
MANAGING POST SEPARATION EMPLOYMENT

Discussion Paper

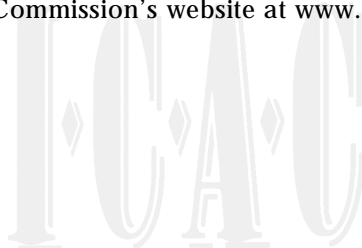
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FOREWORD

In NSW there are few restrictions on the type of private sector employment public officials can obtain when they leave office. Yet the area of conduct known as post-separation employment can raise difficult issues for all concerned. Public officials, whether elected, appointed or employed, are obliged to act always in the public interest. The community also expects them to do so. However, public officials take up private sector employment for a variety of reasons. Terms of office end, governments downsize, employment contracts expire, individuals seek new challenges. These and other circumstances can give rise to post separation employment issues for both individuals and organisations. They also raise questions about whether and when a public official's obligation to the public interest ceases and personal career interests can take over.

While public officials should not be unduly restricted from working elsewhere when they leave office, their post separation employment activities should not reflect adversely on the effectiveness of public administration, or open to question the propriety of their own activities as public officials. Because the activities of some public officials have done so, the main question addressed by this paper is to what extent former public officials should be restricted in the scope of employment they can undertake after they leave the public sector, to better preserve the integrity of government operations.

The ICAC has received many complaints about the conduct of some former public officials who have joined the private sector. Some conduct shows lack of integrity, other conduct shows that public officials need to exercise better judgment when choosing other work. There is an increasing public concern that some former public officials have not maintained the standards expected of them as public officials, when obtaining subsequent positions.

This paper highlights some significant post separation employment issues. It focuses on conduct of public officials that:

- improves their private sector employment prospects
- involves improper use of confidential government information
- seeks to lobby or influence their former colleagues or staff.

The paper also examines some problems employers have experienced when re-employing or re-engaging redundant public officials.

While identifying the risk areas, the ICAC has surveyed problems elsewhere in Australia and overseas. The paper briefly describes what others have done about post separation employment.

In keeping with the ICAC's objective of offering constructive advice to the public sector on corruption prevention issues, the discussion paper examines several possible strategies to minimise opportunities for corruption. These consist of:

- restricting the activities of former public officials by imposing limited bans or cooling off periods
- using codes of conduct to specify what is required
- developing organisation-specific strategies
- including restrictive covenants in employment contracts

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- extending the "key officials" legislation in force in the New South Wales liquor, gaming and casino industries to all public servants
 - adopting the informal guidelines and sanctions such as the business appointment rules in force in the United Kingdom Civil Service and the Australian Public Service.

This discussion paper is being sent directly to chief executives and other principal officers who are responsible for reporting corruption to the ICAC and for promoting corruption prevention. While the ICAC has expressed its views throughout the paper, it does not profess to have all the answers. We are seeking comments and submissions on what, if any, further measures are needed.

We will evaluate all responses received and decide whether to make recommendations to the Government.

The Hon B S J O'Keefe AM QC

Commissioner



CHAPTER 1

1.0 Introduction

In New South Wales few public officials are restricted in the types of employment they can obtain after they leave public sector employment or cease to hold public office. While the ICAC recognises that individuals should not be unduly restricted in their choice of employment, we have received many complaints and reports about the conduct of former public officials that suggest a lack of integrity or that greater care needs to be exercised when choosing employment that bears a close or sensitive relationship to their work as public officials.

Post separation employment issues can be difficult to deal with. While it is common for public officials to seek work in the private sector after they leave public office, their post separation employment activities should not reflect adversely on the effectiveness of public administration, or call into question the partiality of their own activities as public officials.

The problems that arise when public officials seek to join the private sector in jobs that bear some nexus with their former roles, can involve ethical dilemmas such as conflicts of interest. These can be difficult to resolve in a way that satisfies both the interests of the public and the individual. Failure by all those responsible to deal with the issues appropriately, or to act with integrity when seeking alternative employment, can adversely affect the public's confidence in the integrity of government and those who carry out government functions.

In preparing this discussion paper the ICAC has reviewed complaints and problems, surveyed major risk areas for public sector organisations and public officials, and reviewed actions taken by others faced with similar problems. In keeping with our objective of offering constructive advice to the public sector, the paper offers some suggestions of how to minimise opportunities for corrupt conduct by former and current public officials in New South Wales. We also ask a number of questions about the need for further conditions governing the conduct of former New South Wales public officials.

We now seek comments and submissions on what further measures, if any, are needed.

1.1 Responses to the discussion paper

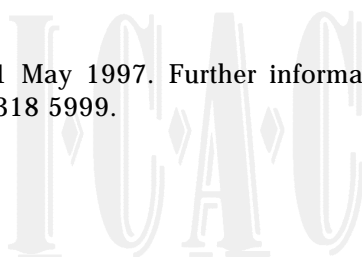
The ICAC invites written submissions in response to the issues raised in this paper. We will evaluate them and decide whether to make recommendations to the Government.

Responses may be to any or all the issues covered in the paper. Issues not covered by the paper should also be addressed.

They should be addressed to Mr Peter G Gifford, Director of Corruption Prevention and Education:

Address: 191 Cleveland Street Redfern NSW 2016
Postal: ICAC GPO Box 500 Sydney NSW 2001 or DX557
Telephone: (02) 9318 5999
Facsimile: (02) 9699 8067

Submissions should arrive by 31 May 1997. Further information can be obtained by contacting Chris Leeds on (02) 9318 5999.



1.2 Background

The ICAC continues to receive complaints about the conduct of those who have "switched sides" and moved from the public to the private sector. The complaints involve public officials, from holders of high political office through to public servants and local government employees. The following are examples:

- a former Premier took positions on the boards of companies that the Government had been dealing with
- the former chief executive officer of a NSW government agency was, immediately on retirement, appointed to the board of a company with whom the agency had significant business dealings
- a former Premier, as director of a public company, lobbied a former departmental head to influence a decision that would favour the company
- former employees of a government agency formed a company and tendered for an advertised government contract, intending to recruit their former colleagues if successful
- a public official travelled overseas to assess a tender bid and on return resigned to work for the bidder's competitor. The agency was concerned it had lost its reputation for protecting the confidential information of its bidders
- public officials received redundancy payments from a government agency and were immediately re-engaged as consultants to perform the same work
- a council building surveyor approved the construction of faulty building work and then went to work for the construction company.

Some common factors have emerged from the complaints. The former public official's new job is usually related to their former position. The possibility exists that access to government information or to individual public servants could be used for personal gain, to exercise unfair influence, or to obtain favourable decisions for the former official or third party such as an employer or client.

Of particular concern are situations where public officials have used their positions to further their own employment interests or have obtained employment because of their inside knowledge of government information, programs or plans.

