



## FINAL REPORT (Redacted)

Investigation pursuant to referral

Section 24(2)(a) *Independent Commissioner Against Corruption Act 2012*

Agency	Department of the Premier and Cabinet
Ombudsman reference	2013/07046
ICAC references	2013/000114; 2013/000463
Date of referral	7 November 2013
Issues to be assessed	Whether officers of the Department of the Premier and Cabinet committed misconduct or an act of maladministration in granting leave without pay and allowing a departmental executive to work with an incumbent supplier during a tender process

### Jurisdiction

This matter was referred to the Ombudsman by the Commissioner pursuant to section 24(2)(a) of the *Independent Commissioner Against Corruption Act 2012* (**the ICAC Act**), as raising a potential issue of misconduct or maladministration in public administration within the meaning of that Act (**the referral**).

### Action taken

Using my powers under the *Ombudsman Act 1972*, I have conducted an investigation of the issue in response to the referral by:

- notifying OCIO and the Chief Executive of the Department of the Premier and Cabinet (**the department**) of the allegations concerning Mr A, and considering their responses and documentation
- considering:
  - the ICAC Act and the Ombudsman Act
  - the results of independent research, including a background paper 'Strategic procurement of ICT products and services by the South Australia government' dated 26 March 2012
  - Code of Ethics for the South Australian Public Sector made pursuant to the *Public Sector Act 2009*
- preparing a provisional report and providing it to the department and the Commissioner for comment
- preparing this final report.

### Standard of proof

The standard of proof I have applied in the investigation and this report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance

with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 (*Briginshaw*), I have considered the nature of the complaint and the allegations made and the consequences if they were to be upheld. *Briginshaw* recognises that greater care is needed in considering the evidence in some cases;<sup>1</sup> and it is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...<sup>2</sup>

### **Response to my provisional report**

1. None of the parties provided a response to my provisional report.

### **Background and evidence obtained in the investigation**

2. Delivery of state government information and communication technology (ICT) services is the responsibility of the department and OCIO. OCIO is a business unit within the department.
3. In 2003, the government commenced a program called 'Future ICT Service Arrangements Initiative' (**Future ICT**), in order to centralise strategic procurements for a range of across-government ICT related products and services.
4. In February 2006 following a procurement process, global information technology company, Company D, was selected to deliver ICT services under what was then called the 'Managed Network Services Purchasing Agreement' (**MNS**). The contract was for 40 months with an optional extension of up to three years, commencing on 1 April 2006. There were extensions and variations to the contract over the following years in order to allow Company D to provide of ongoing services and finally in 2014, disengagement services.<sup>3</sup>
5. In 2008, the Future ICT team became an operational unit within OCIO, and was rebranded as ICT Strategic Sourcing (**ICTSS**). Over the following years, ICTSS developed across-government ICT projects which were sequentially grouped in segments known as Tranches 1, 2 and 3.<sup>4</sup> Tranche 3 is relevant to the investigation.
6. ICTSS services and procurements are conducted in line with the state government's procurement processes. The ICT Board has carriage of all across-government ICT procurement activity. The ICT Board is chaired by the Chief Executive of the department and its members include the Chief Executives from the Department for Health and Ageing, the Department for Communities and Social Inclusion, Primary Industries and Regions SA, the Under Treasurer and the Chief Information Officer of OCIO. A Procurement Steering Committee has responsibility for assisting the ICT Board to carry out its functions.
7. On 16 January 2012, the State Procurement Board approved the Tranche 3 Acquisition Plan and delegated its authority to the ICT Board.
8. The arrangements for the supply of the Tranche 3 services included four segments:
  - Network Carriage Services (approximately \$69m pa)

<sup>1</sup> This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

<sup>2</sup> *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

<sup>3</sup> For example, extensions and variations dated 29 July 2009, 23 July 2012, and in or around March 2014.

<sup>4</sup> See 'Strategic Procurement of ICT products and Services by the South Australian Government', dated 26 March 2012.

