Paper presented to the Interdepartmental Accounting Group (IAG) Conference

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My invitation to speak at your conference requested that I detail the role of the Integrity Commissioner and essentially some experiences that I have had either in a past life or in my present role.

I took up my position on 1st July this year following the end of the tenure of the first incumbent, the Honourable Alan Demack, who was a retired Supreme Court Judge.

The office is created under the *Public Sector Ethics Act 1994* and provides that the Integrity Commissioner may advise the Premier on any ethical matter, if asked. He also may advise any Member of Parliament, senior executive officer or a person holding an appointment made by the Governor or Governor in Council in relation to conflicts of interest. The judiciary are not included in this category. Beyond this, the Act provides that it is the duty of the Integrity Commissioner to contribute to public understanding of public integrity standards by contributing to public discussion of policy and practice relevant to his functions.

The role is not a proactive one and it is not my function voluntarily to proffer advice to any person unless asked. I have no investigative function or powers. There are secrecy provisions that relate to me so that I am bound not to disclose any information provided to me for the purposes of seeking advice nor am I permitted to disclose that advice. On the other hand, the recipient of the advice is able to deal with it in whichever way they wish. Attending these statutory secrecy provisions, as you might expect, is the overriding factor of confidentiality. A person coming to seek advice can expect that their request will be kept confidential, subject to any overriding legal requirements.

The *Public Sector Ethics Act* enshrines in statute 5 cardinal principles, which are really motherhood statements. They are:

- Respect for the law and the system of government
- Respect for persons
- Integrity
- Diligence
- Economy and efficiency.

I am sure you will agree that each of these and their combination forms a most desirable set of principles to which all those in public office should aspire.

Let us now turn to the question of ethics so far as it relates to the individual as opposed to an institution. Obviously, a great deal has been written about ethics and different theories abound. There remain differences of opinion as to whether ethics can be taught as such or whether provision of a code is advantageous.

Since I have taken up this position, I have found a statement in an editorial in the Melbourne Age in August this year to be most apt. There the editor observed "a sense of ethics only becomes a meaningful part of everyday life when the question of what constitutes moral behaviour is not settled, but active and alive within the individual".

In the field of ethical dilemmas, or sometimes even trilemmas or greater, there is often no absolutely correct answer. The circumstances of each case bring into place different considerations. Sometimes, in order for necessary public administration to progress, it will be necessary for a conflict to be managed rather than avoided. An example may well be in a remote locality where a decision-maker knows every member of the community including those competing in a particular instance for a favourable answer.

I consider that the background against which I work namely being essentially placed in a back room where people, at their own behest can come and seek advice, accords with reality. I do not think it is productive to lecture people as to what should be their ethical values as though there were some absolute truth applying to every situation. I go back here to the observation from the editor of the Melbourne Age. I can understand that most people would find it quite offensive if there were any suggestion, however veiled, that their sense of ethics was wanting or absent. Given the difficulty in this regard, in my view the approach has to be much more subtle. Aspirational is the term, which I think best describes the approach, which should underpin any code of conduct or any system of ethical training.

Last week saw the launching of a manual, which will prove to be most helpful in the area of managing conflicts of interest. The CMC and the New South Wales ICAC combined to publish a manual and tool kit on this subject so far as it relates to the public sector. It emphasises that there is nothing wrong with being the subject of a conflict of interest. The challenge is to report, manage and deal properly with it. The manual also makes the point that a proper approach to recognising and dealing with these matters must be demonstrated by example from the top.

Once there is a focus on ethical behaviour, as Queensland legislation does, it is to be hoped that there will be an intrinsic awareness in those holding public office that will subconsciously or otherwise alert them to a situation where difficulties could arise.

I have detected a parallel between my experience in a previous life and what I perceive as the approach to effective ethics within the public sector.