In New South Wales, recent government efficiency reforms have led to downsizing and the outsourcing of many traditional public sector functions. As well, opportunities for staff to move between the public and private sectors have also increased, as the management practices and essential qualifications required to work in each sector have merged. Many individuals are now less likely to regard public sector employment as a long term career. Politicians choose to leave office for careers in the private sector or are forced to do so after elections. Factors such as these have created the climate for post separation employment issues to arise.

i) What is 'post separation employment'?

The term "post separation employment" covers the situation where a public official leaves the public sector and obtains employment in the private sector. The problems dealt with in this paper usually arise where there is a close, or sensitive, relationship to the person's former role as a public official. Post separation employment problems can also arise for serving public officials who are contemplating leaving office.

ii) Who is a public official?

There are many categories of public official. Section 3 of the Independent Commission Against Corruption Act, 1988 ("the ICAC Act") defines a public official as any individual "having public official functions or acting in a public official capacity." A range of public offices is covered by the ICAC Act, including the Governor, a Minister of the Crown, Judge, public servant, teacher, a member of the police service and any person employed, or engaged by, or acting for or on behalf of, a public authority.

Some public officials are elected, others are appointed, but in New South Wales most are employed, either as public servants or as other government employees. The ICAC's experience shows that some categories of public official are more likely to face situations involving post separation employment concerns than others. These include chief executive officers, senior executives or senior officers, individuals performing regulatory or inspectorial functions at state or local government level, and positions that develop, collect or access confidential government information.

As elected officials, Ministers of the Crown and Members of Parliament hold significant offices of public trust. Their post-parliamentary service employment arrangements can also raise important issues of public interest, particularly as no restrictions currently apply because as elected officials they enjoy no security of tenure.

Some public officials are subject to restrictions imposed by their own governing bodies. Judges who leave the bench to become solicitors or barristers are subject to restrictions imposed by the NSW Law Society and the NSW Bar Association. Barristers who were formerly judges are restrained from practising in the court over which they presided for a period equal to the period that they presided as judge. The restraint is limited to a period of not less than two, nor more than five years. Since 1989, solicitors in New South Wales who were formerly judges in a court or tribunal have been restrained from appearing in person before the court or tribunal in which they held office, for a period of two years.

iii) Post separation employment and conflicts of interest

Conflicts of interest are at the centre of many of the post separation employment problems addressed in this paper. They arise when public officials are influenced by personal interests and fail to perform their public duties impartially and in the public interest. The prospect of outside employment can create a potential for, or the appearance of, a conflict of interest for public officials.

The Draft Model Code of Conduct for NSW public sector agencies says public officials are responsible for identifying and avoiding financial or other interests that could compromise the impartial performance of their duties. It requires them to disclose any potential or actual conflict of interest. Public sector organisations must resolve conflicts of interest in the organisation's favour.

1.3 Basis of ICAC interest

The ICAC became interested in the conduct of former public officials for a number of reasons, including:

- Two of its investigations highlighted the problems that can arise when former public officials use official contacts to obtain private sector employment. In the *ICAC's Report on Investigation into Tendering for Vinyl Floor Products*, a public servant who was solely responsible for awarding a large government supply contract recommended acceptance of a supplier's tender and later joined the company, without disclosing he had a conflict of interest.

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- In the ICAC's *Report on the Investigation into the New South Wales Film Corporation and Pepper Distribution*, a Film Corporation employee who made film marketing agreements that greatly benefited Pepper Distribution, headed up the company overseas when the NSW Film Corporation was disbanded. It was suspected that the company had been created by the public official concerned.
 - Problems identified by the former NSW Chief Secretary's Department (now the Department of Gaming and Racing) led to amendments to the Liquor Act, 1976 and the Registered Clubs Act, 1982. These restricted designated "key officials" from holding positions in the liquor or gaming industries within three years of leaving employment. The ICAC assisted to formulate guidelines for those affected.
 - The Casino Control Act, 1992 prohibits designated key officials in the casino industry from obtaining employment or forming business associations with casino operators for a period of four years after leaving employment.
 - In its report *Integrity in Public Administration*, the third report on its investigation into the resignation of Dr Terry Metherell from the Legislative Assembly and his appointment to a public service position, the ICAC examined the laws and practices of public sector recruitment in New South Wales. It found that the system was not sufficiently corruption resistant and recommended that all public sector jobs be advertised and filled on merit. The report concluded that "no process controlled by Government can presently give a job to a former Member of Parliament without a significant risk of controversy and public disquiet." It recommended an independent and eminent standing panel of review should consider such instances after recommendation, but before appointment, with the power to effectively vet the recruitment process that has occurred.
 - In October 1994, the NSW Auditor-General's public report on *the Audit of Infrastructure Projects in the Roads and Traffic Authority* noted examples of former public officials who had an influence on, or an opportunity to influence, certain road infrastructure projects, who later became employees or consultants to organisations associated with these projects. The report recommended that the Government introduce a code to encourage all former NSW public officials to abstain from working directly on a matter that they had previously been responsible for or were involved in. In response, the NSW Government announced that rules governing the careers of former public officials "may need to be re-examined", following the NSW Auditor-General's findings. The 1996 Code of Conduct for senior executive service officers contains no specific measures in response to the Auditor-General's concerns.

1.4 Who is responsible for corruption prevention?

Avoiding post separation employment problems is a shared responsibility. Public officials are responsible for behaving ethically while in public office. It follows that their post separation employment should not reflect adversely on the public sector.

Public sector organisations also need to be alert to the potential problems of post separation employment. Re-employing redundant public officials can expose them to allegations that they are allowing employees to double-dip; that is to obtain both the benefits of redundancy packages and government work. Even if this is not corrupt, it can adversely affect the reputation of government administration.

The following chapters examine some issues that have arisen or that may occur and present some strategies for dealing with post separation employment.

CHAPTER 2

2.0 The Issues

Complaints to the ICAC, our investigations of alleged corrupt conduct, and our research into public sector ethics, suggest that the following are risk areas for the NSW public sector:

2.1 Public officials who modify their official conduct to improve their private sector employment prospects

The community is entitled to expect that public officials act honestly, fairly and impartially and that official decisions are not influenced by individuals' plans for, or offers of, outside employment.

i) What problems can arise?

a. Bribery

Public officials who intend to leave government employment for related private employment may modify their conduct for personal gain in many ways. An obvious example is bribery, for example where a public official solicits or obtains a corrupt payment, or an offer of future employment, on the understanding (express or tacit) that in return they will act partially.

b. The problem of self interest

Sometimes the problem may be more subtle. Public officials make policy, legislate, enforce standards and engage in commercial transactions on the community's behalf. Opportunities for personal gain can arise where public officials can favour their private interests over their public duty. If revealed, this can adversely affect public confidence in the public sector. Organisations may be at risk from the conduct of the public officials described in the following hypothetical case study:

Case study No. 1

Anne, the marketing director with a public sector organisation, regularly travelled overseas to market its automatic ticketing system. Over time, she realised that the system's proprietary technology represented 'world best practice' and there were consultancy opportunities available to bring others' systems up to that standard. After returning from one trip, Anne discussed the situation with two work colleagues and together they decided to form a consultancy company to exploit business opportunities. They never revealed their intentions to their employer. Anne's company secretly won a contract let by an overseas company to perform computer software development for its ticketing system. Anne and her colleagues took leave and did the work.

