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# STRATEGIES FOR MANAGING POST SEPARATION EMPLOYMENT ISSUES:

## A Corruption Prevention Project

September 1998

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# CHAPTER 1

## Introduction

In April 1997, the Independent Commission Against Corruption (ICAC) released its Managing Post Separation Employment Discussion Paper. The main question discussed was the extent to which 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 public administration.

This publication will be of interest to all employers of public officials, whether at the state or local government level. The Independent Commission Against Corruption Act 1988 (the 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 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 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.

## Background

There has been a long period of change in the public sector by a succession of New South Wales (NSW) governments, particularly changes to the nature of public sector employment. This has led to changes that include:

- efficiency reforms, that led to downsizing and outsourcing public sector functions to the private sector
- convergence of management practices and the essential qualifications required for work in the public, local or private sectors
- fixed term contract employment for senior public officials
- a tendency for some public officials not to regard public sector employment as a long term career and to consider moving between the public and private sectors in their career planning.

Almost since its inception, the ICAC has received complaints about the conduct of individual public officials who resigned to take up related employment in the private sector, some of which resulted in investigations. These complaints warranted a more focussed approach to corruption prevention on the topic of post separation employment.

## What is post separation employment?

Post separation employment is where a public official leaves the public sector and obtains employment in the private sector. The type of employment which may be cause for concern is that which bears a close or sensitive relationship with the person's former position as a public official. A public servant who accepts a voluntary redundancy package for example, and purchases a small business, is unlikely to give rise to post separation employment concerns. A chief executive officer who resigns from the public service to work in the private sector in the area of his or her former expertise might.

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Problems may also arise if a former government minister obtains work as a political lobbyist, particularly if that work involves contact with his or her former department, colleagues, or staff.

Treatment of post separation employment issues does not require as a prerequisite, a strictly defined relationship of employer and employee. A former public official may work as a self-employed contractor or consultant, for example. While there are many types of post separation employment issues they usually involve:

- the person's former position as a public official
- their current occupation or business activity
- an intended or desired relationship with the former public sector organisation which employed him or her
- an actual or potential conflict of interest between the former public official's public duty and private interests, and
- the prospect that an adverse perception about public administration may arise.

## Why is the icac interested in post separation employment?

Section 12 of the Act requires that in exercising its functions, the ICAC regards the protection of the public interest and the prevention of breaches of public trust as its paramount concerns. Public officials are expected to perform their work with integrity, that is, impartially, honestly and fairly. If a public official misuses his or her official position to obtain a personal career advantage, whether intentionally or innocently, the community is entitled to ask whether standards of public administration have been maintained.

Relatively few public sector organisations responded to the discussion paper. This suggests that the majority of public sector organisations do not consider the risks associated with post separation employment to be very high. This may be because, as in some cases, they are aware of the risks to their specific organisations and have taken steps to shore up their administrative and operational practices. In other cases, organisations appear not to perceive their administrations to be in a category that would face post separation employment issues.

In the ICAC's view, however, post separation employment is an issue that has implications for all public sector organisations. As such, public sector organisations should not wait for risks to become apparent before acting. Organisations are encouraged to review their systems, processes, policies and practices to determine whether post separation employment strategies should be adopted to shore up standards of public administration at both the local and sector levels. This document is designed to help organisations in this task.

## Whose problem is post separation employment?

In theory, post separation employment is a shared problem, for both the public sector and public officials to resolve while the person concerned is a public official. For the most part however, former public officials have no restrictions imposed on the type of employment they can obtain after they leave the public sector, and many post separation employment problems only emerge after the public official has left office. Thus public sector organisations are more likely to be accountable than former public officials are, if problems arise. It follows that they need to be prepared to deal with such issues.

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## About this document

This report contains an evaluation of the submissions received following publication of the Managing Post Separation Employment Discussion Paper. It also contains the ICAC's position on the issues identified, as well as strategies to assist public sector organisations to manage post separation employment issues. It avoids duplicating the contents of the ICAC discussion paper, which contains a more detailed discussion of the issues.

The ICAC does not participate in the operational decisions of the NSW Government or its agencies. Thus the suggestions and strategies outlined in this publication do not constitute legal advice or the ICAC's approval of any process or decision that public sector organisations take when developing strategies to manage post separation employment problems. Organisations are encouraged to seek legal advice if they are uncertain whether any proposed actions are appropriate.

