REPORT ON INVESTIGATION INTO PORK BARRELLING IN NSW

ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

ICAC REPORT
AUGUST 2022

Cover image:
Participants in the Commission's Forum on Pork Barrelling, held 3 June 2022. (From left): Moderator Kerry O'Brien and panellists the Hon Joseph Campbell QC, Professor Anne Twomey, the Hon Peter Hall QC, Professor AJ Brown, Ian Godwin and Dr Simon Longstaff AO.

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Mr President
Mr Speaker

In accordance with s 74 of the *Independent Commission Against Corruption Act 1988* (the ICAC Act) I am pleased to present the Commission's report on its investigation into pork barrelling in New South Wales.

It was not necessary to conduct a public inquiry for this investigation. The Commission however has concluded that pork barrelling can, under certain circumstances, involve serious breaches of public trust and conduct that amounts to corrupt conduct. The Commission determined that it was in the public interest to examine and report on those circumstances.

I draw your attention to the recommendation that the report be made public forthwith pursuant to s 78(2) of the *Independent Commission Against Corruption Act 1988*.

Yours sincerely

The Hon Peter Hall QC
Chief Commissioner

Contents

Summary of investigation and outcomes

This investigation by the NSW Independent Commission Against Corruption ("the Commission") concerned the practice of pork barrelling. The term "pork barrelling" is widely used and understood in Australia but the Commission has defined it as:

> *the allocation of public funds and resources to targeted electors for partisan political purposes.*

The Commission's investigation commenced in 2020 after it received complaints alleging that the distribution of public money under the NSW Government's Stronger Communities Fund (SCF) involved corrupt pork barrelling.

Also in 2020, the NSW Auditor-General announced a performance audit of the SCF, and the Public Accountability Committee (PAC) of the NSW Legislative Council established an inquiry into NSW grant programs (including the SCF). The reports issued by the Auditor-General (in February 2022) and the PAC (in March 2021 and February 2022) made numerous observations about the management of the SCF, including adverse findings. The State Archives and Records Authority (SARA) also released a report in January 2021, dealing with recordkeeping aspects of the SCF.

In November 2021, Premier the Hon Dominic Perrottet MP announced a review of grants administration in NSW. Given the existing findings and review processes concerning the SCF, the Commission decided that it was not in the public interest to continue investigative action that could have led to adverse findings against any individual. Consequently, the scope of the Commission's investigation was revised to focus on the practice of pork barrelling more broadly and, in particular, whether it could allow, encourage or cause corrupt conduct (chapter 1).

To assist its investigation, the Commission engaged a number of experts to prepare papers and participate in a forum held on 3 June 2022. This report represents the view of the Commission but draws on the analysis of these experts.

Results

The Commission has found that, in certain circumstances, pork barrelling can constitute corrupt conduct (chapter 3). In the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"), corrupt conduct is defined in s 7 as any conduct which falls within the description of corrupt conduct in s 8 and which is not excluded by s 9.

While individual matters should always be assessed on a case-by-case basis, the Commission has found that a minister, for example, may engage in corrupt conduct involving pork barrelling, within the meaning of s 8 of the ICAC Act, if the minister:

- influences a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function, such as providing an assessment of the merits of grants, in a dishonest or partial way
- applies downward pressure to influence a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function, such as providing an assessment of the merits of grants, in a manner which knowingly involves the public servant in a breach of public trust
- conducts a merit-based grants scheme in such a way as to dishonestly favour political and private advantage over merit, undermining public confidence in public administration, and benefiting political donors and/or family members
- deliberately exercises a power to approve grants in a manner that favours family members, party donors or party interests in electorates, contrary to the guidelines of a grant program which state that the grants are to be made on merit according to criteria
- exercises a power to make grants in favour of marginal electorates, when this is contrary to the purpose for which the power was given.

In summary, those who exercise public or official powers in a manner inconsistent with the public purpose for which the powers were conferred betray public trust and so misconduct themselves.

The Commission has also found that pork barrelling could satisfy s 9 of the ICAC Act. It may do so, for example, by conduct amounting to a substantial breach of the Ministerial Code of Conduct or the Members' Code of Conduct. In particular, substantial breaches of the following clauses of the Ministerial Code could arise in a pork barrelling scheme:

- clause 3, stating that a minister must not knowingly breach the law
- clause 5, stating that ministers "must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law" and "must not direct that agency to provide advice with which the agency does not agree"
- clause 6, stating "A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person".

In circumstances where pork barrelling is serious and wilful, it may constitute conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder, such that criminal punishment is warranted. Such conduct could potentially satisfy the elements of the criminal offence of misconduct in public office and, consequently, also satisfy s 9 of the ICAC Act.

In issuing this report, the Commission intends to make it clear that ministers and their advisers do not have an unfettered discretion to distribute public funds. The exercise of ministerial discretion is subject to the rule of law, which ensures that it must accord with public trust and accountability principles. As set out in the judgment of Isaacs and Rich JJ in *R v Boston* (cited in chapter 3), chief among the public duties of a member of Parliament is "the fundamental obligation … the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".

However, the principles of public office are not at odds with political reality. It should also be recognised that in some areas, such as, in formulating policy, public power may be legitimately exercised in order to satisfy a political objective. A minister may legitimately harbour a hope or expectation of some political (or personal) advantage flowing from their exercise of public power. But they may only legitimately do so if that hope or expectation is in the nature of a "side wind" and not the dominating motivation for the exercise of public power in a manner inconsistent with the public purpose for which that power was granted.

Corruption prevention

Chapter 4 of this report sets out some observations about how pork barrelling could be prevented and better regulated. In doing so, the chapter examines topics including the framework for grants and funding, potential gaps, the role of ministers and members of Parliament, accountable officers, assessing funding applications and submissions, value for money, recordkeeping and audits.

The following recommendations are made.

RECOMMENDATION 1

That any whole–of–government guidelines concerning grants funding be issued pursuant to a statutory regulation.

RECOMMENDATION 2

That the *Government Sector Finance Act 2018* be amended to mirror s 71 of the *Commonwealth Public Governance, Performance and Accountability Act 2013* by including obligations that a minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money and that the expenditure represents value for money.

RECOMMENDATION 3

That the grant funding framework, or equivalent requirements, apply to the local government sector. This should include situations where local councils are both grantees and grantors.

RECOMMENDATION 4

That the NSW Procurement Board considers the need for a direction, policy or guidance that specifically prohibits or deals with pork barrelling. If necessary, relevant guidance can be published on the buy.nsw website or reflected in relevant procurement training.

RECOMMENDATION 5

That clause 6 of the Ministerial Code be amended to read, "A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act in the public interest, and must not act improperly for their private benefit or for the private benefit of any other person".

RECOMMENDATION 6

That the proposed cross-agency Community of Practice develops templates and guidance that prompt the consideration of public interest, which may be consistent with the general approach adopted by the Legislative Council under its order 136A.

RECOMMENDATION 7

That, in addition to being documented, any input from a minister or their staff in the assessment of grants should be published on the central grants website.

RECOMMENDATION 8

That information required for publication on the central grants website should not contain any redactions for Cabinet confidentiality.

RECOMMENDATION 9

That the requirement for ministers to give reasons if they make a decision contrary to advice from public officials should be strengthened by requiring those reasons to reference the relevant selection criteria, merit and the public interest.

RECOMMENDATION 10

That the cross-agency Community of Practice identifies mechanisms for determining and managing situations where a minister is in a position to award, or influence the award of, grants in their own electorate.

RECOMMENDATION 11

That where grant schemes or opportunities seek the input of local members, the process should encompass all relevant members and not be limited to members of the political party or parties that form government. This requirement could be reflected in the Proposed Guide or supporting materials.

RECOMMENDATION 12

That the proposed cross-agency Community of Practice:

- be led by a senior officer who is accountable for funding policy and practice across the NSW public sector
- includes at least one nominated senior officer from each cluster
- addresses pork barrelling in its proposed training materials.

RECOMMENDATION 13

That, with regard to proponent-submitted business cases and cost-benefit analyses, the assessing official or agency should consider:

- the assumptions made, whether explicit or implicit
- the reliability of the information provided, including any gaps
- the need for additional due diligence to be performed on the proponent or related parties
- overstatement of benefits or understatement of costs
- opportunity costs.

The cross-agency Community of Practice should develop standardised templates, guides and scoring mechanisms to assist proponents and public officials who assess grant

applications. These should supplement but be consistent with TPP 18-6 and TPP 17-03.

RECOMMENDATION 14

That the cross-agency Community of Practice considers preparing a model contract for external consultants who are engaged to prepare business cases and cost-benefit analyses.

RECOMMENDATION 15

That the agency responsible for the central grants website undertakes audits at two yearly intervals to ensure compliance with the requirement to provide end-to-end information on all grant programs after the website has become fully operational.

RECOMMENDATION 16

That the central grants website:

- contains two main categories – one for entities providing funding and another for those seeking funding. The information should include guidance on requirements and best practice in categories
- provides information on topics such as:
  - what pork barrelling is
  - why it should be avoided
  - responsibilities of public officials in relation to pork barrelling
  - practical measures to avoid pork barrelling
  - how to report pork barrelling.

RECOMMENDATION 17

That the central grants website has search and reporting functionality that presents data in an interactive way and allows analysis across grant schemes.

RECOMMENDATION 18

That the grant funding framework requires additional information for ad hoc and one-off funding to be published on the central grants website, including:

- the document explaining why that method has been used and outlining the risk mitigation strategies
- whether the funding decision was in line with the agency's recommendation (noting that this is already proposed in the case of ministerial decision-makers)
- if the agency's recommendation was not followed, the decision-maker's reasons for not following that recommendation (noting that this is already proposed in the case of ministerial decision-makers).

In addition, any grant guidelines applying to ad hoc and one-off funding should be published on the central grants website.

RECOMMENDATION 19

That the central grants website requires information to be displayed about complaints and appeals processes in a prominent location.

RECOMMENDATION 20

That the Department of Premier and Cabinet arranges for an independent audit to be conducted to verify that the recommendations in the State Archives and Records Authority's 22 January 2021 report have been fully implemented.

RECOMMENDATION 21

That:

- the proposed funding framework encourages internal audit reports to be provided to an agency's audit and risk committee on certain categories of high-risk grants
- the NSW Government considers requiring the Auditor-General to conduct regular performance audits in relation to high-risk grants or grant schemes, including those that involve a high risk of pork barrelling
- the Audit Office of NSW be given "follow-the-dollar" powers, as previously recommended by the Public Accounts Committee of the NSW Legislative Council.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and as required by s 111E of the ICAC Act, will be furnished to the responsible minister or officer. The Commission will seek advice in relation to whether the recommendations will be implemented and, if so, details of the proposed plan of action and progress reports. The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website at www.icac.nsw.gov.au.

Recommendation this report be made public

Pursuant to s 78(2) of the ICAC Act, the Commission recommends that this report be made public forthwith. This recommendation allows either Presiding Officer of a House of Parliament to make the report public, whether or not Parliament is in session.

Chapter 1: Background

This chapter sets out some background information concerning the investigation conducted by the NSW Independent Commission Against Corruption ("the Commission") into pork barrelling in NSW.

How the Commission's report came about

In May 2020, a number of media reports appeared regarding the use of public money as part of the NSW Government's Stronger Communities Fund (SCF). Also in May 2020, the Commission received a number of complaints alleging corrupt conduct in the SCF. The substance of these media reports and complaints was that grants of public funds from the SCF were made for the improper purpose of gaining a partisan political advantage. That is, pork barrelling.

After making some enquiries with the Department of Premier and Cabinet (DPC), the Commission decided to commence an investigation into the allegations, (Operation Jersey).

On 3 July 2020, the Public Accountability Committee (PAC) of the NSW Legislative Council, established an inquiry into the *Integrity, efficacy and value for money of NSW Government grant programs*. The PAC's two reports were issued in March 2021 and February 2022. The Commission provided a written submission to the PAC's inquiry and, on 16 October 2020, the Chief Commissioner gave oral evidence at the inquiry.

In July 2020, the NSW Auditor-General announced her 2020–21 work program, which included a performance audit to "examine the integrity of the assessment and approval processes for the Stronger Communities Fund (tied grants round) and Regional Cultural Fund".

In October 2020, the SARA received a complaint concerning recordkeeping practices by the office of the premier in relation to the SCF. In response to the complaint, the SARA completed an assessment and, in January 2021, produced its report, *Alleged non-compliant disposal of records relating to the Stronger Communities Fund*. Among other things, the SARA's report found that the office of the (then) premier breached s 21(1) of the *State Records Act 1998* by disposing of working advice notes without authorisation.

On 3 November 2021, Premier the Hon Dominic Perrottet MP announced a review into grants administration in NSW, to be led by the DPC in partnership with the NSW Productivity Commissioner.[1] The Commission contributed to the review and the final report – *Review of grants administration in NSW* ("the Review") – was issued in May 2022. The report made 19 recommendations[2] and, on 7 June 2022, the NSW Government announced its "support or support in principle for all of the recommendations".[3] With minor exceptions, the Commission also supports the recommendations made in the Review and believes, that, when fully implemented, they will make a vital contribution to lifting integrity standards. Consequently, the Commission's recommendations in chapter 4 of this report are intended to supplement the work of the Review.

Revision to investigation scope

On 8 February 2022, the Auditor-General released her report, *Integrity of grant program administration*. This report examined the SCF[4] and made a number of factual findings including the following:

- the fund involved the distribution of $252 million of public funds to 24 councils that had amalgamated in 2016 or been subject to a merger proposal
- 96% of available SCF funding was allocated to projects in NSW Government-held state electorates

- funding for councils was determined by the then premier, deputy premier and minister for local government and communicated by their staff through emails to the Office of Local Government (OLG), with little or no information about the basis for the council or project selection. The OLG administered payment of these funds without questioning or recording the basis for selection
- for the 22 councils where funding allocations were determined by the former premier and deputy premier, the only record of their approval is a series of emails from their staff
- a briefing note prepared for the former premier by a member of her staff contained the following statement: "We have continued to work on how we allocate this funding to get the cash out the door in the most politically advantageous way". The Auditor-General noted that this indicates that the preferential allocation of funding to government-held electorates was deliberate.

The Auditor-General's findings regarding the SCF were consistent with the evidence collected by the Commission in its investigation to that point under Operation Jersey.[5]

Based primarily on the findings made by the Auditor-General, the PAC and the SARA, and the Review, the Commission decided that it was not in the public interest to continue investigative action that could have led to adverse findings against any individual. Consequently, the scope of the Commission's investigation was revised as follows:

1. *Consider the circumstances in which the allocation of public funds and resources to targeted electors for partisan political purposes (known as "pork barrelling") may allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct. The scope of the investigation will include, as considered appropriate, an examination of particular grant funding programs including:*
   - *the Stronger Communities Fund – Tied Grants Round Program (Round 2)*
   - *the Regional Cultural Fund established in 2017*
   - *the Community Sport Infrastructure Grant Program established 2018 (a federal grant program).*
2. *Identify whether any laws governing any public authority or public official need to be implemented or changed and whether any methods of work practices or procedures of any public authority or public official could allow, encourage or cause the occurrence of corrupt conduct and, if so, what changes should be made.*

Why the Commission investigated

The Commission has not previously made a finding that pork barrelling is corrupt. Nor is it aware of any other Australian anti-corruption commission having made such a finding.

However, based on the evidence collected in Operation Jersey and the findings of the Auditor-General summarised above, the Commission has concluded that pork barrelling can, under certain circumstances, involve serious breaches of public trust and conduct that amount to corrupt conduct. The Commission determined that it was in the public interest to examine and report on those circumstances. The reasons for doing so include:

- The Commission is concerned that some elected officials may hold the misguided view that their discretion to spend public funds on pork barrelling schemes is unfettered.
- It is important that public officials be provided with information about the metes and bounds of conduct that is likely to be corrupt or attract the Commission's attention.
- Putting the possibility of corrupt conduct to one side, the Commission has a statutory obligation to promote the integrity and good repute of public administration.[6] An examination of pork barrelling aligns with that obligation.

Purpose of this report

This report contains no findings of corrupt conduct against any person.

The purpose of this report is to:

- articulate, with as much precision as possible, circumstances where pork barrelling is likely to constitute corrupt conduct, thereby enlivening the Commission's jurisdiction. In undertaking this task, the Commission seeks to inform elected and appointed officials of their obligations as holders of high public office
- set out the harm caused by pork barrelling and the relevant ethical and corruption prevention issues
- make associated recommendations to government.

Conduct of the investigation

As noted above, Operation Jersey commenced as an investigation into allegations of corrupt conduct associated with the SCF. Although the Commission decided against pursuing the possibility of adverse findings against individuals, in preparing this report, the Commission has considered the evidence concerning the administration of the SCF.

In April 2022, the Commission engaged three subject matter experts – Professor Anne Twomey from the University of Sydney, the Hon Joseph Campbell QC, Adjunct Professor at the University of Sydney and former judge of the NSW Court of Appeal, and Dr Simon Longstaff AO, Director of the Ethics Centre and Adjunct Professor, Australian Graduate School of Management at the University of NSW – to consider the revised scope of the Commission's investigation. Each of these experts produced a paper, which can be found in appendices 2, 3 and 4.

In addition, on 3 June 2022, the Commission held an expert forum ("the forum") at which integrity issues associated with pork barrelling were discussed. Professor Twomey, Professor Campbell and Dr Longstaff participated in the forum. They were joined by the Chief Commissioner, the Hon Peter Hall QC, and two other experts – Ian Goodwin, the NSW Deputy Auditor-General, and Professor AJ Brown of Griffith University. The forum was live streamed to the public via the Commission's website. The transcript of the forum is available at Appendix 1. A video recording of the forum is also available via the Commission's website. An opportunity was also afforded to interested parties to make submissions to the Commission.

In addition, the Commission's investigation has entailed examining:

- reports by auditors general, government agencies, think tanks, academics and other subject matter experts, including interstate and overseas reports, that deal with pork barrelling
- relevant legal judgments and media reports
- its information holdings.

Decision not to hold a public inquiry

After taking into account the matters set out in s 31 of the the ICAC Act, the Commission was not satisfied that it was in the public interest to conduct a public inquiry. Instead, the Commission was satisfied that the matters raised in the investigation could be addressed satisfactorily by way of a public report pursuant to s 74(1) of the ICAC Act. In making that determination, the Commission had regard to the following matters:

- the forum provided an adequate opportunity for relevant issues to be brought to the attention of interested public officials and members of the public
- the available written reports about the topic of pork barrelling provided sufficient material and case studies upon which the Commission could rely
- as this report does not make adverse findings of fact in relation to any particular individuals, issues of procedural fairness did not arise.

Chapter 2: About pork barrelling

This chapter briefly defines pork barrelling and describes some of its characteristics.

What is pork barrelling?

The term "pork barrelling" is widely used and understood in Australia and there is little disagreement about its general meaning. This report defines pork barrelling as:

> ***the allocation of public funds and resources to targeted electors for partisan political purposes.***[7] [Original emphasis.]

Other definitions exist but they all share a central concept: the use of public funds to achieve political objectives.

One of the key points made in this report is that in a democratic system of government, some room must be made for the consideration of political factors and the exercise of political judgment. Politicians have a legitimate interest in their own election or re-election and, subject to the principles that insist upon the public interest as the paramount consideration, are entitled, in appropriate circumstances, to allow their political objectives to have some effect on the decisions they make. This idea was expressed in the following terms by Mahoney JA in *Greiner v ICAC*:

> *There is no doubt that, in some cases where public power is exercised, it may be exercised after taking into account a factor which is political or it may be exercised for the purpose of achieving a political object.*[8]

So, although the term "pork barrelling" is pejorative in its everyday use, a distinction needs to be drawn between the legitimate and extraneous political objectives in the exercise of public power. The Commission's analysis and recommendations regarding this issue are detailed in chapter 3.

