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How fragmented control can foster corruption

By Dr Robert Waldersee, ICAC Executive Director, Corruption Prevention, Education and Research

Two of the most fundamental principles of organisational design are unity of command and the clear allocation of accountabilities. Whether it is service provision, efficiency, safety or innovation, establishing clear lines of command with accountable individuals within those lines is the best way to structure an organisation. This is equally true for preventing corruption.

The ICAC's recent investigation into corruption in the provision and certification of security industry training found that both these principles were violated. Control was fragmented across multiple lines, rather than through a unified control line, and accountability was diffused across multiple bodies. A major registered training organisation involved in the investigation, Roger Training Academy, took advantage of the weakness of the fragmented controls and lack of clear accountabilities to corruptly issue security training and certification to possibly thousands of individuals.

The reporting lines that might have detected corruption were fragmented across the regulatory bodies: the Vocational Education and Training Accreditation Board (VETAB) and the Security Industry Registrar (SIR). This fragmented control also extended indirectly across the industry peak bodies and the Security Industry Council. As a result neither VETAB nor SIR was fully aware of the situation at Roger Training Academy, although both had some idea there was a problem.

Nor were accountabilities clearly located. Both VETAB and SIR had some legislative requirement to manage corruption. Neither was clearly defined as the accountable body. The result was a situation where the extent of the problem was unclear, with information spread across multiple control lines, and the motivation to act was blunted by a lack of clear accountability.

Fragmented control and diffused accountabilities also played a role in the corruption uncovered in the Commission's 2008 investigation into the NSW Fire Brigades (NSWFB). The ICAC found that two NSWFB contract project managers engaged in dishonest schemes that resulted in them receiving corrupt payments totalling \$2.4 million.

The scheme involved submitting false tenders and quotes to the NSWFB to manipulate the awarding of capital works contracts to companies owned by one of the men, Christian Sanhueza. Mr Sanhueza was able to shop for signatures by going to one of three managers at various levels instead of being required to put all his work through his direct supervisor. This meant

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Access the latest corruption prevention tools from the ICAC website – see page 6 for more.

Commissioner's Editorial

I am very honoured to take up the position of ICAC Commissioner for this five-year term. I take this role in reducing and preventing corrupt conduct in NSW very seriously.

While the ICAC is committed to investigating and preventing corruption there is a responsibility also on senior management in state and local government agencies to recognise and respond appropriately to any allegations of corrupt conduct within their organisation. The community has the right to expect that their public officials will act in an ethical and responsible manner and the onus is on senior managers to uphold and promote these values. Reducing corruption needs to go from being reported to being effectively actioned.

Much of my focus going forward will be on the managerial responsibilities contributing to individual acts of corruption. This is not to diminish the impact of inadequate policies and cultures that facilitate corrupt conduct. It is equally important to ensure the close control of procedures by management and that corrupt behaviour is neither tolerated or overlooked at any level in an organisation.

Many of our past investigations, particularly those involving the Wollongong City Council and RailCorp, identified deficiencies in senior management through failure to act on corrupt conduct. Another contributing factor was the lack of policies and procedures to ensure future corruption is reduced. The ICAC provides a great deal of information and advice about preventing corruption, and this edition of *Corruption Matters* features an article about our new online corruption prevention toolkit for managers. See page 6 for more detail about the numerous topics and information available in the toolkit, which can be easily accessed from our website.



The ICAC Commissioner, the Hon David Ipp AO QC.

I am pleased to announce that the ICAC was a critical stakeholder in a review of the national procurement competencies and most of the 125 recommendations made were accepted. The story on page 4 provides further detail on this initiative.

Another interesting article in this edition examines the dangers of fragmented control systems. Dr Robert Waldersee, the Commission's Executive Director of Corruption Prevention, Education and Research, looks at the lessons to be learned from the Commission's investigation into corruption in the provision and certification of security industry training (see cover story).

I would also like to draw your attention to the Commission's investigation into corrupt conduct allegations involving Michael McGurk and others. Following the ICAC's public inquiry in February this year, the Commission found that none of the 13 allegations made in relation to a tape recording owned by Mr McGurk were substantiated. It should be noted that while the role of the ICAC is to investigate, prevent and report on corruption it is equally important for allegations of corrupt conduct to be negated where appropriate. This matter is a good example particularly with the amount of speculation and rumour that preceded this public inquiry.

I encourage you to circulate this edition of *Corruption Matters* and make use of the many ICAC resources available. Recognising, reporting and responding to corrupt behaviour is paramount to maintaining the integrity of public administration in NSW, and it is something in which all of us charged with the responsibility of serving our state have a role.

