



## **PRESERVING PARADISE**

### **good governance guidance for small communities — Lord Howe Island**

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## Commissioner's foreword

When the Discussion Paper that preceded this report was released I stated our goal of helping all small and isolated communities achieve the highest standards of ethical conduct from the public officials who serve them. In order to do this, the independent Commission Against Corruption (ICAC) formulated a Regional and Rural Outreach Strategy (RAROS)

This strategy is intended to help the ICAC understand the unique issues rural and regionally based public authorities and communities face. It is our intention to help these public authorities build high levels of corruption resistance to serve the communities as effectively, efficiently and ethically as possible. We will do this by consulting with interested parties and then by tailoring specific solutions to meet their needs.

Consistent with the RAROS initiative, this paper contains a number of suggestions and recommendations intended to help address issues relevant to small and isolated communities, and specifically Lord Howe Island. We have chosen Lord Howe Island for a number of reasons, which are explained in this report. Many people with an interest in the Island have responded vigorously to the issues we have raised. People should not speculate that Lord Howe Island officials were chosen because they were corrupt - they were not and this report is not the result of a corruption investigation.

In the context of our RAROS, it was opportune from a corruption prevention perspective for the ICAC to examine governance issues in a community that had generated a significant number of complaints and public interest over the years. In doing so, we have had the opportunity not only to make recommendations that relate to Lord Howe Island, contained in Part A of this report, but also to examine some unique solutions to governance issues for all small isolated communities faced with similar predicaments, which are found in Part B of this paper.

While we have endeavoured to provide practical solutions to help address some of the issues identified in respect of Lord Howe Island, the responsibility for making real change lies with the Minister for the Environment, the Lord Howe Island Board, the NSW Department of Transport, the Waterways Authority and the Islanders themselves.

We urge those parties to use this report as the catalyst for jointly addressing the issues of concern that have arisen in respect of Lord Howe Island over the course of many years.

We also hope that other small and isolated communities find the suggestions provided in this report useful for addressing issues related to conflicts of interest, secondary employment and making complaints, and generally helping to build greater resistance to corruption risks.

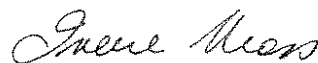
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Irene Moss AO  
Commissioner



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## PART A

### Recommendations for enhancing governance on Lord Howe Island

#### Why Lord Howe Island?

What is it about Lord Howe Island (LHI) that warrants the interest of the Independent Commission Against Corruption (ICAC), the Parliament and the press?

In his report to Parliament in 1986-87, the Auditor-General raised concerns about financial management and internal controls on the Island.

Concerns continued into the financial year 1987-88, reflected in the Auditor-General issuing a qualified audit certificate for the LHI accounts.

Prompted by these reports, in 1990, there was a Public Accounts Committee inquiry into the LHI Board which made thirty-nine recommendations about improving management of the Island notwithstanding advice from the Auditor-General that same year that satisfactory remedial action was being taken.

In 1995, Officers from the ICAC visited LHI to undertake corruption prevention and education work in response to complaints. Codes of conduct were developed for the Island Board and staff working for the Board.

In 2000, questions were asked in Parliament about administration of LHI<sup>1</sup>.

On 20 July 2000, the National Nine Network's *A Current Affair* ran a story about problems with the governance of LHI.

In June 2001, the ICAC produced a Discussion Paper to raise issues of concern about administration on LHI.

Now, the ICAC is producing a report to address issues detailed in the Discussion Paper.

One reason there has been so much interest in the Island is that it has some outstanding attributes, its world heritage listing, pristine environment, idyllic location and beautiful natural features. These attributes mean that people other than those who live on the Island have a justifiable interest in the way it is managed and the things that happen there. We all should be concerned to ensure that a natural and national treasure such as LHI is managed and administered in the most efficient and effective way possible.

Undoubtedly, the Island has these attributes because of its physical isolation. It also has a small, dedicated community, tourist numbers to the Island are controlled and access to the Island itself is restricted. While many of us might consider these qualities to be ideal, from a public administration perspective, they can create problems. The types of problems they can create are evident in the complaints the ICAC has received about LHI. These are analysed below. Although the ICAC has received just 24 complaints and registered 5 matters (a total of 29 referrals) as information in the last eight years, the average incidence of complaints from the Island is about 300 times the State average<sup>2</sup>.

Although none of the LHI complaints have led to findings of corrupt conduct, their frequency and similarity is of great concern. It has led the ICAC to consider taking a more pro-active approach to LHI complaints in order to explore opportunities for addressing the root causes of complaints. The ICAC therefore, put together a Discussion Paper in the hope that it would raise awareness about the issues giving rise to the complaints, stimulate some reflection amongst those with an interest in the Island's

governance, and lead to a renewed emphasis on preventing these problems. A copy of the Discussion Paper was sent to every Island household.