Characteristics of pork barrelling

Pork barrelling is not a new phenomenon. Writing in the *Law Society Journal Online*, Amy Dale notes that the expression was first used in the United States and has had negative connotations for almost 150 years.[9]

As a general rule, pork barrelling entails targeting electors on a geographical basis. That is, targeting electorates that a political party wants to win or retain. A typical hallmark of pork barrelling is disproportionate allocation of funding to marginal electorates. However, pork barrelling is not necessarily confined to geographical discrimination. It could, for instance, involve targeting a particular demographic, such as retirees. If this targeting was for the partisan purpose of winning or retaining electorates with a high proportion of retirees, rather than because it represented good public policy, the conduct could be construed as pork barrelling. Another example might be support for a particular industry, for example, defence. If a large defence project were announced principally because particular marginal electorates would benefit from the resulting economic activity, the spending could amount to pork barrelling.

That is to say, for pork barrelling to exist, the decision-maker must have an *intent* to achieve a political or partisan objective. This is discussed in more detail in chapter 3.

Pork barrelling is often associated with promises and announcements made during election campaigns. But it is not necessarily limited to campaigning and can arise in any part of the electoral cycle.

Pork barrelling can also arise from the conduct of:

- public officials who wield executive power (that is, ministers, other members of the government and their staff)
- public officials with no formal executive power

(that is, government backbenchers, elected members of the opposition and non-government parties who make election promises)

- individuals who are not yet public officials (that is, candidates for political office who are not yet elected or staff of political parties).

In Australia, pork barrelling is most evident in state and federal government decision-making, where established political parties campaign to win a majority of electorates in order to form government. In areas that are divided into wards, pork barrelling appears to be less common in local government. This is because the concept of "marginal wards" or "marginal local government areas" does not exist in a practical sense. However, local government is not free from pork barrelling and much of the commentary in this report can be applied in a local government setting.

As defined above, pork barrelling involves the use of public funds and resources in a targeted, partisan way. Consequently, it usually entails funding for local amenities, infrastructure or organisations. This can be achieved through a variety of means but, most commonly, is done via direct provision (for example, the government itself upgrades a sports facility) or grant (for example, the government provides funding to a community club, which uses it to upgrade its sports facility).[10] But pork barrelling can take other forms, such as:

- awarding a significant government contract to an organisation based on its location in a marginal electorate (that is, targeting via procurement)
- types of financial assistance that are not technically described as a grant or procurement (for example, a joint venture agreement, a loan on preferential terms, forgiving a debt, and provision of government premises at peppercorn rent)
- locating or re-locating a government agency in a marginal electorate
- providing incentives for a large company to locate or relocate its operations in a marginal electorate
- sequencing the rollout of a government program to give priority to marginal electorates.

Pork barrelling is differentiated from electoral bribery, which is a criminal offence under the *Electoral Act 2017*. Section 209(1) of that Act says:

> *A person must not, in order to influence or affect any person's election conduct, give or confer, or promise or offer to give or confer, any property or any other benefit of any kind to the person or any other person.*[11]

Section 209(4) makes it clear that the offence "does not apply in relation to a declaration of public policy or a promise of public action".

Pork barrelling, on the other hand, does not entail a strict quid pro quo. It is designed to win votes but there is no direct pork-for-votes agreement. In addition, electoral bribery entails an actual or promised transaction with an individual. Pork barrelling, by contrast, aims to influence individual electors, but not by providing inducements on a person-by-person basis. So, promising to build a new sporting facility in a marginal electorate could be pork barrelling. Offering individual voters free tickets to a sporting event, in exchange for their vote, would be electoral bribery.[12]

Finally, for the purposes of this report, the Commission differentiates between the conduct of a parliamentarian in their capacity as a local member and other forms of partisan behaviour.

It is normal and even desirable for an elected member to use their influence to obtain benefits for "their" electorate. While it may be unfair if some parliamentarians have more success than others in attracting funding for their local area (for instance, because they also happen to be a minister), the Commission does not regard a member simply advocating for their own electorate as pork barrelling.

What harm does pork barrelling cause?

Pork barrelling is not a benign activity. The practice is detrimental to the public interest in a number of important respects.

Erosion of public trust

As set out in s 8 of the ICAC Act, and explained in chapter 3, breaches of public trust can amount to corrupt conduct. But setting legal issues to one side, pork barrelling breeds cynicism and erodes trust in the institutions of government. In particular, it sends a message that politicians:

- are more interested in being elected than acting in the best interests of the entire community
- will only provide funding to an electorate if it is marginal or needs to be retained
- treat voters – and the taxes they pay – as a means to achieving a partisan end
- are prepared to use entrusted public power for purposes other than that for which it is granted.

As noted above, while there is a difference between pork barrelling and electoral bribery, the distinction is lost on some citizens. For at least some people, pork barrelling is tantamount to a form of bribery.

Antithetical to democratic government

To their credit, some politicians have admitted to a level of unease with pork barrelling. Others have placed the problem in the "too hard basket" by claiming that pork barrelling is an inevitable feature of Australian democratic systems. But precisely the opposite argument can be mounted. Pork barrelling is not a characteristic of democracy – it damages democratic processes. It will usually involve the inequitable use and distribution of public resources which are necessarily limited. Political advantage trumps public interest principles which require public funding to be based upon, and give effect to, the concepts of merit and need.

As noted by Dr Longstaff in his paper:

> *A final point about democracy – at least as practiced* [sic] *in Australia – is that all citizens are taken to be equal in the measure of authority they may confer on any democratically elected government. This simple fact is captured in the simple aphorism: "One person, one vote". This is a form of radical equality in which the sole criterion for exercising authority is to be an eligible voter. Beyond that, nothing else is relevant – not education, wealth, postcode, occupation, gender, religion … nothing else matters. Every elector stands equal to every other. The fact the votes of one or more particular voters (e.g. in marginal seats) might prove to be decisive is irrelevant when it comes to the relative status of different individual or classes of electors. All stand equal.*

Merit, need and waste

Where public funds are allocated for the purpose of obtaining a political objective, it does not automatically follow that the decision lacks merit or is not in the public interest. However, in pork barrelling situations, where partisan political objectives override other considerations, there is a higher probability that public funds are not allocated on the basis of genuine merit and need. In part, this is because well-established public sector conventions tend to be abandoned or abused. These include robust business cases, the objective application of merit-based criteria and monitoring of outcomes.

Pork barrelling also has the potential to waste funds if they are allocated to projects that are not properly costed and managed. In addition, while projects funded under a pork barrelling scheme may be worthy, they are less likely to represent the best use of scarce public money.

Pork barrelling also potentially wastes the time and expertise of public servants, who are tasked with designing and implementing merit-based programs. Similarly, it wastes the time of citizens who apply for public funding in the expectation of fair treatment.

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Chapter 3: When does pork barrelling become corrupt conduct?

Introduction

Porter v Magill[13] was a 2002 case in the United Kingdom involving the unlawful expenditure of millions of pounds in public money on a housing scheme that was intended to increase the proportion of conservative voters in a particular municipality. There was evidence that the scheme was implemented for the electoral advantage of a political party. In *Porter v Magill,* Lord Scott opened his speech to the House of Lords in this way:

> *My Lords, this is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption.* ***So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government.*** *Like Viola's "worm i' the bud" it feeds upon democratic institutions from within (Twelfth Night)."*[14] [Emphasis added.]

The rhetorical power of Lord Scott's statement applies with equal force to pork barrelling. As discussed in chapter 2, the allocation of public funds and resources to targeted electors for partisan political purposes, if allowed to flourish, engenders public cynicism about elections and politicians and damages the reputation of democratic government. Indeed, there is evidence that pork barrelling has had a role to play in a process of democratic decay already underway in Australia.[15]

Additionally:

> *…making grants on the basis of political advantage, rather than merit and need, results in the unfair distribution of public funds, the funding of unworthy or unviable projects, the inefficient allocation of scarce resources, poor planning and a lack of coordination with other levels of government in providing appropriate local facilities.*[16]

Pork barrelling characteristically involves the exercise of ministerial discretion in the allocation of public funds. Transparency International observed in 2021 that parliamentary discretionary spending schemes, at a global level, tend to be used for political rather than welfare-optimising causes. Transparency International noted that such schemes are often associated with high risks of corruption and that their impact is to "[skew] the overall political arena in a manner that does not strengthen democratic norms".[17] This message is consistent with the opening of Lord Scott's speech in *Porter v Magill*.

On occasion, it has been publicly asserted by some elected officials that ministerial discretionary powers are unfettered or that they are not subject to any particular constraints. The Commission does not accept such assertions. They are wrong, both at law and in ethics.

Professor Anne Twomey has stated that:

> *…contrary to the beliefs expressed by some Ministers, no Minister has an unfettered ministerial discretion to make decisions according to his or her own personal wishes or political advantage.*[18]

Professor Twomey's statement is supported by the observations of the High Court in 2012, in dicta in *Wotton v State of Queensland*, that "the notion of 'unbridled discretion' has no place in the Australian universe of discourse".[19]

Ministerial discretion in the allocation of public funds creates opportunities, if not temptations, to pursue political rather than public interests. Ministers involved in discretionary decision-making of this kind face challenges reconciling political pressures with their public duties. However, as will be explained in this chapter, the rule of law ensures that ministerial discretion must accord with public trust and accountability principles.

Chief among the public duties of a member of parliament is "the fundamental obligation … the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".[20] The nature of this obligation is considered later in this chapter (see "Principles of public office").

The exercise of ministerial discretion in NSW has arisen from time-to-time in various matters that have been investigated by the Commission. Establishing whether the exercise of official functions in a particular case constitutes corrupt conduct within the meaning of the ICAC Act requires an assessment of the relevant allegations against the provisions of s 8 and s 9 of the ICAC Act.

Where ministerial discretion is involved, this assessment requires that the allegations be weighed against the standards of conduct that apply to ministers, as public officers, when exercising their official functions. In some cases, the Commission must consider whether there are legitimate discretionary reasons for the decision in question. The relationship between legal constraints and political realities in the context of pork barrelling is also considered in this chapter (see "Public power and the realpolitik").

In August 2020, the Commission made submissions to the NSW Parliament's Public Accountability Committee inquiry into the integrity, efficacy and value for money of NSW Government grant programs ("the PAC Inquiry"). The Commission submitted to the PAC Inquiry that pork barrelling by an elected official might be corrupt conduct if it breached public trust. The Commission noted that a breach of public trust may arise if a grant were to be allocated for the purpose of advancing a political objective or private interest, at the expense of, or without due consideration of, the public interest. The Commission also noted that:

> *…allocating grants to particular electorates because they are marginal, or otherwise preferred by the government (also known as pork-barrelling), will not, absent other markers of misconduct, amount to corrupt conduct.*

This chapter expands on those submissions, describing the "other markers of misconduct", and sets out the Commission's determination of the question: when does pork barrelling become corrupt conduct?

In answering that question, the chapter firstly surveys the legal limits on the exercise of ministerial discretion by reference to the fundamental principles of public office. Those principles underpin the various legal implications that may flow from conduct involving pork barrelling. The chapter briefly considers some of those implications, including breaches of criminal and administrative law, before turning to an analysis of the potential application of the corrupt conduct provisions of the ICAC Act.

The answer to the question posed above is, essentially, that a serious case of wilful pork barrelling could lead to a finding of serious corrupt conduct under the ICAC Act.

However, plainly, not all cases of pork barrelling will satisfy the relevant test. The chapter considers the relationship between legal constraints on ministerial discretion and practical realities of politics in our system of representative democracy. Finally, it highlights the legal touchstone against which public officials involved in the allocation of public resources for party political purposes ought to consider their conduct.

The former NSW premier, Gladys Berejiklian, was reported in 2020 as saying that pork barrelling was "not an illegal practice".[21] The former prime minister of Australia, Scott Morrison, was recently reported as saying, in relation to any federal integrity commission that may be established, that such a body should focus on identifying criminal behaviour rather than subjective questions such as whether spending in respect of marginal seats amounts to pork barrelling. Mr Morrison added, "No one is suggesting anyone has broken any laws, are they?".[22]

The discussion below answers such suggestions with a clear statement: pork barrelling can indeed amount to a breach of the law, including the criminal law, and in some circumstances, it can also constitute serious corrupt conduct under the ICAC Act.

The analysis that follows has been aided by comprehensive papers prepared for the Commission by Professor Twomey[23] and Professor Campbell.[24]

Principles of public office

Fundamental legal principles relating to the exercise of public power, including principles concerning public trust and the duty of public officials to act in the public interest, are central to the Commission's analysis of pork barrelling in the context of s 8 and s 9 of the ICAC Act. The principles of public office derive from the common law and are now regarded as constitutionally enshrined in our system of government. They underpin the rule of law in Australia at both the Commonwealth and state levels.

Constitutional provisions

At the federal level, s 44 of the Commonwealth Constitution ("the Constitution") provides for the disqualification of certain persons from being eligible to sit in Federal Parliament as a senator or member of the House of Representatives. Among categories of persons disqualified are those, set out in s 44(v), who have a direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth. Section 45 of the Constitution provides that the place of any senator or member becomes vacant if they become subject to any of the "disabilities" specified in s 44 or if they take any fee for services rendered in Parliament to any person or state (such as being paid to ask questions in Parliament).

Professor Twomey has observed that, in *Re Day [No 2]* (2017) 263 CLR 201, the High Court interpreted the disqualification provision in s 44(v) of the Constitution broadly, capturing a member's beneficial interest in a family trust which holds a pecuniary interest in an agreement with the public service.[25] In *Re Day [No 2]*:

- Kiefel CJ, Bell and Edelman JJ observed that "parliamentarians have a duty as a representative of others to act in the public interest" and have "an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations"[26]
- Nettle and Gordon JJ said that the "fundamental obligation of a member of Parliament is 'the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'".[27]

In NSW, s 13 of the state's *Constitution Act 1902* contains similar disqualification provisions to those in s 44 and s 45 of the Constitution. Professor Twomey has noted that s 13:

> *…can be traced back to the Constitution Act 1855 (NSW)*[28] *and was included in the Constitution Act with 'a view to prevent corruption'.*[29] *It has therefore applied in New South Wales for as long as responsible government has existed in the State. It is likely that the High Court would apply it in the same context of a duty of Members of Parliament to serve in the public interest, without consideration of private benefit.*[30]

Common law principles

The legal duty of public officers to serve in the public interest has deep historical roots. Professor Campbell has assisted the Commission by tracing the concept of an office of public trust and its reception in NSW law.[31] The Hon Paul Finn, former judge of the Federal Court of Australia, has explored the origins of this duty in the law of equity, including "how trust and fiduciary ideas have been, and could be, invoked to circumscribe and channel the exercise of public power for the benefit or protection of the public".[32] Justice of the High Court of Australia, Stephen Gageler AC, has also examined, in extra-judicial writing, the equitable foundations of the duties of public office.[33]

For present purposes, however, it is the common law (rather than equity) which has laid down the principles that constrain the lawful exercise of public power and which are most relevant to the assessment of pork barrelling in the context of the ICAC Act.

Lord Mansfield's seminal judgment in the 1783 case of *R v Bembridge*[34] is an important reference point. In that case, an official accountant was convicted of acting contrary to his public duty by wilfully failing to disclose to a government auditor information which should have been included in a public account. It was argued that the accountant's conduct was such that he should be accountable only "for a civil injury, and not a public offence". Lord Mansfield stated in response:

> *…if a man accepts an office of trust and confidence, concerning the public, especially when it is attended with profit, he is answerable to the king for his execution of that office; and he can only answer to the king in a criminal prosecution, for the king cannot otherwise punish his misbehaviour, in acting contrary to the duty of his office.*[35]

Lord Mansfield further stated that, where there is a breach of trust "in a subject concerning the public … as that concerns the king and public (I use them as synonymous terms), it is indictable".[36] The criminal offence of misconduct in public office, which Lord Mansfield was referring to, is considered in more depth later in this chapter.

Linking Lord Mansfield's approach in *R v Bembridge* to the 1920 Australian case of *R v Boston*,[37] Professor Twomey has observed:

> *The High Court has applied the same duty to Members of the NSW Legislative Assembly, describing it as a duty to 'advise the King', which must be done in accordance with what a Member considers is 'right and proper'.*[39] *The ultimate requirement is the pursuit of the public interest. If a Member is influenced by money, he 'violates a duty in which the public is interested' and 'puts himself in a position in which his interest and his duty conflict'.*[40] *The Member's duty is 'to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'.*[41] *That duty extends to 'the function of vigilantly controlling and faithfully guarding the public finances'.*[42]

Mr Finn has observed that, in the second half of the 20th century, events in Australia "compelled us to rediscover and expand upon laws designed both to sanction abuse of public office and to promote official probity". Mr Finn notes the changes wrought by the Fitzgerald Inquiry in Queensland[43] and the WA Inc Royal Commission in Western Australia[44] "in the standards to be expected of, and applied to, public officials and employees of all stations".[45]

The WA Inc Royal Commission reported that:

> *Three goals can be identified as necessary to safeguard the credibility of our democracy and to provide an acceptable foundation for public trust and confidence in our system of government. These goals are:*
>
> *(a) government must be conducted openly;*
>
> *(b) public officials and agencies must be made accountable for their actions; and*
>
> *(c) there must be integrity both in the processes of government and in the conduct to be expected of public officials.*[46]

The WA Inc Royal Commission also observed that, "In a democratic society, effective accountability to the public is the indispensable check to be imposed on those entrusted with public power".[47] The reference in this observation to power "entrusted" to public officials is an allusion to the architectural principle that public power is held on public trust for the people. As the High Court has made clear, "...the powers of government belong to, and are derived from, the people".[48]

Official functions and powers are the subject of the public trust concept which, in their exercise, require loyalty and fidelity to the public interest by both elected and appointed officials. The public trust principle provides both the basis and the rationale for regulating the conduct of public officials.[49] In *Porter v Magill*, Lord Bingham noted:

> *It follows from the proposition that public powers are conferred as if upon trust that those who fail to exercise powers in a manner consistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle.*[50]

Professor Campbell has surveyed the Australian authorities regarding the application of the principles of public office to members of Parliament and notes:[51]

> *On the Australian authorities, a Member of Parliament, once duly elected, has a duty to serve,*[52] *and has a "parliamentary duty of honest unbiased and impartial examination and inquiry and criticism.".*[53] *Thus, a Member of Parliament holds a public office.*[54] *In particular, a Member of Parliament has a "public office", within the meaning of that expression in the crime of misconduct in public office, notwithstanding that a Member is elected rather than appointed.*[55] *So does a Minister.*[56]

On this point, as noted by Professor Twomey,[57] the NSW Court of Criminal Appeal said in *Obeid v R*[58] in 2017 that:

> *Members of Parliament are appointed to serve the people of the state, including their constituents, and it would seem that a serious breach of the trust imposed on them by using their power and authority to advance their own position or family interests, rather than the interests of the constituents whom they are elected to serve, could constitute an offence of the nature alleged.*[59]

In that decision, the Court of Criminal Appeal rejected an argument by Mr Obeid that the duty imposed upon a parliamentarian is a matter of conscience only, and not

subject to legal sanction.[60] It is a public duty which is subject to legal sanction.

Breaches of a public official's duty to act in the public interest are not limited to cases involving personal financial gain. As Professor Twomey has explained:[61]

> *The duty to act in the public interest and the legal sanctions that attach to it, extend beyond a requirement to avoid being influenced by personal financial gain. An offence may occur when the public trust has been abused by the misuse of power, regardless of whether it results in personal gain.*[62] *The South Australian Court of Criminal Appeal approved of a passage by Finn where he stated that:*
>
> > *official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.*[63]
>
> *Finn observed that improper purposes that had founded convictions for misconduct in public office included showing favouritism to some individual or group, harming or disadvantaging an individual, and 'advancing the interests of a political party, as where known supporters of one party are deliberately omitted from an electoral roll'.*[64]
>
> *A breach of public trust can also occur, even when the actual outcome of a decision achieves a valuable end.* ***It is the abuse in the exercise of the power, being an exercise for an improper purpose, which is relevant, rather than the end achieved.*** *As Finn noted, misconduct in public office does not concern 'the correctness or otherwise of the decision as an exercise of official power', but is, rather, directed at 'the state of mind which informed the decision'.*[65] ***If the public official acts dishonestly, corruptly or in a partial manner in exercising an official power for a purpose other than that for which the power was granted, then there is a breach of public trust, regardless of 'whether the act done might, upon full and mature investigation, be found strictly right'.***[66]
>
> *Hence the two arguments most commonly made by politicians in response to allegations of pork-barrelling – that it is not corrupt or unlawful because they weren't lining their own pockets and the community received valuable support – do not hold water. Such conduct can still be regarded as both corrupt and unlawful if it involves the partial exercise of public power for a purpose other than that for which the power was granted.* [Emphasis added.]