Copies of both the discussion paper and this document are available free of charge from the ICAC's Education Section. Alternatively, they can be accessed at the ICAC website [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au). The ICAC can further assist public sector organisations to assess their potential post separation employment risk areas, and to identify appropriate safeguards. Organisations wanting advice should contact the Corruption Prevention Duty Officer on ph: (02) 9318 5999.



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## CHAPTER 2

### The Submissions

#### Introduction

The ICAC published the Managing Post Separation Employment Discussion Paper to assist public sector organisations in dealing with the risks posed by post separation employment of former public officials. Because it has no role as a legislator or a government policy maker, the ICAC relies instead on influencing public sector organisations and individuals to adopt better management practices that will help prevent corruption.

The discussion paper examined the issue of post separation employment in the public sector and identified some possible corruption prevention strategies. The individual issues are not new, but public sector organisations have only begun to categorise them as post separation employment, in recent years.

#### What did the ICAC Discussion Paper deal with?

The discussion paper concentrated on the four main post separation employment issues that public sector organisations most often seek the ICAC's advice on. They are:

- public officials who modify their conduct to improve their post separation employment prospects
- former public officials who improperly use confidential government information
- former public officials who seek to influence public officials
- re-employment or re-engagement in the public sector of retired or redundant public officials.

In this instance, and in recognition that some of the suggestions in the discussion paper were likely to be controversial, the ICAC sought the opinions of public sector chief executives and other principal officers responsible for promoting corruption prevention in their organisations and reporting corruption to the ICAC. We undertook not to make any representations to the Government until we had obtained their opinions about the need for further measures.

In keeping with its undertaking, the ICAC has reviewed its position on the four main post separation employment issues, and its suggested strategies, in light of respondents' views, comments and suggestions.

#### Analysis of the submissions

Respondents expressed strong general support for the discussion paper and said its publication was timely. The submissions were varied in line with respondents' particular interests and concerns, and because a breadth of views was expressed in response to the ICAC's tentative suggestions. Several submissions said the discussion paper was a useful tool to assist public sector organisations to reconsider existing probity measures, or develop additional safeguards to take into account specific risks. Many contributors were interested to hear about problems other public sector organisations were facing and how they were addressing them. Respondents also emphasised the importance of the employer of a former public official taking responsibility for addressing the risks, especially where formal sanctions are contemplated.

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The strongest theme to emerge from submissions was the need for balance. Respondents expressed strong and consistent views on the need to ensure restrictions on post separation employment should be in proportion to the risks posed.

Respondents suggested no new or additional broad approaches to the problems the ICAC identified. This suggests that the main strategies for managing post separation problems are still those mentioned in the discussion paper. These strategies are:

- using codes of conduct
- developing specific post separation policies
- using employment contracts
- enacting legislation
- using informal sanctions.

For the most part, public sector organisations want to be able to manage any post separation employment issues that arise on an individual basis. There was virtually no support for the ICAC's suggestion that the issue could be addressed by whole of sector prohibitions, such as an extension to the provisions contained in the NSW Registered Clubs Act 1976, Liquor Act 1982 and the Casino Control Act 1992 (referred to collectively as the 'key officials legislation'), which restricts the future employment options of former regulators in the liquor and gaming industries.

The reason given by the majority of respondents for rejecting whole of service or sector restrictions was they thought the level of risk to public sector integrity did not warrant the degree of hardship and inefficiency that broadly targeted public sector restrictions may impose. The ICAC will not be recommending legislation to the Government.

Each post separation employment issue will involve unique circumstances. Public sector organisations will therefore need to choose the strategy or combinations of strategies that offer suitable solutions.

Additional concerns expressed by some respondents included perceived difficulties in implementing, monitoring and enforcing some of the initiatives canvassed in the discussion paper. A few respondents were concerned that some of the proposed prohibitions constituted unlawful restraints on the common law right to freedom of employment.

Organisations representing highly specialised areas within the public sector strongly opposed extending prohibitions to their industries. For instance, health administration is characterised by a narrow pool of labour and relies on mobility between the public and private sectors to maintain industry effectiveness.