### *Reaction to the Discussion Paper*

Responses from the IHI Board, New South Wales (NSW) Department of Transport, Waterways Authority and the NSW National Parks and Wildlife Service all indicate their broad support for the ICAC's endeavours in respect of Lord Howe Island.

The IHI Board advised that, while it had concerns with certain aspects of the Discussion Paper, it supported the majority of recommendations and would like to work co-operatively with the ICAC toward a comprehensive and constructive final report.

The NSW Department of Transport advised that both it and Waterways Authority were committed to implementing strategies relating to activities on the Island as soon as possible.

The Minister for the Environment, the Hon Bob Debus MP has advised that, as the Board reports directly to him, he will consider appropriate future action, including legislative or policy review after community, Board and ICAC comment on the paper.

The responses to the Discussion Paper from individuals have largely been polarised between those in support of the paper and those critical of it. Those in support believe it accurately reflected community concerns today about governance issues on the Island, while those against believe it represented the vexatious and incorrect view of a minority.

In all, the ICAC received 22 written responses, met with 2 Island residents and the IHI Board at ICAC premises and took numerous phone calls. The majority of responses were totally or largely in support of the paper.

A great deal of concern was expressed by some respondents to the Discussion Paper that their identities would be revealed. This concern is, in itself, symptomatic of one of the many dilemmas facing people in small and isolated communities - that if they complain, they will be identified and suffer recriminations or ostracism. We explore this issue for rural and regional communities more fully in this report.

We did receive a number of requests to reveal the names and numbers of complainants. The reasons

for these requests appear to be motivated by a desire to prove that the number of complaints about the Island emanate from a minority of complainants. That this should be a matter of concern for people who are disconcerted by the ICAC's focus on IHI is not surprising. The argument that would follow such a revelation is that because most people have not complained, there is no real problem.

In addressing this issue, the first thing that must be said is that all responses to the Discussion Paper are confidential, as are all complaints to the Commission.

Second, the number of complaints from the same source is not a reliable indication that the complaints are baseless. It is incumbent upon any public agency receiving complaints to carefully consider the substance of each one before determining what action to take, irrespective of whether the complaints regularly emanate from a single source or a small pool of concerned persons. Not doing so may result in significant opportunities to discover and address problems being lost.

Third, it is not uncommon for anyone responsible for receiving complaints to receive them from a minority of people even though a great many may be affected - this is as true in business as it is in government. It also applies in the range of communities from large metropolitan to small rural. In fact, research suggests that less than four per cent of dissatisfied customers bother to complain.

We anticipated in the Discussion Paper that many of those with an interest in the governance of IHI, not least many of the Island's residents, would find the ICAC's interest in their affairs a little off-putting. We speculated that some may even wonder whether they have been unfairly singled out for undue attention. That has clearly been the view of some.

In the Discussion Paper we advised that our intention was to constructively survey the issues and in so doing, provide some practical recommendations for improving governance of the Island. In the ICAC's opinion, the very quality of IHI that has given rise to many of the complaints, the linked phenomena of a small isolated population and unavoidable conflicts of interest, is, perhaps even more so, why the IHI is deserving of the ICAC's attention.

From the ICAC perspective, another answer to the question asked at the outset is that small and isolated communities have as much right as any other



population group in NSW to expect the highest standards of ethical conduct by their public officials. The ICAC hopes this report will contribute to that goal.

### *The ICAC and LHI*

As indicated above, we have been interested in the Island before. In 1995, as a result of receiving a number of complaints about the LHI Board, two Senior Corruption Prevention Officers visited the Island on two occasions for a total of four days to carry out education, training and corruption prevention work.

At the time, the ICAC was criticised for visiting the Island on the basis that it has a very small population and is regarded as a tourist destination. Press reports indicated some residents were of the view that the visit was unwarranted as the Island was an honest community with a very low incidence of crime. The implication was that ICAC officers were on a junket.

The ICAC was established by the Independent Commission Against Corruption Act 1988 to expose and minimise corruption in the NSW public sector. We do this in a number of ways, including responding to requests for assistance or acting on our own initiative to provide corruption prevention education, advice and support designed to promote awareness of corruption risks and to build resistance against these risks. The visit was intended to 'raise awareness of corruption issues and to ensure effective corruption prevention procedures are in place'.

On the 1995 visit, ICAC Officers met with senior and other public officials on the Island to discuss issues of concern and to provide assistance in the development of Codes of Conduct for the Island's Board members and Board staff. These codes were subsequently adopted in that same year. A community forum was also held to enable all residents to discuss issues of concern and to understand what constitutes corrupt conduct, the responsibilities and accountabilities of the Board, conflicts of interest and codes of conduct etc. Meetings were also held with complainants.