The case of *Porter v Magill*, quoted at the beginning of this chapter, demonstrates that the duty of public trust owed by local authorities to their rate payers extends to prohibit the exercise of public power in order to promote the electoral advantage of a political party if the public power in question had been conferred not for that purpose, but for a public purpose. In *Porter v Magill*, Lord Bingham noted:

> *Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise.* ***But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party…***[67] [Emphasis added.]

The extent to which political concerns may legitimately influence a decision-maker who is involved in the allocation of public resources is considered later in this chapter (see "Public power and the realpolitik").

In a lecture delivered by the Hon Robert French AC, former Chief Justice of the High Court, it was observed that:

> *It is probably not controversial that ethical behaviour derives from a view that the actor holds himself or herself in relation to others. In the case of a person occupying public office, the relationship will always be defined by the constitutional proposition that the office is held for the benefit of others.* ***Public offices are created for public purposes and for the benefit of the public.*** *It is not necessary to travel beyond the boundaries of utilitarian ethics to conclude that* ***ethical behaviour by a person exercising public power requires that person to exercise that power honestly, conscientiously, and only for a purpose for which that power was conferred.*** *This is in one sense nothing more than a manifestation of the application of the rule of law to public decision-making … The powers which are conferred on any public official* ***must necessarily be exercised only for the purposes of, and in accordance with the law by which those powers are conferred…***[68] [Emphasis added.]

In summary, the principles of public office establish that, where a public power is held for a specified purpose (for example, the power to expend public money for a particular public purpose) it cannot, as a matter of law, be utilised for a private, political or electoral purpose at the expense of the public interest. To do so would be an improper exercise of public power.

Legal implications of pork barrelling

An improper exercise of public power of the kind described above can have a range of legal consequences. That is, a breach of public trust may amount to a breach of the law. In a particular case, such conduct could breach administrative law controls on public decision-making. It could breach the NSW Ministerial Code of Conduct. It could constitute criminal conduct, including the indictable offence of misconduct in public office. It could also amount to serious corrupt conduct under the ICAC Act.

Professor Campbell has adeptly addressed a wide range of legal implications of pork barrelling.[69] This chapter draws on some of them. Interested readers are referred to Professor Campbell's paper for greater detail.

Administrative law implications

In *FAI Insurances Limited v Winneke, Mason J* said of the court's approach to reviewing the exercise of statutory discretion in administrative decision-making:[70]

> *…The court will not ordinarily regard a statutory discretion the exercise of which will affect the rights of a citizen as absolute and unfettered. If Parliament intends to make such a discretion absolute and unfettered it should do so by a very plain expression of its intent. The general rule is that the extent of the discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment (*Swan Hill Corporation v Bradbury *(1937) 56 CLR 746 at 757-758;* Water Conservation and Irrigation Commission (NSW) v Browning *(1947) 74 CLR 492 at 505)). In the words of Kitto J. in* R. v Anderson; Ex parte Ipec-Air Pty Ltd *(1965) 113 CLR 177, at 189:*
>
> > *…a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, confident to discharge the duties of his office, ought to confine himself…*[71]

The jurisdiction of the court to review the validity of government decisions according to the principles of administrative law does not permit a court to review the merits of a particular decision. Rather, the court is concerned with the validity of decision-making processes. Judicial review of administrative decisions involves an assessment by the courts of whether the legal requirements for a valid decision have been satisfied.

If judicial review determines that the requirements of administrative law have not been met, then the decision in question may be ruled invalid and legal remedies may be available. Such remedies may include orders setting aside the decision or requiring the public authority to try again to make a valid decision. Injunctions may be available to prevent a government authority giving effect to an invalid decision.

A decision to expend public resources in a way amounting to pork barrelling might be invalidated because of a failure to comply with any of the requirements for a valid decision. Those requirements include that the administrative decision-maker must:

- have lawful authority to make the decision
- act for a proper purpose
- take into account relevant factors, and ignore irrelevant factors
- act reasonably
- afford procedural fairness.

Professor Campbell has carefully considered each of these requirements and how they apply to conduct involving pork barrelling.[72] For present purposes, it is important to highlight the following observations by Professor Campbell on the requirement to act for a proper purpose.

- When a power is conferred for a particular purpose, the court will not allow the recipient of that power to use the power for a different purpose[73]. Expending funds for party political advantage will frequently involve acting for an improper purpose.
- The fact that a particular policy was put to electors who may have provided an electoral majority to a political party is an insufficient basis to expend public money on that policy.[74] Expenditure must be within the scope of a power conferred by law and comply with the administrative law requirements about the manner in which a decision to expend money is made.
- In a case of mixed motives (where a decision has been based on both improper and proper

purposes), a decision will be invalid if the improper purpose was the "dominating, actuating reason for the decision".[75] In other words, it is sufficient to invalidate a decision if the improper purpose is "a substantial purpose in the sense that no attempt would be made to act in the same way the decision required if that improper purpose had not existed".[76] This is in line with the court's approach to the causal significance of improper purpose concerning the criminal offence of misconduct in public office (considered later in this chapter).

While an unsuccessful applicant for a government grant could have standing to challenge a decision to award grants to others on a partisan political basis,[77] there are likely to be practical difficulties in seeking pure administrative law remedies, in part due to stringent time limits for commencing some proceedings for judicial review.[78] Professor Twomey has examined a practice, at the Commonwealth level, where government decision-making in allocating grants of questionable legality involves an assessment of "constitutional risk", effectively "evaluating the risk that someone who has standing to do so will challenge the making of the grant in court, resulting in it being struck down".[79]

However, beyond the availability of pure administrative law remedies, wider legal implications may flow from the invalidity of an administrative decision involving pork barrelling. As Professor Campbell explains:

> *Invalidity of an administrative decision will more often be part of what is needed for some legal consequence to arise under an area of the law other than administrative law. Invalidity of the decision will sometimes be an element in whether some breach of the criminal law has occurred … Invalidity of an administrative decision will sometimes be an element in whether some civil liability has arisen … It will sometimes enable action to be taken by one of the integrity agencies…*[80]

For example, a deliberate breach of administrative law principles in a matter involving the allocation of grant funding for partisan political purposes could breach s 3 of the NSW Ministerial Code of Conduct, which requires that "a Minister must not knowingly breach the law". Professor Twomey[81] has observed that clause 3 of the code:

> *…covers any type of law,*[82] *not just a criminal law. It would therefore not only cover breaches of the common law offence of misconduct in public office, but also breaches of other laws, such as those dealing with public finances or maintaining public records, even where no criminal offence is involved. It may also include administrative law. If this were the case, if a Minister acted for an improper purpose, took into account irrelevant considerations or acted in a biased manner in exercising his or her powers to make grants or approve the construction of infrastructure, knowing this to be outside the scope of the Minister's powers, the Minister might be found to have engaged in a breach of s 3 of the Ministerial Code.*

Such a breach, if substantial, could satisfy s 9(1)(d) of the ICAC Act and trigger the jurisdiction of the Commission (subject, of course, to the definition of corrupt conduct in s 8 of the ICAC also being satisfied). A detailed analysis of the NSW Ministerial Code of Conduct in the context of s 9 of the ICAC Act is undertaken later in this chapter (see "Focus discussion – four key issues").

Professor Twomey, referring to an article by Mahoney JA, notes:[83]

> *…the failure on the part of a public official to exercise a public power for a proper purpose in the public interest is most commonly dealt with by courts under administrative law. This is appropriate where the public official acted in good faith and made a mistake in the exercise of his or her power. But as Mahoney JA pointed out, judicial review under administrative law does "not deal with the vice in the misuse of public power".*[84] *He considered that civil remedies are "not adequate to prevent – to deter – such misuse".*[85] *He correctly observed that the "obloquy upon the official is seldom great", with the matter being attributed to the "technicalities" of administrative law.*[86] *If the deliberate misuse of public power is to be deterred, then criminal action must be a genuine threat.*

Criminal law implications

Among the more serious legal implications of pork barrelling, which address the vice in the misuse of public power, are potential breaches of the criminal law. Professor Campbell has identified numerous offences under which criminal liability may flow from conduct involving pork barrelling.[87] They include:

- misconduct in public office
- bribery
- electoral bribery
- corruptly receiving a commission or reward
- attempting, urging or assisting in the commission of a crime
- conspiracy to commit a crime
- concealing a serious indictable offence.

The purpose of this chapter is not to cover the field by explaining how criminal liability, or other legal implications of pork barrelling, may arise. Much of that important background work has been adeptly addressed by Professor Campbell.

Rather, the focus of this chapter is to identify when pork barrelling becomes corrupt conduct for the purposes of the ICAC Act. In this context, conduct which could constitute or involve a criminal offence is one of the statutory criteria capable of triggering the Commission's jurisdiction: s 9(1)(a) of the ICAC Act. The implications of s 9(1)(a) of the ICAC Act, and particular consideration of the elements of the common law criminal offence of misconduct in public office, are addressed below (see "Focus discussion – four key issues").

Other legal implications

In addition to the administrative law and criminal law implications of pork barrelling, Professor Campbell has also canvassed potential civil liability[88] and considered the roles of other integrity bodies[89] (in addition to the Commission) concerning pork barrelling. He has also identified a range of legal aids to the disclosure, discovery or proof of pork barrelling.[90]

Professor Twomey has surveyed financial accountability mechanisms in NSW that provide the relevant framework in which to assess conduct involving pork barrelling.[91] In cases alleged to constitute corrupt conduct, the Commission must assess the particular conduct against the requirements of those accountability mechanisms to ascertain whether the conduct in question falls short of the required standards and, if so, by what degree. Details of the financial accountability mechanisms in NSW are set out later in this chapter.

Corrupt conduct under the ICAC Act

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

The discussion that follows identifies those aspects of the definition of corrupt conduct that could be engaged by conduct involving the allocation of public resources for partisan political purposes. Where appropriate, examples illustrating the type of conduct that could be captured within the ambit of various subsections are included in the discussion.

Section 8

Section 8 of the ICAC Act defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

> *(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or*
>
> *(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or*
>
> *(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or*
>
> *(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.*

The provisions of s 8(1) of the ICAC Act that are of particular relevance to allegations of pork barrelling are s 8(1)(b), concerning the dishonest or partial exercise of official functions, and s 8(1)(c), concerning the breach of public trust. Those matters go to the heart of this chapter and are considered separately below (see "Focus discussion – four key issues").

In cases of pork barrelling involving downward political pressure applied to public servants, then s 8(1)(a), which concerns conduct by any person that adversely affects the honest or impartial exercise of official functions by a public official, may apply.

Subsection 8(1)(a) – conduct that adversely affects the honest or impartial exercise of official functions by a public official

Example: a minister may engage in corrupt conduct if they influence a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function such as providing an assessment of the merits of grants, in a dishonest or partial way.

Subsection 8(2) of the ICAC Act provides that:

> *Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters*
>
> *(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),*
>
> …
>
> *(i) election bribery,*
>
> *(j) election funding offences,*
>
> *(k) election fraud,*
>
> *(l) treating,*
>
> …
>
> *(x) matters of the same or a similar nature to any listed above,*
>
> *(y) any conspiracy or attempt in relation to any of the above.*

In 2015, the High Court held that s 8(2) of the ICAC Act is directed towards conduct of any person which adversely affects, or could adversely affect, the *probity* – rather than the *efficacy* – of the exercise of official functions by a public official or public authority.[92]

As noted above, s 8(1)(a) is similar to s 8(2) insofar as they are both directed at the conduct of "any person". Section 8(1)(a) is concerned with conduct that could adversely affect the *honest or impartial exercise of official functions* by a public official or public authority. The mischief that remains for s 8(2) of the ICAC Act to deal with is therefore relatively limited. It is restricted to matters involving the conduct of "any person" adversely affecting the probity of the exercise of official functions by a public official, but in a manner other than the dishonest or partial exercise of those functions, and which could involve any of the 25 specified matters set in subsections from (a) to (y).

Notwithstanding its narrow ambit, it is possible that s 8(2) of the ICAC Act could be relevant to the assessment of an allegation of pork barrelling in a case involving a conscious breach of public trust by the public official, as opposed to the dishonest or partial exercise of their official functions.

Subsection 8(2)(a) – conduct that adversely affects (the probity of) the exercise of official functions by a public official and involves official misconduct

Example: a minister may engage in corrupt conduct if they apply downward pressure to influence a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function such as providing an assessment of the merits of grants, in a manner which knowingly involves the public servant in a breach of public trust.

Subsection 8(2A) of the ICAC Act adds another layer to the definition of corrupt conduct. It provides that:

> *Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters—*
>
> …
>
> *(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,*
>
> …

There can be little doubt that a serious case of pork barrelling could "impair public confidence in public administration". Professor Campbell has analysed the operation of s 8(2A) of the ICAC Act and has expressed the view that "disposing of funds or assets for the benefit of a political party is a disposition of the funds or assets 'for private advantage'" within the meaning of s 8(2A)(c), explaining:

> *In construing those words, the contrast seems to be one between private advantage and public benefit or good – and disposition of funds or assets for the benefit of a particular political party is not a disposition for the public benefit or good.*[93]

Whether or not a person's involvement in a particular scheme to give advantage to a political party (by way of the disposition of public funds or assets) would be found to be "dishonest" within the meaning of s 8(2A)(c) would ultimately be a question of fact in each case.

Subsection 8(2A)(c) – conduct that impairs public confidence in public administration and involves dishonestly obtaining or benefiting from the disposition of public assets for private advantage

Example: a minister may engage in corrupt conduct if they conduct a merit-based grants scheme in such a way as to dishonestly favour political and private advantage over merit, undermining public confidence in public administration, and benefiting political donors and/or family members.

Section 9

Subsection 9(1) of the ICAC Act provides that, despite s 8, 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 the context of this chapter, the most significant aspects of s 9(1) of the ICAC Act are s 9(1)(a), that the conduct must constitute or involve a criminal offence, and s 9(1)(d), that alternatively, in the case of a minister of the Crown or a member of a House of Parliament, the conduct must constitute or involve a substantial breach of an applicable code of conduct. Those matters go to the heart of this chapter and are considered separately below (see "Focus discussion – four key issues").

Subsection 9(3) defines certain terms used in s 9(1)(a) and states that:

> *For the purposes of this section—*
>
> ***applicable code of conduct** means, in relation to—*
>
> *(a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or*
>
> *(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.*
>
> ***criminal offence** means a criminal offence under the law of the State or under any other law relevant to the conduct in question.*
>
> ***disciplinary offence** includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.* [Original emphasis].

Subsections 9(4) and 9(5) make further provisions relevant to potential corrupt conduct findings in relation to a minister of the Crown or a member of a House of Parliament:

> *(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.*
>
> *(5) Without otherwise limiting the matters that it can under section 74A(1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.*

The effect of s 9(4) and s 9(5) is that the conduct of a minister or a member of Parliament, which satisfies the requirements of s 8 of the ICAC Act, may be found to be corrupt conduct if it would cause a reasonable person to believe that it would bring the integrity of the office or of Parliament into serious disrepute and the conduct constitutes a breach of a law (which does not need to be a criminal law). The operation of s 9(4) and s 9(5) of the ICAC Act is discussed later in this chapter, in the context a recent NSW Government review of grants administration (see "Financial accountability mechanisms").

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission's approach to making corrupt conduct findings is set out in Appendix 6.

Focus discussion – four key issues

Subsection 8(1)(b) – partial exercise of official functions (key issue 1)

As noted above, s 8(1)(b) of the ICAC Act includes within the definition of corrupt conduct "any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions".

The practice of pork barrelling is, obviously, partisan by nature. As has been explained in chapter 2, the definition of pork barrelling adopted for the purpose of this report is "the allocation of public funds and resources to targeted electors for *partisan* political purposes". If alleged conduct did not involve prejudice in favour of a particular political party, it would not be pork barrelling.

The key issue is not whether pork barrelling is partisan, but rather, whether or not partisan behaviour of that kind amounts to a "partial exercise of official functions" within the terms of s 8(1)(b) of the ICAC Act such that it falls within the general meaning of corrupt conduct under the Act.

In *Greiner v ICAC*, Gleeson CJ considered s 8 of the ICAC Act and said that "the references to partial and impartial conduct in s 8 must be read as relating to conduct where there is a duty to behave impartially"[94]. In other words, if a public official is under no obligation to behave impartially then they will not breach s 8 by exercising their official functions in a partial manner. For present purposes, however, and in light of the principles of public office, it is difficult to envisage any circumstance in which a public official involved in the allocation of public resources would not be under a duty to behave impartially.

As has been noted by both Professor Twomey[95] and Professor Campbell,[96] the dissenting judgment of Mahoney JA in Greiner v ICAC includes remarks (which were not dependent on the reason why he dissented) which are helpful in understanding the concept of "partial" conduct in s 8(1)(b) of the ICAC Act. First, Mahoney JA considered the meaning of "partiality" by reference to the mischief that the ICAC Act is directed at addressing:

> *It is concerned to prevent the misuse of public power. Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that "partial" and similar terms in the Act are essentially directed.*
>
> *It is wrong deliberately to use power for a purpose for which it was not given: partiality is a species of this class of public wrong.*[97]

Mahoney JA then considered what is involved in partial conduct for the purpose of s 8 of the ICAC Act. He observed:

> *As used in s 8, it involves, in my opinion, at least five elements. First, it is used in a context in which two or more persons or interests are in contest, in the sense of having competing claims. In the present case, those claims were for appointment to a position. Secondly, it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another. Thirdly, for the term to be applicable, the advantage must be given in circumstances where there was a duty or at least an expectation that no one would be advantaged in the particular way over the others but, in the relevant sense, all would be treated equally. Fourthly, what was done in preferring one over the other was done for that purpose, that is, the purpose of giving a preference or advantage to that one. And, finally, the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed or expected that preference could be given, but for a purpose which was, in the sense to which I have referred, extraneous to that power.*[98]

It seems clear that the allocation of public resources for the purpose of favouring one particular political party with electoral advantage, over other political parties, would satisfy the first, second and fourth of Mahoney JA's requirements, namely that there be competing interests, that a preference or advantage be given to one of those interests but not the other, and that what was done was done for the purpose of conferring that advantage. As noted above, public officials entrusted with the responsibility of allocating public funds are, prima facie, under an obligation to act impartially. This would satisfy Mahoney JA's third element.

Mahoney JA's fifth element of "partial conduct" would be also likely satisfied in most cases of pork barrelling if the expenditure of public money for the purpose of favouring a political party with electoral advantage was extraneous to the public purpose for which the power was granted. The relevant test to be applied in circumstances where there may be mixed motives (proper and extraneous) behind the exercise of a public power is discussed later in this chapter (see "Touchstone – 'dominant purpose'").

Subsection 8(1)(b) – conduct of a public official involving the partial exercise of official functions

Example: a minister may engage in corrupt conduct if they deliberately exercise a power to approve grants in a manner that favours family members, party donors or party interests in electorates, contrary to the guidelines of a grant program which state that the grants are to be made on merit according to criteria.

Subsection 8(1)(c) – breach of public trust (key issue 2)

Subsection 8(1)(c) of the ICAC Act provides that corrupt conduct includes "any conduct of a public official or former public official that constitutes or involves a breach of public trust".

