

IPAA Victoria Corrupt Conduct and Investigations Symposium

18 September 2013

Lessons learnt from 40 years of Ombudsman investigations

The role of the Ombudsman developed because individual citizens did not have the resources or capacity to effectively challenge the bureaucracy's use of the extensive powers and privileges afforded it in a Parliamentary democracy.

Together with the introduction of Freedom of Information legislation and the establishment of administrative tribunals, the *Ombudsman Act 1973* empowered Victorian citizens to subject public sector agencies to scrutiny. These reforms provided citizens with a right to Government information, to challenge decisions which adversely affected their lives and to complain when public officials misused their positions.

Since 1973 the Victorian Ombudsman has dealt with more than 200,000 complaints, 107,000 investigations and enquiries, tabled more than 100 reports in Parliament and made more than 7,000 reports to agencies.¹

After the introduction of the *Whistleblowers Protection Act 2001*, the Ombudsman had a wider range of tools available to him to hold public officials accountable. In the last five years the Ombudsman has substantiated more than 125 allegations made under the WPA including²:

ALLEGATION	
Corrupt conduct	99
Substantial risk to public health and safety	12
Substantial mismanagement of resources	10
Detrimental action	3
Substantial risk to the environment	1
TOTAL	125

During the same period more than 3,000 complaints³ were received under the Ombudsman Act alleging misconduct or conflict of interest concerning public officers. Many of these matters were resolved directly with the agency concerned including more than 300 allegations that were investigated and found not to be substantiated.

My brief today is to share a perspective borne from the Ombudsman's investigation of allegations of misconduct and corruption. As these figures attest, the Ombudsman's 40 years' experience of examining such matters is as broad as it is deep.

¹ Victorian Ombudsman: *A section 25(2) report to Parliament on the proposed integrity system and its impact on the functions of the Ombudsman*. December 2012, page 19

² Ibid

³ Ibid

While there is much to learn from this experience the following stands out. Corrupt conduct flourishes where there is:

- the opportunity for personal gain
- combined with weak leadership and poor management
- that results in a culture tolerant of bad behaviour and
- a laissez-faire attitude to accountability mechanisms.

Today I will draw from two investigations conducted more than twenty years apart to illustrate that these lessons, while neither new nor novel, need to be front-of-mind for anyone with an interest in detecting and preventing corruption.

Operation Bart

Operation Bart was an investigation conducted by Victoria Police with oversight by the Victorian Ombudsman in the 1990s. This investigation demonstrated how quickly and deeply corrupt conduct can permeate an organisation.

The investigation examined conduct across 89 police stations and considered the involvement, if any, of 1,548 individual police members. It arose from allegations that kickbacks were being paid to officers by companies who were called out to undertake temporary repairs to damaged premises.

Since 1978 police had been required to use a centralised system to obtain the attendance of shutter services at premises that police have found unsecured and where the owner could not be contacted. The service would undertake temporary repairs for which the owner would be liable. Often, for convenience sake, the owner would then engage the firm to complete the permanent repair.

In 1995 police whistleblower Karl Konrad approached the Ombudsman. He alleged that members were receiving kickbacks from certain companies to bypass the central allocation system. It was quickly established that similar allegations had been made in the past.

Records seized from one company showed some 1200 payments totalling \$144,000.00 had been made to police between April 1994 and May 1995. An average of \$2000.00 per week was made to unnamed police with most payments being either \$100 or \$200.

Ultimately 550 police were charged with 1290 disciplinary offences. Just over 100 members resigned while under investigation.

The Ombudsman's two reports regarding Operation Bart make clear his concern that this behaviour went unchecked to such an extent for so long.

Unsurprisingly the Ombudsman concluded that much of the responsibility lay squarely at the feet of management. In many instances the Ombudsman concluded that supervisors were actually involved in the scam. In other

instances he concluded that they 'turned a blind eye.' He summed up his assessment of these supervisors in the following terms:

Many of these supervisors have lacked commitment, some have been corrupt and, in most cases, they have demonstrated laziness and mediocrity.

The supervisors who were not themselves corrupt had frequently failed to meet their responsibilities in many other ways. For example the Ombudsman identified that supervisors would have detected the by-passing of the central allocation system if they had, as they were required to do, signed-off documents that members routinely submitted to them. Some supervisors said they had signed these documents without having read them.

Operation Bart demonstrated the rapidity at which corrupt behaviour can spread through an organisation. When a member involved in the scam transferred to another station it took, on average, less than six weeks for the "infection" to take hold at their new station.