- Network Management Services (**NMS**) (approximately \$19m pa). NMS concerns management of the government's Central Data Network, Local Data Network and Gateways
  - Network Internet Services (approximately \$2m pa)
  - Messaging and Business Communication Services (**MBCS**) (approximately \$10m pa).
9. The NMS procurement process is the focus of this investigation. I understand that the NMS delivers the same services as those under the MNS.
10. On 24 April 2012, OCIO called for Expressions of Interest (**EOI**) in relation to all four Tranche 3 services set out above. The EOI for the NMS closed on 5 June 2012, and 21 responses were received. The NMS EOI evaluation commenced on 7 June and ended on 9 October 2012.
11. Company D, the incumbent, lodged an EOI for the NMS, and was one of seven shortlisted to receive a Request for Proposal (**RFP**). I understand Company D also lodged an EOI in relation to the MBCS, and was also shortlisted to receive an MBCS RFP.
12. On 18 December 2012, the NMS RFP documentation and evaluation plan was approved within OCIO and released on 8 January 2013 to the seven shortlisted suppliers. The NMS RFP closed on 19 March 2013. Responses were received from Company D and two other companies, and four suppliers withdrew from the process.
13. The ICT Board approved the final evaluation report for the NMS on 11 December 2013, and selected Company E as the preferred supplier.
14. The MNS agreement with Company D expired on 30 September 2014, after which Company E took over the NMS delivery.

### The allegations

15. The allegations provided to the investigation by ICAC are that:
- former Director, Strategy and Innovation of OCIO, Mr A treated staff poorly 'over a number of years', including making racial jibes ... as well as behaving in a physically threatening and intimidatory manner' in breach of the Public Sector Code of Ethics and his executive contract.
  - Mr B, the then Executive Director of OCIO was aware of Mr A's treatment but supported Mr A, despite a high turnover of staff in Mr A's directorate.
  - between November 2012 and March 2013, a series of anonymous letters were sent to the human resources division complaining about Mr A, 'seeking relief from their daily grief. Some were at risk of suicide at the time.'
  - in response to this, the department elected to grant Mr A leave without pay to work for Company D in Victoria in April 2013. It is alleged that this decision was inappropriate and failed to pay due regard to a potential conflict of interest, as during this time:
    - Company D was the incumbent supplier in the government's MNS Purchasing Agreement
    - the department was negotiating an extension to Company D's term under the agreement to ensure business continuity and to enable a transition to the Tranche 3 ICT procurements (which included the NMS segment)
    - Company D was one of the tenderers in the NMS segment of the Tranche 3 procurements.

## Relevant law/policies

Section 5(3) of the ICAC Act provides:

(3) ***Misconduct in public administration*** means—

- (a) contravention of a code of conduct by a public officer while acting in his or her capacity as a public officer that constitutes a ground for disciplinary action against the officer; or
- (b) other misconduct of a public officer while acting in his or her capacity as a public officer.

Section 5(4) of the ICAC Act provides:

(4) ***Maladministration in public administration***—

- (a) means—
  - (i) conduct of a public officer, or a practice, policy or procedure of a public authority, that results in an irregular and unauthorised use of public money or substantial mismanagement of public resources; or
  - (ii) conduct of a public officer involving substantial mismanagement in or in relation to the performance of official functions; and
- (b) includes conduct resulting from impropriety, incompetence or negligence; and
- (c) is to be assessed having regard to relevant statutory provisions and administrative instructions and directions.

**Whether officers of the Department of the Premier and Cabinet department committed misconduct or an act of maladministration in public administration in granting leave without pay and allowing a departmental executive to work with an incumbent supplier during a tender process**