Professor Campbell has considered the expression "public trust" in the context of s 8(1)(c) of the ICAC Act. He observed that the appropriate construction of the term is in the sense of the expression as discussed in part 2 of his paper.[99] In short, the expression captures the essential elements of the principles of public office set out earlier in this chapter. The duties of public office imposed on a public official derive from the "office of trust" that the official holds in relation to the public. In particular, it will be recalled, that:

> *It follows from the proposition that public powers are conferred as if upon trust that those who fail to exercise powers in a manner consistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle.*[100]

Construing the expression "breach of public trust" in s 8(1)(c) of the ICAC Act in this manner is consistent with the requirement in s 12 of the ICAC Act that:

> *In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.*

Pork barrelling could readily amount to a breach of public trust and constitute corrupt conduct within the ambit of s 8(1)(c) of the ICAC Act, if it involved the allocation of public money to achieve a partisan political objective that was not the purpose for which the power to allocate that money was conferred. So much is consistent with Lord Bingham's remarks in *Porter v Magill*:

> *…a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party…*[101]

Subsection 8(1)(c) – conduct of a public official involving a breach of public trust

Example: a minister may engage in corrupt conduct if they exercise a power to make grants in favour of marginal electorates, when this is contrary to the purpose for which the power was given.

Subsection 9(1)(a) – a criminal offence (key issue 3)

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 and which is not excluded by s 9. One of those exclusions is 9(1)(a) of the ICAC Act, which relevantly provides that conduct does not amount to corrupt conduct unless it "could constitute or involve … a criminal offence, or…" one of the other conditions specified in s 9(1)(b)-(d).

The approach taken by the Commission to making findings as to whether conduct could constitute or involve a criminal offence for the purpose of s 9(1)(a) of the ICAC Act is as follows:

> *In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.*[102]

Conduct involving the allocation of public funds for partisan political purposes could constitute a range of criminal offences. Professor Campbell has identified a number of those offences (listed earlier in this chapter) and explained how criminal liability may arise in cases involving pork barrelling.[103]

The crime that is most likely to be involved in serious cases of pork barrelling is the offence of misconduct in public office. This discussion will focus on that offence.

As has been noted by Professor Twomey,[104] misconduct in public office is a common law offence that has been developed by courts in other jurisdictions, such as the United Kingdom, Canada and Hong Kong.[105]

The WA Inc Royal Commission report said of the origins and rationale for the offence:

> *For over 700 years in the common law system, the criminal law has had an indispensable place in proscribing serious misconduct in public office. This is entirely appropriate. Conduct which departs significantly from the standards of probity to be*

expected of officials, conduct which demonstrates a conscious use of official power or position for private, partisan or oppressive ends, is so contrary to the very purposes for which power and position are entrusted to officials as to warrant public condemnation in a criminal prosecution.[106]

Drawing on international jurisprudence, the offence of misconduct in public office is now well established in Australian law. The elements of the offence, articulated by the Victorian Supreme Court in 2010 in *R v Quach,*[107] and accepted by the NSW Court of Criminal Appeal in 2017 in *Obeid v R,*[108] are:

(1) a public official;

(2) in the course of or connected to his public office;

(3) wilfully misconduct[s] *himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;*

(4) without reasonable excuse or justification; and

(5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.[109]

The first element requires that the misconduct be performed by a public official. In a case of pork barrelling, this fact is likely to be obvious. Only relatively senior public officials have the delegated legal authority to allocate public funds which could be used for the improper purpose of enhancing the electoral prospects of a political party. Ministers, and on occasion members of Parliament, are the most likely to be involved. As has been established earlier in this chapter, both ministers and members of Parliament hold a public office, including within the meaning of that expression in the crime of misconduct in public office.[110]

The second element of the offence requires that the official's misconduct be performed in the course of, or in connection with, their public office. Mr Finn has outlined three different ways in which the requirement of "linking the official's conduct to his office and thus giving it its public, and criminal, character" will be made out, being that the public officer:[111]

- failed to do something that they were duty bound to do
- was purporting to exercise a power actually entrusted to them, or
- positively utilised their official position or the opportunities it placed before them although they had no official authority at all to act as they did.

In *Herscu v The Queen* the High Court said:

An act of a public official, or at all events a Minister, can constitute an act "in the discharge of the duties of his office" when he performs a function which it is his to perform, whether or not it can be said that he is legally obliged to perform that function in a particular way or at all."[112]

Brennan J in *Herscu v The Queen* expressed the requirement in the following way:

In ordinary speech, "the discharge of the duties" of the holder of a public office connotes far more than performance of duties which the holder of the office is legally bound to perform: rather the term connotes the performance of the functions of that office. The functions of an office consist in the things done or omitted which are done or omitted in an official capacity … When the office is such that the holder wields influence or is in a position to wield influence in matters of a particular kind, the wielding of influence in a matter of that kind is a discharge of the duties of the office. Such a wielding of influence is something done in an official capacity.[113]

In a case of pork barrelling, the exercise of discretion by a minister to determine or influence the allocation of public funds in a particular manner would likely fall squarely within the scope of their public office.

The third element of the offence of misconduct in public office requires wilful misconduct. As Professor Twomey has observed, the criminal law does not punish honest officials who make mistakes or errors of judgment.[114] This element is directed at the abuse of public trust motivated by dishonesty or corruption. Malice is not required – it is enough that the official "knows that what he is doing is not in accordance with the law"[115] or "knew that he was obliged not to use his position in that way, or he knew that it was possible that he was obliged not to use his position in that way but chose to do so anyway".[116] Reliance on legal advice to establish a defendant's lack of intention will not always be effective.[117]

In a case involving alleged pork barrelling, proof that an official knew, or was reckless as to the fact, that their conduct was not in accordance with the law, may turn upon codes of conduct and financial accountability mechanisms in place to govern the particular allocation of public funds. An official's awareness of those codes and mechanisms may be facts in issue.[118] Relevant grant guidelines are likely to be critical components in that regulatory framework. The applicability of such guidelines to ministerial decision-makers might also be an important issue. The financial accountability mechanisms that currently apply in NSW are considered later in this chapter. The NSW Ministerial Code of Conduct is

addressed in the next part of the chapter in the context of s 9(1)(d) of the ICAC Act.

For an offence of misconduct in public office to be established, it is not necessary that the official position be abused for any sort of gain to the public officer.[119] As Mr Finn has explained:

> *Official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not intentionally abuse the trust reposed in him.*[120]

This element of the offence draws upon the fundamental principles of public office as they apply to a public official's office of trust. Conduct involving pork barrelling which might amount to a breach of public trust for the purposes of s 8(1)(c) of the ICAC Act, as discussed above, could also potentially satisfy the wilful misconduct element of the offence of misconduct in public office.

For a crime to be established, it is necessary to establish the causative role of the improper purpose in motivating the wilful misconduct. The NSW Court of Criminal Appeal in *Maitland v R*; *Macdonald v R*[121] clarified that it is not necessary that the improper purpose be the sole motivating factor for the activity of the official that constitutes misconduct. Rather, it is necessary to prove that the action the public official took would not have been taken "but for" the improper purpose.

As noted previously in this chapter, the *Maitland v R*; *Macdonald v R* "but for" test is coherent with the principles of administrative law applicable to the review of the validity of decisions involving mixed (legitimate and extraneous) motivations. These tests are considered again towards the end of this chapter (see "Touchstone – 'dominant purpose'").[122]

The fourth element of the crime of misconduct in public office provides that criminal culpability will only arise in circumstances where there is no reasonable excuse or justification for the misconduct. For present purposes, it is sufficient to repeat the observation of Professor Twomey that:

> *…the two arguments most commonly made by politicians in response to allegations of pork-barrelling – that it is not corrupt or unlawful because they weren't lining their own pockets and the community received valuable support – do not hold water. Such conduct can still be regarded as both corrupt and unlawful if it involves the partial exercise of public power for a purpose other than that for which the power was granted.*[123]

The fifth element of the offence requires that the misconduct be sufficiently serious, in the circumstances, to warrant criminal punishment. This is a high bar. As noted by Professor Twomey:[124]

> *The English Court of Appeal observed that there must be a 'serious departure from proper standards', and that a mistake, even a serious one, would not suffice.*[125] *It noted that the 'threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.'*[126]
>
> *The same view has been taken in Australia…*

In considering this aspect, it is relevant to consider the comments by Beech-Jones J in sentencing Edward Obeid in 2016:[127]

> *…the more senior the public official the greater the level of public trust in their position and the more onerous the duty that is imposed. Under this State's constitutional arrangements, and leaving aside the third arm of government, only Ministers occupy a more senior position than that occupied by parliamentarians.*

Those comments are consistent with the remarks of Lee J regarding the significance of a cabinet minister breaching their duty in *R v Jackson and Hakim*:[128]

> *We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex.*

On the issue of seriousness, it is important to keep in mind that s 12A of the ICAC Act requires that "in exercising its functions, the Commission is, as far as practicable, to direct its attention to serious corrupt conduct and systemic corrupt conduct". Accordingly, the Commission is not concerned with small-scale or minor instances of pork barrelling. Rather, the Commission is required to direct its attention to pork barrelling of a serious kind, involving high ranking public officials, significant sums of public money, and wilful misconduct. Matters of that kind may well satisfy the test of seriousness for the offence of misconduct in public office.

Subsection 9(1)(d) – a substantial breach of an applicable code of conduct (key issue 4)

Another of the exclusions in s 9(1) of the ICAC Act is subsection 9(1)(d) which provides that conduct does not amount to corrupt conduct unless it could (as an alternative to a criminal offence) "constitute or involve … 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".

At the time that *Greiner v ICAC*[129] was decided, s 9(1) of the ICAC Act did not contain any legal standard against which the conduct of a minister could be tested other than conduct which could constitute or involve a criminal offence (s 9(1)(a)). Subsection 9(1)(d) was introduced into the ICAC Act in the wake of *Greiner v ICAC* in order to address a perception "that Ministers of the Crown were beyond the reach of the ICAC".[130] Parliament's intent in inserting s 9(1)(d) into the ICAC Act can be gleaned from the minister's Second Reading Speech, which said:

> *…a set of standards more analogous to that applying to other public officers should apply to Ministers and members of Parliament. Public servants and other public sector employees are subject to disciplinary provisions and codes. A breach of such provisions and codes may attract the jurisdiction of the Independent Commission Against Corruption and result in a finding of corrupt conduct. It is proposed, therefore, to put members of Parliament and Ministers on a similar footing to public sector employees by providing that a breach of a code of conduct applicable to them can attract the ICAC's jurisdiction and result in a finding of corrupt conduct when it is found that a substantial breach has occurred.*[131]

The expression "substantial breach" is not defined in the ICAC Act. According to its ordinary meaning, it connotes a serious breach of an applicable code of conduct and not a transgression that is trivial, small or incidental in nature. Considered in its statutory context, and in light of the minister's Second Reading Speech, a "substantial breach" of an applicable code of conduct is to be regarded as equally serious as conduct that could, for example, constitute or involve a "disciplinary offence" (s 9(1)(b)) or reasonable grounds for dismissing a public official (s 9(1)(c)) and thus, in an appropriate case, warrant the making of a corrupt conduct finding.

Section 9(3) of the ICAC Act provides that:

> *For the purposes of this section—*
>
> ***applicable code of conduct*** *means, in relation to—*
>
> *(a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or*
>
> *(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.* [Original emphasis.]

The Legislative Council and the Legislative Assembly have each adopted a Code of Conduct for Members ("the Members' Code"), in identical terms, for the purposes of s 9 of the ICAC Act.[132] The preamble states that members of Parliament "acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and institutions and conventions of parliament, and using their influence to advance the common good of the people of New South Wales". Substantive provisions of the Members' Code address, among other things, the misuse of public power for personal benefit and conflicts of interest.[133]

The code of conduct that is more relevant to this discussion of pork barrelling is the Ministerial Code of Conduct ("the Ministerial Code"). Clause 5 of the Independent Commission Against Corruption Regulation 2017 provides that the Ministerial Code that is set out in the appendix to that Regulation is prescribed as an applicable code of conduct for the purposes of s 9 of the ICAC Act. The Ministerial Code applies to any member of the Executive Council and, in some but not all respects, includes a parliamentary secretary within the definition of a "minister".[134]

The preamble to the Ministerial Code, which does not form part of the substantive code but may be taken into account in the interpretation of its provisions,[135] relevantly states that:

> *1. It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest.*
>
> …
>
> *3. Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales.*

The preamble to the Ministerial Code recognises fundamental legal obligations, including duties to maintain public trust and act in the public interest to the exclusion of any other interest, which already apply as a matter of law to government ministers.[136] This is the background against which the operative clauses of the Ministerial Code must be construed.

The most important clause of the Ministerial Code in the context of this discussion is clause 6, which concerns a minister's duty to act in the public interest. Clause 6 provides:

> ***6 Duty to act honestly and in the public interest***
>
> *A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.*

For present purposes (putting aside dishonest conduct), there are two key obligations imposed on a minister under clause 6: first, there is a positive obligation to "act only in what they consider to be the public interest"; secondly, there is a negative duty under which a minister "must not act improperly for their private benefit or for the private benefit of any other person".

It is important to note that the positive obligation and the negative duty stand independently of each other.[137] That is to say, the duty to act only in what the minister considers to be the public interest exists independently of the negative duty to avoid acting improperly. So, if a minister acted for interests other than which they considered to be the public interest, then a breach of the Ministerial Code would ensue, regardless of whether or not that conduct involved acting improperly for the minister's benefit or the benefit of any other person.

The duty imposed on ministers under clause 6 to "act only in what they consider to be the public interest" requires a subjective assessment of what constitutes the public interest – that is, it is what the *Minister considers* to be the public interest. Professor Twomey has noted the effect of this qualification:

> *This makes it more difficult to establish that a substantial breach has occurred. A Minister may argue that he or she genuinely considers that the provision of grants or the funding of infrastructure is in the public interest even though it is skewed towards marginal electorates or those held by his or her own party.*[138]

In this sense, the duty imposed on a minister under clause 6 of the Ministerial Code to act only in what they consider to be the public interest is a narrower obligation than exists at common law. Given the subjective assessment involved, a substantial breach of that duty may also be harder to establish. On this issue, Professor Twomey has examined the interaction between the common law, the Ministerial Code and s 8 and s 9 of the ICAC Act:

> *In* Obeid v R, *the NSW Court of Criminal Appeal held that a Code of Conduct adopted for the purpose of s 9 of the ICAC Act could not be said to oust or limit a duty on a Member under the common law.*[139] *Nor does a Code 'define the totality of a Member's obligations'.*[140] *Section 9 of the Act contemplates that conduct breaching s 8, such as a breach of public trust might constitute a criminal offence or a breach of an adopted code of conduct, without suggesting that one would exclude the operation of the other. Hence, even if an act did not amount to a breach of the Ministerial Code of Conduct, it might still give rise to a finding of corrupt conduct if it satisfied one of the other requirements in s 9.*[141]

Turning to the negative duty imposed on ministers under clause 6 of the Ministerial Code "not to act improperly for their private benefit or for the private benefit of any other person", two related questions arise as to whether the allocation of public money for electoral advantage of a political party could involve a minister acting: (a) "for their private benefit"; or (b) "for the private benefit of any other person".

In relation to the first question, Professor Twomey has noted that "there is an argument that exercising an official power to engage in pork-barrelling for the purpose of achieving electoral success for a political party involves acting in a Minister's private financial interests".[142] This argument is based on the fact that a minister's job, and therefore their salary, allowances and superannuation, are all conditional upon the success of their political party in attracting electoral support.

In addressing the second question, it is critical to ascertain whether or not the expression "any other person" is wide enough to include a political party. A political party that is an unincorporated association would not ordinarily be regarded as having legal personality independent from the individual party members who comprise the association. However, as Professor Campbell has noted:[143]

> *Clause 11 of the Code defines "person" as including "a natural person, body corporate, unincorporated association, partnership or other entity." An unincorporated political party would thus fall within the scope of "any other person" in clause 6 of the Code.*[144] *An incorporated political party would also fall within the scope of "any other person" in Clause 6, by virtue of being a "body corporate … or other entity".*

On this basis, a political party may well fall within the scope of "any other person" in clause 6 of the Ministerial Code. Professor Twomey shares this view.[145] If so, the question would then become whether the allocation of public funds for the electoral advantage of that political party constitutes a "private benefit" within the meaning of clause 6. On this point of statutory construction, Professor Campbell has observed:[146]

> *In deciding when it is "acting improperly" for the private benefit of a political party, the notion of "private benefit" would be understood by contrast with the public benefit that is achieved by acting in what the Minister considers to be the public interest. In deciding what was acting "improperly" it would be legitimate to take into account the portions of the preamble to the Code that are quoted above. Acting by spending money or disposing of public assets to advance the interests of a particular political party tends against maintaining public confidence in the integrity of government, it is not pursuing the interest of the people of New South Wales to the exclusion of any other interest, it tends against maintaining the public trust that has been placed in Ministers, and is not performing their duties to advance the common good of the people of New South Wales.*

However, clause 11 of the Ministerial Code defines "private benefit" in the following way:

> ***private benefit*** *means any financial or other advantage to a person (other than the State of New South Wales or a department or other government agency representing the State), other than a benefit that—*
>
> *(a) arises merely because the person is a member of the public or a member of a broad demographic group of the public and is held in common with, and is no different in nature and degree to, the interests of other such members, or*
>
> *(b) comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing.* [Original emphasis.]

This definition excludes from the scope of a "private benefit" any benefit that "comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing". Professor Twomey notes:

> *This appears to be directed specifically at 'pork-barrelling' and excluding it from the reference to private benefit in s 6. There may be a difference, however, between actions that involve a mere 'hope or expectation' of enhanced political standing, and more closely directed pork-barrelling, such as that which directly benefits party donors. Further, the requirement in s 6 to act only in what the Minister considers to be in the public interest would still stand.*[147]

Notwithstanding what may be an attempt in clause 11 to exclude pork barrelling from the reference to a private benefit, a substantial breach of clause 6 of the Ministerial Code may be established in circumstances where the alleged conduct involves closely directed pork barrelling of the kind alluded to by Professor Twomey, or very large sums of money, or where there is evidence of a scheme involving a calculated anticipation of electoral advantage as opposed to a "mere hope or expectation" of enhanced popular standing.

Expressed in another way, cases involving a "mere hope or expectation" of enhanced popular standing are to be distinguished from those where a minister's dominating or actuating purpose in exercising a public power and allocating public funds in a particular manner was to achieve electoral advantage for a political party. If the matter would not have been dealt with in such a way but for that extraneous political purpose, then it would likely amount to "act[ing] improperly … for the private benefit of any other person" and be captured within the ambit of clause 6 of the Ministerial Code.

Such an approach would be consistent with Professor Campbell's construction of "private benefit" in light of the preamble to the Ministerial Code (discussed above), preferring an interpretation which maintained the public trust placed in ministers and public confidence in the integrity of government and which pursued the interest of the people of NSW to the exclusion of any other interest.

Such an approach would also be consistent with the principles discussed earlier in this chapter, in particular the "but for" test for the criminal offence of misconduct in public office[148] and the principles that apply in administrative law where a decision has been based on a mixture of improper and proper purposes.

If there is any potential ambiguity as to the ambit and application of clause 6 of the Ministerial Code and the meaning of "private interests of any other person", reform would be appropriate to remove such ambiguity and, as may be considered necessary, clarify the standards of conduct expected of ministers in the exercise of their discretion involving the allocation of public funds. For present purposes, the Commission has confined itself to the issue of construction discussed above.

There are two further clauses of the Ministerial Code that are of particular relevance to conduct involving pork barrelling; they are clauses 3 and 5.

As flagged earlier, clause 3 of the Ministerial Code relevantly provides that "a Minister must not knowingly breach the law…" (see "Administrative law implications"). This requirement is not limited to breaches of the criminal law. A deliberate breach of laws dealing with public finances or record-keeping would trigger clause 3, as might a wilful breach of administrative law.

