... the Department has strengthened its record keeping on case management meetings over the past 12 months.

Recommendations

I recommend that the Department of Education and Training:

Recommendation 1

Arrange an independent audit of BAWM and related RTOs contracted by the department from 1 October 2012 until 31 August 2013 to identify the involvement and influence of the EO, if any, on decisions regarding those RTOs.

Response from the Department of Education and Training:

The Department accepts the recommendation.

Recommendation 2

Require that officers responsible for the provision of funding to, and the management of funding contracts with private companies, sign statutory declarations regarding their personal interests and any conflicts of interest, on a quarterly basis. The same requirement should apply more broadly to all officers of the Victorian Public Service who have similar responsibilities.

Response from the Department of Education and Training:

The Department accepts the recommendation to improve its declaration of private interests procedures for officers responsible for the provision of funding and management of funding contracts to private companies.

Chronology

The following is a chronology of key events.

Date	Event
May 2010	EO commenced as an EO at Skills Victoria
18 January 2012	Ms A, Ms B and others were appointed Directors of BAWM Pty Ltd (BAWM)
27 June 2012	Skills Victoria received an unclear complaint involving BAWM
October 2012	<ul style="list-style-type: none"> EO and Ms A first discussed the possibility of an executive role and shareholdings for EO in OzSoft Solutions Pty Ltd (OzSoft) EO stated he advised his manager
7 December 2012	EO signed a Confidentiality Agreement regarding OzSoft
March 2013	<ul style="list-style-type: none"> Ms A provided EO with a draft employment agreement with OzSoft (subsequently witnessed by Ms A) and a draft loan agreement with Student Hub Pty Ltd (subsequently signed for Student Hub by Mr B and Ms A) EO advised his manager he may be offered the role of Chief Executive Officer of a software company
21 March 2013	Mr B and Ms A were appointed Directors of Student Hub
5 June 2013	Email to EO from a Team Leader at Skills Victoria regarding 'continued noise about BAWM' suggesting a referral to the Market Monitoring Unit
June/July 2013	EO advised his manager that he may resign to join OzSoft and she encouraged him to speak to the Deputy Secretary
18 June 2013	Internal high level departmental email discussed a possible counter-offer to retain EO at the department
28 June 2013	The Victorian Registration and Qualifications Authority informed EO about significant increases in claims by BAWM
29 July 2013	EO signed an employment agreement with OzSoft witnessed by Ms A
31 July 2013	<ul style="list-style-type: none"> EO met complainant who had made a complaint regarding BAWM on 27 June 2012 EO signed a loan agreement with Student Hub for \$234,090 on behalf of his company enabling the purchase of a 10% share in OzSoft by his company with Mr B and Ms A signing for Student Hub EO signed a Share Purchase Agreement with Student Hub on behalf of EO's company to purchase a shareholding in OzSoft, with Mr B and Ms A signing for Student Hub EO signed a Shareholders Agreement between EO, his company, OzSoft and others with Mr B and Ms A signing for Student Hub EO called Ms A twice in the morning, four times the day before
1 August 2013	EO tendered his resignation to the department
August 2013	EO's manager removed EO from matters related to OzSoft

Date	Event
8 August 2013	A Justification For Off-Cycle Audit was provided to a Team Leader at Skills Victoria
9 August 2013	Team Leader at Skills Victoria requested off-cycle audit by this date and booked the audit for 26 August 2013
13 August 2013	Email from EO to complainant stated the department was following up the link with BAWM, but that the complaint related to matters for the regulator
16 August 2013	Email from a Team Leader at Skills Victoria referred to the submission to EO of a brief regarding the proposed off-cycle audit of BAWM
21 August 2013	<ul style="list-style-type: none"> • OzSoft dividends valued at \$30,000 were deposited into EO's bank account while he was still employed by the department • Market Monitoring Unit informed EO of its proposed investigations into RTOs including BAWM
27 August 2013	<ul style="list-style-type: none"> • File note by a Senior Project Officer at Skills Victoria that the off-cycle audit into BAWM would not proceed • EO called Ms A
30 August 2013	EO's final day at the department
2 September 2013	EO commenced as Managing Director of OzSoft
22 October 2013	OzSoft dividends valued at \$25,000 were deposited into EO's account
31 October 2013	EO was appointed a Director of Student Hub
5 December 2013	OzSoft dividends valued at \$30,000 were deposited into EO's account
6 December 2013	<ul style="list-style-type: none"> • Vocation was listed on the Australian Stock Exchange • OzSoft was purchased by Student Hub • BAWM, Aspin and Student Hub were purchased by Vocation • EO's OzSoft shares were exchanged for Student Hub shares and EO became a Director of Student Hub and part owner of OzSoft • EO sold 67% of his Student Hub shareholding to Vocation for \$860,376 and retained the balance as Vocation shares, held in escrow • \$879,988 was deposited into EO's bank account

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