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## Part 1 Responses to individual issues

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### Issue 1 Public officials who modify their official conduct to improve their post separation employment prospects

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This issue is about public officials not acting honestly, fairly and impartially, or allowing their official decisions to be influenced by their plans for, or offers of, outside employment. Public officials who aim to unfairly improve their post separation employment may adversely affect public confidence in government administration. Conduct can involve:

- favouring private interests over public duty
  - individual public officials ‘going soft’ on their official responsibilities to further personal career interests
  - an individual acting partially by over-identifying with prospective employers’ interests (‘regulatory capture’)
  - bribery, where a public official solicits gain in return for partial performance of duties.
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The ICAC previously suggested:

- public officials should be required to advise employers of any job offer they decide to accept where it bears a close or sensitive relationship to their current position
  - organisations should assess which positions are likely to be affected by conflicts of interest
  - employees should be obliged to make a rigorous assessment of their employment options and declare any conflicts of interest in good faith.
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### Summary of responses

Many respondents said they had experienced problems with this issue. Responses ranged from general support for the suggestions made by the ICAC, to concerns that the suggestions were heavy-handed or impractical. For example, some submissions questioned the enforceability of measures such as a requirement for a public official to give notification of an intention to resign.

Organisations with stronger interaction and exchange with the private sector were more opposed to proposals such as imposing cooling off periods on former public officials moving to the private sector. Current regulations were considered adequate where legal sanctions are operating, such as the key officials legislation governing the liquor and gaming industries.

In other cases, the impact of restricting labour mobility was considered detrimental to the sector (as in health administration). Other reasons given were that current remedies for dealing with misconduct should be adequate to address such behaviour.

The impact of post separation employment restrictions on labour mobility was a common concern, despite formal protection being able to be legitimately afforded to trade secrets, know-how obtained on the job, and contact with clients, or those with whom the employer has regular dealings.

Respondents rejected imposing restrictions on public officials who are retrenched or who have their contracts terminated, although some recognised there could be individual

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exceptions to this objection. Good supervisory practices were seen as essential for managing much of the conduct described in the discussion paper. Some respondents said their existing practices were adequate to deal with the issue. Some respondents supported the need to improve them.

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## Issue 2 Former public officials who improperly use confidential government information

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This issue is about former public officials using confidential information acquired during the course of official functions for personal benefit, or to benefit another person or organisation. It does not involve the information that becomes part of an individual's personal skills and knowledge that can be legitimately used to gain other employment.

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The ICAC previously suggested:

- public sector organisations need to categorise their information to assess the risk of misuse
  - consideration be given to banning former public officials from taking up employment if access to confidential 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 involve their former positions.
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## Summary of responses

Many respondents expressed support for the issues raised and the options canvassed on this topic. Respondents advocated a need, however, to distinguish between individuals' generic skills and knowledge and specific or restricted knowledge, and to proscribe only the use of the latter.

Organisations that interacted heavily with the private sector were concerned that imposing blanket restrictions on the use of information might impede the exchange of non-sensitive information. Existing legislation, such as the Crimes Act, was regarded by one respondent as sufficient for addressing misuse of information.

Some respondents reported they had initiatives in place to safeguard their confidential information that were operating well. They included:

- incorporating 'handling of confidential information' modules in induction training programs
- setting out clear behavioural standards in codes of conduct
- requiring employees to sign confidentiality agreements as a condition of employment, in some cases imposing a moratorium on the use of information acquired during their employment.

In its submission, the Department of Gaming and Racing (responsible for the key officials legislation operating in the NSW liquor and gambling industries), reported that while it does not explicitly prohibit the use of confidential information, the legislation made its employees aware of the possible implication of dealing with sensitive and confidential material and the need for secrecy.

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## Issue 3 Former public officials who seek to influence public officials

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This issue is about former public officials pressuring ex-colleagues or subordinates to act partially by seeking to influence their work or securing favour. This can happen in many

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ways, such as through informal contact, 'jumping the counter' to obtain government information, or lobbying.

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The ICAC previously suggested:

- a cooling off period for former public officials during which time they cannot lobby their former organisation on matters in which they were personally and substantially involved
  - there should be a public register of lobbyists.
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## Summary of responses

Most respondents agreed that former public officials seeking to influence the work of ex-colleagues or subordinates was a serious issue. Some respondents agreed with the suggestion that contact by former public officials seeking to lobby public officials, or otherwise influence decisions on issues with which they were previously involved, should be limited. Some respondents thought that a direct pecuniary benefit must be established for prohibitions to apply. Others said that limiting contact was reasonable for a prescribed period of time.