The Hon David Ipp, AO QC
Commissioner

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that no one manager had an overall picture of his activity and no single manager was motivated by a clearly assigned accountability to monitor the behaviour closely.

Paradoxically the widespread requirement for many signatures within an approval process is designed to improve oversight but may weaken accountability. The immediate supervisor is not ultimately accountable, and therefore not highly motivated, because there will be a higher-level signature. The higher-level signatory generally signs because they are too distant from the activity to be informed and must trust the first signatory. No-one will be held accountable if it goes wrong.

A “tick and flick” approach to approval can develop. That no manager is motivated to check because there are not clearly defined accountabilities has provided an opportunity for corrupt behaviour in several investigations.

Designing an organisation where there is a single, unified command line and accountable individuals identified within that line is good for most activities an agency will undertake, and is an effective way of minimising corruption. In the case of security industry regulation, the ICAC has recommended that a single line of control be established through the Police Force and that the SIR now be held accountable for corruption within the industry.



Introduction to the new ICAC Commissioner

The ICAC welcomed the Hon David Ipp AO QC to a statutory five-year term as Commissioner in November 2009.

Although a native South African, Commissioner Ipp has many years experience in the judicial system in New South Wales and Western Australia, having immigrated to Australia in 1981.

He was appointed a Judge of the New South Wales Court of Appeal from 2002 to 2008, following a year as an acting Judge in that court in 2001.

From 1989 to 2001 Commissioner Ipp was a Judge of the Supreme Court of Western Australia, where he was also the Judge in Charge of the Civil List from 1993 to 2001. During this time major reforms were introduced, following consultation between reformist judges in each state, to improve the efficiency of the administration of the judicial system.

He is a well respected member of the community and was appointed Queen's Counsel in 1985. In 2007 he was honoured to receive the Order of Australia for service to the judiciary through the implementation of major reforms in court procedure in Western Australia, and to the law as a significant contributor to a review of the law of negligence in Australia.

Commissioner Ipp has held many tertiary teaching positions with a focus on legal ethics. This has included a Fellowship at the University of Western Australia (from 1998 to 2001), Visiting Fellowship of the University of Cambridge in 2008 and Scholar in Residence at the University of Virginia Law School in 1994.

His wealth of experience and knowledge includes holding chair positions on many committees including the NSW Supreme Court Education Committee from 2003 to 2009, the Standing Advisory Committee on Judicial Education from 2004 to 2009 and Chairman of the Privacy Committee of the Law Council of Australia from 1986 to 1989.

In 2002 he was proud to serve as the Chair of the Panel appointed by the governments of the Commonwealth, States and Territories to review the law of negligence. The recommendations put forth by this Panel were substantially adopted by legislation throughout Australia.

Commissioner Ipp has been widely published, most notably as a Consulting Editor for *Butterworths Australian Legal Dictionary* and Editor of their *Business and Law Dictionary*. Other published works have addressed a wide variety of topics from the duties of lawyers to the courts, to judicial intervention and negligence.

Commissioner Ipp is the ICAC's fifth Commissioner, and looks forward to continuing the high standards set in fighting and preventing corruption in NSW.

Focus on procurement

Procurement is an area most government agencies deal with and has been a significant focus for the Corruption Prevention section of the ICAC and featured heavily in some of the Commission's recent investigations. This edition of *Corruption Matters* provides information on two recent initiatives undertaken to improve the procurement process in the public sector.

Review of national procurement competencies

Government Skills Australia (GSA) identified the ICAC as a critical stakeholder in the recent review of the national procurement competencies. (GSA is the national industry skills council for government and community safety.)

Margaret Ludlow from the ICAC's corruption prevention section provided valuable input on probity and corruption risks. The review revealed that probity requirements or attention to corruption risk in procurement and contract management were often generalised, sidelined or not included. The recommendations made to the review focused on including, particularly in the performance criteria, the following:

- Specific probity requirements such as fairness, impartiality, and identifying and managing conflicts of interest in core competencies.
- Identifying and controlling corruption risk as part of risk management.
- Probity issues that relate to procurement processes, systems, structures and delegations.
- Expected behaviour of individuals, including stressing the probity boundaries of professional relationships with suppliers and contractors.

The national review also examined the competencies that comprise the five levels of procurement and contract management qualifications, from the Certificate to the Advanced Diploma, within the Public Sector Training Package.

