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**PROCUREMENT PRACTICES IN THE WA PUBLIC SECTOR –
INSTITUTIONALISED CONFLICTS OF INTEREST?**

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INTRODUCTION

Between 2008 and 2010 the Corruption and Crime Commission ('the Commission') investigated misconduct allegations against a number of junior, Western Australian state and local government purchasing officers who purchased toner cartridges from a group of Victorian companies ('the company').

The investigation established that between 2006 and 2009, at least \$620,000 was spent in toner cartridges purchased from the company. There are three noteworthy aspects of those purchases:

- Had the same number of cartridges been purchased from approved suppliers, the cost to Government would have been around \$205,000, a difference of \$415,000.
- The toner cartridges purchased were inferior.
- Many more cartridges were purchased than were actually needed.

Toner cartridges are a relatively insignificant consumable item used by all public authorities. On a whole of Government basis the loss of \$415,000 is trifling. For a variety of reasons the Commission chose not to make misconduct findings against the purchasing officers, but they were censured by their own organisations. The investigation prompted central government to remind all public authorities to follow approved procurement policies.

On one view, it might be said that this is enough. The issue has been identified and action taken to resolve it.

The problem with this is that the policy and procedural environment in which the purchasing officers worked was, and remains, conceptually flawed. These flaws systematically institutionalise conflicts of interest in all situations in which public officers exercise discretionary authority.

These institutionalised conflicts of interest mean that public authorities create moral dilemmas for the public officers they employ. Public authorities either effectively guide their officers to make bad decisions or provide no guidance at all, and then punish them for making those bad decisions. It

follows that the behaviour identified by the Commission will happen again, if it is not happening already.

This issue is not trifling. The systematic nature of these institutionalised conflicts of interest means that the financial cost is likely to be significant. Putting to one side moral questions, it makes sound business logic to address this issue on financial grounds alone.

This paper explores this conceptually flawed policy and procedural environment by briefly considering what happened in the cases investigated; and identifying the policy and procedural flaws which might explain why. In doing so it discusses conceptually sound approaches to gifts and benefits upon which an appropriate policy and procedural environment might be built.

WHAT HAPPENED?

The purchasing officers involved found themselves on the receiving end of very aggressive sales tactics, which they found surprisingly difficult to deal with. These tactics included:

- **Aggression** – inundating purchasing officers with telephone calls, with each call increasing in pressure; staying on the line until a ‘confirmation order’ was signed and faxed back; and claiming these ‘confirmation orders’ were contracts which bound the public authority to future purchases.
- **Deception and Misinformation** - making untrue claims about the quality of their products; providing false or misleading information about the name of the company; and using aliases.
- **Gifts** – sending so-called ‘promotional items’ to purchasing officers, the nature and value of which varied according to the value of purchases – a reward scheme, so to speak
- **Credit Card Purchases** – encouraging purchasing officers to use corporate credit cards. These had significant purchase limits and did not need further approval. Surprisingly, given the availability of good systems to do so, the use of these credit cards was not actually reviewed by the public authorities involved.

This was well illustrated by contact between the company and a Commission investigator. During telephone conversations the investigator purported to be an employee of a State Government public authority.

Across several calls the sales representative identified himself by one name, and later by another. The investigator was initially told that if an order was placed, gifts such as a Play Station 3 or Navman would be sent. In further conversations, a large size LCD television was suggested. The Commission officer was encouraged to place an order using a credit card. He did so and received gift vouchers to the value of \$400.

Over the course of a year, one public officer purchased approximately \$23,000 worth of toner cartridges from the company. Had those purchases been made through an approved supplier, they would have cost just under \$5,000. The officer received about \$3,000 worth of gifts, which included:

- A ‘Microsoft Xbox 360’.
- A ‘PlayStation’ game console.
- One thousand dollars worth of Harvey Norman store vouchers.
- A DVD player.

- A television.

There was nothing illegal nor especially sophisticated about the company's approach. Looking at these transactions from outside and after the fact, it is hard to understand how they occurred. The pressure applied by the representatives should not be underestimated, but sales people pressuring purchasing officers is common enough.

And the purchasing officers' policy and procedural environment was clear cut. Without going to the detail of that environment, it actively ruled out purchasing from the company. All they had to do to defeat the aggressive sales tactics was to fall back on those clear cut policies.

The company was not an approved state or local government supplier, it was not local, and the toner cartridges did not constitute value for money.

Further since the gifts were neither token nor of negligible value, they could not be accepted.

These clear cut parameters notwithstanding, the policy and procedural environment failed.

