



Strengthening the Victorian Government Integrity System - Does Victoria have a government corruption problem?

Introduction – What is the evidence?

History and human nature support the conclusion that there has been, and always will be, corruption occurring in government.

“The short answer ... is that there will always be a government corruption problem (in all countries) unless a miracle occurs to remove greed and the desire for power and hubris from the psyche of homo sapiens. There is also the fact that some of the species do not believe that the rules apply to them, and others believe that the end will always justify the means”.¹

Its extent and significance, however, is not something that can be assessed like other criminal behaviour because it is conducted in secret and the only witnesses will normally be the participants. Other criminal activity will usually have a victim. With corruption, we are the victims and will know nothing of the conduct. However good the Government Integrity System, direct evidence will therefore be limited but its existence will be a significant confirmation that Victoria has a corruption problem.

What also needs to be examined is the evidence of the relevant surrounding circumstances, especially the way government is conducted, its culture and quality, including the quality of its integrity systems. In Victoria they are a problem in their own right creating an environment that does not address or deter corruption but encourages it.

A. The Evidence

Is there direct evidence of public corruption in Victoria?

It is remarkable how easy it is to forget the examples, even of recent years. There are many. They have occurred at a range of levels within the public sector. A number of them are associated with the procurement process. In those situations the corrupt will have difficulty not leaving some evidence behind them. But in those areas where, for example, policy and major planning and other decisions involving large sums of money are involved, corruption can and will occur without leaving a trail.

A.1 Recent Direct evidence?

In the last 3 years the Ombudsman has reported corrupt conduct in government bodies,

- Cenitex, a corporation to supply IT services to the Victorian government ⁱⁱ
- Victorian Building Commission- ⁱⁱⁱ
- "Office of Living Victoria", a new State Water Agency^{iv}

It should be noted that the Ombudsman is no longer investigating corruption matters.

IBAC has identified examples ranging from bribery in a cemetery to the conduct of Councils. It is currently engaged in two major investigations involving

- the Education Department concerning "Banker Schools" (Operation Ord) ^v - and
- the Transport Department (Operation Fitzroy) ^{vi}

Prior to the establishment of IBAC, we had to rely on the Ombudsman, the police and internal review by the Department or Agency concerned. Experience has shown the inadequacy of that situation. One example concerned the establishment of IBAC. There was an incident discussed before a Parliamentary Committee concerning a Department of Justice (DOJ) employee who sought a bribe of \$20,000.00 in return for assisting a tenderer to obtain a contract to provide security services to IBAC. The Department also had evidence that he had spoken to another public servant in another Department about what he was doing. There was no independent investigation and, while the DOJ employee, was asked to leave, the other public officer was allowed by his Department to remain. There was no inquiry into the affairs of the DOJ employee to determine whether this was a personal isolated aberration or the tip of an organised corruption iceberg.

That sort of result is not unusual in internal review systems - and understandable. The superior officers are busy and have other "more important" and pressing responsibilities. They are also

in a conflict of interest situation carrying with it strong and subtle pressures to minimise the damage to the reputation of the public body they lead and themselves.

It should also be noted that, at that time, Victoria lacked, what it still lacks, a fully empowered and resourced independent anti-corruption body which could ensure that an independent investigation would take place.

A.2 Other evidence – a survey.

IBAC has recently had an investigation conducted of perceptions of people in the public service.^{vii} 839 Senior Victorian public servants were interviewed (p.9). In the course of that investigation they were asked whether they thought there was the opportunity of seven different types of corruption occurring within their department or agency and whether they had suspected or personally observed such corrupt behaviour. The results (set out in Table 7) were as follows;

Corruption in Department/agency	Opportunity%	Suspected %	Observed %
Hiring friends or family for public service jobs	53	38	25
Conflict of interest	72	38	20
Misuse of information or material	68	32	15
Abuse of discretion	58	28	15
Hiring one's own company, or the company belonging to close associates or relatives to provide public services	33	18	9
Perverting the course of justice	16	3	2
Bribery	32	4	1
Don't know	3	6	4
Prefer not to say	0	1	4

While the judgements of the 839 people of "opportunity" and "suspicion" may have a larger subjective element in them than observation of corrupt conduct, they are significant. The percentage figures for "opportunity" also support the circumstantial evidence discussed below that the risks are high. The number who "observed" corrupt conduct while lower is also significant.

We plainly have a corruption problem. But how serious is the problem? It is necessary to look into the circumstances from which, and in which, the direct evidence has emerged, and will continue to do so, together with the government integrity systems we have and their capacity to help to address the problem.

