

Responses from the NSW ICAC

Question on Notice

Ms ABIGAIL BOYD: In another part of your submission you talk about the potential for contractors or employees to leave a department and then go and work on the other side for a supplier and have a bit of an advantage having been there and known what the department was after. Do you have concrete examples, or have those concerns been brought to you in any form? Or was that statement more a statement of what could potentially occur?

LEWIS RANGOTT: No, this is a real issue, and I can come back with some detail on notice if you wish. It's a difficult one because you can't stop people from quitting their job and going and getting a job elsewhere, and nor do we want to prevent that from happening. There's a short-term issue. If they walk out the door with time-sensitive information in their head—so what's about to happen in the next two months—and they can turn that into a commercial advantage for their new employer, that's a problem. That's why sometimes people get put on gardening leave the second they tell their boss they've taken a new job. But beyond that, there's not a hell of a lot you can do; otherwise you're stopping people from getting a job. But the medium-term issue is that that now former employee may have relationships with their now former colleagues. If they're trading on that relationship to get a benefit, that's a problem. It would be a classic conflict-of-interest scenario, which can be managed.

Response

This phenomenon is sometimes called the revolving door problem. The recently-published *Dictionary of Corruption* describes it in the following terms “*The revolving door can be problematic both when former public-sector officials enter the private sector, and vice versa. In public-to-private sector transitions, new private sector employees may use their access to or influence over former public-sector colleagues to benefit their current employer/company. A job offer from the private sector could itself be a “reward” from the company for an official’s past favouritism. In private-to-public transitions, former private-sector employees who join the public sector may favour former employees in industry over the public interest, when public funds are allocated, or when regulations are made or enforced*”.¹

From time-to-time, the Commission receives complaints that are consistent with this description. By itself, a professional relationship with a former colleague is unlikely to rise to the level of a conflict of interest. However, if the relationship bears hallmarks of a friendship or ongoing commercial arrangement, then a conflict may arise.

The Commission’s *Investigation into the awarding of contracts by employees of the former NSW Roads and Maritime Services* (Operation Ember) provides a useful example. That investigation found that a public official participated in a corrupt scheme to award work to companies owned and operated by his former work colleagues, who were also personal friends. In return, the public official received significant corrupt payments.

OFFICIAL

¹ Barrington R. et al, 2024, Agenda Publishing Limited, p. 280.

As indicated during the Commission's oral evidence, it is counterproductive to prevent individuals from moving between the private and public sectors. Consequently, the risk is best managed by requiring decision-makers to disclose any relevant personal interests, segregating duties where possible and imposing a rigorous, merit-based tender evaluation process.

Supplementary questions

1. *Your submission states "For a variety of reasons, the Commission does not support selection criteria or weightings that give preference to local content or local suppliers"; "the Commission sees little benefit in policies that favour local content" and it urged the Committee to make a recommendation "Discouraging the use of local content or supplier preference schemes". However during the hearing Mr Rangott stated "The ICAC is certainly not against local preference, per se", and suggested to the Chair regarding the proposed recommendation "perhaps you could strike out "discouraging" and put "better managing"".*

Is it now the formal position of the ICAC that you are withdrawing your unqualified statement that "the Commission does not support selection criteria or weightings that give preference to local content or local suppliers"?

Response

No. However, as noted during the Commission's evidence, its concerns with local preference schemes are primarily associated with local government procurement. The Commission's submission also notes, on page 4, *"The transactions that the Commission finds to be corrupt tend to be relatively small. It is unusual to identify an individual transaction of more than \$1 million that involves corrupt conduct. The corrupt conduct more often involves numerous smaller transactions, which corrupt individuals know are less likely to attract the attention of management or be subject to more robust control"*.

Consequently, the Commission's written submission would have been improved by emphasising that its concerns regarding local preference schemes were centred around relatively small transactions (some of which are the result of order splitting) and the local government sector.

2. *Does ICAC now concede that there may be a benefit in "policies that favour local content"?*

Response

There may be benefits to such policies but the Commission is best-placed to confine its comments to matters involving corruption risks.