Clearly, the visit of the ICAC officers led to opportunities for improved measures being established to ensure higher standards of public administration. The visit was also intended to lead to a clearer understanding within the community of corruption issues, measures to prevent corruption and what it is the ICAC does. Since that time the ICAC has continued to receive complaints from the Island<sup>3</sup>.







## ICAC Review 2001

In 2001, ICAC officers undertook a comprehensive analysis and review of data and complaints about IHI. To explore current issues and expand our understanding of the issues facing IHI, we interviewed a number of senior public officials with experience of IHI. Interviews included the Chairperson of the IHI Board, the other National Parks and Wildlife Service (NEWS) representative on the Board, Waterways Authority personnel and the then Manager of the IHI Board. These interviews confirmed that the main issues on the Island arise from conflicts of interests and the way in which they are managed.

In its response to the Discussion Paper the Board expresses its disappointment that there were no elected Board members included in the 'senior public officials with experience of IHI' who were consulted and interviewed in preparing the Discussion Paper. This is said to have been interpreted by sections of the IHI community as demonstration that "their elected officials are under suspicion for corrupt or incompetent conduct". It is unfair that the elected officials on the IHI Board be subjected to such suspicion. It is the normal practice of the ICAC to consult with the Chairman of the Board when seeking opinion about a Board's activities, as the officer capable of best representing the views of the Board and to whom all other Board members are responsible. Further, the ICAC has consulted widely, and with all Board members, subsequent to the release of the Discussion Paper and in developing this report.

The *Lord Howe Island Act 1953* was also reviewed together with the governance structure operating on

the Island. One purpose of the review was to establish whether weaknesses existed in the present governance structure, what could be done about any such weakness and who should be responsible for taking action accordingly. Key issues from this review are discussed below.

The IHI Board invited officers of the Commission to attend its Board meetings in September to observe meeting procedures in both open and closed session and discuss observations thereafter. It was also intended this would provide an opportunity for the Board to "work co-operatively with the ICAC towards a comprehensive and constructive Final Report".

While appreciating the invitation and noting the Board's co-operation with implementing recommendations contained in the paper, the Commission was unable to accept this offer. Instead, arrangements were made for members of the Board to attend Commission premises to discuss the final report before its release.

### *Overview of referrals received by the ICAC*

Analysis of matters received by the ICAC shows:

- the central issue generally has been conflicts of interests which lead to alleged abuse of the situation and/or victimisation
- governance of the Island is an issue in that the IHI Board has been the subject of 20 of the 29 referrals to the ICAC. The IHI Board is discussed in more detail below

- shipping services to the Island require particular attention as they have been the subject of 19 of the 29 referrals. Of these 19, 16 relate to the IHI Board. Shipping services are also discussed in more detail below.

The balance of the referrals relate to fishing (employment), air transport (contracts) tenders (three matters relating to the IHI Board) and development control (IHI Board).


The Board believes it has already taken reasonable steps to deal with issues that give rise to complaints about its involvement in shipping services to IHI by outsourcing the contracts for supply of fuel and goods to the Island by ship to the NSW Supply Service. By doing so, the Board expects that allegations about conflicts of interest for Board members will not arise, as critical decisions about the letting of such contracts are made by an independent, professional organisation.

The Board states that the details of the complaints made against it have not been made available to it and that this makes it difficult for the Board to respond to issues of concern. Some of the complaints referred to the ICAC about IHI were in fact referrals from the Board. In order to enable it to deal with the complaints more effectively, the Board asks that a process be implemented by the ICAC to provide more detailed information about complaints.

The ICAC acknowledges this request and is prepared to find new ways to help the Board understand the complaints received about it. The substance of the complaints about the Board, and in relation to the Island generally, were stated in the Discussion Paper and concern conflicts of interest issues and shipping services. The ICAC will not however, disclose information that will indicate, or is likely to indicate, the identity of the complainant without that person's authority to do so.







## How can governance on the Island be strengthened?

At present, the responsibility for the operation of the LHI Act lies with the Minister for the Environment. The LHI Board reports directly to the Minister for the Environment. The NSW National Parks and Wildlife Services (NEWS) provides administrative support to the Minister and the LHI Board. Also, two officers of the NEWS are on the LHI Board. There are some difficulties associated with this responsibility, as the following quotes illustrate:

*"The Island members [on the Board] tend to vote, in my opinion, against anything that smacks of regulation."<sup>14</sup>*

*"There is an innate mistrust and dislike by Islanders of any perceived interference in their lives by mainlanders, be they bureaucrats of any nature or the government members of the Board."<sup>15</sup>*

*"Islanders perceive that their Island is overrun by bureaucrats taking advantage of the opportunity of visiting a beautiful island. It is a common complaint...."<sup>16</sup>*

Although the Minister for the Environment has primary responsibility for ensuring that the issues identified in this report are addressed he will undoubtedly need to consider directing the LHI Board in doing so and may also call on NEWS for administrative support and expertise in this regard. Undoubtedly, this will be a difficult task requiring the commitment of resources and will face obstacles such as those suggested in the above quotes. However, it is the ICAC's opinion that action needs to be taken to

address the issues of concern to the satisfaction of those on the Island and other legitimately interested parties.