As their reputation spread, several overseas companies sought to use Anne's company and eventually, all three employees resigned and worked for the company full-time, overseas.

Although they were able to exploit the business opportunities only by using the agency's technology, they never disclosed the existence of the company or these opportunities to their employer. When it discovered the situation, the organisation took legal action against Anne and her colleagues for misuse of government information. The organisation was also concerned it had lost valuable commercial opportunities to its former staff, who had been able to exploit post separation employment opportunities solely through their jobs as public officials.

What strategies could prevent such conduct?

c. Going soft on official responsibilities

Problems can also occur where public officials who intend to leave the public sector succumb to pressure or temptation to "go soft" on their responsibilities to further their personal career interests. Organisations with enforcement responsibilities, such as the police service, local government and the liquor, gaming and casino industries, can be at particular risk from such conduct.

A study by the New York Bar Association found that at higher levels of government administration, employees such as lawyers who anticipated leaving the public sector were put under an inevitable pressure to impress private concerns with whom they dealt. The risk to government of public officials favouring potential employers was not so much from bribery through job offers but from the:

"sapping of government policy, especially regulatory policy through the nagging and persistent conflict of interests of the government official who has his eye cocked toward subsequent private employment. To turn the matter around, the greatest public risks arising from post employment conduct may well occur during the period of government employment, through the dampening of aggressive administration of government policies."

Such conduct may not be detected until it is too late or may be too subtle to be seen as corrupt. Those involved in sapping are unlikely to incriminate themselves and even if colleagues or subordinates become suspicious, the conduct is not always reported. The study highlights the difficulty of preventing partial conduct and the importance of having sound corruption prevention strategies in place that recognise the risks of such behaviour to public sector integrity. These strategies can include:

- requiring employees to advise employers of all job offers
- requiring employees to advise employers when they are contemplating leaving the public sector
- moving people who are going to leave from sensitive areas for a period prior to separation.

d. The problem of "regulatory capture"

A company may wish to hire a public official they have dealt with if the person has access to government information, future programs or useful contacts that is not publicly available. In the absence of any cooling-off period between the time a public official leaves office and joins the company, conflicts of interest can arise between the person's public responsibilities and private interests.

The risk of public officials with regulatory or inspectorial responsibilities identifying too closely with prospective employees and being tempted to act partially is known as "regulatory capture." The problem was identified by the Street Inquiry into the New South Wales Casino Industry in 1991, which said that:

"regulatory inspectors may identify to too great an extent with the interests of the industry, to the neglect of the public interest. Reducing the risk that casino inspectors will be captured by the very interests which they regulate, is an important consideration for casino control authorities."

The Inquiry said a delicate balance was needed between casino inspectors and operators to avoid over-identification with each others' interests on the one hand and an aggressively adversarial enforcement posture on the other. The Inquiry found that over-identification could result in soft administration, whereas aggressive enforcement could cause operators to conceal irregularities.

Key officials in the casino industry are now subject to post separation employment restrictions for four years. This minimises the temptation "to mould individual behaviour with a view to future advantages as well as to draw on past associations to secure present advantages."

2.1.1 ICAC suggestions

Public officials should be required to advise employers of any job offer they decide to accept where it bears any close or sensitive connection with their current position. Organisations should perform a risk assessment in each instance and take appropriate measures to reduce the risk of a conflict of interest. They should also assess which positions are likely to be affected by this requirement. Employees would be obliged to make a rigorous assessment of their employment options and declare any conflicts of interest in good faith.

Such practices represent a reasonable balance between the two extremes of doing nothing and requiring employees to advise an employer whenever they contemplate leaving public office.

Once an employee has discharged their obligation to inform the employer, the onus would shift to the employer to take action to resolve any conflict of interest.

The ICAC favours the use of cooling-off periods where public officials in sensitive areas of public sector employment wish to take up employment in businesses or organisations that bear a close or special relationship to their former roles as public officials.

2.1.2 Questions

1. What measures should be taken to prevent public officials from modifying or tailoring their official conduct while in government employment for future personal gain?
2. Should the post separation employment of key public officials be further regulated to prevent these problems? For example, should the cooling-off periods imposed on former public officials in the New South Wales liquor, gaming and casino industries be extended to other public officials? If so, to what extent, how should they operate, and who should implement them?
3. Should post employment restrictions apply if a public official is retrenched or a contract period cut short?
4. What can be done to prevent public officials from favouring potential employers during the period of their government employment?

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- * Other than requiring public officials to notify all firm intentions to resign are there any ongoing measures employers can take?
 - * Are normal supervisory practices sophisticated enough to detect the conduct described in this paper?

2.2 Former public officials who improperly use confidential government information

Many public officials have access to information gathered for public purposes. Much of the information is personal, some of it is sensitive. Other public officials work on government policies, programs and operations some of which are confidential or sensitive. All such information can have commercial value and needs to be safeguarded as against being made publicly available. While some information becomes part of an individual's personal skills and knowledge and can be legitimately used to gain other employment, confidential government information may not be used to benefit public officials or others.

The ICAC Act recognises the misuse of information is a risk to public sector integrity. It says that conduct of a public official or a former public official that involves the misuse of information, or material that has been acquired in the course of official functions, can be considered corrupt. This applies if the information was used for personal benefit or to benefit another person.

At common law, employees with access to confidential information must use it solely for the employer's purposes, unless with permission. Improper use can expose individuals to dismissal and civil action by the employer.

i) The ICAC Experience

In 1992, the ICAC extensively investigated corruption in the use of confidential government information. Its Report on Unauthorised Release of Government Information revealed a widespread corrupt trade in confidential government information in New South Wales. It was standard practice to buy and sell government information for such purposes as locating debtors and preparing for civil and criminal litigation. The report revealed that one public official earned more than \$100,000 from just three "clients".

A significant concern of that inquiry was the conduct of former public officials, particularly former police officers who had become private inquiry agents. Through contacts with former colleagues, a vast information network had developed, copies of confidential police documents were obtained and sold, and confidential police information from high ranking officers was made available to inquiry agents over the telephone. Information was also provided to people against whom police were preparing prosecution cases.

Practically all the information found by the ICAC to have been released from government departments and organisations had passed through the hands of former public officials, as the following case study shows.

Case Study No. 2

Three former and serving police officers formed a security consultant and private inquiry agency company in 1985.

