

*Presented to Committee by IAC  
Commissioner M. Latham.  
20/10/14 ML*

#### **Current Investigation – Public official having an interest in a contract**

The Commission is currently investigating the conduct of a public official who until early in the Commission's investigation was employed in a senior managerial position within a large NSW government owned corporation (GOC).

The public official commenced employment with the GOC over eight years ago as a 457 visa holder. Initially the public official was employed by an offshore company that had a contract with the GOC for the supply of ICT services. The GOC agreed to be the 457 visa sponsor for the company's employees.

This arrangement and contract with the offshore company continued for at least three years until the public official's manager left the GOC to take up a position in a large private corporation. The public official then applied for and was successful in obtaining his former manager's position and using his new permanent employee status obtained permanent residency.

Throughout the entire eight year or so period the off shore company and/or its subsidiaries have been continuously contracted by the GOC to supply ICT services that the public official was either employed to deliver or later, in the senior managerial position, employed to manage the relevant contract.

The Commission is investigating evidence that at all material times, both as a sponsored 457 visa holder and later as a permanent employee the public official had a significant undeclared pecuniary interest in, and was involved in the management of the off shore company and/or its subsidiaries.

The Commission is also investigating information that since the public official was awarded the senior managerial position, he has:

- used and disclosed confidential information to:
  - the offshore company in connection with negotiations concerning the renewal of its contract
  - the subsidiary, in relation to a tender process.
- diverted employees of the off shore company, also GOC sponsored 457 visa holders, to work on a contract its subsidiary has with a large private company. The GOC is allegedly being billed for the diverted employee's labour, although the time billed has not been expended on providing services to the GOC.

### Public Officials having a pecuniary interest in a government contract

The Commission recommends that the *Crimes Act 1900* (NSW) be amended to make provision for a new offence to specifically deal with public officials who have a personal interest in a contract with the public authority by which they are employed or engaged.

Procurement in the public sector is inherently a high-risk activity that can be particularly vulnerable to corrupt conduct. There are numerous recent examples of investigations undertaken by the Commission where a public official, through a direct pecuniary interest in a company or business, has exercised their public official functions to award contracts to that company or business. The Commission also regularly receives complaints of conduct that is more insidious but no less an abuse of official position and no less financially beneficial to the public official. This occurs when a public official, without disclosing the nature of their interest in the matter, uses their position to influence another public official to unwittingly award a contract to the former public official's company or business. It may also occur where a public official uses inside or commercially privileged information to obtain an advantage in the process for awarding the contract. Some examples of investigations conducted by the Commission demonstrate the serious nature of this type of conduct and difficulty prosecuting that conduct for the lack of an appropriate offence.

In 2010 the Commission conducted an investigation (Operation Kanda) into the undisclosed conflicts of interest of a University of Sydney employee, Deborah Yandell. Between 2007 and 2009 she awarded university contracts worth more than \$350,000 to Razorback Services Pty Ltd and approved its claims for payment without disclosing to the university that she and her husband jointly owned the company. Of the money the university paid to the company, nearly \$154,000 was transferred to accounts held jointly by her and her husband and subsequently expended for their benefit. Although the Commission found that Ms Yandell had engaged in corrupt conduct, it was not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to her prosecution for any criminal offence because the Commission considered there was no obvious criminal offence that covered her husband's conduct, and Ms Yandell was not a "public official", at common law, for the purpose of a misconduct in public office offence.

In 2012 the Commission investigated the recruitment of contractors and other staff by a University of Sydney IT manager (Operation Citrus). The Commission found that Atilla Demiralay, the manager of a university information technology unit, had awarded work to a private recruitment business in which he and his wife had an interest. That business received over \$1.5m from the university as a result of Mr Demiralay's conduct. For the same reasons as in the case of Ms Yandell, the Commission was not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to his prosecution for any criminal offence (except for providing false and misleading evidence to the Commission).

Each week the Commission receives complaints involving persons employed by large public sector Departments who are alleged to be fully employed by the Department concerned, yet also have a direct pecuniary interest in a private business that has a substantial contract with the Department, the most common example of which is for the supply of specialist labour. There can be no justification for a public official being allowed to benefit from their public official position in this way.

Departmental codes of conduct appear only concerned that the secondary employment is declared and in many cases, the conflict is dismissed by both public official and the Department on the basis that the public official's partner or close family member is said to be operating the business. There appears to be little comprehension by public official supervisors of the actual and perceived conflict of interest and inherent misuse of the public official's position.

At present there is no criminal offence in New South Wales that is specifically directed to this type of conduct; conduct that ordinary, reasonable members of the public would consider of a criminal nature and appropriate for the law to recognise as such as has occurred in other Australian jurisdictions.

For example, in Queensland s 89 of the *Criminal Code Act 1899* provides for a three-year imprisonment offence where a public official knowingly acquires or holds, other than as a member of a "registered joint stock company" of more than 20 persons, a private interest in any contract or agreement with respect to a matter concerning a department in which the public official is employed.<sup>19</sup>

The same offence existed in Western Australia under the s.84 of the *Criminal Code Act 1902* until a new regime of corruption offences were enacted in 1988. The offence of "corruption" in section 83 of the *Criminal Code Compilation Act 1913* (WA) is wider in scope and provides an offence in circumstances where any public officer, without lawful authority or a reasonable excuse, and so as to gain a benefit or cause a detriment, pecuniary or otherwise:

- (a) acts upon any knowledge or information obtained by reason of his office or employment;  
or
- (b) acts in any matter, in the performance or discharge of the functions of his office or employment, in relation to which he has, directly or indirectly, any pecuniary interest; or
- (c) acts corruptly in the performance or discharge of the functions of his office or employment

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<sup>19</sup> There is a similar offence under section 85 of the *Criminal Code Act 1924* (Tas) and in the Northern Territory, under section 89 of the *Criminal Code Act* (NT).