### *Lord Howe Island Board*

The Chairman of LHI Board is appointed by the Minister responsible for administration of the LHI Act. Currently, the Chairman is a senior executive in the National Parks and Wildlife Service (NEWS). The Minister may direct and control the Board in all matters except in so far as it makes a report or recommendation.<sup>7</sup>

The Board is comprised of five members, the Chairman, another board member who is nominated by the Minister administering the National Parks and Wildlife Act and the remaining three who are elected every three years by Island residents. The Minister may only remove Board Members who are not elected members. Presently, the two non-elected board members are both employees of the NPWS.

The LHI Board is the primary decision maker and government services provider on the Island. The functions of the LHI Board are to undertake the care, control and management of the Island and trading affairs on the Island, including electricity supply, public health, roads and public facilities generally, tourist trade and dealings in leases. It also manages all Crown Land, conducts a palm nursery and a liquor distribution outlet, owns maintains and operates the local aerodrome, and acts on behalf of the NSW Registrar of Births Deaths and Marriages. It is also responsible for the management of the Island

Permanent Pads Reserve and the Gower Wilson Memorial Hospital.

### *Public Accounts Committee and the Board*

In December 1990, the Public Accounts Committee (PAC) published the Report on the IHI Board after conducting an inquiry.

The PAC made recommendations including those relating to the holding of meetings of the IHI Board and its committees in public, the development of meeting procedures for use by the IHI Board and its committees, the reviewing of its minute taking procedures to ensure that the minutes accurately reflect proceedings in the interests of accountability, and amending the IHI Act to include a requirement that pecuniary interests shall be fully disclosed and recorded in a register which is open to the public.

The IHI Board moved to implement these recommendations following that report. The Board advises that in response to a PAC review in 1997, the then Minister for the Environment indicated that "the Board has either implemented or adopted in principle thirty-two of the PAC recommendations, representing 82% of the total. Of the remaining seven recommendations now remaining, two were believed to be outside the Board's control, one is still being considered and four were either not implemented or considered to be inappropriate. In the latter case the Board has justified its decision not to implement the proposed recommendations".

However, some time has now passed and it would be appropriate to look again at the report to determine the extent of implementation of the recommendations accepted by the IHI Board and to review any outstanding recommendations. A number of the PAC recommendations are of particular relevance to the matters addressed in this paper.<sup>8</sup>

### *Our view*

#### *It is recommended that:*

1. The Minister for the Environment require the IHI Board to report in its next Annual Report on the extent of implementation of the PAC recommendations providing reasons for not implementing any recommendation of the PAC.

## **How relevant are the codes of conduct for Board members and Board staff?**

Guidance for the conduct of Board members is provided by the Code of Conduct for Members of the IHI Board adopted in 1995. A Code of Conduct for Staff of the IHI Board was also adopted at the same time. Despite an undertaking in these Codes that they would be reviewed one year after being introduced, this has not occurred. There have been considerable advancements in Codes of Conduct and good governance since these codes were developed.

An example of this is the publication from the Audit Office of NSW released in 1998 entitled, *On Board – guide to better practice for public sector governing and advisory boards*. In fact, this publication contains checklists that touch upon many of the areas previously found deficient in the IHI Board's operation by the Audit Office and in respect of which the PAC made recommendations for improvement. Given that this paper contains recommendations about revisiting the PAC recommendations, it would also seem sensible to use the guide *On Board* to assess, and if necessary, improve the current practices of the IHI Board.

Based on the above, and having regard to the relatively high number of referrals we have received about the Board and on its previous commitment to do so, it is timely that the review of the Code and Board practices occurs now, and in fact be given some priority.

#### *It is recommended that:*

2. The IHI Board should review its Code of Conduct and the Code of Conduct for Board staff to ensure they are relevant and to incorporate up-to-date provisions.

The Board agrees that the Codes of Conduct should be regularly reviewed and such a review will be undertaken in 2001-02 and thereafter during every three year term of the Board.

3. Board members and staff should receive training in the revised Codes.

The Board indicates that Board members and staff have been trained in the current Codes and will be widely consulted in the proposed review of codes. The Board also believes staff and Board members



have received abundant training on ethics, conflicts of interest and "are possibly more conscious of these issues than most other public officials in NSW".

While it is not possible to verify this opinion, it is the ICAC's experience that training is always required when revising Codes of Conduct, even for experienced, well informed public officials. The risk in assuming no training is needed is that new requirements of the Code of Conduct may not be known or understood, leading a public official to commit an inappropriate act. For this reason the ICAC makes the recommendation above.