One of the directors, a serving police Superintendent used his position to obtain confidential police information for his company. He released this information to the company and either sold it or used it for company business, for profit. While on leave pending retirement in 1987, he did not have direct access to the police computer system. He still obtained information from officers at any of the 14 Sydney suburban police stations under his district command. He was able to obtain it on the basis that he was the "ex-boss."

The information included registration and licence checks, police information, telephone records, county council information and Medicare, immigration and social security records. Those who provided him with the information included a serving Chief Superintendent, an Inspector and a Detective Sergeant.

Purchasers of the information included insurance companies, banks and other financial institutions, law firms and even a Commonwealth Government agency.

The Report said that three things were necessary to keep the corrupt trade in information in check, namely:

1. There must be a clear line drawn between information which is available to the public and information which is retained as confidential.
2. That which is available to the public should be readily, quickly and cheaply available.
3. That which is to be retained as confidential, should be properly protected.

One of the ICAC report's recommendations was that the release of confidential government information be made a criminal offence. On 26 March 1996, following revelations before the Police Royal Commission that there were no criminal laws under which action could be taken against public officials who misuse confidential information obtained through their work, the NSW Government announced that a comprehensive privacy and data protection package would be introduced into the NSW Parliament. Under this proposed legislation, public officials who use information corruptly will face imprisonment or a fine. Requirements relating to the confidentiality and safeguarding of personal information collected, used and held by public sector agencies in future, are contained in the Privacy and Personal Information Protection Bill, 1997. It is expected that the Bill will be introduced into the NSW Parliament this year.

It has long been a criminal offence for a Commonwealth public official to publish or communicate any fact or document which they were under a duty not to disclose at the time they ceased to be a Commonwealth officer. The penalty is two years imprisonment.

In the absence of uniform criminal or other sanctions in New South Wales, public sector organisations have relied on other approaches, such as using codes of conduct and disciplinary action, to prevent unauthorised use of confidential government information. However practical problems still exist. If a public official deliberately obtains confidential government information for private use, it may be a disciplinary offence. If the employer does not learn of the problem until after the public official has left office, disciplinary action is impossible, and the only redress is civil action.

While proposed laws to impose criminal sanctions on the release of confidential information will raise the stakes for public officials, if enacted, organisations are responsible for implementing suitable systems and procedures to protect government

information. They will also need to ensure that employees are made aware of their obligations when dealing with such information.

ii) Use of confidential information by Members of Parliament

Members of Parliament and Ministers have high level access to confidential government information and the capacity to use this information in many ways. The current Code of Conduct for NSW Ministers of the Crown requires them to "maintain the confidentiality of information committed to their secrecy" and says that as holders of public office, Ministers are subject to the criminal and civil law and responsible for the misuse of confidential information acquired by virtue of their office.

Ministers are also prohibited by the Code from using or communicating information obtained in office to gain a direct or indirect private advantage, or to advantage another person, or to make investments or enter dealings based on information not available to the public. The Code of Conduct also requires ministers, after leaving office, to maintain the secrecy of information that they were obliged not to disclose when in ministerial office.

Despite the fact that Members of Parliament and Ministers now routinely have post-parliamentary careers, there are no restrictions over the paid activities that these public officials can engage in after they leave office. For instance there is no enforceable cooling off period between cessation of holding office and resuming a career that would prevent the use of confidential information to further personal career or business interests.

A similar situation exists for Commonwealth Government Ministers. The Bowen Committee of Inquiry Concerning Public Duty and Private Interest, which reported in 1979, recommended no restrictions on the activities of former Ministers on the basis that members of parliament lacked security of tenure. The availability of a pension was not considered. The issue of post ministerial employment has not been addressed since the Bowen Report. While guidelines require Commonwealth departments to address the post separation employment activities of Commonwealth public servants, no such measures exist in relation to Commonwealth members of parliament.

This contrasts with the approach adopted in the United States. The Ethics in Government Act 1978 creates a legal presumption that former federal public officials possess confidential information about particular matters involving specific parties. It imposes limited bans on former members of Congress, their staff and former public servants from representing specific outside parties on those matters.

2.2.1 ICAC suggestions

Public sector organisations need systems that properly categorise the information they collect for public purposes so they can assess the risk of misuse. Management inaction offers opportunities for individuals to further their private interests. Recent events such as the revelations in the NSW Royal Commission into the Police Service show that some public sector organisations still do not adequately protect government information. The community is entitled to expect that such information is properly safeguarded and will only be used for the purposes for which it is gathered.

It may be feasible to minimise the misuse of confidential information already held by public sector organisations by:

banning former public officials from taking employment that bears a close relationship to their public sector position if access to confidential government information is likely to be a reason for the new employment

banning former public officials for a defined period from dealing with government in their new positions in relation to matters that involved their former positions.

Organisations should periodically assess the status of the information they hold. It may be that over time some information no longer needs to be safeguarded. Making such information publicly available will limit the prospects of misuse.

Given that NSW Government Ministers now routinely have post parliamentary careers, and have access to confidential information, the ICAC suggests restricting the paid activities these public officials can perform as soon as they cease to hold parliamentary office, by use of enforceable cooling off periods. The nature and extent of these restrictions and the range of Members of Parliament who would be affected warrants strong consideration.

2.2.2 Questions

1. In addition to any current or proposed laws governing the use of personal or confidential government information, what measures can public sector organisations take to prevent the unauthorised use of such information?
2. Should there be restrictions on the paid activities of former Members of Parliament to prevent the use of confidential government information? If so, what restrictions? Should all serving Members be affected, or only Government Ministers?

2.3 Former public officials who seek to influence public officials

Public officials must act fairly when providing services to the public. Problems can arise if former public officials seek to influence the work of ex-colleagues or subordinates. Consider the following hypothetical case study:

Case Study No 3

Jay, an executive of the State Infrastructure Agency (SIA), was its strategic planning manager responsible for major capital works projects. Jay left the SIA and was employed by Cee Corporation Limited. Cee then tendered for a major project for the SIA and advised that if selected, Jay would be their project manager. The SIA was concerned about the probity implications of Jay's involvement in the bid.

Jay had made many of the SIA's strategic planning decisions and supervised staff carrying out these policies. Two of Jay's former staff were on the tender selection committee and told management they were uncomfortable about Jay's involvement. Neither could be easily replaced, because of their technical expertise. The SIA was concerned that Jay's presence might unfairly influence his former staff and that both Cee's competitors and other critics of the project would see the potential for undue influence.

Considerations for the SIA included the following:

- Did it need to resolve the issue immediately, or only if Cee won the bid?
- Could it intervene in the business arrangements of Cee and ask it not to use Jay for the project as a condition of continuing to deal with its bid?

-
- What responsibilities did it have to its employees to prevent their exposure to allegations of influence?

While there are no laws in place in New South Wales dealing with influence by former public officials, some countries have attempted to limit their influence over their previous employers. For example, in the United States, federal law prohibits high level federal government officials from communicating with, assisting others to, or appearing before their former agency for any private party, for a two year period.