Each qualification includes core and elective competency units, elements and performance criteria. To be awarded the qualifications candidates are assessed as competent against these units. Most government agencies base their training programs on the competencies whether participants opt for a qualification or not.

Although the review was under considerable time restraints, the majority of the recommendations made by the ICAC, over the 23 competencies, were accepted. The changes ensure attention is given to probity in process and individual actions and decisions; and corruption risks and controls in each stage of procurement and contract management. The new competencies are expected to be endorsed officially by the GSA in early 2010.

Improvements to the Procurement Certification Training Program

A review was undertaken into the Procurement Certification Training in mid 2009 by the Procurement, Outsourcing and Contracting taskgroup (part of the Corruption Prevention area of the ICAC) and the NSW Department of Services, Technology and Administration (DSTA).

Focus was given to content, course activities, case studies and assessment tasks related to corruption risks, prevention strategies and expected standards of behaviour in the four levels of training.

Consultation was also directed towards the best way to deliver the training by the ICAC partnered with the Department.

Taskgroup member Margaret Ludlow reviewed the materials and delivered comments to DSTA in August 2009. Overall the review found that :

- probity and ethical behaviour were discussed generally or stressed only at particular stages of the procurement process;
- corruption risk needed to be included in the topic of risk management in all levels;
- roles and responsibilities for identification and control of corruption risk and probity of process needed to be strengthened at all levels.

Between October 2009 and February 2010 Margaret, with assistance from other taskgroup members, developed new materials for inclusion in the Procurement Certification Training for delivery from 2010. This material included:

- a practical guide to corruption risk in the stages of procurement;
- possible controls and responsibilities at the organisational, managerial and individual levels to be provided to all training participants; and
- new workshop slides, course activities and case studies to improve the understanding of probity, corruption risk and corruption prevention in procurement.

For further information on corruption risks in procurement please contact the ICAC on (02) 8281 5999.

Protections for reporting corruption

There are different protections afforded to NSW public officials who report allegations of corrupt conduct. The *Protected Disclosures Act 1994* offers legal protection around retaliation, confidentiality of information and legal liability.

Under the Act a person who undertakes a reprisal against a public official making a protected disclosure can be prosecuted. If convicted a person may be fined and/or face imprisonment.

Ensuring a report is a protected disclosure

Protection under the Act applies, and does not necessarily need to be stated as a protected disclosure, when the report is made through one of the following channels:

- the head of the agency, the agency's protected disclosures coordinator or the person with this authorisation
- the ICAC (for allegations of corrupt conduct)
- the NSW Ombudsman (for allegations of maladministration)
- the NSW Auditor General (concerning serious and substantial waste of public money)
- the Department of Local Government (concerning serious and substantial waste in local government)

However a disclosure is not protected if it does not show or intend to show corrupt conduct, maladministration or serious and substantial waste. Other circumstances to negate a protected disclosure include if an allegation is considered frivolous or vexatious, claims that are made to avoid disciplinary action or which question government policy and if an allegation is not made voluntarily. In addition if a claim is made with intentionally false statements or is intended to mislead then the Protected Disclosures Act does not apply.

Maintaining confidentiality

Confidentiality is one of the main protections covered by the *Protected Disclosures Act 1994*. The agency concerned is required to maintain the confidentiality of the claimant except in certain circumstances such as it being in the public interest or to effectively investigate the matter.

The Act also protects the person making the claims from criminal and disciplinary action for a breach of confidentiality.

It is important that the person making the corruption allegations also maintains their own confidentiality as this will help to ensure an effective investigation process.

Legal liability

Under the Protected Disclosures Act a person is not subject to any legal liability for making a protected disclosure. The Act provides legal protection against defamation procedures that may be brought against the person making an allegation that may damage a reputation.

Making a disclosure in accordance with the *Protected Disclosures Act* gives a better chance of of the situation being remedied.

Further details on protected disclosures can be found by visiting the ICAC website at www.icac.nsw.gov.au or by phoning (02) 8281 5999.



Protected disclosure legislation can provide legal protection for public officials around retaliation, confidentiality and legal liability.

Managing Unreasonable Complainant Conduct Project - Stage 2

In June 2009 the NSW Ombudsman's office published the 1st edition of the *Managing Unreasonable Complainant Conduct Practice Manual*. It was the end result of Stage 1 of a joint project of all Australian Parliamentary Ombudsmen.

The Practice Manual is designed to help agencies and their staff take a systematic and consistent approach to managing challenging interactions with complainants. The Manual provides guidelines, suggestions and strategies designed to assist organisations in addressing the safety concerns raised by unreasonable conduct and to ensure adequate resources are available to enable staff to properly manage such cases. The suggested guidelines and strategies aim to supplement an organisation's existing operational policies and procedures.