B. Circumstantial evidence – a long standing and worsening risk of serious corruption?

B1. Presence of Critical Factors enabling corruption to flourish?

As shown in the history of the development of systemic corruption in Queensland and W.A. in the 1980's, two factors are generally found to play a critical role; secrecy and executive control concentrated in the hands of a few.^{viii}

Turning to Victoria:

(a) Secrecy. The secrecy of governments in Victoria, including over major policy development, ministerial planning decisions, other decision making, contracts and major infrastructure agreements has increased significantly over the last 20 years.

(b) Executive power controlled by a few with little or no accountability. This has also been a feature of government in Victoria, for example, including in one of the historically most corruption vulnerable areas, urban planning. For some years, the Minister for Planning has been empowered to intervene in major planning applications but the law does not require a public process and instead allows the applications to be made and processed in secrecy. In particular, the Minister is under no obligation to publish reasons.

In addition, a practice has been allowed to develop which is known as “flipping” where Developer A

- buys a city property,
- seeks a permit to build 20 or 30 stories,
- the Minister then intervenes and grants the permit sought

Developer A does not proceed to build but holds the property for some 12 to 15 months and sells it at a very large multimillion dollar profit to Developer B. Developer B then seeks permission for a further 20 or 30 stories and is given it - again by the Minister.

It is difficult to identify any public benefit in this process. There is, however, a grave risk of corrupt activity at different levels of government in the various stages in that process.

IBAC, at present, could not start to conduct an investigation of the practice to ensure all is above board because of the secrecy involved and lack of information and IBAC'S extremely restricted threshold test, which, in light of the recent High Court judgement in the Cunneen case^{ix}, must be rigorously interpreted against IBAC.

B2. Extent of Opportunity and temptation?

We have in the last 30 years greatly increased the opportunities to corrupt governments and the temptation to do so.

(a) Outsourcing. Our ongoing expansion of outsourcing of services to and by government including PPPs means that many more people and their businesses are engaged in and dependent on securing government contracts and, therefore, seeking them by whatever means are available.

(b) Lobbying. Lobbying is one of those means. Over the last 30 years, lobbying has grown into an industry of power and influence serving powerful vested interests. It includes a rotating door between employment in it and/or private enterprise after loss of parliamentary office and from the lobbying industry to government as staffers to MPs and as public servants.^x

(c) Political Funding. Over the last 30 years, the so-called “arms race” in political funding has developed together with the widespread practice of raising funds by selling access to MPs and Ministers (is the Code of Conduct being breached? See cl3 (1) of the Code^{xi}). Practices have developed to conceal the sources of donations. The system has apparently been effectively used in recent years by the Mafia to gain access to, and influence, Federal Ministers and MPs including at least one Victorian MP - <http://www.smh.com.au/federal-politics/political-news/key-liberal-fundraising-body-took-mafia-money-for-access-20150629-gi07yb.html> . Why not also the Victorian Government?

B3. A vulnerable culture in two branches of government – the Executive and the elected

(a) The loss of a fundamental guiding principle. There is a longstanding ancient ethical and common law principle that applies to those to whom we entrust the power to govern on our behalf. It appears to have been forgotten by all of us over the last 30 years. This key principle requires that those entrusted with such power must put the public interest first, in particular, ahead of their personal and party interests.^{xii}

(b) The current guiding “principles”.

In the political world the forgotten public office public trust principle has been largely replaced by the “Whatever it takes approach” which gives priority to the pursuit of power over the public interest.^{xiii} In the public service, the above public trust model in which the people are the principals and beneficiaries and those entrusted with power by them our public trustees, has been replaced with the business model in which the principal is the State, government is its business agent and the people are merely clients.^{xiv}

(c) Consequences – political world?

We should not be surprised that, in those circumstances the money we entrust to the people in government is seen by many of them as belonging to their “business” not to the people. We should also not be surprised that, in the political arena, the culture appears to have changed to the point that our elected representatives and those advising them see nothing wrong in

- using the public office we have entrusted to them as the means to raise money to benefit them and their parties and
- deciding who they will speak with on the basis of whether they are paid to give the access or not, and

and, as a result, thereby choosing to give preferential access to those who can pay over those who cannot.

(d) Consequences – public sector.