Former US federal employees are also prohibited from "switching sides" to act for another person in any matter in which the US Government has a direct interest, if the former employee had participated in the matter "personally and substantially". Under *the Ethics in Government Act 1978*, a two year prohibition applies to matters that were the official's responsibility within one year of termination. Breaches of these post employment restrictions are punishable by imprisonment and/or a fine.

In Canada, federal public office holders are subject to a Post Employment Code that prohibits them acting for or on behalf of any person or entity, on any government matter that they have been involved in. They cannot make representations for or on behalf of any other person or entity to any department with which they had direct and substantial dealings during the 12 months immediately prior to leaving public office.

There is a corresponding duty on serving public officials to report official dealings with former public officials, other than routine service provision to an individual, to the Canadian Government's Ethics Counsellor.

In the course of its advisory work, the ICAC suggests former public officials should avoid dealing with former colleagues other than to obtain the routine services of the organisation as a member of the public. Serving public officials should also ensure their official dealings with former colleagues or staff are at arm's length.

i) The influence of lobbyists

Lobbyists seek to influence decisionmakers at all levels of government. Lobbying is an established part of the democratic process in the United States and Canada and has increased in the United Kingdom and Australia in recent years.

A public official who is still in office, but who is thinking of working as a lobbyist, may be tempted to make decisions that favour prospective clients or employers. A former public official who is now a lobbyist may be tempted to use information or contacts that are not generally available for personal benefit, or to benefit an employer or client.

Former colleagues may regard the lobbyist as an insider and grant special access and therefore give lobbyists an unfair advantage. In the ICAC's opinion, no public official should favour any former public official in the course of their duty and equality of access should be a feature of all official dealings.

ii) The regulation of lobbying

The ICAC's *Report on North Coast Land Development* considered that lobbying could easily lead to corruption and recommended the establishment of a public register of lobbyists, and perhaps their clients. The report concluded a register could provide a sound basis for regulation of lobbying activities, by legislation or self regulation. No such measures have yet been introduced in New South Wales, although the effect of lobbying on public sector ethics has received close attention in other countries.

United States law imposes a cooling off period on senior federal government officials during which they cannot lobby their former agency on any matter. The law is intended to prevent former government officials from exercising undue influence over their former colleagues.

In Canada, public concern over the effect of influence on the federal government resulted in laws requiring all paid lobbyists to be registered. Lobbyists must disclose their client's identity, the subject matter of the lobbying, the department or agency lobbied, how the consultant is paid, e.g. whether on a contingency basis, and even what "communication techniques" are used. Contravention of the law is a criminal offence attracting a maximum penalty of (Can)\$100,000 and two years imprisonment.

The role of professional lobbyists in the United Kingdom has been reviewed recently by the Nolan Committee on Standards in Public Life which recommended against registration of lobbyists, preferring to leave it up to public institutions "to develop ways of controlling the reaction to approaches from professional lobbyists."

2.3.1 ICAC suggestions

A cooling off period for former public officials, during which time they could not approach their former employer on matters in which they were personally and substantially involved, has been used successfully in other countries. It would lessen the likelihood that public administration would be compromised by influence. As the purpose of cooling off periods is to remove any personal advantage the former public official has gained over others, rather than to restrain trade, they would need to be limited in time.

While it might be sufficient to limit contact by former senior public servants to their former Department or agency, for higher profile public officials such as Members of Parliament and Ministers, whose knowledge of government programs and influence is likely to be greater, broader restrictions may be appropriate.

The ICAC also reiterates the recommendation contained in *its Report on North Coast Land Dealings*, that because lobbying is prone to corruption there should be a public register of lobbyists.

Attempted influence can also place public officials under pressure to act partially. Employers are responsible for minimising the possibility of this, by asking employees to report any contact, then acting on that report.

2.3.2 Questions

1. Should public sector organisations be able to limit contact by former public officials seeking to lobby public officials or otherwise influence decisions on issues with which they were previously involved?
2. Should restrictions apply to former Members of Parliament and senior public servants, such as Chief Executive Officers in relation to these activities?
3. Should there be a public register of lobbyists and their clients? If so, who should implement and maintain it?
4. Should serving public officials be required to report all non-routine contact by their former colleagues or staff where attempted influence or lobbying is involved?

2.4 Re-employment or re-engagement of retired or redundant public officials

Public sector voluntary redundancy schemes assist surplus employees who cannot be redeployed in the public sector to retire or compensate them while they find work elsewhere. NSW public officials who participate in these schemes cannot usually return to the public sector during the period covered by the separation payment. If they do, they must refund that portion of the severance payment that applies to the period of re-employment.

The ICAC has received complaints or reports about public sector organisations who have re-employed former public officials, or who have engaged them as consultants or contractors including instances where:

- senior executives received generous redundancy compensation payouts and re-entered the public service in classified positions but kept their full redundancy payments
- public officials left public employment only to be re-engaged as consultants or contractors at higher rates of pay to perform essentially the same work
- public officials who decided to go into business and bid for work from their former employer, "arranged" their own redundancies.

i) Re-employment

The New South Wales Government's *Policy on Managing Displaced Employees* provides that redeployment is the principal means for managing employees whose positions have been deleted. If redeployment is unlikely to occur within a reasonable period of time, voluntary redundancy may be an option.

As well as repayment provisions that discourage former public officials from seeking to be re-employed during the period covered by the redundancy payment, additional measures apply to redundant senior executives who apply for publicly advertised positions. Following public criticism that the NSW Roads and Traffic Authority had re-employed a former senior executive officer who had accepted a voluntary redundancy, redundant senior executives seeking re-employment must now show that their claims for the vacancy are "demonstrably superior" to other applicants in a competitive field.

Despite these measures, the obligation is on public sector organisations to ensure that the administration of voluntary separation policies is not prone to corruption.

ii) Engagement of former public officials as consultants or contractors

The ICAC is aware that some staff who have received payments under voluntary redundancy schemes have subsequently been employed as consultants or contractors, sometimes to do the same or similar work for their former employer.

This can cause problems for public sector organisations, as the following hypothetical case study shows:

Case study No 4

Arthur, a professional engineer in a public sector organisation, obtained a redundancy package and formed a consultancy company. Soon after, Arthur's former colleague Barry accepted a voluntary redundancy package and joined Arthur's company as an employee. Arthur's company then responded to a tender issued by the public sector agency requiring project management of the same major

engineering refurbishment program that Arthur was managing as an employed engineer. Arthur's company was awarded the work but the CEO intervened. The agency's policy at the time prohibited re-engagement of redundant employees, or awarding contracts or consultancies to companies in which former employees were principals, within 12 months. It didn't want to deal with either Arthur or Barry for this reason.

Arthur consulted his lawyers who complained to the agency that its policies were an unfair restraint of trade, as the company was a different entity to Arthur the former public official. Arthur took his concerns to the media who publicised his case.