At the National Crime Authority there was a need for heightened security, much more so than would apply in an ordinary workplace. Some people within the National Crime Authority community were used to this being from law enforcement agencies. Others who formed part of the team came from backgrounds that had no experience in this. The challenge was to introduce them to an effective regime of security. It would have been possible to rely wholly on written requirements but I think this would have been quite ineffective. True it was that there was actual experience of a disaster where a bomb exploded, killing one person and blinding another. However what was done was to convince those concerned of the need for security as part of their every day life. Rather than requiring slavish adherence to the written code, efforts were made to foster an instinctive recognition of considerations of security. After a while behaviour followed this pattern. This is the way that I see on a parallel plane that recognition and practice of ethics in the public sector could and should take place.

A conflict of interest simply stated occurs when there is a conflict between one's public duty and one's personal interest. There are real and perceived conflicts of interest the former being where somebody acts notwithstanding their knowledge of the conflict. This definition will also include the more serious end of the scale where the criminal offence of corruption may occur. There is also an important other side of the coin, namely the perceived conflict of interest. I will be discussing in detail a recent example of this but at present let me observe that the perceived conflict of interest can be something that must be avoided even if the person concerned professes immunity from adverse influence or inappropriate considerations.

All this means that there needs to be some instinctive awareness that an area of conflict or potential conflict has been entered and consideration must then be given to the way forward in the light of ethical obligations. This is not to say that far fetched or remote considerations should trammel the business of public administration moving forward.

In some circumstances, I have been surprised to discover that holders of public office did not have a correct appreciation of their duty or entitlements and thus proceeded on a false premise, not recognising that a conflict existed. The area of ownership of intellectual property and its use, especially if there is financial benefit accruing from an outside market, is a very complex one, both legally and ethically. This is a developing area where conflicts may abound. Work is now being done at whole of government level to address these issues and this will facilitate the involvement of any public official.

A conflict of interest or a potential one can arise in the day-to-day activities of any public official. Bearing in mind that some issues can be quite difficult and minds might differ, a person would be well advised to consult with colleagues or superiors to test his or her own judgement. Ultimately of course there is the opportunity to resort to the Integrity Commissioner in the field of a conflict of interest. This resource is available to all public officials of senior executive status in Queensland the proviso being that the head of the department is notified. To my mind it is a healthy rather than an unhealthy sign that a person is prepared to seek advice in relation to a potential conflict of interest. Often the person at the centre of the matter is not the one who can bring the most objective mind to bear upon the problem.

The focus upon proper public administration has been very much highlighted in Queensland following the Fitzgerald Inquiry and its Report. It is now the responsibility of the head of each department to see that a code of ethical conduct is in place and to take steps to see that it is adhered to. Guidelines have been published in many forms, which deal with the question of receipt of gifts or hospitality. The clear focus is upon integrity, to counter any suggestion that some inappropriate influence was introduced into a decision-making process. It is interesting to observe the parallel over this period between what has happened in the public administration sector and what has happened in relation to private enterprise.

Take for example the question of hospitality. The public sector is focussed upon implementing an impeccable process for dealing fairly in the expenditure of public money. This is very firmly promoted by legislation and other aspects of government policy. The private sector is driven by competition. The provision of hospitality seems to be a key plank in the platform of any commercial entity that is in competition. The current focus in the public sector would prevent the receipt of such hospitality from any entity which might be a competitor for a favourable decision from the proposed recipient of hospitality. All this is a fact of life in relation to private sector contracts. What of the current trend in public/private partnerships where very major enterprises are conducted in a partnership? Undoubtedly the constraints upon any government official continue to apply but, having regard to the size of the enterprise and different components of it, can the government insist that the practices of its partners be modified in the field on accepting hospitality from potential contractors?

Underpinning all of these considerations is the background that corporations are answerable to their shareholders who require profit to be made. Public officials in relation to the distribution of public funds have an obviously different duty. Dealing with any conflict of interest involves an analysis of the applicable duty.

Let me now turn to a couple of recent real life examples that pinpoint how minds might differ as to whether or not an unacceptable conflict exists. The examples demonstrate how, especially with hindsight, and especially from the point of view of a disappointed applicant, matters can be perceived in an unfavourable light. It emphasises the necessity, when there is the slightest cause for concern, to take a very careful step back and to review how the matter would be looked at it objectively by a reasonable person. This is not necessarily the same as posing a test of what the media might say about it, because the media, as we all know, sometimes has an agenda focussed upon making a story out of something that objectively might not be untoward.