> *If this were the case, if a Minister acted for an improper purpose, took into account irrelevant considerations or acted in a biased manner in exercising his or her powers to make grants or approve the construction of infrastructure, knowing this to be outside the scope of the Minister's powers, the Minister might be found to have engaged in a breach of s 3 of the Ministerial Code*.[149]

Clause 5 of the Ministerial Code provides that:

> ***5 Lawful directions to the public service***
>
> *(1) A Minister must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law.* [Original emphasis.]

A minister who issued directions to a public servant to distribute public funds in a way that constituted illegal pork barrelling could breach clause 5 of the Ministerial Code. As Professor Twomey has observed:

> *The section recognises that a Minister is entitled to disagree with the advice of a public service agency and make decisions contrary to that advice. The Minister can also direct an agency to implement the Minister's decision. But the Minister cannot direct the agency to act contrary to the law. Hence, a Minister who directed or requested a public servant to breach the public servant's legal obligations under the* Government Sector Employment Act 2013 *(NSW), the* Government Sector Finance Act 2018 *(NSW) or the* State Records Act 1998 *(NSW),*[150] *or act outside of the public servant's powers by exercising a decision-making power for an improper purpose or taking into account irrelevant considerations, could be found to have breached s 5 of the Ministerial Code.*

Conduct of this kind, involving downward pressure by ministers on public servants, has also been considered earlier in this chapter in relation to potential breaches of s 8(1)(a) and s 8(2) of the ICAC Act (see "Corrupt conduct under the ICAC Act").

Financial accountability mechanisms

Whether or not legal implications of the kind surveyed in this chapter flow in a given case of pork barrelling will depend on the particular facts of the matter. In assessing whether an allegation of pork barrelling involves invalid decision-making, breaches an applicable code of conduct, constitutes a criminal offence or amounts to corrupt conduct under the ICAC Act, a key consideration will be the extent to which the decision-maker departed from the requirements of the financial accountability mechanisms that govern the expenditure of public funds.

Accountability measures safeguard and give practical effect to the principles of public office identified earlier in this chapter. In relation to grant funding programs, accountability measures operate to: (1) identify and record the basis and reason(s) for an exercise of public power associated with grant funding; and (2) ensure that both merit and need are properly assessed and determined in accordance with specific criteria. A properly designed and administered grant funding program accordingly carries an assurance that public monies are expended for proper purposes. Further discussion on this issue and related recommendations can be found in chapter 4.

In Australia, the regulatory frameworks that govern the expenditure of public funds differ between the states and territories and the Commonwealth. In their various forms, they set out legal rules, codes of conduct and guidelines which combine to regulate the conduct of public officials who are engaged in decision-making involving the expenditure of public money. It is in this context that the behaviour of public officials who are alleged to have engaged in pork barrelling must be considered.

Professor Twomey has observed that the legal framework to ensure financial accountability and probity with respect to the making of grants in NSW is deficient in comparison with superior accountability mechanisms in place at the Commonwealth level.[151] Key features of the NSW regulatory framework include:

- s 7 of the *Government Sector Employment Act 2013* ("the GSE Act"), which sets out "core values" of the government sector, which include placing "the public interest over personal interest", upholding the law, providing non-partisan advice, providing services fairly and, significantly, being "fiscally responsible and [focusing] on efficient, effective and prudent use of resources"
- the Code of Ethics and Conduct for NSW Government Sector Employees which, while there does not appear to be any legal obligation

in the GSE Act to give effect to the core values, provides that breaching these values can lead to disciplinary action. It also states that:

> *You must use public resources in an efficient, effective and prudent way. Never use public resources – money, property, equipment or consumables – for your personal benefit, or for an unauthorised purpose*

- s 3.7 of the *Government Sector Finance Act 2018* ("the GSF Act"), which provides additional values directed towards public officials' use of public resources in connection with financial management. Those values include "accountability" and that the "government officer should take reasonable care so that the officer's use of government resources or related money is efficient, effective and prudent"
- the DPC's *Good Practice Guide to Grants Administration* ("the Good Practice Guide"), which was developed in 2010 to assist NSW Government departments to engage consistent practices for grants programs. While not set out in any statutory rule and lacking legal standing,[152] it provides guidance on grant funding procedure, including that:
  - grants should be compatible with department objectives and allocations to recipients should be "consistent with government priorities"
  - grant programs should be "based on evidence of need" and eligibility criteria should be consistent with program objectives
  - it is "good practice" for recommendations and decisions to be fully documented, as this will make decisions easier to audit
  - grants assessment should be as transparent as possible and, accordingly, grants programs must have criteria against which applications are assessed, the full criteria "should be published" and "decisions must be made on the basis of the published criteria"
  - a minister's approval is to be based upon whether the financial assistance is in line with the goals of the program, whether the costs and other aspects appear reasonable and there are sufficient funds available
  - the assessment must be "fully justified and documented" and any "variance to [a] recommendation" must be recorded with reasons. Those reasons must also be published on the department's website
- the *State Records Act 1998* requires public offices (which includes political office holders, such as a minister, as well as departments) to make and keep full and accurate records of activities of the office (s 10) and ensure safe custody and proper preservation of state records under its control (s 11). It is an offence to damage or alter a state record (s 21).

Case studies of grant funding programs involving allegations of pork barrelling in NSW include examples where ministers have failed to comply with guidance set out in the Good Practice Guide and where their offices have breached requirements of the *State Records Act 1998*. Examples of such case studies are noted later in this report when relevant to consideration of whether any laws governing any public authority or public official need to be implemented or changed and whether any methods of work practices or procedures of any public authority or public official could allow, encourage or cause the occurrence of corrupt conduct and, if so, what changes should be made.

It is important to note that there does not appear to be any requirement in NSW that a minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money. In contrast, at the Commonwealth level, s 71 of the *Public Governance, Performance and Accountability Act 2013* (Commonwealth) imposes on ministers a legal obligation not to approve grants unless satisfied, after making reasonable enquiries, that the expenditure is an efficient, effective, economical and ethical use of the money.

As noted above, Professor Twomey has observed that the financial accountability mechanisms governing the allocation of grant funding in NSW are weaker than those at the Commonwealth level. That deficiency is inexcusable and itself poses a corruption risk.

At the Commonwealth level, however, there are different problems. A lack of strong enforcement options has allowed a pattern of pork barrelling involving clear non-compliance with the regulatory framework to occur. Where the Commonwealth has strong financial accountability mechanisms, but lacks enforcement options, NSW has a stronger enforcement apparatus, including the Commission's jurisdiction, but suffers from having weaker financial accountability structures. In both jurisdictions, pork barrelling continues to occur.

NSW Government review of grants administration

In April 2022, as previously noted in this report, the NSW Government released a report prepared jointly by the NSW Productivity Commission and the DPC titled, *Review of grants administration in NSW* ("the Review").[153]

The Review makes a number of important recommendations directed at strengthening the regulatory framework in NSW in relation to grants administration. These include the recommendation that the existing Good Practice Guide be replaced with a revised *Grants Administration Guide* ("the Proposed Guide") that would extend beyond public servants to apply to ministers and ministerial staff and include some mandatory requirements.[154] Professor Twomey has conducted an assessment of the Review for the Commission.[155] She notes:

> *The Review makes important recommendations about identifying and documenting roles and responsibilities in grant-making, including basic matters such as identifying who has the power to make the decision, along with clear selection criteria, published guidelines*[156] *and the assessment of grant applications against the selection criteria.*[157]

The merits of particular transparency and accountability measures recommended in the Review, and incorporated in the Proposed Guide, are considered in chapter 4.

In this legal chapter, it is important to note two issues regarding the Review: first, the non-legal status of the Proposed Guide; and, secondly, its enforceability.

The Review recommends, in the interests of flexibility, that the Proposed Guide not take the form of a legislative instrument,[158] such as a regulation, but instead be issued under a premier's memorandum which, it is asserted, "is binding on officials, ministers, and ministerial staff and can be readily updated in line with evolving best practice".[159] Professor Twomey has observed that, "While flexibility can be a virtue, it is in "flexibility" that most avoidance of the rules occurs".[160] Examples of avoidance are included in case study discussions later in this report. Professor Twomey has stated:

> *…if there is to be flexibility in altering the Guide (remembering that the current Guide has not been altered since 2010, suggesting that the evolution of best practice does not appear to be very fast), it should be done by way of a legislative instrument, such as a regulation. This would give the mandatory aspects of the Guide a legal status and would enhance accountability by enabling any future changes to be scrutinised by the Houses and the relevant parliamentary committee and disallowed if they did not constitute the 'evolving best practice' that is desired.*[161]

One important consequence of the Proposed Guide being in the form of a premier's memorandum, and not a statutory instrument, is that the latter is "a law" and the former is not. This may impact directly on assessments under the ICAC Act of allegations involving pork barrelling. In particular, if a minister breached the requirements of the Proposed Guide, but the breach did not amount to a breach of "the law", that could prevent the Commission from making findings of corrupt conduct. That may be the case in an investigation of pork barrelling alleged to be potential serious corrupt conduct which involved:

- s 9(4) and s 9(5) of the ICAC Act, where conduct of the minister satisfies the requirements of s 8 and would cause a reasonable person to believe that it would bring the integrity of the office or of Parliament into serious disrepute, it would then be necessary to also establish that the conduct constitutes a breach of "a law"
- s 9(1)(d) of the ICAC Act, where it may be necessary in some cases to establish that a breach of clause 3 or clause 5 of the Ministerial Code has occurred, which would require evidence that the minister had knowingly breached "the law" (clause 3) or knowingly issued a direction or request requiring a public servant to act contrary to "the law" (clause 5).

If the conduct under investigation also constituted or involved the criminal offence of misconduct in public office, the fact that a breach of the Proposed Guide was not a breach of "a law" would not prevent the Commission from making findings of serious corrupt conduct (relying, instead, on s 9(1)(a) of the ICAC Act).

The second legal issue arising from the Review concerns the enforceability of the mandatory provisions of the Proposed Guide. The Review asserts that the Proposed Guide, issued under a premier's memorandum, would be "binding on officials, ministers and ministerial staff".[162] However, the legal basis for this statement is unclear. As Professor Twomey notes:[163]

- ministers would only be bound by the convention that the premier advises the governor on the appointment and removal of ministers and who must therefore hold the premier's confidence
- officials and ministerial staff may face disciplinary action under the GSE Act as a consequence for failure to comply with a premier's memorandum, but only at the discretion of an official or minister.

In both scenarios above, questions arise as to whether enforcement of a failure to comply with the Proposed Guide would actually be pursued in the exercise of discretion by a minister, whose political party may have benefited from the misconduct, or an official, at whose behest or suggestion the misconduct may have occurred.

The Review attempted to resolve some of the difficulties concerning the legal status and enforceability of the Proposed Guide by recommending that, while the Proposed Guide be issued under a premier's memorandum, which is not itself a legislative instrument, compliance with the Proposed Guide be made a separate legislative requirement. The Review suggested that an express requirement to this effect could be added to the GSF Act or the GSE Act.

There are two problems with this proposal. First, as the GSF Act and the GSE Act are primarily directed towards the conduct of public servants, there is a risk that any legislative requirement in those Acts to comply with the Proposed Guide may not be extended to ministers and ministerial staff. Given that the exercise of ministerial discretion in the allocation of grants has consistently been identified by auditors general (federal and NSW) as a core problem associated with pork barrelling, such an outcome would fail to address the real mischief at issue, that is, funding decisions made by or at the direction of ministers of the Crown.

The second problem with the proposal was addressed by Professor Twomey at the forum. She explained that the proposal leads to a very odd legal scenario:

> *…where you actually have obligations under something that's not a law and then you have elsewhere a legal obligation to comply with the thing that's not a law. So you've got a, sort of a law by second degree. And I have to say I did try and sit down and think about how that would work when trying to connect that through to like ICAC obligations, and obligations in the ministerial code to comply with the law, and whether or not that would work it out and satisfy it or not. I'm still not convinced as to what the answer is but I think the whole point of it then is if it's not clear to me whether or not you would still be breaching those kind of provisions, then the uncertainty and lack of clarity surrounding it is in itself a problem.*[164]

The Commission agrees with Professor Twomey's observations on this issue. The proposal amounts to a "semi-legislative" enforcement mechanism, or a half-measure, the legal effect of which is uncertain and, in the Commission's view, unacceptable.

As Professor Twomey has identified in a detailed analysis of Commonwealth grant funding issues, at the Commonwealth level:[165]

- s 71 of the *Public Governance, Performance and Accountability Act 2013* (Commonwealth) ("the PGPA Act") imposes on ministers a legal obligation not to approve grants unless satisfied, after making reasonable inquiries, that the expenditure is an efficient, effective, economical and ethical use of the money
- the *Commonwealth Grants Rules and Guidelines 2017* ("the CGRGs") are given effect as a statutory instrument under s 105C(1) of the PGPA Act.

Professor Twomey has more recently observed, addressing a contention in the Review that the Proposed Guide is not amenable to being given the status of a legislative instrument, that:

> *The argument that the* [Proposed] *Guide is not amenable to being given the status of a legislative instrument because some measures in it are mandatory and others are principle-based*[166] *is a very weak one. Such a distinction is perfectly functional in the Commonwealth's CGRGs, of which one part is mandatory and the other is clearly stated to be non-binding guidelines. No adequate answer was given in the Review's Report as to why the same approach could not be taken in New South Wales.*

The Commission considers that any reform of financial accountability mechanisms relating to grant funding in NSW must, at a minimum, incorporate legal requirements of the kind established at the Commonwealth level under s 71 and s 105C(1) of the PGPA Act to ensure that: (a) ministers in NSW are subject to legally binding obligations to only approve grants if genuinely satisfied that the expenditure is efficient, effective, economical and ethical; and (b) the Proposed Guide takes the form of a legislative instrument, conferring on it the status of law, guaranteeing its supervision by the Houses of Parliament, and safeguarding the enforceability of its mandatory requirements. Recommendations to this effect are made in chapter 4.

Public power and the realpolitik

This chapter has highlighted the legal constraints on public officials in the exercise of public power. It has shown how a breach of those constraints could constitute a breach of the law, including the criminal law, or amount to serious corrupt conduct within the meaning of the ICAC Act. While these are important matters, it is also imperative to recognise the realities of party politics in our system of representative democracy. Mr Finn's observations, concerning the nature of a parliamentarian's trusteeship, are instructive:[167]

It is right that we should be unrelenting in our insistence upon probity in government and in public administration. But equally we should not forget, as a media-driven Australian public opinion seems in danger of doing, that the processes of the democratic, representative and party-based system to which we have committed ourselves, are based, in part at least, upon the striking of compromises, upon securing and using influence, upon obtaining advantages for constituents, and – let it not be gainsaid – for Members of Parliament and for Ministers. Necessarily, limits, and strict ones at that, must be placed upon the compromises and the like we are prepared to countenance in allowing our systems of government to function. But unless we recognise in the roles we have given our politicians and in the laws that bind them, that in some degree and for some purposes, compromise, the use of influence, and advantage seeking and taking are tolerable if not necessary features of our public life, we run the risk of demanding standards of our elected officials which are beyond their reach and which also may be prejudicial to the very public purposes we ask them to serve for our benefit.

My argument is not for the tolerance of corruption. Far from it. It is for the recognition that the standards of conduct properly to be expected of a given class of officials are, first and foremost, the standards of role … Our quest for what is meet in official behavior [sic] *is not answered simply by calling an official a public trustee or fiduciary and by assuming that this carries set consequences…*

In some areas of governmental activity, public power may be legitimately exercised in order to satisfy a political objective. Elected officials may take political considerations into account, for example, in the formulation and the implementation of policy matters that guide how a particular type of government decision-making will be made. In general terms, elected officials are permitted greater scope in such matters as to the factors that may legitimately be brought into their decision-making than is the case with appointed officials.[168]

Those aspiring for political office should be free to inform the electorate about how they plan to exercise executive power if elected. This is usually achieved by announcing policies and making election promises. In a democratic system, candidates for office should have broad scope to campaign, including by proposing new laws, disagreeing with bureaucratic or expert advice and proposing to confer benefits on some parts of the electorate but not others. As noted by Mr Finn above, running for office and forming government involves making compromises. In practice, many of these compromises will necessarily involve a degree of departure from the notion of technical merit. Such departures are to be accepted, provided that relevant public interest factors are considered and given effect.

However, as Professor Campbell has noted, executive decision-makers cannot expend public money on implementing a policy unless the expenditure is within the scope of a power that is conferred by law.[169] Whether or not such expenditure is within the scope of a public power will be a matter of fact in a given case and "it is on the basis of the statute, and the role of the decision-maker, that one decides whether it is legitimate to take into account some governmental policy, or not".[170]

The standards of conduct that apply to members of Parliament, including ministers in some areas, will vary according to the circumstances, the nature of the power being exercised, or the decision made. With the development of political parties, a parliamentarian subordinates their individual judgment to the binding force of party discipline. The principles that apply to the exercise of public power by ministers, as noted above, take account of the realities of the modern practice of government and are not to be applied so as to render the practice of government unworkable. The law does not part company with the reality of party politics.

Ministers are, of course, required from time-to-time to exercise executive powers. Such powers derive from a minister's office, rather than from legislation. Executive powers of this kind may include, for example, the power to enter into contracts or appoint a person to a public office or determine the location of a public facility. While there is increased scope for political factors to legitimately influence a minister's exercise of executive power, such power cannot be exercised to achieve an objective that is extraneous to, or inconsistent with, the public purpose for which the executive power exists. To do so would constitute an improper exercise of power and, as discussed in this report, in some circumstances could constitute corrupt conduct under the ICAC Act.

In general, non-statutory executive decision-making is required to be exercised to achieve a particular public good or an objective that serves the public interest. Whether it has been so exercised will require an examination as to whether the power was properly exercised or pursued for the purpose of achieving its objective(s) or purpose(s).

Mahoney JA's remarks on the exercise of executive power in *Greiner v ICAC*, as considered by Professor Twomey,[171] are informative:

While [Mahoney JA] *acknowledged that Parliament may enact legislation to achieve political ends and that political factors may sometimes fall within proper purposes in the exercise of executive power (eg where*

> *a decision-maker is obliged to take into account government policy), he stressed that the ends for which executive power may be exercised are 'limited by the law'.*[172] *He considered that public power to appoint to a public office 'must be exercised for a public purpose, not for a private or a political purpose' and that a decision about where a public facility is to be built must be based upon what is the proper place for it, rather than where it is most likely to assist the re-election of a party member.*[173] *He also later noted that if an official is given power to allocate money to encourage cultural activities, and distributes it to 'persons or bodies apt to support a particular political party – or to procure that they do so', this too would involve the misuse of a public power.*[174]

The House of Lords in *Porter v Magill*[175] acknowledged that it was legitimate for councillors to desire that their party should win the next election. To hold otherwise would depart from the theory of democracy. However, it was also held that electoral success is impermissible as a sole or dominant motive for an executive decision. The remarks of Lord Bingham distil the relevant considerations:

> *Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council.*[176]

As noted by Professor Campbell, referring to *Porter v Magill*, provided that a public power is exercised for the purpose for which it was conferred, it is not a ground of invalidity if the decision-maker merely hopes that the decision made through exercise of that power would be well received politically.[177]

Lord Bingham's remarks in *Porter v Magill*, and Professor Campbell's analysis, underscore the basic principle that elected politicians are free to exercise public powers for public purposes, in some circumstances, with the hope or expectation that such an exercise of power will earn the gratitude and support of voters in their electorate.

Such an approach is consistent with the Commission's interpretation of clause 11 of the Ministerial Code (previously discussed in this chapter), which carves out from the scope of a "private benefit" in clause 6 any benefit that "comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing".