WHY DID THE POLICY AND PROCEDURAL ENVIRONMENT FAIL?

Central to discussions about corruption and misconduct is the notion of public officers acting out of self interest – taking advantage of the circumstances of their public office to their own benefit. On the evidence this is not the story of these cases.

Also central to discussions about corruption and misconduct is the notion of public officers acting in secret – avoiding detection by hiding their actions. On the evidence neither is this the story of these cases.

The story of these cases is junior public officers being exhausted by, and succumbing to, relentless sales tactics and then being compromised by gifts that they did not seek. Thereafter they felt trapped by their lack of knowledge and increasing unease about the gifts they had received.

Without doubt, a major part of part of the story is that these officers were insufficiently trained about the policy and procedural environment in which they operated, and therefore neither properly understood it nor were able to confidently respond in accordance with it. One strategy to resolve the problem is to ensure that purchasing officers are adequately trained, including regular refresher training. This proposition is reflected in the Commission's report on the investigation.

But this approach really only deals with part of the problem. Even though the purchasing officers felt uneasy about the gifts they received, they typically did not return them, declare them, or seek advice about how to deal with them. The only logical explanation is that they knew that the gifts compromised them and either did not know how to resolve that compromise or were fearful of the repercussions of doing so. No wonder they felt trapped.

This points to a fundamental problem that training and the like cannot resolve. The Western Australian public sector approach to gifts and benefits is conceptually flawed and promotes a culture in which these sorts of case are inevitable.

RELATIONSHIPS

The threshold issue which logically, and therefore necessarily, impacts on any analysis of the role of gifts and benefits in the public sector is the relationship between the person giving the gift ('the gift giver') and the person receiving the gift ('the gift receiver'). The immediate questions of interest are, 'how do gifts impact the relationship between gift giver and gift receiver?' And, 'what are the potential consequences of that impact?'

Whether they are intended to or not, and whether the setting is social or business, gifts create obligations in the minds of those who receive them. Those obligations may extend from no more than positive feelings about the gift giver to a bona fide desire to give something in return.

This is significant among the reasons, for example, why we *exchange* gifts at Christmas. When we receive birthday gifts or going away gifts or get well gifts, we feel positively about the people who give them to us. When they have a birthday or go away or get sick, in large part because we feel positive about those people, we take our opportunity to give them gifts.

The impact on a person receiving a gift may be unrelated to the motivation of the gift giver, but there is nevertheless an impact. No doubt there are a range of emotions experienced by gift receivers, and these vary from person-to-person. But, as a general proposition, the notion that gifts create obligations in the minds of those who receive them is deeply culturally ingrained.

How many of us, for example, have experienced the disappointment at having invested much thought and emotion in giving a carefully chosen gift and received nothing in return? Or worse perhaps, receiving something carelessly or thoughtlessly chosen in return?

This deeply ingrained aspect of our culture doesn't somehow turn off in business settings. To the contrary, people give gifts in business settings *because* these ideas are deeply ingrained.

Following this argument, if the impact of receiving gifts is that a sense of obligation is created, what are the consequences? It is useful to examine this question in the context of the relationship between gift giver and gift receiver. There are three types of relationships which are relevant:

- **Relationship one: gift receiver exercises discretionary authority in relation to the gift giver.** The sense of obligation created in the gift receiver has clear and direct potential to directly influence their behaviour, to the advantage of the gift giver. Therefore, the receipt of any gift in this relationship creates an immediate corruption risk. Whatever the value of the gift, this risk cannot be eliminated, or even significantly reduced, if a gift is accepted.
- **Relationship two: gift receiver can indirectly influence someone else who exercises direct discretionary authority in relation to the gift giver.** The sense of obligation created in the gift receiver has indirect potential to cause them to influence someone else's behaviour, to the advantage of the gift giver. Therefore, the receipt of a gift in this relationship creates an immediate corruption risk. Once again, whatever the value of the gift, this risk cannot be eliminated, or even significantly reduced, if the gift is accepted.

In these two scenarios, it might be argued that gifts of lower value create lower corruption risks than gifts of higher value. This might lead to a discussion about lower corruption risks being more acceptable than higher corruption risks and, in turn, an argument that the corruption risks associated with accepting gifts of token or negligible value might be acceptable.

This argument is errant nonsense. It overlooks that the level of obligation created by the gift is subjective according to the value placed on it by the gift receiver and the dynamics of the relationship between gift giver and gift receiver. Moreover, there is no logical rationale to adopt a policy which creates any form of corruption risk when it can be easily and costlessly avoided.