The agency's own legal adviser confirmed that there was no legal basis on which to refuse to deal with Arthur's company. The public sector organisation was concerned that it was being unfairly exposed to public criticism for trying to maintain public sector integrity.

Current government policy requires repayment of a redundancy payment if a former public official is re-employed in the NSW public sector during the redundancy period, or works as a contractor for the organisation. However as shown in the case study, the policy does not legally apply if the former public official forms a company, is employed by it, and contracts with the former employer, or the public service generally. There are also no restrictions if the former public official is employed by an existing company that tenders for government business.

The common law of employment generally disfavours the use of controls or regulations that interfere with free trade. As the case study shows, in the absence of specific controls applicable to the public sector, organisations that do not want to deal with their former employees for reasons of probity, can be faced with objections that their actions are unfair.

In some Australian states the problem has been recognised and dealt with, although not consistently. Victorian Public Service policy prohibits re-employment of retrenched staff for three years. However, the re-employment restrictions do not apply where the recipient of a Voluntary Departure Package (VDP) establishes a business, applies for government work and declares that he or she is a VDP recipient, and wins the work in a competitive process. Nor do the restrictions apply where the VDP recipient is an employee of a genuine third party organisation that directs the recipient to perform work within, or on behalf of, the relevant body.

Similar provisions apply in Tasmania, where former public officials who have received redundancy packages are restricted from general employment in the Tasmanian State Service, but are permitted to tender through a public process for work for that they were previously employed to do.

In South Australia restrictions have been imposed on former public officials who seek to work as contractors. Recipients of targeted voluntary separation packages must agree not to contract to provide services to the public sector for three years if they would be performing all or a substantial part of the work under that contract. Nor are they able to perform the same, or similar, work functions for a third party that has a current contract with the public sector. Public sector organisations must ensure that they do not employ a person who has received such a payment within the specified non re-employment period.

New South Wales has not dealt specifically with the problem of former public officials who have received separation benefits, then work for their former employers or elsewhere in the public sector, as contractors through a third party company.

2.4.1 ICAC Suggestions

Voluntary redundancy schemes include payments designed to compensate public officials for resigning from the public sector. They require sensitive management to assure the community that public funds are being spent for proper purposes. In the ICAC's view individuals should not be rehired or otherwise engaged to perform the same or similar work as before for their former employer because:

- redundancy signifies that some work will no longer be performed. Rehiring redundant staff soon after separation to do the same or similar work suggests poor public sector workforce planning.
- rehiring redundant staff on the basis of emergencies or an unforeseen need to have the same or similar work performed can still attract public criticism that these needs should have been foreseen and the voluntary redundancy packages not paid.
- re-employment can lead to criticism that public sector redundancy schemes are capable of manipulation for corrupt purposes.
- rehiring the same people again may be contrary to government recruitment practice, which requires due process and merit based selection. Even imposing higher recruitment standards on redundant staff such as requiring demonstrable superiority over other candidates is likely to attract criticism that the redundancy scheme is poorly managed.

Despite the fact that law disfavours restraining trade, in the ICAC's view, public sector employers in New South Wales could require the recipients of redundancy packages to agree not to work for the public sector as contractors, or for third parties for a specified period, as a term of their redundancy packages. Procedures to identify recipients of redundancy packages under such circumstances would be required.

2.4.2 Questions

1. Is the current NSW policy on the re-employment of former public officials who have received voluntary redundancy packages sufficient to maintain public confidence in the schemes and prevent perceptions of double dipping at public expense, or are stronger measures needed?
2. Is it appropriate for former public officials who have received voluntary redundancy packages, and are engaged as contractors or become employees of contractors, to work in the public sector? Are further measures warranted, such as the approach adopted in South Australia?



CHAPTER 3

3.0 Strategies for managing post separation employment issues

A number of strategies can be used in the public sector to prevent or resolve post separation employment problems. These strategies include using codes of conduct, employment contracts or informal sanctions, or developing specific policies or laws.

3.1 Codes of conduct

i) Employees

Every NSW government organisation is expected to have a code of conduct. It establishes the standards of behaviour expected of public officials in an organisation and may be used to help solve workplace ethical dilemmas.

The NSW Public Sector Model Code of Conduct was revised in 1996 but has not yet been released. The existing Model Code sets the minimum standard of behaviour for all public sector staff in NSW. It also provides the framework for organisations to develop their own codes. Provided they address the topics contained in the Model Code, it is up to public sector organisations to decide what else to include.

The ICAC has worked with many state and local government organisations to develop and review their codes of conduct. Most codes of conduct mention post separation employment, usually as follows:

"Former public servants should ensure that they do not accept employment or engage in activities which may cast doubts on their own integrity, that of their former agency or of the public service generally."

Most public sector organisations have not refined this statement to address the issues identified in this paper. Those that have usually include only a prohibition on employees using confidential information in future employment, but do not define what confidential information the organisation deals with.

The 1996 draft Model Code of Conduct includes the following expanded reference to post separation employment:

"Public sector employees should not use their position to obtain opportunities for future employment. They should not allow themselves or their work to be influenced by plans for, or offers of, employment outside the agency. If they do, there is a conflict of interest and the integrity of the employee and their agency is at risk. All staff should be careful in their dealings with former employees of the agency and ensure that they do not give them, or appear to give them, favourable treatment or access to privileged information."

Former employees should not use or take advantage of confidential information obtained in the course of their official duties until it has become publicly available."

The revised Model Code attempts to provide clearer behavioural expectations for both current and former public officials than before, rather than just prohibiting

inappropriate, but unspecified conduct. It is up to organisations to customise the code to their own circumstances.

ii) Members of Parliament and Ministers

In New South Wales there is no legislative restriction on the post-parliamentary private sector employment of former Members of Parliament. Previous attempts to use codes of conduct to make politicians accountable for their post employment activities have been unsuccessful.

The voluntary code of conduct for Ministers introduced by the Greiner Government in 1988 addressed post Ministerial employment. Former Ministers could not take positions with companies which had contractual relationships with the government for two years after leaving office, without the Premier's permission. Part 7 of the Code of Conduct gave the Premier the discretion to waive the two year prohibition, applicable only by reference to certain principles including:

- (i) the nature of the business activities of the relevant organisations and the access of the Minister by virtue of their office to commercially valuable confidential information of value to the organisation
- (ii) the relationship of the organisation to the Government, including frequency of dealings
- (iii) the period during which information would continue to be of value to the Minister and the relevant organisation
- (iv) the nature of the business, profession or occupation of the Minister prior to appointment to office.

The Ministerial code was rigorously enforced by the Greiner Government and resulted in the dismissal of two Ministers for undisclosed conflicts of interest. However, when Premier Greiner retired from politics, he immediately took positions on company boards that dealt with the Government, with his successor's approval.