In Western Australia in the late ’90s, there was a flood of litigation relating to the granting of a certain very valuable mining lease. The aspect of the litigation to which I will take you concerned the process, which ultimately led to a favourable decision to one applicant. Not surprisingly, the entity, which brought the litigation, was the disappointed applicant.

The court of course had to deal with the legal consequences of what occurred rather than the ethical consequences, although you will quickly discern the parallel between the legal concept of bias and the ethical considerations of conflict of interest.

The facts were that several applicants presented their contentions to a mining warden who made recommendations as to which should be preferred. In the ordinary course of the process these recommendations were referred to the relevant government department for comment. These comments were then forwarded to the Director-General who ultimately advised the Minister. The Minister was the decision-maker. In the course of these processes the position of two persons was highlighted.

One was an officer of the department who was recruited as a scribe to record the discussions and ultimate recommendation of two senior people who reviewed the matter. This recording was the background for a minute that was prepared by the two senior people to go to the Director-General who ultimately forwarded it to the Minister. It will be noted that the scribe had no decision-making role in the process. This scribe had previously acquired shares in a company, which had an option to purchase shares in the ultimately successful applicant.

The other person involved in the process was one of the two senior departmental people who prepared a minute for the Director-General's consideration to send to the Minister. This person had an adult son who was independent and for years had been living away from home. Some time before this application he had acquired shares in the same company which would entitle him to an option to purchase shares in the ultimately successful applicant.

The recommendation of the two senior persons was adopted by the Director-General and forwarded to the Minister for his decision. The Minister accepted the recommendation, which resulted in the grant of the mining lease.

In the legal consideration that followed it was the concept of bias or perceived bias that loomed large rather than our ethical focus on conflict of interest. The initial Judge in the Supreme Court did not think there was anything in the contention that disqualifying bias tainted the decision. On the other hand, when the matter came to the Full Court of Western Australia three Judges unanimously held that the circumstances described before were unacceptable and that the decision should be set aside. The High Court sat seven Judges on the matter and six of them came to the conclusion that there was no difficulty in the process and that the activities of the two persons mentioned was so peripheral as not to cross the threshold of disqualifying bias.

Another matter that I will mention briefly in passing is a recent case where a bankrupt person was the subject of litigation. He was made bankrupt by a bank to which he owed money. Legal proceedings took place before a Judge where the bankrupt wanted to set aside the debt.

After hearing the matter, the Judge reserved his decision. During the months that it was reserved the Judge's mother died and he inherited a small parcel of shares in the bank. When he gave his decision, which disappointed the debtor, an appeal was lodged on the basis that there was unacceptable conflict or bias in the Judge in holding those shares. Here there was no disagreement of legal minds and the decision of the Appeal Court was such that this was not unacceptable bias. I raise it in this context to demonstrate to you that close scrutiny is applied to any process and points are taken by disappointed applicants that might seem surprising to some. It is a wake up call to say that one cannot be too careful in following proper procedures.

Having said that, the moral of the story is that one needs to be equipped with an instinctive awareness of what might be a troublesome area and to act very carefully in relation thereto. Sometimes the high water mark might be reached where the conflict is sufficient to warrant stepping aside and taking no further part in the process. On the other hand, public administration cannot function efficiently if officials are troubled by far fetched objections seeking to set aside the whole process.

Let me conclude with another observation. As a result of my travels, both here in this position and previously, I consider that it is of fundamental importance to any organisation to do the small things properly. As I have said, conflicts of interest can range from serious criminal conduct such as corruption through to heedless self-serving actions. I have found at the more serious end there is a real risk of corruption where there is what is termed in common parlance a slack attitude towards performance. This includes performance of small tasks. Failure to act conscientiously in this regard is likely to be symptomatic of a more general disregard for doing things properly. This is something that you in your auditing capacity may well find as a trigger towards implementing closer scrutiny.

Thank you for the invitation to speak to you at your conference.