The type of "hope or expectation" that a public official may legitimately harbour of some political or personal advantage flowing from their exercise of public power is in the nature of a "side wind", as observed by Widgery J in *Llewellyn v Jones*:[178]

> *...it is not enough to bring (the official) within the principle merely to show that when making an order which was within his powers and which he could make for perfectly proper motives, he knew that by a side wind, as it were, he was going to gain some personal benefit ... I would not be prepared to say that it would be misconduct for this purpose for (the official) to make a decision which did affect his personal interests, merely because he knew that his interests were involved, if the decision was made honestly and in genuine belief that it was a proper exercise of his jurisdiction...*

In contrast, the line will be crossed where a public official's dominating or actuating purpose in exercising a public power and allocating public funds in a particular manner was to achieve electoral advantage for a political party. In *Porter v Magill*, the House of Lords applied the public trust principle to set aside a policy introduced by a Conservative leader and deputy leader of a council of selling, under statutory powers, council homes in marginal wards in an attempt to change the voting demographics in their party's favour. Lord Bingham stated:[179]

> *Statutory power conferred for public purposes is conferred as it were on trust not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended – it follows from the proposition, that public powers are conferred as if upon trust, that those who exercise powers in a manner* ***inconsistent with the public purpose*** *for which the powers conferred betray that trust and so misconduct themselves.* [Emphasis added.]

In summary, the exercise of public power may, up to a point, legitimately have a political purpose or be influenced by pure politics and not be subject to the criminal law in some circumstances.[180] However, importantly, political considerations must not be inconsistent with the objects or purposes for which official power exists.

Touchstone – "dominant purpose"

When a minister or some other public official is involved in decision-making that touches on the allocation of public funds, at what point would consideration of party-political advantage become impermissible at law and under the ICAC Act? This is an important practical question that arises from the foregoing discussion of legal constraints on the exercise of public power.

Clearly, the answer to the question in a particular case would depend on the circumstances and an assessment of the power in question and the role of the public official. However, such an answer will be of limited practical assistance to a public official faced with a scenario of this kind. Therefore, it is appropriate in concluding this discussion to highlight the legal touchstone against which public officials must assess such situations.

The clearest formulation of the relevant test is perhaps that which was formulated and applied by the NSW Court of Appeal in *Maitland v R; Macdonald v R*. In a prosecution for the crime of misconduct in public office, it is necessary to establish the causative role of the improper purpose in motivating the wilful misconduct by proving that the action that the public official took would not have been taken "but for" the improper purpose.[181]

As noted earlier in this chapter, the "but for" test in *Maitland v R; Macdonald v R* is coherent with the principles of administrative law applicable to the review of the validity of decisions involving mixed motivations. According to those principles, an administrative decision will be invalid if the improper purpose was the "dominating, actuating reason for the decision"[182] or "a substantial purpose in the sense that no attempt would be made to act in the same way the decision required if that improper purpose had not existed".[183] A similar test ought to be applied when considering whether a minister's conduct in allocating public funds for partisan political purposes may amount to "act[ing] improperly … for the private benefit of any other person" and thus be captured within the ambit of clause 6 of the Ministerial Code.

The Fitzgerald Inquiry expressed a similar approach when identifying the real or dominant motive in decision-making, observing:[184]

> *Whilst internal mechanisms, systems and controls assist to some extent, they are unlikely to be definitive. Departmental records will justify the decisions by reference to legitimate considerations, and factors such as personal financial interest or political bias may not be known to anybody except the decision-maker. Often it will be unclear whether political advantage is the sole or dominant motive for a decision or merely an incidental consequence.*

With the "but for" and "dominant purpose" tests in mind, it is useful to reflect on the remarks of Lord Bingham in *Porter v Magill*, quoted above, to the effect that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred, betray public trust and so misconduct themselves. Those remarks strike at the heart of the issue – public power must be exercised in a manner that is consistent with the purpose for which the power exists. A failure to do so may amount to a breach of public trust, and in a serious and wilful case, a criminal offence and corrupt conduct under the ICAC Act.

As mentioned elsewhere in this report, even if it does not amount to criminal activity or corrupt conduct, pork barrelling may be objectionable on other grounds. Expenditure may be lawful or not serious enough to constitute corrupt conduct but still be unethical, unfair or wasteful.

The next chapter deals with these issues by analysing ways in which pork barrelling can be prevented or better managed.

Chapter 4: Measures to prevent pork barrelling

Introduction

In recent times, the integrity of grant funding has been undermined by perceptions of pork barrelling. Professor Twomey has observed that the exposure and criticism of pork barrelling, "particularly in reports by the Auditor-General and parliamentary inquiries, occurs at regular intervals, but lessons are not learned as the same conduct keeps being repeated, despite its condemnation".[185]

The scandals involving grant funding are well-documented. A striking example is found in the NSW Auditor-General's February 2022 report examining the administration of the SCF (round two) and the Regional Culture Fund. The report found that the assessment and approval process for the awarding of $252 million in grant funding under the SCF lacked integrity and that the program guidelines were deficient in several respects and not used to guide selection decisions.

The same report also found that the ability to demonstrate integrity and value for money in the approval process used to award $100 million to organisations in regional NSW via the Regional Cultural Fund was compromised as the then minister, in consultation with the then deputy premier, did not follow the recommendations of the independent selection panel and, indeed, overrode particular recommendations. This conduct resulted in around $9.3 million being awarded to applicants that were not rated highest by the independent panel.[186]

The other examples discussed in this chapter further demonstrate that poor practices in the administration of grants are sufficiently serious and frequent to warrant concern.

As far back as 2009, the Audit Office of NSW surveyed a selection of councils and non-government organisations and found that less than one in five believed decisions to approve or reject grant requests were fair and transparent.[187] The low levels of trust shown by the survey highlights the importance of improving the integrity of funding practices.

More recently, an open letter to parliamentarians penned by 31 former judges prior to the 2022 Federal Election remarked:

> *Where billions are to be spent and significant power is available to dispense it with little oversight, greedy people with convenient consciences and powerful connections will ensure that, with the manipulation of their influence, they will obtain illegal or unethical advantage to the detriment of the interests of the general public.*[188]

The following sections of this chapter outline the reforms necessary to address the public concern about pork barrelling. The Commission believes that a comprehensive and structured set of recommendations is required to safeguard the integrity of grant funding processes. The Review has already made many meaningful recommendations for reform which extend across the life cycle of grants – from the design of funding programs through to the monitoring and acquittal of individual grants. The NSW Premier has recently committed to implementing these recommendations.

The Commission has supplemented the Review's work, rather than repeating existing recommendations. The essential elements of the Commission's approach are the adoption of rules that have the status of a law, guaranteed supervision and scrutiny to ensure enforceability, and measures to promote transparency and accountability. It is also important that a broad and holistic approach to reform is adopted to prevent the exploitation of loopholes. To this end, measures to prevent pork barrelling should be implemented at both the program level, and at the funding award level where the evaluation and conferring of individual grants takes place.

Improving funding processes to address pork barrelling should also help reduce poor practices in government funding generally. Consequently, the recommendations made in this report should help enhance efficiency, effectiveness and the achievement of outcomes for a significant component of government spending.

The framework for grants and funding

As previously noted in this report, the Good Practice Guide was developed in 2010 to assist NSW Government departments to engage consistent practices for grants programs. The Good Practice Guide provides tools and resources for use by grant program managers. Although the Good Practice Guide is not a legislative instrument, the Review argues that it is legally enforceable as it is issued under a DPC circular and failure to comply may result in disciplinary action under the GSE Act. The Commission has addressed, in chapter 3, the need for an alternative enforcement mechanism established by regulation and the reasons for adopting an appropriate legislative approach. Such reform provides for a clear statement of enforceable standards to be observed by ministers as well as others involved in grant funding and public administration. As the NSW Premier has announced in-principle support for the recommendations made in the Review, it is likely that the Good Practice Guide will be superseded by the Proposed Guide, also referred to in chapter 3.

In addition to the Good Practice Guide, various pieces of legislation set out certain requirements to act in the public interest, achieve value for money and maintain accountability for decision-making. These include the:

- the GSF Act
- the GSE Act
- *State Records Act 1998*
- *Government Information (Public Access) Act 2009*.

This legislation provides some protection against the excesses of pork barrelling.

Compliance and enforceability

The Review recommends the Proposed Guide be issued "under a Premier's Memorandum, which is binding on officials".[191] It also recommends that compliance with the Proposed Guide be "a legislative requirement". The Commission supports the intent behind these recommendations.

However, for the reasons set out in chapter 3 – under the heading "NSW Government review of grants administration" – if the Proposed Guide were issued only under a premier's memorandum, any breach of the Proposed Guide would not constitute a breach of a law.

Consequently, the Commission reiterates the need for the Proposed Guide to be made pursuant to a legislative instrument, possibly in the form of a Regulation subject to the oversight of Parliament.

RECOMMENDATION 1

That any whole–of–government guidelines concerning grants funding be issued pursuant to a statutory regulation.

The *Government Sector Finance Act 2018*

According to s 3.7 of the GSF Act, a government officer of a GSF agency should be guided by values and associated principles when exercising functions in connection with financial management, including that: "The government officer should take reasonable care so that the officer's use of government resources or related money is efficient, effective and prudent".

Professor Twomey notes that there is no reference to whether government funds are spent in the public interest.[192] There is also no direct reference to value for money, which is a probity principle that pork barrelling frequently breaches.

Professor Twomey also notes that the GSF Act does not appear to have an equivalent requirement to that in s 71 of the *Public Governance, Performance and Accountability Act 2013* (Commonwealth). This requirement provides that a minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money.

Section 71 has general application and the adoption of a similar provision in NSW would be useful if attempts were made to provide funding in a way that avoided the proposed grants framework. It also clarifies a minister's duties for expenditure.

RECOMMENDATION 2

That the *Government Sector Finance Act 2018* be amended to mirror s 71 of the Commonwealth *Public Governance, Performance and Accountability Act 2013* by including obligations that a minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money and that the expenditure represents value for money.

Potential gaps

Local government

Local councils can make grants from their own funds. In addition, they can be used as a vehicle for distributing grants made by state and federal governments. The Proposed Guide does not apply to local councils, notwithstanding the requirement that when local government or other third parties:

> *…administer grants on behalf of the NSW Government, officials **must** satisfy themselves that there are practices and procedures in place for the administration of the grants consistent with the key principles and requirements of the Guide, with appropriate adaptations as necessary.*[193] [Original emphasis.]

Perceptions of pork barrelling have arisen in the Commonwealth sphere in a situation where the the CGRGs did not apply to money that was distributed through a different tier of government. For example, the Tasmanian Integrity Commission has pointed out that the CGRGs did not apply to the commuter car parks project (which was part of the Urban Congestion Fund), as money was distributed through the states which are specifically excluded from the Commonwealth framework.[194] The Australian National Audit Office's (ANAO) 2021 report into this fund found that the selection process "was not demonstrably merit-based" and that "project distribution reflected the geographic and political profile of those given the opportunity to identify candidate projects for funding consideration".[195]

As stated at the outset of this chapter, the Commission believes that a broad approach should be taken to the reform of pork barrelling. In keeping with this principle, grants made by or to local councils should be covered by the framework or equivalent requirements.[196]

RECOMMENDATION 3

That the grant funding framework, or equivalent requirements, apply to the local government sector. This should include situations where local councils are both grantees and grantors.

Pork barrelling through procurement

The Commission has received allegations that procurement processes have been used to facilitate pork barrelling, including via consulting contracts. This is particularly relevant as the Proposed Guide only applies to funding that meets its definition of a grant. As a result, it is unlikely that procurement activities would be covered by the proposed framework.

In NSW, procurement activity is regulated by the *Public Works and Procurement Act 1912* and related directions are issued by the NSW Procurement Board.

The objectives of the NSW Procurement Board include to:

- ensure best value for money in the procurement of goods and services
- improve competition and facilitate access to government procurement business by the private sector
- simplify procurement processes while ensuring probity and fairness.

Although there is not a specific prohibition against pork barrelling in the *Public Works and Procurement Act 1912* or associated directions, there are existing requirements to obtain value for money and conduct procurement activities in accordance with the principles of probity and fairness (see, for example, s 176).

However, for completeness, the Commission recommends that the Procurement Board consider the need for some additional guidance in relation to pork barrelling.

RECOMMENDATION 4

That the NSW Procurement Board considers the need for a direction, policy or guidance that specifically prohibits or deals with pork barrelling. If necessary, relevant guidance can be published on the buy.nsw website or reflected in relevant procurement training.

Promoting the public interest

As noted in chapter 3, clause 6 of the Ministerial Code provides that:

> *A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in* ***what they consider to be*** *the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.* [Emphasis added.]

As noted by Professor Twomey (also detailed in chapter 3), the words, "what they consider to be", allow a subjective assessment of what constitutes the public interest. Consequently, the Commission makes the following recommendation.

RECOMMENDATION 5

That clause 6 of the Ministerial Code be amended to read, "A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act in the public interest, and must not act improperly for their private benefit or for the private benefit of any other person".

Although the term "public interest" is referred to in over 200 acts of the NSW Parliament, and over 50 regulations, no precise and absolute definition exists.[197] Instead, a determination of what is in the public interest depends on the context and circumstances of each case. Determining the public interest when assessing and awarding grants may at times be a difficult exercise when funding documents do not articulate what the public interest is.

Any lack of clarity surrounding the term "public interest" also creates an opportunity for ministers to erroneously claim that they consider pork barrelling to be in the public interest, even if objectively and reasonably it is not.

The recently introduced Standing Order 136A of the Legislative Council provides a useful reference point.[198] The order creates a process for considering certain government bills with regard to public interest questions, including:

- what is the policy's objective couched in terms of the public interest?
- what alternative policies and mechanisms were considered in advance of the bill?
- what were the pros/cons and benefits/costs of each option considered?
- were the views of stakeholders sought and considered in making the policy?

Any bills that do not include a *Statement of Public Interest* can be referred to a committee.

If funding programs and guidelines incorporate public interest justifications, it would assist ministers and other public officials with respect to proper decision-making. This would also enable a more practical assessment by others of whether the minister acted in the public interest.

The Review recommends developing grants administration skills and expertise among officials by establishing a cross-agency "Community of Practice," convened by the DPC.[199] The Commission supports this initiative.

RECOMMENDATION 6

That the proposed cross-agency Community of Practice develops templates and guidance that prompt the consideration of public interest, which may be consistent with the general approach adopted by the Legislative Council under its order 136A.

The role of ministers

The NSW Auditor-General notes that recent audit reports from Australian jurisdictions have raised concerns about a lack of transparency with respect to ministerial involvement in decision-making.[200] The administration of the SCF and the Regional Cultural Fund revealed similar concerns in NSW.

The Auditor-General found that the initial grant program guidelines for the SCF were developed in consultation with the then premier, deputy premier, minister for local government and their staff. The guidelines were revised in June 2018. Important information was missing from the guidelines, including the type of projects that were to be prioritised and how the funds should be administered in accordance with priorities. Information about how councils and projects would be selected was also missing. For example, the guidelines did not have provision for an assessment of identified projects against the criteria for eligible projects. The guidelines were also not published.

The then premier, deputy premier and minister for local government adopted a process to select projects that did not reference the (deficient) criteria for eligible projects in the guidelines. The result was that 96% of available funding was allocated to projects in NSW Government-held electorates. The minister for local

government only approved funding for projects at two of 24 councils, despite being responsible for distributing the SCF funds.

The Auditor-General's report notes that the lack of formality in approving 22 of the 24 funding allocations was a factor in preventing accountability and transparency over the approach to selecting councils for funding.

In the case of the Regional Cultural Fund, the relevant minister in consultation with the deputy premier in multiple cases did not follow the recommendations of the independent assessment panel and did not document the reasons for making changes. These decisions compromised the integrity of the approval process.

The CGRGs promote integrity by imposing several requirements on ministers. Similarly, the Proposed Guide is intended to apply a number of specific obligations on ministers, including that they:

- must administer a grant in accordance with the grant guidelines
- must not approve or decline a grant without first receiving written advice from officials on the merits of the proposed grant or group of grants
- must record the decision in writing when approving or declining a grant, including the reasons for the decision (and any departure from the recommendation of officials), having regard to the grant guidelines and the key principle of achieving value for money, and manage these records in accordance with the requirements of the *State Records Act 1998*
- may approve the awarding of a grant, or opening of a grant opportunity, using a method other than a competitive, merit-based assessment process. The minister or their delegate must have regard to the advice of officials and must document the reasons for selecting the alternative process.[201]

In addition, the Proposed Guide states that information about "the exercise of Ministerial discretion in making grant decisions that vary from the recommendation of officials, including the reasons for any such decision" should be published on a central grants website.[202] The central grants website is further discussed later in this chapter.

The Proposed Guide also states that, when a decision-making minister or their staff member provides input on the assessment of grants, this should be recorded, and any actions taken as a result should be documented in the assessment brief. Some examples of this input might include allowing a submission to be accepted after the closing date, waiving admissibility requirements and changing the selection criteria or weightings after submissions have been received. As Professor Twomey points out, this documentation may be hidden in an unpublished brief.[203] For this reason, the Commission believes that, where a minister instructs or allows a deviation from the established grants process that may affect or has affected the outcome of a grants award, the circumstances, reasons and results of the deviation should be disclosed on the proposed central grants website.

RECOMMENDATION 7

That, in addition to being documented, any input from a minister or their staff in the assessment of grants should be published on the central grants website.

Cabinet confidentiality

Professor Twomey notes that cabinet confidentiality may be used as a reason not to disclose information.[204] She cites the example of the Commonwealth Building Better Regions Fund,[205] in which a ministerial panel was established to determine funding approvals. Cabinet confidentiality was claimed to apply in relation to the decisions of this body, so that any reasons for the allocation of funding were redacted from documents before they were publicly released. As Professor Twomey observed, these actions removed transparency and accountability. In Round 3 of the program, of the 330 projects approved, 112 were chosen by the ministerial panel against the merit-based recommendations of the relevant department.[206]

The CGRGs provide in paragraph 4.12 that while ministers may approve grants that are not recommended by relevant officials, they must report annually to the finance minister by 31 March about all instances where they have approved a grant which the officials recommended be rejected. The report must contain a brief statement of reasons for the approval of each grant. In the letter to the finance minister, the list of the 112 projects, their location and the reasons for overturning the merit-based recommendations of the department, were all redacted. There were the same redactions for Round 4 of the program, where 49 of the 163 projects were approved despite not being recommended for funding by the department.[207]

Professor Twomey argues that the grant requirements should require a minister to publish reasons on the relevant grant website where they act contrary to the advice of public servants, "with no redactions for Cabinet confidentiality", before such funds can be paid to the recipient. The Commission agrees with Professor Twomey's view that not allowing redactions for

Cabinet confidentiality would significantly improve the transparency of grant schemes and would provide a basis for genuine scrutiny of such decisions.[208]

RECOMMENDATION 8

That information required for publication on the central grants website should not contain any redactions for Cabinet confidentiality.

Reasons for decisions

As noted above, the Proposed Guide requires the provision of reasons for decisions. This is an important reform that, on the face of it, should help ensure transparency and accountability. However, the existing Good Practice Guide contains references to "reasons", including the suggestion to:

- document reasons for decisions in an assessment
- record decisions and any variance to recommendations with reasons
- publish decisions on a department's website and disclose reasons for any variations.[209]

In many cases, agencies did not take up these suggestions to supply reasons.

As noted above, the Commonwealth experience also reveals that the reasons provided for decisions are often inadequate. Professor Twomey's research reveals that this requirement is often respected only in form, not substance. She found that:

> *Sometimes the excuse is given that the decision was made by a former Minister, so no reason is known. In one case, the Minister wrote that he was enclosing the details of the grants and 'the reasons for my decisions', only to attach a table which in relation to one grant said 'no reason provided'. On occasion, the reasons focus on matters other than merit, need and value, such as the statement that the grant distribution 'ensures geographical coverage of grants across Australia'. Most commonly the reasons simply describe what the program is intended to do. Almost none explain why the recommendation of the public servants was wrong and needs to be overturned.*[210]

Professor Twomey suggests that if ministers act contrary to advice from public officials, the minister should be obliged to provide reasons explaining why the altered outcome is more meritorious than that recommended, assessing this by reference to the criteria in the grant guidelines, and specifying the additional evidence relied upon to reach that conclusion.[211] The Commission believes that this approach will help ensure the provision of complete and meaningful reasons.