We should also not be surprised that in the public sector the culture has been failing to deal adequately with minimising the risk associated with conflicts of interest problems; for, among other things, under the business model it is likely to be the reputation of the Public Service “business” that matters most not the public interest^{xv}. These realities were examined recently by the Ombudsman. In his 2014 Report, “Conflict of interest in the Victorian public sector – ongoing concerns”^{xvi}, he concluded that

“Conflict of interest is a key challenge facing the Victorian public sector. It is worrying that it occurs..... Despite multiple reports and investigations by my office into this issue, it continues to be a significant theme in many complaints to my office. It is worrying that it occurs all too frequently in the Victorian public sector. Also, it can jeopardise the proper expenditure of significant public funds.”

But don't we have Codes of Conduct that apply and open and accountable government systems to address these changes and so address the corruption risks flowing from all the above changes and weaknesses?

Yes, we have them on paper but, they are so inadequate, they compound Victoria's corruption problem.

C. The inadequacies of the Victorian Government Integrity System.

That system comprises

- Codes of Conduct (general and re lobbying),
- Legislation (whistleblowers, Freedom of Information, and disclosure of Political Donations).

- The Auditor- General, Ombudsman and IBAC.

All are inadequate.

(a) Codes of conduct. Victoria's Codes of Conduct for public sector employees are detailed. They tend to focus on the impact of employees' conduct on the reputation of the branch of government concerned. The forgotten critical and overarching guiding value and standard - that they hold offices of public trust (cf. Commonwealth Statement of Ministerial Standards – "that public office is a public trust" cl. 1.2) is not mentioned. Small gifts are allowed^{xvii} – presumably on the basis of the widespread assumption that small gifts do not corrupt. Recent research has shown this to be incorrect^{xviii} as did the investigations by the W.A and Victorian Ombudsmen of corrupt dealings over the purchase and supply of toner printer systems.^{xix}

The Code for Members of Parliament focusses on conflicts of interest, allows gifts (disclosure threshold \$500.00) and fails to refer to the critical overarching guiding value and standard.^{xx} It is unclear whether there is an operating Code for Ministers.^{xxi}

Codes have not been successful in addressing conflicts of interest (see above and the recent IBAC investigations including that into the conduct of the Banker schools). We note that it appears to have been able to investigate those matters because those involved leave a trail of evidence behind them and direct evidence of the facts has been provided to it at the outset of the investigation. In matters like the Obeid matter, that is not the case.

The Code re Lobbying^{xxii} is easily avoided because it is confined to third party lobbying and has many exceptions.

- (b) Whistleblowers. The Public Disclosure Act, fails to protect whistleblowers and discourages people from "blowing the whistle";
- (c) The FOI system. Notwithstanding the recent inclusion of an Information Commissioner, the FOI system falls well short of Queensland's Right To Know legislation. The exemptions provided are too broad and have significantly contributed to the increase in government secrecy;
- (d) Political Donations. Victoria does not have a State regulatory system for the disclosure of donations but relies on the Commonwealth one that applies to federal political parties only and has a disclosure threshold that is too high (\$12,400.00 - \$1000.00 is present best practice) and does not require contemporaneous disclosure but allows very long delays before disclosure.^{xxiii} For a recent analysis of the Federal (and therefore the Victorian System which adopts it) see Peter Timmins's recent analysis - <http://foi-privacy.blogspot.com.au/2015/07/voices-for-action-on-influence-peddling.html> .

- (e) The Office of the Auditor- General. This vital safeguard is seriously limited. It is unable to follow the dollar, exchange of information with other integrity agencies and is subject to unnecessary constraints that significantly and unnecessarily limit and delay it in performing its role;^{xxiv}
- (f) IBAC. While IBAC has already demonstrated its value and importance, it is severely limited in its ability to investigate because of the thresholds set which prevent it investigating systemic corruption of the secrecy and sophistication of the Obeid matter and excludes conduct which may constitute breaches of the common law offence of misconduct in public office.^{xxv} Further the elements of the threshold are such that they provide ample opportunity for the corrupt to collaterally legally challenge investigations thereby stopping them and, if charged with offences, to challenge the admissibility of evidence obtained by IBAC.

The reality is that Victoria lags far behind the best practices to be found, for example, in NSW and Queensland. Little wonder that we are yet to hear of an Obeid case in Victoria.

Conclusions.

The reality

When regard is had to the direct evidence of recent corruption and the above realities, the conclusion that should be drawn are that there is a very high risk of serious corruption in Victoria in both the political and public service arms of government. In addition, that high risk is compounded by one of the weakest and most flawed government integrity systems in Australia. That government integrity system is best described as a Clayton's government integrity system. An extreme proposition, but the present system contributes significantly to the secrecy that allows corruption to flourish and fails to provide a real deterrence.