There was strong support for a public register of lobbyists and their clients. Little comment was offered, however, on whether or not the register should be legislated or self-regulating. One respondent proposed the NSW Ombudsman as the most appropriate body to establish and maintain the register. Additional considerations canvassed included having appropriate categories within the register, taking into account privacy provisions, and applying criminal sanctions where the requirements of the register are breached. One respondent suggested that although a public register was desirable, it should be considered part of a public official's responsibilities to be aware of sectional interests that may place pressure on them.

The ICAC stands by its recommendation contained in its 1990 report Investigation into North Coast Land Development, that as lobbying is prone to corruption, there should be a public register of lobbyists.

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## Issue 4 Re-employment or re-engagement of retired or redundant public officials

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This issue is about public sector organisations rehiring or re-engaging the public officials who are made redundant to do the same or similar work as before, for the same employer or elsewhere in the public sector. This may involve:

- senior public servants receiving generous redundancy compensation payouts and re-entering the public service in non-executive positions while keeping their full redundancy payments
  - public officials leaving 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 decide to go into business and to bid for work from their former employer after arranging their own redundancies.
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The ICAC previously suggested:

- individuals should not be rehired or otherwise engaged to perform the same or similar work as before for their former employers.
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## Summary of responses

Some respondents stated strongly that public officials in receipt of redundancy benefits should not be re-employed, despite existing provisions in NSW for re-employment on condition of pro-rata repayment of redundancy benefits. It was unclear from submissions whether this indicated lack of knowledge of the provision set out in the NSW Premier's Memorandum Managing Displaced Employees (No.96 5), or whether respondents felt that the repayment provision did not do enough to discourage former public officials from seeking re-employment in the public sector during the period covered by the redundancy payment.

Many respondents, however, advocated re-employment in certain circumstances. The possibility of restrictive arrangements interfering with labour mobility, restraint of trade law and the NSW Government's Service Competition Policy, caused some concern among respondents. The latter prescribes, in relation to tendering, that preference be given to private sector proposals that provide employment opportunities for existing staff of the contracting organisation. The issue of effectively policing prohibitions was also raised.

Organisations reliant on employees with specialist skills argued strongly that the re-engagement of a redundant public official might be warranted where the outsourcing of the position is considered more efficient and economic. It was strongly suggested that any prohibitions should distinguish between particular knowledge and general skills, in order to protect productive labour mobility between sectors.

It was argued that the prospect of restricted employment opportunities following public sector employment would act, and in some cases does act, as a disincentive to some individuals with specialist skills, who might otherwise seek public sector employment. Some respondents indicated that adequate compensation to individuals for restrictions on post-public sector employment would mitigate the disincentive.

Another theme to emerge strongly was that it is unreasonable to place restrictions on a labour force subject to downsizing, corporatisation, contracting out and privatisation. It was also argued that where poor labour force planning results in too many redundancies, it is unreasonable to compound the planning error by not re-employing, where the merit principle was satisfied. It was said that the Government, in these circumstances, should be held accountable for poor workforce planning decisions.

Some interest was expressed in the various re-employment provisions of other States, although none were advocated as options that should be considered as alternatives to the NSW provisions. Some respondents described the voluntary redundancy programs they had developed and implemented in their own organisations, which included provisions and guidelines for the re-employment of former employees. Some of the circumstances described in which re-employment was considered reasonable included, for example, where the former employee:

- obtains work as a result of a competitive quotation or tendering process
- gains employment with a company that has an existing contract with the organisation
- gains employment with a company that supplies services to the organisation on an irregular basis.

Other respondents felt that imposing more restrictive arrangements on re-employment of former public officials would be out of proportion to the risks posed by this problem.

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## Part 2 What did the submissions say about the ICAC strategies?

The ICAC suggested a range of strategies for managing post separation problems, particularly the use of codes of conduct; developing specific post separation policies; using employment contracts; enacting specific legislation and applying informal sanctions. Readers were asked to comment on each of the proposals, with the following results.