The cases highlighted by the Commission's investigation amply illustrate this point. The purchasing officers involved did not even want the gifts given to them by the company. They were nevertheless an important strategy employed by the company to successfully compromise them.

- **Relationship three: gift receiver neither exercises nor influences the exercise of discretionary in relation to the gift offerer.** The sense of obligation created in the gift receiver has no potential to influence anyone's behaviour, to the advantage of the gift giver. Therefore, it is difficult to see how accepting gifts creates corruption risk. Acceptance or rejection of gifts in these circumstances is a question limited to organisational cultural preference.

Following this line of reasoning, the next question to ask is, 'how does the Western Australian public sector deal with the question of relationships?' As part of its investigation the Commission looked at almost all gift policies across the state and local government sectors in Western Australia.

The relationship between gift giver and gift receiver is not treated as a threshold issue in these policies. The threshold issue for gift policies is overwhelmingly the value of the gift.

That notwithstanding, the issue is recognised to some extent in 32% of policies, which articulated that no gifts of any kind were to be accepted by procurement officers. In the sense that relationships are relevant, 52% of policies make reference to them, but not in the detail discussed above. Disclosure of the relationship between gift giver and gift receiver was an element of only 14.7% of gift registers.

The public sector's approach appears to be based on the nonsensical argument that gifts of token value or below a certain monetary value have only a limited capacity to corrupt.

This conceptually flawed approach has significant consequences when discretionary authority is being exercised.

When discretionary authority is involved, the logical extension of a conceptually sound approach is that the policies, procedures and organisational culture ought to actively encourage officers exercising discretionary authority to decline gifts. Why gifts should be declined and how to do so should be very clearly stated. Organisational culture ought to actively support these officers declining gifts so that they feel supported in doing so, thereby creating 'decline gifts' norms.

The current approach does the opposite of this. Because policy and procedure is that some gifts are acceptable and some are not, the organisational cultural consequence must inevitably be support for gift acceptance, at least at some level. It follows that a certain, unquantifiable degree of influence over discretionary authority decision-making by those with an interest in the outcome of such decisions is acceptable.

How public officers could possibly make meaningful sense of this is unclear. Unacceptable norms are inevitable. For example, nothing perhaps prevents a public officer negotiating about the value of a gift to ensure that it is within the token or defined monetary values.

How tokenism is decided is equally unclear. Public authorities' policies are either silent about token values or range from \$25 to \$100. Can a \$99 gift really be of only token value? Because it is worthless in the autograph market, is the autograph of a minor sporting identity really only of token value if the gift receiver is an autograph collector seeking that autograph?

The inevitable consequence of this flawed approach is that motivated people or organisations will leverage these flaws to their advantage. They will give so called token gifts or gifts which fall under monetary thresholds to public officers who exercise discretionary authority. And they will do so for the sole purpose of gaining some advantage in those public officers' discretionary decision-making.

Although the gifts provided exceeded monetary limits, this is precisely the tactic employed by the company.

When those public officers accept gifts in accordance with policy, they will confront an irreconcilable conflict of interest. It is a small step for a clever external party to manipulate these circumstances in order to trap, or at least make the public officer feel trapped, between their sense of personal obligation to the gift giver and their public officer duties.

This is precisely what happened to the purchasing officers in the cases investigated.

RECORD KEEPING

As well as this threshold issue a second issue of great significance is how decisions about gifts and benefits are recorded.

A conceptually sound approach is one that supports a policy and procedural environment based on outlining why gifts should be declined by officers exercising discretionary authority and how to do so; and promotes an organisational culture which actively supports them declining gifts.

Following the argument advanced earlier that gift givers in business settings are likely to take advantage of the ingrained cultural response of people to gifts, a conceptually sound approach must also extend to management reviewing the information contained in records and using it to determine where their organisations are at risk to corruption from gift givers.

Five things should follow from this logic:

1. Records should be actually kept.
2. Records should capture the relationship between gift giver and potential gift receiver.
3. Records should appropriately guide potential gift receivers to decline gifts when discretionary authority is involved in the relationship.
4. Records should focus on the decisions and reasons for decisions of potential gift receivers.
5. Management should actually review the records.

The Commission's investigation report recommends that public authorities adopt forms to record decisions made when gifts are offered. These should then be aggregated into a 'gift decisions register'. As discussed below, the 'gifts decisions register' notion is conceptually different from traditional 'gift registers'. A possible model form for this purpose is illustrated below.

Name of Public Authority Record of Gift Decisions

All employees are required to complete this form if they are offered a gift. Once completed, the form must be signed by a manager and saved on the Gift Decisions Register.