The nature and extent of the above circumstances is such that we must accept that we have a serious problem that has yet to be adequately addressed.

Further, our present Clayton's Government Integrity System will not only encourage corruption, it will result in bad government. It will waste, and cost, Victorians many millions of dollars. The people of Victoria are entitled to a best practice government integrity system.

Addressing the problem

In this Parliament, Victoria has the opportunity to significantly address our corruption problem.

The Coalition, ALP and Greens went to the election agreed in supporting the strengthening of at least two critical government integrity bodies, - IBAC and the Auditor-General.^{xxvi} While their

promises varied in detail, they should be congratulated in supporting such reforms particularly for committing to place the public interest ahead of their own personal party interests.

For in doing so, they will be conscious of the fact that they run the risk of exposing themselves and their colleagues, particularly if in government, to additional scrutiny and their parties to potential political damage if any of their members engages in corrupt conduct. But they should also bear in mind that as our public trustees, they should regard themselves as obliged, in any event, to account fully to us. Their's is an unavoidable conflict of interest position but guidance may be found in the statement of the public office public trust principle by Sir Gerard Brennan.

"It has long been established legal principle that a Member of Parliament holds "a fiduciary relation towards the public" and "undertakes and has imposed upon him a public duty and a public trust.

The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee."^{xxvii}

By honouring that principle as they address their commitments, they will take significant steps towards both open and accountable government and addressing the serious corruption risks Victoria faces. Their actions will also advance good government, minimise the wastage of our funds and advance economic growth^{xxviii}. They will also send a message to the Victorian people that government corruption is wrong and will not to be tolerated. If, however, the Parties choose to maintain the present system, the message they will send is that corruption is, at worst, a minor matter and will not be addressed. This particularly matters because -

"Our Government is the omnipresent teacher. For good or for ill, it teaches the whole people by its example".
xxix

ⁱ <http://www.australiancollaboration.com.au/essays-books-and-reports/essays/corruption/> ; at p 22,

ⁱⁱ <https://www.ombudsman.vic.gov.au/getattachment/d8a9a8bd-76f3-4852-8db0-ad5bd774418d>

ⁱⁱⁱ <http://www.cbp.com.au/Updates/Ombudsman-finds-overspending-and-corruption-in-Vic>; for report see <https://www.ombudsman.vic.gov.au/getattachment/3e3f9fd4-993e-48c2-86df-1e11432063410>

^{iv} <http://www.theage.com.au/victoria/living-victoria-ombudsman-stirs-up-state-water-agency-20140324-35e8q.html>

^v <http://www.theage.com.au/victoria/ibac-sets-date-for-investigation-into-alleged-victorian-education-department-corruption-20150316-1m06ic.html> ; <http://www.theage.com.au/victoria/ibac-turning-spotlight-on-alleged-fraudulent-use-of-education-funds-20150426-1mtexd.html>)

vi - <http://www.theage.com.au/victoria/transport-department-staff-funnelled-public-money-to-their-children-ibac-hearing-told-20140723-zw0op.html>

vii <http://www.ibac.vic.gov.au/docs/default-source/research-documents/ibac-perceptions-corruption-report-v2-2013.pdf>

viii <http://www.australiancollaboration.com.au/essays-books-and-reports/essays/corruption/> ; at p 13ff

ix <http://www.accountabilityrt.org/is-the-high-court-helping-to-fight-corruption/>

x <http://www.themandarin.com.au/33963-lobbying-vested-interests-subversion-public-interest/>

xi MPs Part I—Code of Conduct Members of Parliament (Register of Interests) Act 1978 No. 9223 of 1978

[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/DDE300B846EED9C7CA257616000A3571/DC6CE02B6B9FA16ECA2577610027C5DE/\\$FILE/78-9223a002.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/DDE300B846EED9C7CA257616000A3571/DC6CE02B6B9FA16ECA2577610027C5DE/$FILE/78-9223a002.pdf).