3. *Does ICAC now formally withdraw its proposal that the Committee make a recommendation "Discouraging the use of local content or supplier preference schemes" in favour of a recommendation directed at "better managing the use of local content or supplier preference schemes"?*

Response

See response to question 1.

4. *Is this apparent change in ICAC’s formal position on local content schemes between 12 January 2024 and 2 March 2024 simply a consequence of poor choice of wording and expression, and a failure to communicate clearly in its submission, or has ICAC actually changed its view?*

Response

See response to question 1.

5. *If so, what were the factors that led to this change of view?*

Response

See response to question 1.

6. *Did ICAC discuss its approach to local content schemes with any representative of the NSW Government during this period? Or with any third party?*

Response

No.

7. *What is ICAC’s view on the Government’s policy commitment to “increase tender weightings to 30 per cent to capture local content, job creation, small business and ethical supply chains”?*

Response

When assessing tenders, it is desirable to set and adhere to a scoring methodology that is as objective as possible. Allocating a numerical weighting to a particular selection criteria helps to achieve this.

See also response to question 9 below.

8. *Are there any aspects of that policy that could give rise to an increase in opportunities for corrupt practices?*

Response

See answers to questions 1 above and 9 below and page 12 of the Commission’s submission.

9. *If the policy were to be fully implemented what steps would you recommend the Government take to mitigate these risks?*

Response

Many routine procurement controls would mitigate the risk. Importantly, any procurement involving a local preference weighting should ideally be performed via a formal tender process, assessed by a properly constituted tender evaluation committee, the members of which should be free of any conflicts of interest.

Consistent with evidence provided to the Committee by the NSW Government, any procuring agency should determine whether a local preference scheme is permissible under relevant international procurement agreements and enforceable procurement provisions (see pages 18-21 of submission no. 40 to the inquiry).

In terms of evaluating the local preference component of a tender, the evaluation methodology should consider:

- the specific attributes that a tenderer requires in order to be assessed as “local” and the method for scoring these attributes
- whether it is possible to game the evaluation (for example, by establishing a token or cometic local business presence for the purpose of gaining an advantage)
- what claims made by tenderers need to be verified. For example, if a tenderer submits that it has an ethical supply chain, or will generate many local jobs, the evaluation committee needs to determine whether and how to test those claims²
- officers assessing tenders should adhere to an agreed evaluation methodology which is unaffected by lobbying efforts that take place outside the formal assessment process. This is often established by setting an agreed protocol for communications between tenderers and the committee.

10. *The Industry Capability Network has raised an issue with Panels citing an example related to a panel for signage contracts created by Transport for NSW. A panel established in 2019, set to operate until 2025, with a possible extension until 2028, has just three suppliers on the approved list. All other potential suppliers have been locked out for six-nine years. Construction contractors who carry out works for TfNSW utilise the same panel. Do you consider that the use of exclusive panels – especially when extended for additional years with no opportunity for new suppliers to be added raises potential corruption issues?*

Response

The Commission’s October 2023 publication, *Corruption risks associated with supplier panels*, contains information about relevant corruption risks. On page 8, the publication (which is general in nature) states:

New panel members may be required if:

- *the agency has underestimated the amount of work that needs to be awarded to panel members*
- *a critical mass of existing members is removed, or declines work offered by the agency*
- *there is a structural or technological change in the market*
- *there is a relevant change in legislation or government/agency policy.*

In addition, the agency may adopt a policy of permitting new suppliers to periodically apply to join a panel. This generally will be at the discretion of the agency but, for obvious reasons, this process should be no less rigorous than the initial panel creation process.

In the situation described, corruption concerns could arise if the existing three-member panel is:

OFFICIAL

² The Commission’s June 2020 publication, *Supplier due diligence: a guide for NSW public sector officials* contained detailed information about how to check information submitted by tenderers.

- not providing value for money and buyers may decide to procure “off panel”
- extended (for example, at the six year point) without properly reassessing or retesting the market and the public sector agency is perceived as being too close to the incumbent panel members.

Ideally, creation of a panel should entail an assessment of the market conditions and/or needs analysis which may identify be valid commercial reasons that determine the size and duration of the panel.