<p style="text-align: center;">Gift-Recipient</p> <p>Name of person being offered gift <input style="width: 90%;" type="text"/></p> <p>Position <input style="width: 90%;" type="text"/></p>	<p style="text-align: center;">Gift-Offerer/Gift-Giver</p> <p>Name of person who is making the offer <input style="width: 90%;" type="text"/></p> <p>Business/ organisation <input style="width: 90%;" type="text"/></p>
<p>Description of gift-offer <input style="width: 95%; height: 30px;" type="text"/></p>	
<p style="text-align: right;">Value <input style="width: 100px;" type="text"/> <small>(if required by policy)</small></p>	
<p style="text-align: center;">Relationship with Gift-Offerer/Gift-Giver</p> <p style="text-align: center;"><small>Does the intended recipient of the gift have discretionary authority in relation to the gift-offerer/gift-giver? (Such as purchasing discretion)</small></p>	
<p style="text-align: center;">YES Discretionary authority exists <small>Gift-offer must be</small></p> <p style="text-align: center; border: 1px solid black; padding: 5px;">DECLINED</p> <p><input type="checkbox"/> Returned <input type="checkbox"/> Declined prior to receipt</p>	<p style="text-align: center;">NO No discretionary authority exists <small>Was the gift declined or accepted?</small></p> <p style="text-align: center; border: 1px solid black; padding: 5px;"><input style="width: 90%;" type="text"/></p> <p>Disposal <small>(select disposal method)</small></p> <p>If Accepted: <input type="checkbox"/> By officer <input type="checkbox"/> Donated (charity/social club) <input type="checkbox"/> Other (specify) <input style="width: 100px;" type="text"/></p> <p>If Declined: <input type="checkbox"/> Returned <input type="checkbox"/> Declined Prior to receipt</p>
<p>Person completing form</p> <p>Name: <input style="width: 100%;" type="text"/></p> <p>Position: <input style="width: 100%;" type="text"/></p> <p>Signature: <input style="width: 100%;" type="text"/></p> <p>Date: <input style="width: 100%;" type="text"/></p>	<p>Authorisation/Approval</p> <p>Name: <input style="width: 100%;" type="text"/></p> <p>Position: <input style="width: 100%;" type="text"/></p> <p>Signature: <input style="width: 100%;" type="text"/></p> <p>Date: <input style="width: 100%;" type="text"/></p>

The model form all of the elements which logically need to be recorded, but any form covering these elements would suffice.

In terms of the discussion thus far, the 'gift decisions register' approach supports an agreed decision-making process based declining gifts by officers exercising discretionary authority; gives public officers the opportunity to declare all of their actions in relation to gifts offered, thereby normalising a record keeping process; and reinforces 'decline gifts' norms of behaviour.

Importantly, it also captures valuable information about where public authorities are under 'attack', or are exposed to corruption risk from people or organisations bearing gifts. As an indicator of

misconduct risk or exposure, an audit of gift decisions registers is potentially an important tool for public authorities.

Given the potential consequences of corruption related to gifts, both financial and non-financial, the benefits of investing in auditing gift decision registers is far outweighed by the cost of doing so.

This begs the question, 'what is the Western Australian public sector's approach to gifts and benefits record keeping?'

In the Western Australian public sector gift decision registers do not appear to exist, albeit that 28% of policies did address recording gifts offered and declined. The overwhelmingly typical approach is registers of gifts accepted - so called, gift registers.

Sixty percent of gift policies required public officers to declare gifts accepted on a gift register. Of those, 66% provided guidance on how to complete the register. The remaining policies did not provide what might be regarded as useable instruction to the public officer.

Only one policy indicated that the register is audited.

This approach is the opposite of the 'gift decisions register' approach. It denies public officers the opportunity to declare all of their actions in relation to gifts offered, thereby normalising that record keeping is not, or at least is only partly, necessary. It does not reinforce an agreed decision-making process, it promotes the merit of accepting gifts and, in turn, creates inappropriate 'accepting gifts' norms of behaviour.

Overall, the gift register approach reinforces the institutionalised conflict of interest, and consequent moral dilemmas, brought about by focussing on gift values rather than relationships between gift givers and gift receivers.

To the extent that gift registers capture some useful organisational information, they miss vital chunks of information about where public authorities are under 'attack,' or are exposed to corruption risk from people and organisations bearing gifts.

In any event, with the exception of one gift register which is audited, this information is not actually used by management.