Code of conduct for Members

s.3 (1) It is hereby declared that a Member of the Parliament is bound by the following code of conduct—

(a) Members shall—

(i) accept that their prime responsibility is to the performance of their public duty and therefore ensure that this aim is not endangered or subordinated by involvement in conflicting private interests;

(ii) ensure that their conduct as Members must not be such as to bring discredit upon the Parliament;

(b) Members shall not advance their private interests by use of confidential information gained in the performance of their public duty;

(c) a Member shall not receive any fee, payment, retainer or reward, nor shall he permit any compensation to accrue to his beneficial interest for or on account of, or as a result of the use of, his position as a Member;

(d) a Member shall make full disclosure to the Parliament of—

(i) any direct pecuniary interest that he has;

(ii) the name of any trade or professional organization of which he is a member which has an interest;

(iii) any other material interest whether of a pecuniary nature or not that he has in or in relation to any matter upon which he speaks in the Parliament;

(e) a Member who is a Minister shall ensure that no conflict exists, or appears to exist, between his public duty and his private interests;

(f) a Member who is a Minister is expected to devote his time and his talents to the carrying out of his public duties.

(2) Without limiting the generality of the foregoing in the application and interpretation of the code regard shall be had to the **recommendation of the Joint Select Committee of the** Victorian Parliament appointed pursuant to The Constitution Act Amendment (Qualifications Joint Select Committee) Act 1973

presented to the Legislative Assembly on the 23rd day of April, 1974 (D.14/1973–74) contained in paragraph 12 of that report.

^{xii} Hon T Smith QC; Australia's Democratic governments; a proud history, their present state and future?
<http://www.accountabilityrt.org/?s=rotary> .

^{xiii} Sir Gerard Brennan - PRESENTATION OF ACCOUNTABILITY ROUND TABLE INTEGRITY AWARDS. DEC 2013
<http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/> .

^{xiv} Professor Graycar, Research Paper, Perception of Corruption in Victoria - p.4
<http://www.ibac.vic.gov.au/docs/default-source/research-documents/ibac-perceptions-corruption-report-v2-2013.pdf>,

^{xv} See discussion in <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits> discussed in http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-_3_.pdf (p 17)

^{xvi} <https://www.ombudsman.vic.gov.au/getattachment/940cb4e0-45bc-4fad-a76d-c32ca5f6b401>

^{xvii} <http://vpsc.vic.gov.au/ethics-behaviours-culture/gifts-and-hospitality/>

^{xviii} "You owe me" - Malmemendier and Schmidt; <http://www.nber.org/papers/w18543> - reported the Age <http://www.theage.com.au/comment/the-smaller-the-gift-the-larger-the-fallout-20140418-zqvy7.html#ixzz2zzMeY07G>

xix The 2011- The toner cartridge case - excessive ordering and at inflated prices from a supplier who made small gifts. The Victorian Report
<https://www.ombudsman.vic.gov.au/getattachment/554534e7-6201-4eb4-9fed-85a37e89bdba>
The WA Report;
<https://www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202011/Misconduct%20Allegation%20in%20Relation%20to%20the%20Purchase%20of%20Toner%20Cartridges%20in%20Exchange%20for%20Gifts.pdf> (p xvi) additional cost was at least \$415,000.00

^{xxi}
[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/DDE300B846EED9C7CA257616000A3571/DC6CE02B6B9FA16ECA2577610027C5DE/\\$FILE/78-9223a002.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt3.nsf/DDE300B846EED9C7CA257616000A3571/DC6CE02B6B9FA16ECA2577610027C5DE/$FILE/78-9223a002.pdf)

^{xxii}
http://www.lobbyistsregister.vic.gov.au/lobbyistsregister/documents/Vic_Gov_Professional_Lobbyist_Code_of_Conduct_Nov_2013.pdf

^{xxiii} <http://www.theage.com.au/comment/political-donations-victorias-big-secret-20141014-115mgh.html>

^{xxiv} <http://www.accountabilityrt.org/following-the-money-an-auditors-view/>

^{xxv} <http://www.accountabilityrt.org/?s=toothless>; <http://www.accountabilityrt.org/victoria-needs-better-tools-to-fight-corruption/>

^{xxvi} <http://www.accountabilityrt.org/wp-content/uploads/2014/10/Parties-Commitments-211114.pdf>

^{xxvii} <http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/> . See also ART Inaugural Government Integrity lecture by Hon Fred Chaney; <http://www.accountabilityrt.org/inaugural-art-lecture-fred-chaney-integrity-parliament-where-does-duty-lie/>

^{xxviii} See speech of the UK Prime Minister, David Cameron at the OGP summit at the end of 2013: <https://www.gov.uk/government/speeches/pm-speech-at-open-government-partnership-2013>

^{xxix} *Olmstead v United States* (1927), 277U.S., 438, 485, Brandeis, J.