There has been an enormous and positive response to the Manual and the Ombudsman's office has provided training to over 140 public and private organisations across Australia since publication.

While the various strategies in the Practice Manual cover most of the circumstances that can arise, some strategies can only be implemented by organisations that have the discretion to end their relationship with the complainant. A further issue is that some smaller non-government service providers and those involved in remote service delivery have restricted resources and can experience difficulties in implementing some suggested strategies as a result.

The Ombudsman's office is now embarking on Stage 2 of this project, which is aimed at developing additional strategies for complaint handlers to make the Practice Manual more relevant to:

- organisations required to maintain an ongoing relationship with the complainant
- smaller organisations or those involved in rural or remote service delivery

In the coming months the NSW Ombudsman's office is proposing to hold a number of focus groups in Sydney to seek insights from a range of relevant people with experience in dealing with unreasonable complainant conduct in the above circumstances.

Given the need for many service providers to maintain an ongoing relationship with a complainant, we are also interested in exploring methods organisations may have utilised to assist in rebuilding productive relationships between a complainant and the organisation when such relationships have broken down.

If you are interested in participating or would like further information about Stage 2 of this project please contact Mr Chris Wheeler, Deputy Ombudsman at cwheeler@ombo.nsw.gov.au. If you are interested in training on the management of unreasonable complainant conduct, please contact Sheila O'Donovan at so'donovan@ombo.nsw.gov.au. The Practice Manual is available for download from our website at www.ombo.nsw.gov.au/publication/guidelines.asp

Bruce Barbour
NSW Ombudsman

ICAC online resources for preventing corruption

Extensive work has been undertaken by the ICAC to produce a comprehensive online toolkit on preventing corruption. This section of the ICAC website provides advice, tools and resources beneficial to the public sector, and those in the private sector that deal with government agencies.

The toolkit features general strategic information and more specific topics on internal and external corruption risk areas. The key elements of good prevention policies and plans are detailed along with attention to specific business areas and procedures in the workplace such as external relationships and procurement.

All stages of preventing corruption are outlined to help you develop sound preventative measures, from risk management, identifying and responding to corrupt behaviour to monitoring, reporting and the ongoing review.

The website toolkit is easy to use either as a complete guide of 46 topics or to reference specific topic areas.

To access the toolkit simply go to the preventing corruption section of the ICAC website at www.icac.nsw.gov.au



ICAC investigation into corruption allegations involving Michael McGurk and others

A major role of the Commission is to investigate whether or not corrupt conduct has occurred. The Commission's efficacy and the due fulfilment of its statutory obligations do not necessarily depend on its making findings of corrupt conduct. In some cases it can be just as important to establish that no corrupt conduct has occurred. It is in the public interest to demonstrate where appropriate that allegations leading to significant loss of confidence in government and public administration are unfounded. Unwarranted loss of such confidence can be harmful to society. The investigation conducted by the ICAC into Michael McGurk and others is an example of such a matter.

Following the murder of Mr McGurk on 3 September 2009 widespread media and public comment emerged concerning allegations of corruption of which Mr McGurk had claimed to have knowledge.

The Commission identified 13 allegations concerning senior public officials, including NSW Government Ministers. These allegations were principally based on the contents of a recording of a conversation between Mr McGurk and Ron Medich on 6 February 2009, various statements attributed to Mr McGurk by two journalists and a business associate of Mr McGurk, and information provided to the Commission by a correctional centre inmate.

The need for an ICAC investigation

The allegations were serious. The public reporting of some of the allegations gave rise to a mass of rumour and speculation concerning corruption that had the potential to undermine confidence in public administration. The Commission therefore determined to investigate the allegations.

Conduct of the investigation

For almost five months a multi-disciplinary team (including investigators, lawyers, corruption prevention analysts and support staff) worked on the investigation. The Commission obtained and analysed extensive electronic and other material obtained by the NSW Police during the course of its investigation into the murder. The Commission also obtained and examined additional information from other sources including members of parliament and senior public officials. A large number of witnesses was interviewed and statements obtained. In addition, 27 compulsory examinations (private hearings) were conducted. The Commission obtained and executed search warrants on premises suspected of containing other recordings made by Mr McGurk.