However lessons can be drawn from the stations where these corrupt practices did not take hold. One witness, who worked in the industry, described how the supervisor at a station, upon becoming aware of attempts to recruit his subordinates, called the witness in and made it clear that these approaches were not welcome. The company received no more referrals from that station.

The 'toner' investigation

The Ombudsman's 2011 report, *Corrupt conduct by public officers in procurement* provides a more recent example of corrupt conduct flourishing when provided with the right environment.

On 1 January 2006 the Victorian Government Purchasing Board (VGPB) established a State Purchase Contract for public bodies to use when purchasing stationery and office products. Toner cartridges for Multi-Function Devices are one such product.

The investigation followed a notification from the Western Australian Corruption and Crime Commission that it had been investigating allegations that public officers were purchasing toner cartridges from a supplier that was not the authorised government supplier. Ultimately, the Commission found that \$620,000 worth of toner had been purchased from the supplier between 2006 and 2009 whereas the same quantity would only have cost \$205,000 if purchased from the approved suppliers. The officers concerned had received kickbacks from the supplier in return for their business.



Figure 1 Excessive toner stores photographed by WA Corruption & Crime Commission

The Commission advised the Ombudsman that the supplier was based in Victoria and he, in turn, decided to investigate whether this practice was also occurring in Victoria.

After some preliminary research the investigation focused on the purchase of toner cartridges from the supplier by three agencies:

- Arts Victoria
- three Victorian schools
- a prison.

The investigation found that, just as in Western Australia, public officers were receiving kickbacks by way of free gifts such as pre-paid Visa cards and Coles Myer vouchers.

The investigation found purchasing officers who had:

- purchased toner cartridges at inflated prices⁴
- purchased toner cartridges that were not required⁵
- split invoices⁶
- purchased cartridges despite a free supply being available under the terms of the machine's service contract⁷.

While the Ombudsman's investigation focused on only three schools the supplier confirmed that 66 schools had purchased toner cartridges from it in 2009-10.

Once again this investigation highlights the combination of circumstances that enable corrupt conduct to occur:

⁴ In one instance the already inflated unit price of a toner cartridge quoted by the supplier increased by a further \$202 per unit: from \$167 to \$369 over a five month period. Throughout this period, OfficeMax toner cartridges cost \$99.

⁵ For example, one officer purchased enough black toner cartridges to supply the government department for 40 years. Toner cartridges expire after 24 months.

⁶ For example, a purchasing officer requested that an order from The Company be split into four invoices to ensure the total amount of each invoice would not trigger further enquiry.

⁷ The cartridges cost either \$799 or \$899 per unit.

- the opportunity for personal gain
- combined with weak leadership and poor management
- that results in a culture tolerant of bad behaviour and
- a laissez-faire attitude to accountability mechanisms.

The lack of effective management oversight that allows such conduct to proceed undetected is demonstrated by the failure of Arts Victoria to identify that a Project Officer had purchased a 40 year supply of black toner cartridges in a single year.

Overall the officer spent over \$100,000 in toner cartridges from the supplier when less than \$20,000 worth was required. She made purchases without having a financial delegation. Once she had a financial delegation some of her purchases exceeded her delegation. From one financial year to the next her expenditure on toner cartridges went from 27 per cent to 47 per cent of the office requisites budget.

The lack of management oversight of her activities was summed up by the Project Officer herself:

I was fairly self-managed ... I had been left fairly much left to manage those jobs on my own and at my discretion.

Not only does this case demonstrate a lack of management oversight, it demonstrates the importance of an organisation's leadership fostering a culture that is consistent with public sector values. At interview, the Project Officer concerned stated:

... Arts Victoria people, they get free tickets to shows ... I mean Arts Victoria ... it's just full of free tickets to operas, to ballets ...

The Ombudsman concluded that the officer's conduct occurred within the context:

I consider that there is a general culture at Arts Victoria where benefits and gifts to stakeholder events (such as opera, theatre and ballet) are regularly accepted and not declared or recorded by staff on the ground that such gifts relate to a staff member's professional role. I consider this rationale to be naïve, given that providers of these gifts are bodies which exist and survive on the basis of grants, many of which are supplied by the State Government. The amounts and beneficiaries of those grants are influenced by the advice of public officers and in particular public officers at Arts Victoria.