FURTHER CONSIDERATIONS

These two conceptual flaws make the Western Australian public sector's approach to gifts and benefits problematical. In addition to this, the public sector generally takes something of a laissez-faire approach to gifts and benefits. This laissez-faire approach is reflected in a number of aspects of public sector gift policies and registers.

The Commission's investigation established the following:

- 73% of public authorities have both a gift policy and a gift register.
- 12% had a gift policy but no register.
- 8% had a gift register but no policy.

- 2% had neither¹.

The fact that 73% of public authorities had both a gift policy and gift register is inarguably positive, as is that 93% had at least something in place. But this positivity does not hold up to more detailed analysis.

Local government regulations establish the core requirements of local government gift policies, and this was reflected in the policies examined. There was little variation between the gift policies of local governments. Therefore, for the purposes of analysis one 'standard' local government gift policy was considered.

Some consistency, albeit limited, was also evident in state public authorities' gift policies, most likely because of the practice of public authorities copying each other's policies.

This overlap in policies means only 25 distinct gift policies were identified among 274 public authorities analysed. These policies were broken down into the three broad areas of format, accountability and content. These areas were, in turn analysed against 14 key elements (see Figure One, below). Nine of these elements were considered critical for an adequate policy. Based on that analysis a view was formed about the adequacy of the 25 policies.

	ELEMENT	Critical
FORMAT		
1	Location of the Policy	
2	Procedures and Guidelines	✓
3	Detail	✓
4	Definitions	✓
ACCOUNTABILITY		
5	Declaration Required If Receiving Gifts	✓
6	Gift Register	✓
7	Consequences of Breaching Policy	✓
CONTENT		
8	Minimum Monetary Value	
9	Relationship with Gift-Offerer/Gift-Giver	✓
10	Declining Gifts	✓
11	Disposal of Gifts	
12	Policy when Agency Gives Gifts	
13	Accumulation of Gifts	✓
14	Training ¹	

FIGURE ONE: ELEMENTS OF GIFT POLICIES

¹ The remaining 5% of public authorities did not respond to the survey

Based on that analysis, and putting to one side the conceptual flaws already discussed, policies were ranked as ‘excellent’ through to ‘poor’, based on the number of critical elements they contained. As Figure Two illustrates, 56.5% were categorised as ‘poor’. Only 30.5% were categorised as ‘good’ or ‘excellent’.

Number of Critical Elements in Policy	Rating	Number of policies	Percentage of policies
8 or 9	Excellent	2	8.7%
6 or 7	Good	5	21.8%
5	Average	4	13.0%
1 to 4	Poor	14	56.5%

FIGURE TWO: CATEGORISATION OF GIFT POLICIES

Only 44% of policies included procedures and guidelines. Without appropriate supporting procedures and guidelines, the overall effectiveness of any policy is questionable. There were insufficient instructions about managing gifts in 64% of policies. Some policies consisted of only a single paragraph or statement.

Only 36% of policies included definitions of major terms, and across those definitions there was limited consistency. Many of the policies made reference to token gifts, and placed monetary values on such gifts, but did not define ‘token’.

The position was slightly different in local governments. The regulations define ‘notifiable’ gifts and ‘prohibited’ gifts by assigning monetary amounts and time periods to them, but not token gifts.

Only 24% of gift policies articulated the consequences of breaching policy. When a policy was located within a code of conduct, the consequences of transgression were generally outlined in the context of the overall code.

Accumulation of gifts was considered in only 13% of the policies examined.

Together with the conceptual flaws, this laissez-faire approach and consequent lack of clarity around so much of these gift policies, it is hardly surprising that the purchasing officers in the cases investigated did not properly understand their obligations.

CONCLUSIONS

There are serious conceptual flaws in the approach to gifts and benefits in the Western Australian public sector. Those conceptual flaws stem from the following:

- Treating gift values as the threshold policy issue, instead of the relationship between gift giver and gift receiver.
- Recording gifts received, instead of recording decisions about gifts offered.

This conceptually flawed approach is exacerbated by something of a laissez-faire approach to gifts and benefits.

The conceptual flaws systematically institutionalise conflicts of interest, thereby causing public officers who exercise discretionary authority to face moral dilemmas that they are likely to find difficult to resolve. These conflicts apply across all levels of the public sector. Therefore, the problems identified in the cases investigated by the Commission are likely to be replicated across the West Australian public sector.

This means that West Australian public sector is exposed to significant, wide spread corruption risk by dint of its own policies and procedures. On any logical analysis the financial and non-financial benefits of resolving these flaws far outweighs the cost.

Radical reform of the sector's approach to gifts and benefits is needed.