RECOMMENDATION 9

That the requirement for ministers to give reasons if they make a decision contrary to advice from public officials should be strengthened by requiring those reasons to reference the relevant selection criteria, merit and the public interest.

Conflicts of interest

The administration of funding programs by public officials who have conflicts undermines the level of trust held by stakeholders in funding outcomes and increases the potential for corrupt activity.

Several grant funding arrangements have been associated with poorly managed conflicts of interest. For example, in 2020, a Commonwealth minister involved in the grant process resigned when it was revealed she had a membership of a shooting club that obtained a grant as part of a sports grant program. She maintained that at no time did her membership of shooting sports clubs influence her decision-making, nor did she receive any personal gain. However, the minister acknowledged that her failure to declare her membership in a timely manner constituted a breach of the prime minister's ministerial standards.[212]

The ANAO report on this program also identified an undeclared and unmanaged conflict of interest that involved a senior Sport Australia employee with responsibilities for the grant program. This employee had a relationship with an organisation linked to applicants of the fund (and ongoing engagement with that organisation). According to the report, there was a risk that the sport linked to this organisation was provided with a competitive advantage compared to other sports and potential applicants.[213]

The Auditor-General's June 2021 report, *Grants administration for disaster relief*, provides another example of poor conflict of interest procedures. The report stated that it was not known how many employees of the Department of Customer Service had completed conflict of interest declarations for a $10,000 Support Grant. Furthermore, 29% of declarations provided for employees assessing a $3,000 Recovery Grant were incomplete as at March 2021, and a further nine per cent were not finalised even though they indicated a real, potential or perceived conflict.[214]

The Review notes existing obligations with respect to conflicts of interest in the Ministerial Code of Conduct and the Code of Ethics and Conduct for NSW Government Sector Employees. The Proposed Guide requires that when designing the assessment process, officials must consider and develop a plan for managing any conflicts of interest that might arise. It also provides that mechanisms should be in place to manage potential

conflicts of interest, such as a register of interests and procedures for declaring interests.[215]

In addition to these worthwhile probity measures, the grant funding framework could also address the situation in which ministers are in a position to award, or influence the award of, grants in their own electorate. Such situations normally would not be characterised as a conflict of interest but the Commission anticipates that probity concerns could arise from an individual's competing duties as both a minister and a local member.

RECOMMENDATION 10

That the cross-agency Community of Practice identifies mechanisms for determining and managing situations where a minister is in a position to award, or influence the award of, grants in their own electorate.

The role of members of Parliament

In several cases of perceived pork barrelling, the choice of projects to be funded as part of the scheme was made partly or substantially by members of Parliament (members).[216] For instance, in the case of the SCF, projects were identified by members. In the operation of the Urban Congestion Fund, members were also canvassed[217] while in the Community Sport Infrastructure Program,[218] representations were received from senators and members.

The role of members in such situations may lack transparency and accountability as:

- documentation to support a member's preferred recipient may be deficient or absent
- the NSW lobbying framework does not cover member representations
- members are not subject to the *State Records Act 1998*.

There is a risk that members may select or recommend recipients:

- for the purpose of obtaining political advantage
- where they have a conflict of interest
- without proper regard to merit.

The Proposed Guide provides that where it is anticipated that a grant opportunity will involve input from members or other stakeholders, public officials must ensure that the grant guidelines clearly outline the role of stakeholders and the engagement process. Public officials must also ensure that members' input is documented, including how it was considered in the assessment process.[219] Provided such documentation is accurate and accessible where required, this is a commendable reform.

However, the risk of pork barrelling is increased if the elected party or coalition in power only consults its own members. While it is normal and appropriate for the government to provide its own members with a greater say in matters of policy, when it comes to the distribution of public funds under a merit-based program, any consultation process should not be partisan in nature.

RECOMMENDATION 11

That, where grant schemes or opportunities seek the input of local members, the process should encompass all relevant members and not be limited to members of the political party or parties that form government. This requirement could be reflected in the Proposed Guide or supporting materials.

Accountable officers

In addition to the Community of Practice, key accountabilities should be conferred on certain positions to help avoid pork barrelling schemes in which responsibilities and roles are obfuscated. The administration of the SCF reveals why this is important. In this instance there were numerous deficiencies associated with the operation of the fund, including that the former OLG:

- developed program guidelines that were flawed
- failed to provide advice to the government about the risks of preparing program guidelines that did not transparently reflect how the program would be administered
- failed to publish the guidelines
- accepted determinations with little or no information about the basis for the council or project selection
- did not seek to ensure that identified projects were consistent with the guidelines
- administered payments without recording the basis for selection
- did not ensure that formal records were in place to document approval for 22 of the 24 funding allocations
- accepted instructions to pay grants from the staff of the former premier and deputy premier with informal language such as "everyone is comfortable"

- in one case, created and signed briefing notes based on emails from the staff of the former premier with no specific instruction to pay the council
- failed to create briefing notes for the former premier and deputy premier to sign for each of their grant allocations.[220]

To help address concerns about the identification and responsibilities of accountable officers, the Proposed Guide requires that operational guidance must clearly specify who is responsible for different aspects of the grants process. This includes identifying those responsible for making recommendations, and who is the designated decision-maker.[221]

The UK Government Functional Standard takes a broader approach to defining roles and responsibilities. The Standard provides that "Roles and accountabilities shall be defined in the organisation's governance and management framework and assigned to people with appropriate seniority, skills and experience." The roles include:

- a senior officer accountable for grants across government, who is accountable for the development and implementation of cross-government grants policy and practice
- a senior officer accountable for an organisation's grants
- a senior officer responsible for a grant
- a grants champion in an organisation
- grant managers in an organisation, who are accountable to the senior officer responsible for a grant for the day-to-day management and administration of grants
- other department and organisation specialist roles, which are defined to suit the needs of the grant-making activity being undertaken.[222]

The Commission supports the UK Government's approach of appointing a senior officer across the public sector and senior officers across cluster agencies who are accountable for funding practices. A senior officer across the NSW public sector should also be accountable for policy development. The creation of these roles will help provide guidance, leadership and accountability with respect to the administration of grants and development of policy.

Training should also help increase resistance to pork barrelling and raise the proficiency of practitioners in the field. Training is one of the 10 minimum requirements of the UK Government Functional Standard for grants.

According to the Standard, those undertaking grant management shall have completed basic training to perform their role effectively. Such training should include knowledge of applicable sources of further guidance and the identification of empowering legislation underpinning individual grant schemes.[223]

The Review supports the provision of training in relation to grants and recommends that the proposed Community of Practice would develop materials for this purpose.[224] The Commission believes that training for public officials should cover the issue of pork barrelling.

RECOMMENDATION 12

That the proposed cross-agency Community of Practice:

- **be led by a senior officer who is accountable for funding policy and practice across the NSW public sector**
- **includes at least one nominated senior officer from each cluster**
- **addresses pork barrelling in its proposed training materials.**

Assessments of funding applications and submissions

The assessment of funding applications and submissions is a significant part of the process and should be tightly controlled to enhance integrity and limit pork barrelling, fraud and corruption. Unfortunately, as evidenced by state and Commonwealth audit reports, and allegations of corruption made to the Commission, such assessments may be deficient.

Commission enquiries have revealed that key information provided by applicants may be incomplete, inaccurate or misleading in cases where pork barrelling is alleged. This information may be relied on without examination, or with only cursory examination, by public servants and ministerial staff. Due diligence is, in some cases, not performed to a level to provide adequate assurance.

Various audit reports have also highlighted assessments by both public servants and ministerial staff which appear questionable. For instance, the ANAO reported in 2016 that 17 of the 57 recommended applications had not met the eligibility criteria with respect to the Commonwealth 20 Million Trees program. These projects were recommended above others that met the criteria. The report also detailed how 17 applications had failed due diligence checks, and contained false declarations, yet were recommended for funding. Other problems with the administration of the program included:

- published assessment processes not being followed
- eligibility assessments not being conducted in a transparent or timely manner
- assessment practices not being efficient
- key issues relating to the conduct of the assessment and selection process not being sufficiently drawn to the attention of the relevant minister.[225]

Proponents seeking a government grant are sometimes required to prepare a business case. These business cases typically contain a cost-benefit analysis. In its 2020 *Waste levy and grants for waste infrastructure* report the NSW Auditor-General observed that more than half the grant applications reviewed for the audit included flawed cost-benefit analyses. The report observed that better support or guidance may be needed to assist grant applicants to meet this requirement. The report also noted that robust cost-benefit analyses are an important step in the assessment of whether value for money from an investment will be achieved.[226]

For obvious reasons, proponent-submitted business cases and cost-benefit analyses are likely to favour the proponent. It is not unusual for benefits to be overstated and costs to be understated or omitted by proponents in the desire to obtain funding. Proponents may also be able to select the time period that maximises benefits and minimises costs. In some situations, data used to support a business case may be false or misrepresented. A proponent-submitted application is also more likely to ignore opportunity costs and focus on *its own costs* and benefits, ignoring the broader impact on amenity, the environment and the community. For example, a charity might seek grant funding to deliver its services to disadvantaged citizens across a larger geographical area. However, if some of those citizens are already receiving adequate services from a government agency or another charity, the grant applicant is unlikely to characterise the likely displacement effect as a cost. Furthermore, many ministers and members will not be experienced in constructing or analysing technical cost-benefit analyses.

Even in situations where the proponent engages an experienced consultant, the resulting business cases and cost-benefit analysis can be tendentious.

NSW Treasury has developed *TPP18-06 NSW Government Business Case Guidelines* and *TPP 17-03 NSW Government Guide to Cost-Benefit Analysis* to promote best practice and help establish a clear and consistent approach to the preparation of business cases by public officials. These Treasury policies do not explicitly state that they are applicable to non-government organisations seeking grant funding, however, a government agency may still require grant recipients to comply with relevant provisions.

The Proposed Guide notes that TPP 18-06 and TPP 17-03 only require a business case and a cost-benefit analysis to be prepared by or on behalf of agencies for any new grant program or individual grant over a certain value.[227]

TPP 17-03 also recommends that a cost-benefit analysis should be completed and submitted to Treasury where the following thresholds are met:

- capital expenditure with an estimated total cost of $10 million or more, or
- recurrent expenditure on a case-by-case basis in consultation with Treasury.

Many individual funding decisions involve amounts below the estimated $10 million threshold, including closed, non-competitive grants (known as ad hoc or one-off grants).

According to the Proposed Guide, while TPP 18-06 and TPP 17-03 are not mandatory for smaller grant opportunities, they provide helpful guidance for officials. The Proposed Guide also states that business cases may be appropriate for proposals that may not involve significant expenditure but have a significant impact on the community, economy or environment.[228]

The Commission believes that there is a benefit in the Proposed Guide, specifying the key components of TPP 18-06 and TPP 17-03, that ought to apply to individual grant proposals above specified monetary thresholds or that are considered high risk.

The Commission is aware of past grant assessors ignoring project risks when assessing applications and submissions, including significant and potentially catastrophic risks that should have been considered. The Proposed Guide contains appropriate measures for assessing and managing risks associated with grant funding.

RECOMMENDATION 13

That, with regard to proponent-submitted business cases and cost-benefit analyses, the assessing official or agency should consider:

- **the assumptions made, whether explicit or implicit**
- **the reliability of the information provided, including any gaps**
- **the need for additional due diligence to be performed on the proponent or related parties**

- overstatement of benefits or understatement of costs
- opportunity costs.

The cross-agency Community of Practice should develop standardised templates, guides and scoring mechanisms to assist proponents and public officials who assess grant applications. These should supplement but be consistent with TPP 18-6 and TPP 17-03.

RECOMMENDATION 14

That the cross-agency Community of Practice considers preparing a model contract for external consultants who are engaged to prepare business cases and cost-benefit analyses.

The central public website for funding information

Currently, it is difficult for those seeking funding, and other stakeholders, to obtain a comprehensive understanding about grant opportunities as information is often inadequate and scattered over numerous websites.

The Review acknowledges that transparency is key to building public confidence in grants processes and expenditure. As such, it is proposed that agencies be required to publish end-to-end information on all grant programs, including open and upcoming opportunities, details of grants awarded, the use of ministerial discretion, and program evaluations. As noted earlier in this chapter, the Proposed Guide requires that this information must be made publicly available on a central website.[229] The Commission supports the Review's approach and believes that a central website will provide a significant improvement on the current situation.

Once the website becomes fully operational there is merit in the responsible agency undertaking audits to ensure that the Review's recommendation with respect to the quality and breath of information to be published has been fully implemented.

For ease of navigation, the website could also contain two main categories similar to those used on buy.nsw – one for entities providing funding and another for those seeking funding. Furthermore, the website should contain information about pork barrelling to help ensure the government's position with respect to this issue is formalised.

RECOMMENDATION 15

That the agency responsible for the central grants website undertakes audits at two yearly intervals to ensure compliance with the requirement to provide end-to-end information on all grant programs after the website has become fully operational.

RECOMMENDATION 16

That the central grants website:

- contains two main categories – one for entities providing funding and another for those seeking funding. The information should include guidance on requirements and best practice in categories
- provides information on topics such as:
  - what pork barrelling is
  - why it should be avoided
  - responsibilities of public officials in relation to pork barrelling
  - practical measures to avoid pork barrelling
  - how to report pork barrelling.

Searchability of website

As information is critical for transparency and enhances the overall integrity of funding, it is important that the search functionality of the grant website should make it easy to find relevant information. This can be achieved by:

- presenting data in interactive ways
- allowing analysis across grant schemes
- enabling reports to be created for specific reportable items.

The Proposed Guide provides that in limited circumstances eligibility criteria may be waived. The reasons for any departure from the published eligibility criteria must be documented and approved by the decision-maker.[230]

The UK Government's Guidance for General Grants has a "comply or explain" principle.[231] The Commission supports this approach. Informing stakeholders of significant non-compliance with the established rules, policies and procedures, and the reasons for that non-compliance, will help transparency and accountability. Importantly, stakeholders should be informed of situations where eligibility criteria have been waived.

In addition, it should be easy to locate data about:

- ad hoc and one-off grants
- situations where funding guidelines have been altered
- grants where a minister has acted contrary to an agency's recommendation.

RECOMMENDATION 17

That the central grants website has search and reporting functionality that presents data in an interactive way and allows analysis across grant schemes.

Ad hoc and one-off funding

The Review notes that ad hoc and one-off grants are usually determined by ministerial decision.[232] For obvious reasons, this category of grant is at higher risk of pork barrelling. Ad hoc and one-off grants are also often announced during election campaigns.

In addition, ad hoc and one-off grants tend to be characterised by a lack of competition and planning and a less robust assessment of merit. Ad hoc and one-off grants are also sometimes designed to meet a specific need, often due to urgency or other circumstances.[233] A sense of urgency may lead to controls not being properly followed, thereby creating additional risk.

The Proposed Guide addresses the risks involved in these grants by *generally* applying the same principles and requirements for competitive grants to one-off and ad hoc grants. These include the rule that a minister must receive written advice from officials before awarding a grant and must record the reasons for a decision. In addition, the Proposed Guide requires that, where a method other than a competitive, merit-based selection process is to be used, officials must document the reason and outline the risk mitigation strategies.[234] The Commission supports this approach.

The Proposed Guide provides that where grants are awarded on a one-off or ad hoc basis, guidelines must be approved but are not required to be published (unlike open grant opportunities). However, officials must ensure that information about the grant(s) awarded is made available on the website in line with the general requirements for all grants. The information that must be displayed for grants awarded includes the program name and function, recipient name and location, funding amount, program term and decision-maker.[235]

RECOMMENDATION 18

That the grant funding framework requires additional information for ad hoc and one-off funding to be published on the central grants website, including:

- **the document explaining why that method has been used and outlining the risk mitigation strategies**
- **whether the funding decision was in line with the agency's recommendation (noting that this is already proposed in the case of ministerial decision-makers)**
- **if the agency's recommendation was not followed, the decision-maker's reasons for not following that recommendation (noting that this is already proposed in the case of ministerial decision-makers).**

In addition, any grant guidelines applying to ad hoc and one-off funding should be published on the central grants website.

Complaints and appeals processes

The Proposed Guide provides that where relevant, grant guidelines should include a description of complaint handling, review and/or access to information mechanisms.[236] Ideally, general information about how applicants and other members of the public can make a complaint, along with any appeal processes that exist, should also be displayed in a standalone area of the website.

RECOMMENDATION 19

That the central grants website requires information to be displayed about complaints and appeals processes in a prominent location.

Value for money

The importance of value for money is underscored in the UK Government Functional Standard principle that requires those engaged in managing funding at scheme and award level to ensure optimum efficiency, economy, effectiveness and prudence, to maximise value for public money.[237]

The Proposed Guide also notes that value for money should be a key consideration across the grant life cycle, from the initial design phase through to implementation and evaluation.[238]

The Proposed Guide also includes a number of specific value for money requirements. For example, when a minister is a decision-maker, public officials must provide

advice to the minister that has regard to the key principle of achieving value for money. Public officials are also required to demonstrate at the planning and design stage how a program will deliver value for money by identifying expected lifetime benefits and costs. Additionally, public officials are also required to consider value for money at the individual grant level.[239] These are all valuable reforms because pork barrelling tends to neglect value for money considerations. Recommendation 13 above addresses some value for money considerations.

Recordkeeping

The making of appropriate records is essential to exposing the reasons for decisions and is a core mechanism for the prevention, detection and investigation of fraud and corruption.

Section 12(1) of the *State Records Act 1998* requires each public office to make and keep full and accurate records of the activities of the office. This obligation requires that records created by a public office are accurate, authentic and can be trusted. Additionally, the *State Records Act 1998* creates obligations for public offices to ensure that where records are not created in the normal course of business, they must be created and kept in accordance with s 21.

Section 21 of the *State Records Act 1998* also creates an offence relating to abandoning, disposing of, damaging or altering a state record, which has a maximum penalty of 50 penalty units, or $5,500. Proceedings for this offence must be commenced not later than two years from when the offence was alleged to have been committed.[240]

A two-year limitation period in which to commence prosecution proceedings is insufficient for complex matters. As Professor Campbell notes:

> *If a document that was relevant to pork barrelling were to be destroyed, contrary to s 21, it is fairly readily predictable that the time taken for an investigation to be begun into the pork barrelling, and to reach the stage where it had become sufficiently clear to justify the bringing of criminal proceedings that a relevant document had been destroyed, might be such that the two year time period was exceeded.*[241]

The financial penalty for the offence is also small when compared to the sanctions for similar conduct in other jurisdictions in Australia. Queensland, Western Australia and South Australia impose a financial penalty that is greater than that imposed in NSW.

Moreover, there is no offence for a wilful or dishonest failure to keep records, or a failure to keep records in circumstances involving corrupt conduct.

The administration of the SCF demonstrates how grant projects can be selected with little or no information about the basis for selection. On 22 January 2021, the SARA released a report concerning the alleged unauthorised disposal of records pertaining to the administration of the SCF by a member of staff within the office of the then premier. The report found that "the Office of the Premier breached section 21(1) of the State Records Act with the unauthorised disposal of the working advice notes". It also found that "the monitoring of records management in the Office of the Premier was insufficient and could not appropriately provide management assurance of compliance with records management obligations".[242]

The SARA's report recommended the development of a records management program that would include: a records management policy; detailed advice and support for ministerial staff on the creation, capture, management and disposal of records; training opportunities; and regular monitoring of recordkeeping and appropriate technology or systems. It also recommended updating the "General retention and disposal authority", known as *GDA13: Ministers' Office records*, and updating the Ministers' Office Handbook to provide more detailed information to ministerial staff on their recordkeeping responsibilities and practices.[243]

The SARA also noted in its report:

> *Pursuing legal penalties and action is not consistent with the Authority's regulatory model, which emphasises education and information to assist voluntary compliance by public offices with obligations of the State Records Act. A prosecution of unauthorised disposal of State records is a labour-intensive activity that is almost certain to bring no improvement to recordkeeping or commitment to improving practices.*

and that:

> *The Authority has considered the cost of such novel litigation and the potential benefit and has determined it to be inconsistent with our regulatory model and that such action does not pass a cost/benefit analysis.*[244]

In March 2021, the Commission released its report titled *Investigation into the conduct of councillors of the former Canterbury City Council and others* – known as Operation Dasha. In relation to recordkeeping, this report recommended that, where there has been corrupt conduct as defined in the ICAC Act, the NSW Government reviews the *State Records Act 1998* in relation to the appropriateness of:

- offence provisions, including where there has been a wilful failure to keep records required by the *State Records Act 1998*

- time limitation for the commencement of a prosecution for an offence
- penalties for offences.