### Strategy 1 Using codes of conduct

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The ICAC previously suggested:

- codes of conduct have an important role to play in setting expected standards of behaviour but may be of limited use in solving ethical problems in the workplace
  - the government release its model code of conduct
  - members of both houses of parliament resolve the issue of their codes of conduct.
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The ICAC acknowledges that the effectiveness of a code of conduct is limited to the period of employment and position to which it applies. That is, a code cannot address the conduct of an individual once they have left the organisation in which the code applies. The role of a code of conduct in managing post separation employment issues, therefore, is to provide guidance and direction on the standards of behaviour expected of individuals by an organisation, whilst they are employed by that organisation.

### Summary of responses

Respondents showed strong support for codes of conduct as important management tools that can positively shape the culture of an organisation. Many said that in response to the discussion paper they have undertaken to revise their code of conduct to take into account post separation employment. Support was also expressed for the adoption of the post separation employment provision in the Government's Model Code of Conduct for NSW Public Agencies, which was released after the discussion paper was published.

Some respondents said it was necessary for codes of conduct to be embedded in organisational culture through their widespread exposure to employees, by securing adherence through contracts and strategically linking the code to organisational policies and procedures. In one case it was suggested that it might be reasonable to enforce legal sanctions for breaching a well-advertised code.

Respondents rejected the idea of codes of conduct applying only to specific position holders, arguing it would be detrimental to securing universal commitment to a prescribed or desired set of standards.

### Strategy 2 Developing specific post separation policies

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The ICAC previously suggested:

- organisations must establish and maintain efficient mechanisms for providing guidance on post separation employment issues
  - organisations that consider they are not at risk from the problem should especially consider how they would deal with such problems.
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## Summary of responses

While respondents supported the idea of specific post separation policies, many respondents expressed reservations about imposing further restrictions on the labour mobility of former public officials. Respondents endorsed the view that systems, controls and regulations are more reliable if attention is paid to the ethical health of organisations, through, for example, the dissemination of corporate standards, provision of additional guidelines where conduct is prescribed, and a commitment to regular review of implemented corruption prevention strategies.

Some respondents argued that sanctions are only reasonable where policies are widely disseminated and overtly embedded in organisational culture. Respondents outlined to the ICAC a range of post separation policies they have implemented, including:

- all new employees being required to sign a confidentiality agreement preventing the use of commercially sensitive information to facilitate future employment opportunities (EnergyAustralia)
- all new employees being exposed to an organisation's position regarding post separation employment during their induction (Department of Gaming and Racing), and
- using a closed computer system for the storage of client information (Department of Community Services).

Other respondents indicated that the discussion paper had prompted them to consider additional measures to strengthen the cultural values of their organisation.

Some respondents felt strongly that specific post separation policies should not be necessary where good supervisory and management practices were followed, and said their existing practices would be adequate for managing much of the conduct described in the discussion paper. Others indicated that good supervisory practices are essential, but not sufficient for managing the risks of public officials modifying their conduct to improve their post separation employment prospects.

Respondents using specialist skills argued strongly that policies in favour of re-employment of former public officials are warranted where redundancy occurs, not when a position is no longer needed, but because the outsourcing of the position is considered more efficient and economic.

Another view was that re-employment provisions were considered reasonable in the context of a labour force subject to downsizing, corporatisation, contracting out and privatisation.

## Strategy 3 Using employment contracts

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The ICAC previously suggested:

- restraint of trade clauses, though rare, can be used where the potential risk to public sector integrity justifies compensating individuals for foregoing specific employment opportunities for a specified period
  - they be limited in use to the most senior categories of public official.
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## Summary of responses

According to respondents, the insertion of provisions such as restrictive covenants in employment contracts is the most controversial of the strategies addressing post

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separation problems. The enforceability of such provisions was particularly questioned in relation to current public policy and statute or common law.

Restraint of trade clauses have not been widely used in employment contracts in the NSW public sector. Until the advent of fixed term contracts, public sector employment was, for most employees, ongoing.

Respondents with high levels of contact with the private sector resisted strategies such as the use of covenants in employment contracts. Respondents thought that the extent of current regulation was adequate, especially where legal sanctions operate such as the key officials legislation. As the ICAC expected, it appears that such provisions are only supported in response to some perceived specific problem. In other cases, the dynamism and efficacy of the sector (as in the area of health administration) was deemed at risk by restricting labour mobility through restrictive covenants.

