

**Precis of an address given by the Integrity Commissioner
to attendees at the Crown Solicitor's CEO Breakfast Briefing
on Friday 27th July 2007**

***The Role and Experience of the Integrity Commissioner —
Gifts and Trojan Horses***

The Office of the Integrity Commissioner was created by a 1998 amendment to the *Public Sector Ethics Act 1994*. Interestingly, its genesis appears to stem from concern on both sides of the Parliament, as to the perceived low public standing of persons holding political office. The debates relating to the amendment to the legislation focussed squarely on the creation of an expedient that would enable holders of public office to seek advice prior to taking any step which might result in diminution in the public standing of Members of Parliament. Ultimately, it was decided that an Integrity Commissioner should be appointed on a part-time basis, having a role only to respond to requests for advice and having no function proactively to enforce ethical standards or to receive or investigate complaints.

It is my view that the confidentiality aspect is an essential underpinning of the role of the Integrity Commissioner because other institutions such as the Crime and Misconduct Commission and the Ombudsman are both sufficiently skilled and resourced to deal with proactive and investigatory aspects. Formality attends the provision of any advice. It must fall within the category of a conflict of interest and both the request and advice must be in writing. Whilst it is confidential and the Integrity Commissioner is obliged to observe

secrecy in relation to advice given, the recipient of the advice is able to publish it as widely as he or she sees fit.

The Premier does not fall within the general limitation of being confined to seeking advice only as to a conflict of interest issue. He may seek advice in relation to any matter involving ethics and integrity.

My experience in the office has taught me that one of the pitfalls that arises and sometimes leads to difficulty is that some people do not appreciate that the appropriate test of whether or not an unacceptable conflict of interest exists is the view of the reasonable member of the public properly informed. This is not a subjective test, and relates to matters of perception of others rather than the mindset of the individual involved. Here is where the danger lies, because there is a temptation for an individual to conclude that because he or she is so imbued with ethics that they will be able to proceed with the matter in question, putting aside that which might otherwise result in an unacceptable conflict. It will be immediately seen that this is a subjective and inappropriate test. The difficulty is reinforced by the fact that by its very nature, being involved in a potential conflict carries with it matters relating to personal interest. Somebody with a personal interest is not in a favourable position to make an objective decision, not only in relation to the question in issue, but more particularly in relation to the appropriateness of their involvement.

The old adage of “a lawyer who appears for himself has a fool for a client” serves to demonstrate the point.

The subject of my talk today gives me the opportunity to comment on what appears to be matters of current public awareness and interest. Much publicity has recently been given to the expedient of drug manufacturers lavishly entertaining medical practitioners who have the discretion to choose between drug manufacturers when writing prescriptions. The conflict has been readily perceived in public discussion and the authorities have stepped in. Very recently, a decision that drug companies should make public full details of any benefits provided to medical practitioners has been upheld by the Australian Competition Tribunal.

I think the classification of a gift to a public official as a Trojan horse is a very apt one. You will all be aware the large wooden horse left outside the walls of Troy as a gift. It was taken within the walls where the soldiers encased in it were able to emerge and wreak havoc.

Currently, there has been a major review in relation to policies concerning the receipt of gifts. A final draft of the whole-of-government policy has been circulated and I have been able to make suggestions and comments as to its contents. I am hopeful that it will be promulgated by the Public Service Commissioner as whole-of-government policy. Up until the present time, there seems to have been a common thread in the Codes of various departments that essentially enabled gifts to be accepted without question if under a certain value, usually about \$50.00, and then requiring some recording of the gift if it was above this value. If it was above \$350.00, it would seem that it could, in most cases, at the option of the receiver, be purchased with a discount of \$350.00.

It seems to me that such an approach ignores basic ethical principles.

The primary question that must be asked is whether it is appropriate to accept the gift at all.

There are some circumstances which bring readily to mind that both practicality and public perception would endorse that receipt of the gift is acceptable. For example, a token or memento given in appreciation of some service performed such as giving a paper at a conference. Provided that the gift is a modest one and falls within the broad description previously mentioned, there ought to be no problem.