The following photograph, taken at a school in this instance, is another example where the failure to maintain at least a cursory oversight of staff allowed corrupt conduct to occur. It is difficult to understand how no-one could have questioned the number of cartridges that had been accumulated for this school's single printer:



Figure 2 The excessive supply of toner cartridges found at one school

Lessons

I have deliberately spoken about investigations from different eras to illustrate that much of what we know about corrupt conduct is neither new nor novel. We should not be surprised that those with opportunities for personal gain will take advantage of poor management and a lack of commitment to the implementation of controls. And it should be self-evident that a failure by leadership to set, model and subsequently monitor the ethical tone of an organisation will allow these conditions to arise and fester.

It is striking that mandatory procedures should have stopped the conduct uncovered by both Operation Bart and the Toner investigation. Police members were not meant to call out shutter service providers. Public servants are not meant to purchase toner outside the State Purchase Contract. Records existed that demonstrated these controls were not being adhered to.

However in both cases individuals were permitted encouraged or, at the very least, not detected breaching these controls. Controls are only useful to the degree that they are complied with. A culture that allows “workarounds” for its controls opens the door to corruption.

The Ombudsman’s office continually sees examples of such “workarounds.”. Those involved often have no corrupt intent and explain themselves in terms of “just trying to get things done”. However these practices normalise the avoidance of controls therefore making it easier for corrupt conduct to go undetected. For instance we have seen:

- executive assistants using Corporate Cards on behalf of the card holder
- invoices split so a reliable supplier can be engaged quickly
- procurement exemptions backdated to “meet audit requirements”

- blank approval forms signed to expedite processes.

Each represents a breakdown in control and an opportunity for mischief to occur.

If you work in the public sector your organisation will have an array of processes and controls intended to prevent corrupt conduct. However these processes mean nothing unless they are complied with. It is not enough to be able to certify that policies and procedures exist – organisations must closely examine whether they are being applied in practice.

A culture that is committed to the public sector values will not tolerate these workarounds even where no mischief is intended. It will encourage officers to speak up when they see something that concerns them. It will ensure its internal systems of scrutiny and accountability are proactive, not reactive⁸. People who are inclined to be corrupt will not want to work there.

The new legislation

Finally, this symposium has been organised due to interest in the new integrity system. Others have and will speak in detail about the new framework however I will make a few brief observations regarding how it is affecting the work of Ombudsman.

The legislation is relatively new and those of us who have to work with it are coming to grips with its complexity and the inflexibility of many of its requirements⁹.

One significant change is the removal of the Ombudsman's ability to refer protected disclosure investigations to the employer of a public officer. This discretion was available under the Whistleblowers Protection Act. When deciding whether to exercise that discretion the Ombudsman would consider:

- the seriousness of the alleged conduct
- the seniority of any public officers implicated in the matter
- the agency's track record at conducting investigations
- the need for the Ombudsman's coercive powers to effectively investigate
- the broader public interest that may be served by the investigation being conducted by the Ombudsman.

In the last two financial years the Ombudsman referred more than a quarter of all public interest disclosure investigations, excluding police matters, to public bodies to undertake. He would then oversee the agency's investigation and could "call in" investigations if he considered it necessary. The Ombudsman is now required to undertake the investigation regardless of these considerations.

⁸ For example, does senior management routinely review reports from the Auditor-General or Ombudsman and consider whether issues identified in other organisations could occur in their own?

⁹ For example the Ombudsman Act now includes the phrases "must" or "must not" 97 times compared to 13 in the version that was in effect twelve months ago.

While it is early days it is clear that the Ombudsman will be conducting significantly more formal investigations than was the case under the Whistleblowers Protection Act. In the financial year that ended 30 June 2013 the Ombudsman commenced about 20 more formal investigations than were commenced in each of the two previous financial years. This increase is directly attributable to the new legislative arrangements that took effect on 10 February 2013. The Ombudsman expects, and there is every indication to date, that this increase will much greater across the 2013-14 financial year – the first full year of the new legislative scheme.

The Ombudsman is also working closely with IBAC to manage the interactions that are necessary to progress an allegation from its initial receipt to investigation. For instance it has been necessary to comply with the following process on several occasions:

- the Ombudsman assesses whether an allegation is an “assessable” disclosure
- if it is, he refers it to IBAC to determine whether it is a “protected disclosure complaint”
- if it is, IBAC may refer it back to the Ombudsman for investigation
- the Ombudsman must then undertake a further assessment against criteria set out in the Ombudsman Act prior to deciding whether to investigate¹⁰.

I am pleased to say that to date there has been an excellent level of cooperation between IBAC and the Victorian Ombudsman’s office as we attend to the challenging task of triple handling such matters.

¹⁰ The third occasion on which a single allegation may have to be assessed before action is taken