There was some support for restrictive covenants applying for a prescribed period to senior public officials. Where restrictive covenants are currently operating in respondents' employment contracts, they appear to be of a short-term nature. EnergyAustralia employees, for example, are prohibited from using acquired confidential information by means of a signed confidentiality agreement, that forms a condition of employment.

The proposal to extend restrictive covenants to award based employees was opposed on the grounds that such employees are less likely to be remunerated for such restrictions than senior executives. They were thought vulnerable to being marginalised in the labour market if restricted from using their specific professional or technical skills in the private sector.

Some concerns were expressed about managing improper use of confidential government information, though respondents recognised a need to effectively distinguish between generic skills and knowledge, such as tools of trade, and specific or restricted knowledge. Respondents were also concerned that blanket restrictions in employment contracts might impede the exchange of non-sensitive information.

## Strategy 4 Enacting legislation

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The ICAC previously suggested:

- legislation is a strong deterrent to improper conduct by former public officials because offenders can be prosecuted, but may not be appropriate for all areas of public employment
  - the common law premise that individuals can only be restricted from working where there are compelling reasons to do so, or by agreement, suggests general prohibitions would not have community support.
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## Summary of responses

There was little support for extending current legislation restricting post separation employment in the liquor and gaming industries to other areas of the public sector. Some respondents rejected the idea outright, citing the inappropriateness of applying whole of service restrictions to a highly differentiated sector. Others rejected whole of service restrictions as being out of proportion to the scale of the risk posed to the public sector from questionable conduct. Some respondents expressed the view, however, that in the event of formal sanctions being extended to other areas of the public sector, relevant exemptions should be clearly prescribed.

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It was also argued that additional sanctions against partial performance by public officials was not necessary, as remedies for dealing with misconduct (such as disciplinary and counselling processes) are adequate and should be used more in addressing such conduct.

Many respondents shared the view that the improper use of confidential government information is a serious matter but did not consider the extent of the problem warranted imposing formal sanctions. Existing legislation, such as the Crimes Act was regarded by one respondent as sufficient for addressing issues such as misuse of information.

## Strategy 5 Using informal sanctions

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The ICAC previously suggested:

- vetting systems can operate as sanctions against post separation employment problems
  - while vetting systems are subject to criticism that they may discourage good performers from working in the public sector they do not prohibit this. They focus on narrow risk categories of concern to the public sector
  - the NSW government has previously proposed the use of vetting systems to the ICAC, which considers they have merit.
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## Summary of responses

There was very little response to the discussion on informal sanctions such as those that apply in the Australian Public Service or in the United Kingdom. These systems require former public officials to subject their employment plans to a vetting procedure that may prohibit some forms of employment or impose sanctions.

There was some thought that the NSW public sector would benefit from clearer guidelines setting out standards of behaviour for existing and prospective public officials. Again, whole of service restrictions were rejected. The strongest response in relation to this issue centered on the need to balance any additional rules or vetting mechanisms, with the right of individuals who are subject to such rules or vetting to appeal unreasonable restraints. Very little interest was expressed in adapting the United Kingdom's Business Appointment Rules or the Australian Public Service Guidelines on the Acceptance of Business Appointments to the NSW public sector, despite the broad provisions for exceptions to these rules and guidelines.



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## CHAPTER 3

### Strategies for dealing with post separation employment

The ICAC's revised position is set out in this chapter. In some instances the ICAC's position is unchanged from the discussion paper. This reflects some strong areas of agreement between the views of most respondents and the ICAC.

The tenor of the submissions received suggests that public sector organisations want to be able to decide how to promote the integrity of public administration in NSW themselves, rather than have prescriptive solutions imposed through legislation or other forms of sanctions. There are cogent reasons why an approach involving self assessment and self regulation is appropriate, including the prospect that public sector organisations are the primary stakeholders in implementing solutions that may be used to deal with problems in the future.

It follows, however, that public sector organisations should take the time to:

- review the risks that post separation employment problems may entail, and
- identify the most appropriate strategies for their needs and take measure to implement them.