The current Code of Conduct for Ministers of the Crown does not mention post separation employment, but the ICAC has made submissions on this issue in respect of the revised codes of conduct being prepared by both the NSW Legislative Assembly and the Legislative Council, as these codes deal with the issue of post parliamentary employment. At the time this paper was prepared the codes had not been finalised.

3.1.1 ICAC suggestions

Codes of conduct have an important role to play in setting expected standards of behaviour for individuals in the workplace. However, there are limitations in relying on them to regulate the post separation employment of former public officials where ethical dilemmas such as conflicts of interest are involved.

These can involve complex workplace issues that cannot be satisfactorily resolved by individuals acting alone. Codes of conduct recognise this and require staff to report problems to their supervisors and others for resolution.

A code of conduct is therefore a useful starting point for identifying post separation employment problems that need to be resolved by serving public officials. The Government should release the Model Code of Conduct as soon as possible.

Members of both Houses of Parliament in New South Wales need to resolve the issue of their codes of conduct.

3.2 Developing specific post separation policies

The ICAC encourages chief executive officers and other senior public sector managers to create and promote positive cultural attitudes and values within their organisations. Managing an organisation includes guiding employees on the standards of conduct that are acceptable and sanctioning conduct that fails to meet those standards.

Top management in public sector organisations should lead by example in relation to post separation employment. Many complaints to the ICAC accuse public sector chief executives and senior executives who join the private sector of adopting behaviour contrary to their organisation's own code of conduct. It is more difficult to maintain ethical standards and staff morale if top management disregards those values. The ICAC expects all public sector employees to adhere to their organisation's code of conduct.

Many organisations do not consider they are at risk of post separation employment problems. The ICAC suggests that all public sector organisations should consider the risk as part of their fraud prevention strategy. This would heighten awareness of any risk areas and make it easier to develop policies, procedures and sanctions to address any specific needs that are identified.

The following strategies may assist:

- It may be useful to include specific risk areas in the code of conduct when it is next reviewed.
- Work areas or positions at risk could be targeted for special treatment, e.g. the need to train staff who handle confidential information about their obligations.
- Staff training and development programs can raise post separation employment issues, and help reinforce the required standards of behaviour.

3.2.1 ICAC suggestions

Whatever policy framework is developed, organisations must also establish and maintain efficient mechanisms for providing specific guidance on post separation employment issues. Whether by promoting cultural values that encourage discussion of ethical issues, or through more formal structures, post separation employment issues must be capable of being resolved sensitively and without undue delay. If this does not happen, even the best intentioned policy or strategy may be ineffective as a means of preventing corrupt conduct.

The ICAC suggests that organisations that consider they are not at risk from post separation employment problems should especially consider how they would deal with the type of problems that can arise.

3.3 Employment contracts

Agreements between employers and employees to restrict the conduct of employees after they leave public office are a way of dealing with those post separation employment issues that are identified before a public official leaves. Known as restrictive covenants or cooling off periods, they are more common in the private sector than in public sector employment, where their use would best suit fixed term contract positions, such as chief executive and senior executive officers, and temporary positions such as

ministerial staff. Under such arrangements employees agree, usually for payment, to limit their freedom to act or use information obtained while in public employment for a set period after they leave office. Agreements can also prevent public officials from engaging in employment that may be in conflict with their previous official responsibilities.

Using employment contracts raises the need to balance the integrity of public administration against an individual's freedom of employment. The measures are best dealt with at the outset of employment, although events may arise that require them to be negotiated later in the relationship. The terms must be reasonable for both parties and in the public interest or they may be declared void by the Courts. In New South Wales, the enforceability of such provisions is governed by the *Restraint of Trade Act, 1976*, which gives the courts an overriding discretion to declare provisions void if they are contrary to public policy and the common law.

Elsewhere in Australia, for example in Tasmania, the Tasmanian State Service places restrictive covenants in some termination agreements for its key public officials. The covenants are specific, time limited and recipients receive payment for accepting the restrictions. The covenants are used where the government is concerned about that the possible misuse or disclosure of sensitive information by an employee would not be in the public interest.

In the New Zealand public sector, all chief executive employment contracts contain restrictions on the paid activities staff can engage in after they leave office. A chief executive cannot engage in any employment or activity for up to 12 months, where he or she is likely, or perceived as being likely, to "unfairly or improperly benefit from knowledge that has come into the chief executive's possession in the course of the performance of the duties" unless prior approval is obtained. These measures alleviate concern about public officials deriving benefits from information or contacts gained while in office, and prevent judgments that behaviour has been influenced by future employment prospects. They are also designed to protect the public from concerns that outside organisations may obtain inappropriate advantages or favourable treatment by employing former public officials.

3.3.1 ICAC suggestions

Although they are known in the private sector, restraint of trade clauses are rare in the New South Wales public sector. They can be used where the potential risk to public sector integrity justifies compensating individuals for foregoing future employment opportunities for a specific period. The ICAC suggests that they be limited in use, in important cases, to the most senior categories of public officials.

3.4 Enacting specific legislation

In Australia, there are few laws restricting the conduct of former public officials after they have left public office. The most longstanding exception is the moratorium imposed on elected local government officials in New South Wales under the *Local Government Act, 1919*, and re-enacted in the 1993 Act. There, a person who has held elected office in a council, is ineligible for appointment to a paid office in that council for six months. Because the positions of councillor and employee are both public officials this is not strictly a post separation employment issue, however it is an example of the law recognising that local government has special characteristics, namely the close proximity in which elected officials and employees work to each other - that have resulted in the possibility of improper conduct.

New South Wales has enacted laws to restrict the post separation employment conduct of some former public officials because of the potential for money laundering and other illegal activities in some industries.

In the liquor and gaming industries, laws are in place which aim to increase the integrity of those industries, by limiting conflicts of interest from arising when public officials leave to take up positions in those industries. They apply only to designated key officials in the liquor, gaming and casino industries, so as not to unduly hinder employment mobility.

Key officials are not allowed to seek or hold office as directors of registered clubs, solicit or obtain employment in clubs, hold liquor licences, or solicit employment from a licensee for a period of three years after leaving public office. The key officials referred to in the Liquor Act and Registered Clubs Act include the Director General, Department of Gaming and Racing, the Director of Liquor and Gaming, the Commissioner of Police, members of the Police Senior Executive Service and police officers above the rank of Patrol Commander. Other employees of the Department and the Police Service can be declared to be key officials if necessary.

In the casino industry, the *Casino Control Act, 1992* says that casino operators, close associates of a casino operator, and casino contractors must not employ a key official in any capacity for four years, or have any direct or indirect business or financial association with or interest in any matter with a key official. Nor can a former key official solicit or accept employment from, be an employee of, or have business or financial associations with those persons. Key officials are a member of the Casino Control Authority, the Director, an inspector, or any member of the staff of the Authority, or a consultant to it, who is declared to be a key official for the purposes of the Act. The law provides for some exemptions if it can be proved that the former public official's job was obtained legitimately.