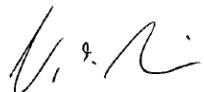
16. By letter dated 19 June 2014, the Chief Executive of the department responded to the allegations and provided extensive documentation to the investigation.
17. Importantly, after considering this response and the documentation, the investigation did not consider it was necessary to interview Mr A.
18. In summary, the response and documentation shows that:
  - between November 2012 and March 2013, the Human Resources section of the department received anonymous complaints about Mr A's conduct; and Mr A himself made complaints about bullying conduct towards him on the part of another executive
  - the complaints were referred to Mr B. There were discussions with the Crown Solicitor about conducting an investigation; and consideration was given to assigning Mr A to alternative duties pending the investigation
  - Mr B considered it was preferable to try and resolve the complaints at the local level; however, he was unable to do this to the satisfaction of any of the parties (Mr A strenuously denied the allegations)
  - unrelated to the complaints, the Chief Executive of the department received a letter dated 21 March 2013 from Mr A seeking to work outside the public sector between 29 March 2013 to 26 April 2013. The work was with Company D, and to assist Company D prepare a document to respond to submissions to the Victorian government about government-wide telecommunications

- Mr A's letter addressed conflict of interest issues, and the Chief Executive sought and received advice from OCIO that Mr A's role within OCIO was not involved with and nor did Mr A have any knowledge of any ICT procurement related matters
- the Chief Executive wrote to Mr A advising him of probity implications with the engagement and reminding him of his obligations under public sector legislation and the Code of Ethics. He also stated that the approval was granted on the basis that he was not involved, engaged or otherwise contributed to any work Company D was undertaking in relation to the SA government
- the Chief Executive also wrote to the Chief Executive of Company D in a similar vein (by letter dated 28 March 2013) 'to further mitigate any conflict of interest', and he highlighted that any breaches 'could see [Company D] being excluded from further consideration in any procurements being undertaken by the SA government'
- on 30 April 2013, Mr A lodged a formal complaint to the Chief Executive and claimed that the matters he had raised constituted maladministration pursuant to the *Whistleblowers Protection Act 1993* and that he was unable to present to work until the matters had been fully investigated
- Mr A subsequently had a number of days absent from the workplace, including sick leave and leave without pay, until his continuous absence from 11 June 2013
- in May 2013 complaints were also received by Mr B from three OCIO employees that raised concerns for their health and safety
- Mr C, Executive Director, Government Services within the department then commenced an investigation, and interviewed 13 witnesses during June and July 2013, including those who had complained about Mr A and Mr A himself. By this time Mr A had engaged legal representation
- by email dated 21 June 2013, during his leave without pay, Mr A sought approval to engage in outside employment for three months from July to September 2013. This entailed working for the Victorian government
- the Chief Executive approved this leave on the basis that Mr A would make himself available for the investigation
- Mr C found that there was substance to some of the complaints, but not others
- by letter dated 8 August 2013, Mr C informed Mr A of his preliminary findings that there was insufficient evidence to prove maladministration within OCIO and he invited him to respond
- in this letter, Mr C also informed Mr A that there had been complaints about him in relation to bullying and harassment; and on 29 August 2013 he directed Mr A to attend an interview to respond to the complaints
- Mr A failed to comply with the direction; and by letter dated 16 September 2013, the department informed him that it intended to proceed with the investigation into the complaints, and where it was suspected that the allegations amounted to *prima facie* misconduct, he would be provided with details in writing and given the opportunity to respond
- despite being warned about the concluding date of his period of leave without pay, Mr A failed to return to work on 1 October 2013. He was directed to report for duty and did not do so
- after a further unsuccessful direction and communication with Mr A's lawyers, Mr A's employment with the SA public sector was terminated on 11 November 2013
- Mr C wrote to the complainants on 27 November 2013 advising them of the above and the termination of Mr A's employment. The letters expressed regret and stated that the department did not condone bullying, harassment or victimisation.

## Conclusion

I have considered the department's response and all of the documentation provided to the investigation, and I am satisfied that potential conflicts of interest were dealt with appropriately by the department when granting Mr A leave between March and April 2013 to engage in work with Company D. I also note that the NMS RFP had closed on 19 March 2013, prior to Mr A's engagement with Company D.

In light of the above, I do not consider that there were any acts of misconduct or maladministration in public administration on the part of any officers of the department within the meaning of sections 5(3) or 5 (4) of the ICAC Act.



Wayne Lines  
**SA OMBUDSMAN**

22 June 2015