This chapter includes a series of self-assessment checklists intended to offer practical guidance and assistance to public sector organisations dealing with these problems. Strategies can be mixed and matched to particular problem areas. For instance, codes of conduct can provide guidance on what is acceptable conduct or signpost the way to resolve conflicts of interest that may arise. However, they may not be useful in isolation. Having organisation-specific post separation policies, such as clear instructions covering specific post employment situations can assist in promoting accountability in conduct and decision-making. They can be linked to codes of conduct, which can act as signposts for employees to follow.

### Public officials who modify their official conduct to improve their post separation employment prospects

The ICAC's position is that the community has a right to expect public officials and elected officials to perform their duties in a fair and unbiased way. Career self-interest or opportunities for personal gain should never affect official decisions. Such conduct can also be insidious, as its occurrence and effects may remain hidden.

The following checklist may help prevent or discourage public officials from improperly modifying their conduct to improve their post separation employment prospects.

#### Using codes of conduct

- Has your organisation explicitly prohibited, in its code of conduct, behaviour which improperly improves post separation employment prospects? Are employees made aware of this requirement?
- Is your code realistic in its scope? That is, does it limit its scope to setting standards for the conduct of individuals whilst they are employed by your organisation?

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- ❑ Does your code of conduct require public officials to advise your organisation when they are contemplating leaving the public sector for employment that bears a close or sensitive relationship to their work as a public official?
  - ❑ Does your code of conduct direct staff to other guidelines which complement the provisions of a code of conduct and/or relevant legislation?

### Developing specific policies

- ❑ Has your organisation developed guidelines for public officials contemplating post separation employment, as an adjunct to the code of conduct?
- ❑ Has your organisation developed criteria for assessing and identifying 'at risk' positions? For instance, has it identified positions that involve client contact, or that deal with sensitive information which may be useful to a prospective employer?
- ❑ Are measures in place to move from sensitive areas, employees who have resigned, for the period between resignation and separation? Are they adequate measures?
- ❑ Is your organisation willing to negotiate with a prospective employer to resolve problems where the employee has advised of a potential or actual conflict of interest?
- ❑ Is your organisation confident that its audit trails for decision making could detect partial conduct?

### Using employment contracts

- ❑ Has your organisation identified positions that are likely to be at risk, such as key executives, technical specialists, procurement staff, those positions with access to confidential information or strategic plans, or those in business relationships with potential employers?
- ❑ Has your organisation considered whether it is feasible to use restraint of trade provisions in employment contracts? Would it be possible to use fixed term contracts for some sensitive positions to enable this to occur?
- ❑ Do your organisation's guidelines require employees to declare any actual or potential conflicts of interest that arise?
- ❑ Is it feasible for your organisation to impose cooling off periods in positions where it is likely that public officials may take up employment in businesses or organisations that have a close or special relationship to their former roles as public officials? If so, does the policy provide for exceptions to cooling off periods?

### Enacting legislation

- ❑ Do the post separation employment issues that arise in your organisation warrant imposing legal sanctions, such as the key officials measures, operating in the liquor gaming and casino industries?
- ❑ Can your organisation deal with post separation employment problems through existing legal remedies, such as letters warning former employees and new employers about undue influence, invoking provisions of the Crimes Act, or using civil litigation?



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## Former public officials who improperly use confidential government information

Public sector organisations are responsible for categorising and safeguarding information gathered from the public for official purposes. Public officials should only deal with government information for such purposes. Some information is not intrinsically confidential, but warrants confidentiality because it is commercially valuable and/or can be used for improper purposes. For instance, buying and selling information gathered about members of the public can have important consequences for the public's privacy and safety. As such, dealing in public records can constitute corrupt conduct.

Public officials, whether elected officials, public servants, contractors or consultants, also generate and/or obtain information that may require protection. Those involved must be made aware of their responsibilities to maintain confidentiality. The following strategies may assist public sector organisations to promote sound practices in relation to the use of government information.

### Using codes of conduct

- Does your organisation's code of conduct prohibit public officials from dealing with confidential information for personal gain or to advantage or disadvantage individuals or groups within the community?
- Does your organisation's code of conduct require public officials with access to sensitive information to declare personal and pecuniary interests that are likely to conflict with their official duties. Is there a system in place for formally registering and managing such conflicts of interest?
- Does your organisation's code of conduct direct staff to guidelines developed to complement the provisions of a code of conduct and/or relevant legislation?