4. In reviewing the Codes, specific attention should be paid to the area of conflict of interest declaration and management. The recommendations made earlier in this report about conflicts of interest in small isolated communities should be considered.

The Board accepts this recommendation and believes the simplest way to manage the issue is to adopt the Disclosure of Pecuniary Interests requirements in the *Local Government Act 1993*, with appropriate amendments for IHI.

In response to the Discussion Paper the IHI Board stated the following in respect to the disclosure of private interests:

'The Board agrees that Board members and senior public officials should be required to register their private interests but the register should follow the guidelines developed for Local Government. The Board understands that these guidelines would only require disclosure of interests where the decision making power of the Board member or public official could have "influence" eg. where a Board member owns a small parcel of shares in an insurance company, this would not preclude the member from taking part in a decision on the purchase of insurance for the Board, because the decision would have negligible impact on the value of the shares and would not benefit in any way'

It is also noted that the Board has begun drafting conflict of interest provisions tailored for IHI that take into consideration non-pecuniary conflict of interests. This is encouraging as it is essential that any action taken by the Board in respect of conflict of interest on the Island cover both pecuniary and non-pecuniary conflicts of interest.

5. In the interests of transparency and to aid understanding of the Board's practices and processes, consideration should be given to using a process which enables all Island residents to contribute to the Code of Conduct for Board members and Board staff.

The Board advises that all Island households were given a copy of the Code of Conduct for public comment in 1996. A similar consultation process will be used as Codes are reviewed in future.

6. The Code of Conduct for Board members and Board staff should be publicly available.

The Board advises that the current Codes have always been publicly available and that future versions will be also.

7. The IHI Board should benchmark its procedures and practices against current developments in governance by Boards, such as by using the checklists contained in the guide *On Board*. The outcome of that review should be the subject of a public report available to all Island residents.

The Board agrees with this recommendation and will implement it following the review of the Codes of Conduct. The review will be made publicly available for comment. Comments will be collated and analysed by senior Board staff and presented to a Board meeting with recommendations for change, where necessary. The Board anticipate that its practices and procedures will be reviewed in this manner during each three year term of the Board.

### **How to keep decision making in between Board meetings transparent**

According to the IHI Board Annual Report for the year ended 30 June 2000, the Board met four times in that financial year and had a further two meetings via teleconference link. The Board determines its own meeting procedures.

Decisions about matters between Board meetings, are made by an Island Committee comprising the three Islander Board members. This committee meets regularly, and when necessary seeks the concurrence of mainland Board members with the recommendations made by the committee, either in writing or via telephone if urgent. This enables decisions to be implemented without deferral to a

Board meeting and 'provides greater flexibility and an expeditious process for dealing with such matters'. This committee generally meets in public, like the Board. The IHI Board advises that the Island Committee is a sub committee of the Board and as such operates in accordance with the Code of Conduct developed for the Board.

The IHI Board also advises that minutes of the Island Committee are recorded in the same manner as Board meetings and are formally adopted by the Board in open session at the next meeting. These minutes are made available to the mainland Board members. Further, the Island Committee operates pursuant to an approved set of delegations. The Vice Chairman of the IHI Board is the Chair of the Island Committee and has responsibility for ensuring that the Committee abides by the Code of Conduct.

An issue of concern about the functioning of the Island Committee is that, in ratifying decisions made by the Island Committee, both mainland Board members must be satisfied that the requirements of the Code of Conduct have been adhered to in the Committee's deliberation. Noting the presence of delegations, the responsibility of the Vice Chairman and the availability of minutes to the mainland Board members, it is unclear whether there is a systematic procedure in place for the Chairman and the other mainland Board member to fulfil this obligation. Concerns about how realistic such an arrangement as this is were also raised by the PAC.<sup>9</sup>

*It is recommended that:*

The IHI Board should through the appropriate means:

- 8 Assess the feasibility of conducting more regular meetings via telephone conference system.

The Board advises that in December 2000 it recognised the need for a review of procedures for dealing with matters outside the normal Board or Island Committee process. It anticipates that this review will be completed by December 2001 and result in the increased use of teleconferencing for Board meetings.

- 9 Otherwise ensure that the Chairman is able to satisfy himself that all issues in respect of conflicts of interest have been adequately addressed before agreement is given to act by mainland Board members based on the recommendations of the Island Committee.

The Board supports amending the Code of Conduct to detail the role of the Chairman (and the Vice Chairman in his absence) in managing conflicts of interest. The amended Code of Conduct will include guidance on management of a conflict of interest involving the Chairman (or Vice Chairman in his absence).