Difficulties arise when there is any relationship or likely future relationship of candidate and decision-maker between the donor and the recipient.

The person who chooses to become a public servant makes an advised decision to devote his or her skills and talents to the service of the community. “Selflessness” to me is an appropriate epithet to describe the hallmarks of public service. This guiding light is not the beacon which private enterprise chooses to chart its course.

A moment’s reflection shows that private enterprise is driven by the imperatives of competition and showing a profit to shareholders. Whilst the notion of being a “good corporate citizen” is beginning to appear in some quarters, the pendulum still has a long way to swing before it is the accepted ethic of the corporate world.

Such being the case, one has to examine very carefully motivation that lies behind the provision of gifts to a person holding office and, especially, a person who is likely to be a decision-maker or to influence the making of a decision. Those in the private sector need to justify to their shareholders the expenditure of any funds.

We all know that there are many strategies involved in activities variously described as marketing or promotion. In the commercial world, there is no Father Christmas.

Competition and imperative to show a profit combine to make the provision of a gift a strategy whereby it is implicit that some return or reciprocation will follow. This is no more than human nature. The ethical person feels obliged and beholden to the person providing a gift.

It is little wonder that in public perception, the giving or an acceptance of a gift attendant upon a decision-making process it is justifiably regarded with the healthiest of scepticism.

It should be pointed out that in the policy, gifts and benefits are widely defined and quite squarely include acceptance of hospitality.

There is another fundamental proposition which demonstrates the weakness of the current policy. The proposition is that any gift received by a public official in the light of performance of his or her duties is never the property of that official, but always the property of the department or the State which employs them.

Such being the case, it is not the prerogative of the recipient of the gift to determine what happens to it. The owner of the gift is the department or the State and it is this entity that must decide what will happen. It must decide in accordance with the public good rather than in the interests of any individual.

I do not think that it is setting too high a standard to postulate the general proposition that it is not appropriate for persons in the public service or holding public office to accept gifts from

others. This is particularly so if the decision-making process is, in any way, connected. The gift is simply not the property of the public official who receives it in light of the office held, and any policy must work from this premise.

Whilst there are acceptable exceptions to the general proposition, they should be closely confined and clearly defined.

It is often said that it can be embarrassing and impolite to refuse a gift, perhaps even an affront to the person offering it.

Whilst questions of etiquette, politeness and consideration for others are an integral part of ethical behaviour, it is my view that all difficulty in this area can be quickly resolved by the intended beneficiary explaining that he or she is bound by a strict policy which prohibits the acceptance of gifts, save for such things as modest tokens and mementos to mark a particular service or occasion.

The prohibition can never be absolute, as cases will depend upon their own circumstances. There are also questions of degree involved.

The term “networking” is often heard to justify acceptance of hospitality. Whilst the proper and efficient discharge of public duties cannot take place in a vacuum, care must always be taken to see that a perception of compromise will not arise. For example, attendance by a decision-maker as a guest in the corporate box of an applicant for a large tender will be readily perceived as quite inappropriate if the decision-maker has to choose between the host

and other competitors. It will be made even more manifest if the host becomes the successful tenderer.

At the other end of the scale, is attendance by members of a department at an industry discussion concerning current trends and innovations which are of vital concern to the department. There can be no adverse perception when the hospitality is modest and attendance is over a broad range of participants in the industry.

Community attitudes change over the years. Not long ago, it was the rule rather than the exception that private enterprise would bestow largesse upon its customers every Christmas period. This was accepted as customary and, most probably, any person who rejected the gift as inappropriate would have been thought as rude or ungracious. Times have changed and it is my understanding that the community has become much more demanding that those holding public office act with exemplary integrity and not be seen, in any way, to be beholden to the person seeking a favourable decision.

In my position, I see this as a very healthy development to be encouraged and fostered so that the private and sector will appreciate that the giving of a gift can be regarded as the provision of a Trojan horse.