### Developing specific policies

- Does your organisation categorise information according to its sensitivity, and delineate publicly available information from confidential information? Is this categorisation communicated within your organisation so that all employees are aware of your policy?
- Does your organisation periodically assess the status of information? It may be that over time some information no longer needs to be safeguarded as confidential. Making such information publicly available will limit the prospects of misuse.
- Does your organisation periodically review procedures involving sensitive areas of government business to ensure probity measures are sufficient and responsive?
- Does your organisation train employees in the use of confidential information?
- Does your organisation have a policy on managing relationships with former public officials who approach government in their new positions on matters that they were formerly involved with? For example, is reference made to section 309 of the Crimes Act in relation to the unauthorised use of confidential information?



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### Using employment contracts

- Has your organisation considered asking current or prospective public officials who deal with sensitive information to sign agreements that prohibit the use of sensitive government information as a condition of employment?
- Does your organisation ensure commercial arrangements with contractors, consultants or advisers prohibit the unauthorised use of official information obtained in the course of the engagement?

### Former public officials who seek to influence public officials

In the absence of laws in NSW to deal with influence from former public officials, public sector organisations need to take responsibility for minimising the possibility that former public officials will attempt to influence government decision making. The ICAC maintains that there should be a register of political lobbyists in NSW, as recommended in its 1990 report Investigation into North Coast Land Development.

Organisations concerned about exposure to this issue may consider a range of strategies.

### Using codes of conduct

- Does your organisation's code of conduct require serving public officials to ensure their official dealings with former colleagues or staff are conducted at arm's length?
- Does your organisation's code of conduct require serving public officials to report all non-routine contact by their former colleagues or staff where attempted influence or lobbying is involved?
- Does your organisation provide guidelines as well as training to assist public officials in clarifying their responsibilities when dealing with former supervisors, colleagues or staff?

### Developing specific policies

- Has your organisation considered establishing a formal process through which disclosures about non-routine contact can be handled?
- Does your organisation require employees to report any improper contact, and managers to act on that report? Measures might include warning off individuals or meeting with the new employer to resolve issues.
- Does your organisation periodically reinforce the duty on serving public officials to report dealings with former public officials, other than the provision of routine services?

### Using employment contracts

- Is it appropriate and feasible for your organisation to impose cooling off periods on certain former public officials, during which time they are prohibited from approaching their former employer on matters in which they were previously personally and substantially involved?

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

The issue of public sector organisations rehiring or re-engaging the public officials who were previously declared redundant, to perform the same or similar work is a cause for concern in the community. Because redundancy signifies that some work will no longer

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be performed, the practice of rehiring redundant staff soon after separation to do the same or similar work may suggest:

- ❑ poor public sector workforce planning
- ❑ public sector redundancy schemes are capable of manipulation for corrupt purposes and are poorly managed
- ❑ rehiring practices breach government recruitment procedures which should include due process and merit based selection.

### Using codes of conduct

- ❑ Is your organisation committed to integrity and transparency in workforce planning and recruitment? Does a statement to this effect appear in corporate documents, such as the corporate plan, annual report, and code of conduct?
- ❑ Does your organisation have a policy on re-engagement of redundant staff that promotes responsible workforce planning practices?

### Developing specific policies

- ❑ How does your organisation deal with the situation where a contractor that has a contract for services with a former public official informs your organisation that it has employed a former employee?
- ❑ What is your organisation's position on what should happen where a redundancy recipient is employed by a third party organisation that directs the recipient to perform work of a similar nature with the former employer?
- ❑ When your organisation must protect its interests by seeking to restrict a former employee from working for a prospective employer, what strategies does it adopt? How does it reduce any disadvantage to the former employee's short-term employment prospects?
- ❑ Does your organisation prevent recipients of targeted voluntary separation packages from contracting to provide the same services to their former employer under contract? What are the exceptions, if any, to this prohibition?
- ❑ Does your organisation allow the recipient of a voluntary redundancy package, who establishes a business, to apply for government work in a competitive process?

### Using employment contracts

- ❑ Does your organisation have positions that deal with such sensitive matters that they warrant preventing redundant former public officials from being rehired or otherwise engaged by their former employer to perform the same or similar work?
- ❑ If so, does your organisation incorporate into redundancy agreements a requirement that recipients agree not to work for the public sector as contractors, or for third parties contracted by the public sector for a specified period?



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