The ICAC also suggests that Conflicts of Interest declarations (pecuniary and non-pecuniary) should be a standing item in respect of all meetings of the Board and its sub committees. This is a practice in many governing Boards and mainland Councils and, coupled with public access to minutes of meetings, or in case of closed meetings, access to minutes by the Chairman, it will give public confidence that conflict of interests on the Island are being managed in accord with contemporary standards of public administration.

### **How to keep Board deliberations accountable and open**

There are issues of accountability and openness of the IHI Board which require particular attention. The IHI Board operates in an atmosphere of openness to the extent that its meetings are usually held in public and non-members of the IHI Board are encouraged to actively participate in discussion and to address the IHI Board on matters in which they are interested. However, there are some areas of concern:

- Record keeping—where a vote of the members is taken, as distinct from the more common decision by consensus, no record is kept of who voted in what way. In the interests of later accountability a record should be kept of who voted in what way.
- Conflicts of Interests—guidance on these is given in the Code of Conduct. However, it appears that when a declaration of a possible conflict of interests is made by a IHI Board member it is usually made during a meeting, giving very little time for consideration of the matter.

The IHI Board Code of Conduct states:

'The decision as to how particular conflicts of interest are managed rests with the Board as a whole. The Board will discuss the nature and effect of the conflict of interest. Members having no related interest in the matter will decide on the appropriate course of action.'



However, in practice the Chairperson rules as to the action which should be taken when a conflict is revealed. When the Chairman is not present during deliberations, such as when the Island Committee meets, he can give no such guidance. Although guidelines exist in the Code of Conduct they appear to present problems in practice.

- *Withdrawal from meetings*—the IHI Board's Code of Conduct permits a IHI Board member who withdraws from discussion of a matter, due to a conflict of interests, to remain and participate as an ordinary member of the public. This permits the member to be seen to bring pressure and influence to bear on his colleagues and to see and hear objections and comments from members of the public who might later make applications which will be subject to deliberations and voting by the member.

Even though IHI Board members have removed themselves from an official capacity it is still the case that they are members of the IHI Board and may be seen to be pursuing their personal interests in possible conflict with the public interest.

The need for this complete withdrawal of a member, once a sufficiently serious potential or real conflict of interests is identified, is rendered all the more important given the isolated nature of the Island and the consequent increased likelihood of matters affecting one or more of the parties arising again in the future.

The IHI Board states that the suggestions made in the Discussion Paper have been partially implemented for some time. The Board agrees it should strengthen its procedures by adopting Local Government guidelines for managing conflicts of interest. Further, the Board advises it will amend the Board's Code of Conduct to ensure the role of Chairman on ruling on conflict of interest issues is adequately reflected.

- *Register of Member's Interests*—where bodies are authorised to make decisions on behalf of the community it is a good probity requirement to have a Register of Members' Interests. This is necessary as it provides a point of reference to which the community or other IHI Board members might refer to identify potential conflicts of interests, both pecuniary and non-pecuniary. Such Registers should record all the interests of a member of a governing body.

There is no provision for a IHI Board Register of Members' Interests. The IHI Act does not require the disclosure of pecuniary interests by Board members despite the PAC making the recommendation over 10 years ago that the Act be amended to do so.

The IHI Board's rules for declaration of interests when decisions are being taken require that a member assesses the likelihood of one or more of his or her interests resulting in conflicts arising. A Register of Members' Interests could be examined to determine whether or not a member has an interest in a matter which has not been disclosed at a meeting or an interest which the member did not consider created a conflict with his or her public duty.

It is, therefore, necessary that a Register contain all interests, not simply those which the member judges to hold the potential of creating a conflict with his or her public duties. It also provides additional general transparency.

The IHI Board advises that it supports the adoption of the Local Government model for declaring interest based on the test of 'influence' (see page 11).

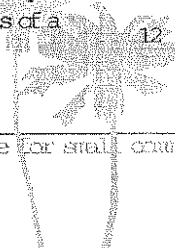
*It is recommended that:*

- 10 the IHI Board review the record keeping of IHI Board meetings to ensure that sufficient details are available to ensure the individual accountability of members for decisions taken.

The Board advises that it is satisfied that its procedures for recording the Minutes of its meetings ensure the individual accountability of members for decisions taken. The Board advised its minute taking procedure permits a dissenting member to have the reasons for dissenting recorded as part of the minutes and that Dissenting votes are already recorded when a decision is not unanimous.

Nevertheless, the ICAC recommends that the procedure be amended to automatically record the name of the member who dissented.

- 11 The Minister for the Environment pursue the amendments of the IHI Act suggested by the PAC in respect of requiring the disclosure of all Board members of their pecuniary interests and the maintenance of a suitable register (see also recommendation 17 later in this report).
- 12 In the interim, pending consideration of the amendments to the IHI Act suggested above, the



IHI Board develop and implement a public Register of Board Members' Interests.