It was also necessary to seek legislative change before the investigation could be finalised. Information obtained by the Commission indicated that the recording of the conversation of 6 February 2009 was unlawful and if Mr McGurk had recorded any other conversations those recordings were also likely to be unlawful. This would prevent the Commission from using or publishing the recordings. On 30

November 2009 the *Independent Commission Against Corruption Act 1988* (ICAC Act) was amended to allow the Commission to use, before 31 December 2010, recordings of any conversation to which Mr McGurk was a party. This would allow the Commission to tender any recordings in evidence and make them public. After extensive investigation, only recordings of the conversation of 6 February 2009 were found.

The public inquiry

It was determined in the public interest to conduct a public inquiry into this matter, even when provisional views indicated no corrupt conduct had occurred. The Commission considered there was a pressing need for the concerns giving rise to the public perception of corruption to be publicly ventilated, for the recording of 6 February 2009 to be publicly played and for the detail of the Commission's extensive investigation to be made known. In particular, the Commission regarded it as important that the entire community be able to scrutinise the relevant evidence.

The public inquiry was held over three days, commencing on Monday 1 February 2010. At the conclusion of the evidence oral submissions were made by counsel assisting the Commission and counsel representing interested parties.

Findings

Two days after the conclusion of the public inquiry the Commissioner, the Hon. David Ipp, AO QC, made an oral statement of findings. This is not normal procedure. It was done in this case because of the intense public interest in the allegations.

The Commission found that the 13 allegations were not substantiated and there was no cogent evidence to support them. No findings of corrupt conduct were made. The full investigation report on this matter was furnished to the NSW Parliament on 25 March 2010.

The significant amount of work involved in this investigation and the subsequent public inquiry showed how timeliness, accuracy and effectiveness are critical to the successful conduct of an investigation irrespective of whether or not corrupt conduct is established.

In other news

Corruption and Anti-Corruption Executive Program

The Corruption and Anti-Corruption Executive Program is the only graduate course in Australia to combine theoretical approaches to corruption with practical corruption prevention strategies. The course is delivered by staff from the ICAC and the Australian National University (ANU), and is offered as part of the ANU's Masters in Public Policy. In 2009 students rated this course among the top 10% of all courses.

Participants will increase their understanding of corruption and develop practical strategies for investigation and prevention. The interactive format gives participants the opportunity to work with attendees from around the world, including senior officials from international anti-corruption agencies.

The course is scheduled for 5 to 12 October 2010 and the ICAC is offering ten scholarships covering the ANU course fee. The scholarships are aimed at senior public officials working in NSW state and local government, who are leaders or potential leaders in preventing corruption. Applications are now open for scholarships for the 2010 Executive Program and should be submitted to the ICAC no later than 23 July 2010.

Please contact Sandra Walker on email swalker@icac.nsw.gov.au or phone (02) 8281 5999 for further information.

National Investigations Symposium

The ICAC, NSW Ombudsman and the Institute of Public Administration Australia (NSW Division) will be hosting the 8th National Investigations Symposium (NIS), at Manly from 3 to 5 November 2010.

This practical Symposium, held every two years, attracts more than 250 people from around Australia and overseas to learn from highly regarded experts from a range of investigative fields.

Topics to be covered will include practical investigation techniques, investigation planning and management, topical issues, case studies, tips and discussions around actual outcomes.

The NIS will benefit:

- experienced investigators,
- complaints handlers,
- regulators,
- managers and human resources professionals, and
- auditors involved in administrative, regulatory or disciplinary investigations.

For further information and to receive updates email info@nsw.ipaa.org.au.

ICAC finds corrupt conduct against barrister and solicitor

The Commission recently made corrupt conduct findings against barrister John Hart and solicitor Anthony Paul for misleading various courts by providing false information about their clients, and for seeking to obtain money improperly from the then Attorney General's Department by agreeing to submit an artificially inflated costs claim.

In its *Report on corrupt conduct affecting the administration of justice in the Wagga Wagga and other local court areas*, the Commission also makes corrupt conduct findings against Mr Hart's client, Jason Kelly, in respect to the costs claim, and for providing money to Mr Hart intended to pay an officer of the Director of Public Prosecutions (DPP) to adversely affect the officer's functions.

The ICAC has recommended that the advice of the DPP be sought with respect to the prosecution of Mr Hart, Mr Paul, Mr Kelly and co-accused Christopher Trinder and Jeffrey Nankivell for various offences.

Corruption Matters is produced twice a year to raise awareness in the NSW public sector and the wider community about corruption-related issues. If you have any comments about the publication or would like to be put on the mailing list, please contact the Corruption Prevention, Education and Research Division of the Independent Commission Against Corruption.

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