3.4.1 ICAC suggestions

Legislation is a strong deterrent to improper conduct by former public officials because offenders can be prosecuted. The readily identifiable risks in the liquor, gaming and casino industries have made post employment restrictions acceptable to the community however legislation may not be appropriate for all areas of public employment.

Extending such prohibitions to all public officials in the absence of a defined risk may be seen as unfair, discriminatory and out of proportion to any risks of misconduct. Over-restriction may also have other adverse effects, including a shortage of trained technical and expert staff in some industries.

The common law premise that former public officials should only be restricted from working where there are compelling reasons to do so, or by agreement, suggests that general prohibitions would not be acceptable as preventative measures. There are arguments to the contrary that overly restrictive controls can stifle mobility between the public and private sectors, and that having former public officials with relevant skills and experience take up positions in an industry may actually improve the integrity of that industry. From a public interest viewpoint, the issue becomes one of balancing freedom of employment with the risks of corruption in a particular industry if integrity is not maintained.



3.5 Informal sanctions

i) The United Kingdom Experience

Committees regulating post separation employment of public servants and members of the armed forces have existed for many years in the United Kingdom, where they have successfully dealt with post separation employment problems on a preventative basis.

All public servants in the United Kingdom are governed by non-statutory Business Appointment Rules designed to reassure the public that their official conduct has not been influenced by the prospect of future private sector employment. The rules aim to maintain public trust in the services and in the people who work in them and are described as "flexible, well understood, and seldom disobeyed" by public servants.

All public servants at permanent secretary and deputy secretary level must have their job plans approved by an external Advisory Committee for two years after the date of their departure from the public service, unless the job is unpaid, in a non-commercial organisation, or is a public appointment. All business appointments sought during the two year period are affected by the rules, not just the first. An automatic waiting period of three months applies before the former public official can take up the appointment, except for fixed term appointees whose terms have expired.

The Advisory Committee may recommend a waiting period of up to two years from the date of leaving government service and may impose behavioural conditions governing the work that the ex-public servant may do for the new employer. The conditions may, for example, prevent ex-public servants from contacting their former departments, or working on tenders for government projects, and may last for up to two years from the date of leaving government service.

The Advisory Committee takes the following considerations into account when recommending waiting periods:

- i) if a proposed move creates "any suspicion, no matter how unjustified, that the advice and decisions of a serving officer might be influenced by the hope or expectation of future employment with a particular firm or organisation"; and
- ii) "The risk that a particular firm might gain an improper advantage over its competitors by employing someone, who, in the course of their official duties, has had access to technical or other information which those competitors might legitimately regard as their own trade secrets or to information relating to proposed developments in government policy which may affect that firm or its competitors."

Applications by lower level public servants are dealt with by the relevant Minister of the Crown or department. Sensitive applications are referred to the Cabinet Office.

Approximately 1000 applications per year are dealt with under the Business Appointment Rules. Around 70 per cent of applications attract no waiting periods or restrictions. Periodic reviews have indicated the Rules reportedly "achieve the appropriate balance between reassuring the public and permitting public servants to move freely into the private sector where there is no perception of impropriety". The Nolan Committee has recommended that the Rules be extended to cover Members of Parliament.

ii) The Australian Public Service experience

The Commonwealth *Public Service Act, 1922*, does not restrict the type of employment that may be undertaken by a former public servant. The Commonwealth's position is

that, as a general principle, mobility between the public and private sectors is not to be unduly restricted. Despite this, the Australian Public Service has had guidelines on the acceptance of business appointments in place for many years. All public servants are expected to follow the guidelines if they intend to take up a business appointment that could give rise to a conflict of interest after resigning or retiring from the Commonwealth.

The guidelines' primary focus is on Departmental Secretaries and other members of the Senior Executive Service. Similar requirements are imposed on all Commonwealth public office holders, but not members of parliament.

The guidelines aim to protect the integrity of the public service, and the reputations of the "losing" department, the public servant and the new employer, by identifying and removing conflicts of interest in the period before an individual leaves Commonwealth employment.

Public servants who are offered a business appointment or employment must notify their department, outline the relationship between their official duties and the proposed appointment, and describe any perceived potential conflict of interest.

Departments then assess the proposed appointment according to the importance and sensitivity of the public servant's position, the relationship of the proposed employer and the Commonwealth, and the period during which the information gained or contacts made would continue to be of value to the public servant and his or her new employer.

Departments are required to take measures to avoid any immediate conflict of interest, such as reallocating the public servant's duties to others, arranging a temporary transfer, or requiring the employee to take leave. Any perceived difficulties in the relationship of the new employer with the Australian Public Service must be resolved. For instance, the guidelines say it may be appropriate to "negotiate an agreement under which the former public servant is, for a specified period, not to be involved in dealings with their former department."

A weakness in the United Kingdom's Business Appointment Rules has been a failure to monitor conformity of decisions across the public sector. Similarly, in the Australian Public Service no centralised information is maintained, and it is left to individual departments to operate the Business Appointment Guidelines within the Public Service Commission's framework.

iii) The situation in New South Wales

The idea of independent scrutiny of post parliamentary employment is not new to New South Wales. As part of the terms of reference of its investigation into the circumstances surrounding the resignation of Dr Terry Metherell from the Parliament of NSW and his appointment to a Senior Executive position in the NSW public service, the ICAC was asked to consider whether it was desirable to proscribe or regulate the appointment of former members of parliament to positions in the public sector. In its submission, the Premier's Department proposed an external committee of review made up of eminent people to scrutinise any selection process that led to the recommendation of any former politician for appointment to any publicly funded position in the State public sector. In its 1993 report, *Integrity In Public Sector Recruitment*, the ICAC recommended that a committee be formed and that selections be vetted where an applicant had been a Member of Parliament in the preceding two years. This recommendation has not yet been implemented.

3.5.1 ICAC suggestions

Vetting systems, such as the United Kingdom's Business Appointment Rules or the Australian Public Service Guidelines, operate as sanctions against post separation employment problems. They can also serve to alert serving public officials to the standards of ethical conduct expected of them before and after they leave office.

While these systems are prone to criticism on the basis that they may discourage suitable people from working in the public sector, neither of the systems described in this paper prohibit post separation employment. They focus only on narrow risk categories that are of concern to the public sector, such as conflicts of interest, and are viewed as important to preserve public sector integrity. The NSW Government has previously proposed such systems to the ICAC as a step in improving public sector integrity and we consider that as such they have merit.

3.5.2 Further Questions

1. Would the informal sanctions that operate in the United Kingdom be a suitable post separation employment measure for New South Wales public officials?
2. Is the approach adopted by the Australian Public Sector and Merit Protection Commission suitable for use in New South Wales?
3. Are cooling-off periods for some positions or public offices a reasonable balance between the need to protect public sector integrity and preserve freedom of employment?
4. Any other ideas or suggestions?



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