13. The IHI Board develop clear guidelines as to what interests of members should be declared, when they should be declared and what steps will be expected of the IHI Board and of a IHI Board member when such conflicts arise. This should extend to include pecuniary and non-pecuniary interests.

In respect of recommendations 11, 12, and 13 the Board advises it supports the changes to the IHI Act to require disclosure of pecuniary interests for Board Members. It will develop and maintain a public register of Pecuniary Interests for Board Members. It is willing to commit to disclosure requirements equivalent to those set out in the Local Government Act, with appropriate amendments for IHI as required. The Board has provided a draft list of possible amendments to Local Government requirements and seeks the assistance of the ICAC in refining these for eventual inclusion in the amended IHI Act.

The ICAC agrees with the Board that amendments to the IHI Act will need to be carefully considered and the ICAC will provide the assistance requested in this regard. The ICAC suggests that, generally, other requirements of the Local Government Act and associated regulations which might clarify, simplify or enhance the operations of the IHI Board be considered to determine if they are relevant for inclusion in any amended IHI Act.

14. The Minister for the Environment, with the assistance of the IHI Board establish an Island joint group to examine feasibility of a single approach to managing conflicts of interest.

The Board does not believe this recommendation is practical because:

- it implies that a single Code of Conduct can be developed for all public officials on the Island
- each of the authorities will have its own Code of Conduct and mechanism for ensuring compliance and for managing non-compliance
- there is no precedent anywhere in NSW for a local authority to usurp the management of State authorities.

The Board does, however, accept the desirability of a single register of pecuniary interests for Board

Members and the appointed officials of other agencies such as Port Operations Manager. The Board advises it will attempt to gain a consensus to this requirement from other agencies on the Island, but cannot guarantee success due to the variable policies and procedures inherent within these organisations.

The ICAC acknowledges the Board's observations, but does not believe that every Code of Conduct for each authority needs to be the same to have a common approach to managing conflicts of interests on the Island. For example, a first step for establishing a common approach may simply be adopting the same definition of conflict of interest across all agencies. A second step would be that endorsed by the Board, in having a single register of pecuniary interests for public officials.

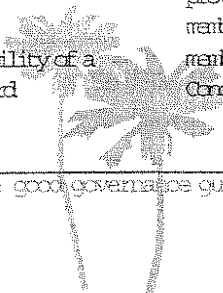
Holistic approaches to the issues being examined in this report have not been considered in such a way before by the ICAC, and arguably by affected communities. Thus, the solution proposed is unique, and therefore without precedent. This should not, in itself, be a reason for not implementing this recommendation.

15. The Minister for the Environment and the IHI Board ensure that the IHI Board amends its Conflicts of Interests provisions to provide for the withdrawal from a meeting of a member who has a pecuniary or non pecuniary interest on which he or she should not vote.

The Board's previous comments about recommendations 11, 12 and 13 also apply here. However, the Board is concerned that this proposal could lead to a loss of a quorum. It is also expected that the role of the Chairman will be expanded in the Code of Conduct to provide guidance on how to manage these circumstances.

### **Are there any problems with the Lord Howe Island Act?**

It is the ICAC's assessment there are significant deficiencies in the IHI Act. The Board points out that the Act is some 48 years old and has had only one major update in the last 20 years. The deficiencies are particularly evident when examining the provisions that apply to elected Island Board members. The IHI Act makes it difficult for Board members to be removed if they breach the Code of Conduct, contravene agreed procedures, or otherwise



abuse their office (without committing an indictable offence).

Further, if it were ever required to do so, as the IHI Act stands, it would be difficult for the ICAC to make a corruption finding against an Island Board member.

The ICAC Act at s.9 states that:

...conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or
- (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.

In respect of the IHI Board, the Minister has the power to terminate the services of the members of the Board other than the Islander members. The member is then disqualified from holding office. This would attract s.9(c) of the ICAC Act.

However, s.5(2) provides that :

'the Minister may, for any cause which appears to him sufficient, remove from office a member other than a member referred to in section 4 (3) (a).'

Section 4(3) (a) refers to the Islander members.

If one of the other two Board members engages in conduct which could constitute or involve reasonable grounds for removal by the Minister it would be possible to make a finding concerning corrupt conduct about that member. However, it would not be open to make such a finding if the Board member concerned was one of the three elected Islander members.

There are no other disciplinary provisions in the IHI Act or the regulations. This means that an Islander Board member cannot presently be found corrupt under s.9(b) or (c) of the ICAC Act because there is no mechanism for them to be disciplined or dismissed from office as required by s.9(b) or (c) of the ICAC Act. An Islander Board member can only be disqualified from office if, for example, they are convicted of an indictable offence, become bankrupt,

are absent from three consecutive ordinary meetings without leave granted, cease to be an Islander or are committed to an institution for mental health reasons.

A corruption finding could only be made against an Islander Board member if they committed a criminal offence, as provided by s.9(a) of the ICAC Act. It is the ICAC's opinion that this deficiency in the IHI Act should be remedied to bring the conduct of Islander Board members into line with those of Members of Parliament and most other public officials. This amendment will help ensure that the standards that apply to mainland public administration in NSW also apply to the Island.

The IHI Act could be amended to provide for the development of a Code of Conduct, although one already exists, and that a significant breach of the Code could constitute reasonable grounds for the Minister to dismiss a member. Such a provision could be extended to any member of the Board. In that situation a finding of corrupt conduct could be made against any Board member even though a criminal offence is not involved.

### Meeting procedures

As previously stated, the PAC made a number of recommendations concerning meeting procedures. These included recommendations that the Board review its minute taking procedures to ensure accountability and amendment of the IHI Act to include a requirement for disclosure of pecuniary interests and recording of the disclosure in a register open to the public. It was also recommended that the Board Liaise with the Department of Local Government in drafting meeting procedures for inclusion in the regulations to the IHI Act. No relevant amendments have been made to the IHI Act or regulations.

The IHI Act provides that 'the procedure for the calling of meetings of the Board, and the conduct of business at such meetings, shall be as determined by the Board' there is no sanction for a breach of the procedure.

Section 10 of the IHI Act provides that the Board is subject to the direction and control of the Minister in relation to the exercise and discharge of its powers, authorities, duties and functions except in so far as it makes a report or recommendation. Even if the Minister directed that the members of the Board observe the procedures it has adopted he could not remove any Islander member for not complying.



Another approach might be to recommend an amendment to the IHI Act so that regulations can be prescribed for the procedure at meetings. In this regard the IHI Act also provides for the making of regulations prescribing penalties for any contravention or breach of the regulations, which for a single occurrence is currently limited to a fine not exceeding four penalty units and a further daily penalty not exceeding 0.5 penalty units. Such an amendment would make Board members more accountable for adhering to meeting procedures and this would improve public confidence in the Board's operations. In doing so, it may help limit the number of concerns Islanders have about conflicts of interest on the Island's Board.

### **Pecuniary interests**

The inclusion of provisions requiring mandatory disclosure of pecuniary interests in the IHI Act or regulations as recommended by the PAC would improve accountability and reduce the likelihood of corrupt conduct. They would certainly guarantee that the IHI Board members were bound to comply with standards of similar Board members and elected officials elsewhere in NSW. For example, local councillors and Members of Parliament are all bound by pecuniary interest provisions.

As matters now stand, a person seeking to profit from the actions of the Board could offer a secret commission to one member of the Board knowing that one or two of the other members already have an interest and would vote in his favour without declaring that interest.

Section 38(4) (b) of the IHI Act provides that:

'Regulations under this subsection may adopt any of the provisions of the Local Government Act 1993, or the regulations made under that Act, with such modifications and adaptations as the Governor deems necessary or desirable.'

An amendment to the IHI Act could be made so that the pecuniary interest provision of the Local Government Act applied as if the Board were a Council with modifications to take into account circumstances peculiar to IHI because of the small population. As stated above, such an amendment would make Board members more accountable and this would improve public confidence in the Board's operations, helping limit the number of concerns Islanders residents have about conflicts of interest on

the Island's Board. Review of pecuniary interest of Islander Board members would then become available through the Pecuniary Interest Tribunal, providing another avenue for resolution of some conflict of interest issues.

*It is recommended that:*

The Minister for the Environment consider amendments to the IHI Act to:

16. Require the IHI Board to have a Code of Conduct, and, or in the alternative,
17. Have the power to dismiss an Islander Board member for a serious and substantial breach of the Code of Conduct.

The Board supports the recommendation to "bring the conduct of Islander Board members in line with those of Members of Parliament and most other public officials" and the associated amendment to the IHI Act.

The Board accepts these recommendations.

18. Adopt the pecuniary interest requirements of the Local Government Act, with suitable amendments for IHI as required.

As noted elsewhere in this report, the Board accepts this recommendation.

19. Provide regulations for meeting procedures, punishable by penalty for non-compliance.

The IHI Board supports amendments to the IHI Act to provide regulations for meeting procedures. The Board also advises that its present meeting procedures are publicly available and will be linked directly to the Codes of Conduct for Board members and Board staff. As a result, the Board states that it is of the view that failure to adhere to meeting procedures would contravene the Code of Conduct and disciplinary action may follow.

### **Other matters**

It is evident from the responses we received to the Discussion Paper that there is a range of concerns people have with the IHI Act. While it is not proposed to discuss these issues in detail as they do not relate directly to the governance issues identified in this report, it is suggested that the proposal for legislative review of the Act contained in this paper should include an opportunity for all Islanders to express their views about suitable amendments.