The Commission takes this opportunity to emphasise the importance of its Operation Dasha recommendation.

RECOMMENDATION 20

That the Department of Premier and Cabinet arranges for an independent audit to be conducted to verify that the recommendations in the State Archives and Records Authority's 22 January 2021 report have been fully implemented.

Audits

Audits of grant programs and individual grants help ensure that the terms of the funding are complied with and value for money is achieved. The Commission has found that it is not uncommon for the right-to-audit and right-to-investigate clauses in funding agreements to be inadequate.

The Review recognises the importance of internal audits by requiring chief audit executives to ensure their agency's internal audit program includes regular audits of grant programs to monitor and assess compliance with the Proposed Guide.[245] The Commission also believes that internal audit reports should be provided to an agency's audit and risk committee on certain categories of high-risk grants. Examples might include significant funding expenditure, ad hoc or one-off grants and funding where there has been non-compliance with the rules or a minister approves a grant against the advice of an agency.

The *Government Advertising Act 2011* requires the NSW Auditor-General to conduct a performance audit on government advertising activities each financial year. There is merit in considering a similar obligation in respect of high-risk grants. If this is agreed, the necessary funding would need to be provided to the Audit Office of NSW.

The PAC has previously recommended that the Audit Office of NSW be given "follow-the-dollar" powers. Currently, the Audit Office of NSW cannot audit the use of taxpayers' money once it passes into the hands of a non-government entity, such as a grant recipient. Follow-the-dollar powers would give the Audit Office of NSW scope to conduct performance audits (but not financial audits) of grant recipients and improve overall accountability of the way public funds are used. The Commission understands that such an approach would be consistent with practices in other states.

RECOMMENDATION 21

That:

- **the proposed funding framework encourages internal audit reports to be provided to an agency's audit and risk committee on certain categories of high-risk grants**
- **the NSW Government considers requiring the Auditor-General to conduct regular performance audits in relation to high-risk grants or grant schemes, including those that involve a high risk of pork barrelling**
- **the Audit Office of NSW be given "follow-the-dollar" powers, as previously recommended by the Public Accounts Committee of the NSW Legislative Council.**

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and as required by s 111E of the ICAC Act, will be furnished to the responsible minister or officer. The Commission will seek advice in relation to whether the recommendations will be implemented and, if so, details of the proposed plan of action and progress reports. The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website at www.icac.nsw.gov.au.

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Endnotes

[1] NSW Premier, *NSW Government review to ensure best practice in grants administration*, media release, 3 November 2021.

[2] A copy of the recommendations is at Appendix 5.

[3] NSW Premier, *NSW Government responds to grants review recommendations*, media release, 7 June 2022.

[4] The report also examined the Regional Cultural Fund, which is discussed in more detail elsewhere in this report.

[5] At relevant times, the Audit Office of NSW and the Commission coordinated their work by exchanging evidence. This is permitted under s 16 of the *Independent Commission Against Corruption Act 1988*.

[6] See s 13(1) of the ICAC Act.

[7] This definition is adopted from the paper *The Regulation of Pork Barrelling in Australia* by S Connolly, Australasian Parliamentary Review, Vol 35, No. 1, Winter/Spring 2020, pp. 24-53.

[8] *Greiner v ICAC* (1992) 28 NSWLR 125 at 163.

[9] A Dale, *Pork barrelling: past its use-by date*, Law Society Journal Online, 31 March 2021.

[10] As seen in the SCF example, grants from one level of government to another can also be used as a vehicle for pork barrelling.

[11] The offence is punishable by a maximum 200 penalty units or imprisonment for three years.

[12] The judgment in *Scott v Martin* 1988 14 NSWLR 663 is relevant to electoral bribery. It is also discussed from pp. 62–69 of the paper prepared for the Commission by the Hon Joseph Campbell QC, *Some legal implications of pork barrelling*, updated 7 June 2022. (Hereafter referred to as "Joseph Campbell paper"). See Appendix 3.

[13] *Porter v Magill [*2002] 2 AC 357.

[14] *Porter v Magill* [2002] 2 AC 357 at [132], 502 (Lord Scott).

[15] A Twomey, *"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay* (2021) 7 CJCCL 293.

[16] A Twomey, *"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay* (2021) 7 CJCCL 293 at 295.

[17] M Bak, "Overview of parliamentary discretionary spending", Transparency International Anti-Corruption Helpdesk Answer, 8 January 2021.

[18] A Twomey, *"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay* (2021) 7 CJCCL 293 at 334–335.

[19] *Wotton v State of Queensland* (2012) 246 CLR 1; [2012] HCA 2, 4 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[20] *R v Boston* (1923) 33 CLR 386; [1923] HCA 5 [400] (Isaacs and Rich JJ). See also Crown submissions summarised by Bathurst CJ in *Obeid v R* [2017] NSWCCA 221 [55].

[21] *The Guardian*, 26 November 2020.

[22] *Sydney Morning Herald*, 4 May 2022, p. 9.

[23] A Twomey, *When is pork barrelling corruption and what can be done to avert it?*, paper prepared for the Commission, updated 25 June 2022 (hereafter referred to as "Anne Twomey paper"). See Appendix 2.

[24] Joseph Campbell paper.

[25] Anne Twomey paper, p. 2.

[26] *Re Day [No 2]* (2017) 263 CLR 201, [49] (Kiefel CJ, Bell and Edelman JJ). See also [183] (Keane J).

[27] *Re Day [No 2]* (2017) 263 CLR 201, [269] (Nettle and Gordon JJ), quoting from *R v Boston* (1923) 33 CLR 386, 400. See also: *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, [243] (Edelman J) and *McCloy v New South Wales* (2015) 257 CLR 178, [171] (Gageler J).

[28] Note, that the terms of the provision were copied from the *House of Commons (Disqualification) Act 1782* (UK). It had been enacted in the United Kingdom in response to concerns about corruption, particularly in relation to contracts to supply the navy and army.

[29] NSW Report from the Select Committee on the Proposed New Constitution, 17 September 1852, *Votes and Proceedings*, Vol 25, No 1, pp. 477–8.

[30] Anne Twomey paper, p. 3.

[31] Joseph Campbell paper, pp. 6–22.

[32] P Finn, "Public Trusts, Public Fiduciaries" (2010) 38 *Federal Law Review* 335, 335. See also P Finn, "The Forgotten 'Trust': The People and the State", in *Equity Issues and Trends* (Cope, 1995) p. 131.

[33] S Gageler AC, "The Equitable Duty of Loyalty in Public Office", in *Finn's Law: An Australian Justice* (T Bonyhady, The Federation Press, 2016) p. 126.

[34] *R v Bembridge* (1783) 22 State Tr. 1.

[35] *R v Bembridge* (1783) 22 State Tr. 1., at 155.

[36] *R v Bembridge* (1783) 22 State Tr. I., at 156.

[37] *R v Boston* (1923) 33 CLR 386.

[38] Anne Twomey paper, p. 3.

[39] *R v Boston* (1923) 33 CLR 386, 409 (Higgins J).

[40] *R v Boston* (1923) 33 CLR 386, 409 (Higgins J).

[41] *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ).

[42] *R v Boston* (1923) 33 CLR 386, 401 (Isaacs and Rich JJ).

[43] Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989).

[44] Royal Commission into the Commercial Activities of Government and Other Matters, *Reports Part 1 and 2* (1992).

[45] P Finn, "Public Trusts, Public Fiduciaries" (2010) 38 *Federal Law Review*, pp. 335, 338.

[46] Royal Commission into the Commercial Activities of Government and Other Matters, *Report Part II* (1992) at [1.2.8].

[47] Royal Commission into the Commercial Activities of Government and Other Matters, *Report Part II* (1992) at [3.1.1].

[48] *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 68 at 723; *Australian Capital Television Pty Ltd v Commonwealth of Australia* (no. 2) (1992) 108 ALR 557 at 593.

[49] P Finn, "Integrity in Government" (1992) 3 *Public Law Review* 243.

[50] Porter v Magill [2002] 2 AC 357, 463 (Lord Bingham).

[51] Joseph Campbell paper, p. 54.

[52] *R v Boston* (1923) 33 CLR 386 at 399-401.

[53] *R v Boston* (1923) 33 CLR 386 at 403.

[54] *R v White* (1875) 13 SCR (NSW) (L) 322; *R v Boston* (1923) 33 CLR 386 at 402.

[55] *Obeid v R* (2015) 91 NSWLR 226 at [56] – [125].

[56] *Herscu v The Queen* (1991) 173 CLR 276.

[57] Anne Twomey paper, p. 3.

[58] *Obeid v R* (2017) 96 NSWLR 155.

[59] *Obeid v R* (2017) 96 NSWLR 155 at 175 [62] (Bathurst CJ).

[60] *Obeid v R* (2017) 96 NSWLR 155 at 175 [63], 192 [148] (Bathurst CJ).

[61] Anne Twomey paper, p. 4.

[62] *Director of Public Prosecutions v Marks* [2005] VSCA 277, [35] (Nettle JA). An example is where a police officer accesses confidential police information to do a friend a favour. As Campbell J has noted in this context, "it is notorious that doing a friend a favour may be a most insidious form of corruption": *Jansen v Regina* [2013] NSWCCA 301, [11].

[63] *Question of Law Reserved* (No 2 of 1996) (1996) 67 SASR 63, 64-5 (Doyle CJ), quoting from Paul Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307, 308. See also: *R v Quach* [2010] VSCA 106, [20] (Redlich JA).

[64] P Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307, 319. See Lord Mansfield's scathing judgment about those who "would engross the whole franchise, and right of election to themselves": *R v Phelps* (1757) 2 Keny 570; 96 ER 1282, 1282-3.

[65] P Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307, 319.

[66] *R v Borron* (1820) 3 B & Ald 433, 434; 106 ER 721, 721 (Abbott CJ).

[67] *Porter v Magill* [2002] 2 AC 357 at [21], 465 (Lord Bingham).

[68] Chief Justice R French AC, "Public Office and Public Trust", 22 June 2011, Canberra, Seventh Annual Sir Thomas More Forum Lecture.

[69] Joseph Campbell paper.

[70] *FAI Insurances Limited v Winneke* (1982) 151 CLR 342, at 368.

[71] In *Minister for Immigration v Li* (2013) 249 CLR 332 at [24], 349 French CJ approved this statement of Kitto J.

[72] For a detailed discussion of administrative law controls on pork barrelling, see Joseph Campbell paper, pp. 23–48.

[73] *Municipal Council of Sydney v Campbell* [1925] AC 338 at 343; R v Anderson; ex parte Ipec-Air Pty Ltd (1965) 113 CLR 177 at 189.

[74] *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 815 (Lord Wilberforce, citing *Roberts v Hopwood* [1925] AC 578 at 596 per Lord Atkinson, 607 and 609 per Lord Sumner, 613 per Lord Wrenbury).

[75] *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 (Dixon CJ, McTiernan J agreeing, and Windeyer J agreeing "generally").

[76] *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 at 106 (Williams, Kitto and Webb JJ).

[77] Joseph Campbell paper, p. 45. Standing may arise from special damage in the form of a lost chance of being a successful applicant.

[78] Joseph Campbell paper, p. 47. A prima facie three-month time limit applies for commencing some proceedings under the *Uniform Civil Procedure Rules (NSW)* 59.10 (1) and (2).

[79] A Twomey, *"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay* (2021) 7 CJCCL 295.

[80] Joseph Campbell paper, p. 24.

[81] Anne Twomey paper, p. 14.

[82] It applies to the laws of NSW and any Commonwealth laws applicable in NSW: Ministerial Code of Conduct, s 12(3).

[83] Anne Twomey paper, p. 5.

[84] D Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review*, p. 17.

[85] D Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review*, pp. 17, 18.

[86] D Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review*, pp. 17, 22.

[87] Joseph Campbell paper, pp. 49–77.

[88] Joseph Campbell paper, for analysis of misconduct in public office as a tort (p. 78), the tort of unlawful means conspiracy (p. 84), statutory civil liability of a person authorising a decision to make a payment that is pork barrelling (p. 85), and liability for breach of process contract (p. 88).

[89] Joseph Campbell paper, for an analysis of the roles of the NSW Auditor-General (p. 102), NSW Electoral Commission (p. 108), NSW Ombudsman (p. 109), and NSW Parliament (p. 113).

[90] Joseph Campbell paper, from p. 118.

[91] Anne Twomey paper, pp. 36–38.

[92] *ICAC v Cunneen* (2015) 256 CLR 1.

[93] Joseph Campbell paper, p. 94.

[94] *Greiner v ICAC* (1992) 28 NSWLR 125 at 145. Mahoney JA at 162 made a similar remark.

[95] Anne Twomey paper, p. 12.

[96] Joseph Campbell paper, p. 93.

[97] *Greiner v ICAC* (1992) 28 NSWLR 125, 160 (Mahoney JA).

[98] *Greiner v ICAC* (1992) 28 NSWLR 125, 161 (Mahoney JA).

[99] Joseph Campbell paper, p. 94 (referring to "Part 2 – the concept of an office of public trust", pp. 6–22).

[100] *Porter v Magill* [2002] 2 AC 357, 463 (Lord Bingham).

[101] *Porter v Magill* [2002] 2 AC 357 at [21], 465 (Lord Bingham).

[102] The Commission's approach to making findings of corrupt conduct is set out in Appendix 6. The Commission's approach to s 9(1)(a) of the ICAC Act is consistent with remarks of Gleeson CJ in *Greiner v ICAC* (1992) 28 NSWLR 125 at 136.

[103] Joseph Campbell paper, pp. 49–77.

[104] Anne Twomey paper, p. 7.

[105] See, for example, in the United Kingdom: *Porter v Magill* (2002) 2 AC 357; and *Attorney-General's Reference (No 3 of 2003)* [2005] QB 73. In Hong Kong, see: *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; and *Sin Kam Wah & Lam Chuen Ip v HKSAR* [2005] 2 HKLRD 375. In Canada, see: *R v Pilarinos and Clark* [2002] BCTC 452; and *R v Boulanger* [2006] 2 SCR 49. Note that in Canada the common law offence has been codified to an extent by s 122 of the Canadian *Criminal Code*.

[106] Royal Commission into the Commercial Activities of Government and Other Matters, *Report Part II* (1992) at [4.5.1].

[107] *R v Quach* (2010) 27 VR 310.

[108] *Obeid v R* [2017] NSWCCA 221, [60]. See also *Obeid v R* (2015) 91 NSWLR 226, [136] and [139] and *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [67].

[109] *R v Quach* (2010) 27 VR 310, [46] (Redlich JA).

[110] *R v White* (1875) 13 SCR (NSW) (L) 322; *R v Boston* (1923) 33 CLR 386 at 402; *Obeid v R* (2015) 91 NSWLR 226 at [56] – [125]; *Herscu v The Queen* (1991) 173 CLR 276.

[111] P Finn, "Official Misconduct" [1978] 2 *Criminal Law Journal* 307 at 314.

[112] *Herscu v the Queen* (1991) 173 CLR 276 at 282 (Mason CJ, Dawson Toohey and Gaudron JJ).

[113] *Herscu v the Queen* (1991) 173 CLR 276 at 276 (Brennan J).

[114] Anne Twomey paper, p. 8, citing P Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307, 312; and *R v Boulanger* [2006] 2 SCR 49, [52].

[115] D Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review*, pp. 17, 25.

[116] *Obeid v R* [2017] NSWCCA 221; 96 NSWLR 155 [149]-[184].

[117] Anne Twomey paper, p. 8, citing *Porter v Magill* [2002] 2 AC 357, 471-475 [34]-[40] (Lord Bingham) and 507 [146]-[148] (Lord Scott).

[118] Appointed public officials are usually required to read a relevant code of conduct and acknowledge in writing that they have done so. Members of the NSW Parliament may be required to undergo an induction process that includes reference to the Members' Code of Conduct and the Ministerial Code of Conduct. See also discussion of the Ministerial Code of Conduct from subsection 9(1)(d) – a substantial breach of an applicable code of conduct (key issue 4).

[119] Joseph Campbell paper, p. 56.

[120] P Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307 at 308, cited with approval in *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63 at 64-5 per Doyle CJ, by Sir Anthony Mason NPJ in *Shum Kwok Sher v HKSAR* [2002] 2 HKLRD 793, (2002) 5 HKFAR 381 at [79], 408 and in *R v Quach* at [20], 316 per Redlich JA.

[121] *Maitland v R; Macdonald v R* [2019] NSWCCA 32; 99 NSWLR 376.

[122] *Maitland v R; Macdonald v R* [2019] NSWCCA 32; 99 NSWLR 376 at [84].

[123] Anne Twomey paper, p. 4.

[124] Anne Twomey paper, p. 9.

[125] *Attorney-General's Reference (No 3 of 2003)* 2004 EWCA Crim 868, [56].

[126] *Attorney-General's Reference (No 3 of 2003)* 2004 EWCA Crim 868, [56]. See to the same effect: R v Boulanger [2006] 2 SCR 49, [52].

[127] *R v Obeid (No 12)* [2016] NSWSC 1815 at [79].

[128] *R v Jackson and Hakim*, unrep, NSWCCA, 23/6/88 at 1.

[129] *Greiner v ICAC* (1992) 28 NSWLR 125.

[130] NSW Parliament, *Parliamentary Debates*, Legislative Assembly, 22 September 1994 (Garry West, Minister for Police). See https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-88780

[131] NSW Parliament, *Parliamentary Debates*, Legislative Assembly, 22 September 1994 (Garry West, Minister for Police). See https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-88780

[132] Current versions adopted by the Legislative Assembly on 5 March 2020 and the Legislative Council on 24 March 2020. See https://www.parliament.nsw.gov.au/members/Pages/members-ethics.aspx

[133] See Anne Twomey paper, pp. 13 and 14, for a discussion of relevant clauses of the Members' Code.

[134] The definition of "Minister" in clause 11 of the Ministerial Code provides that parliamentary secretaries are also covered by the code, except so far as Parts 1 and 5 of the Schedule to the Code are concerned. Part 1 of the Schedule relates to certain interests (like shareholdings, directorships and secondary employment) that a minister must not hold. Part 5 relates to employment after leaving ministerial office.

[135] Clause 12(1) of the Ministerial Code.

[136] As noted by Professor Twomey and Professor Campbell; see Anne Twomey paper, p. 14, and Joseph Campbell paper, pp. 6–7.

[137] Anne Twomey paper, p. 16. See also Joseph Campbell paper, p. 99, remarking that clause 6 "could be breached, in ways potentially relevant to pork barrelling, by any of three types of behaviour by a Minister – acting dishonestly, acting other than only in what they consider to be the public interest, and acting improperly for the private benefit of a political party".

[138] Anne Twomey paper, p. 15.

[139] *Obeid v R* [2017] NSWCCA 221, [78] (Bathurst CJ).

[140] *Obeid v R* [2017] NSWCCA 221, [269] (Bathurst CJ).

[141] Anne Twomey paper, p. 15.

[142] Anne Twomey paper, p. 16.

[143] Joseph Campbell paper, 98.

[144] A longer route to the same conclusion is that an unincorporated association is in law nothing but its individual members, and pursuant to s 8(b) *Interpretation Act 1997* (NSW) a reference to a word or expression in the singular form includes the plural. As well there is an interpretation rule in Clause 12 of the code that "the singular includes the plural". Thus the unincorporated party, as a collection of natural persons, would fall within the "natural person" element of the definition of "person".

[145] Anne Twomey paper, p. 16.

[146] Joseph Campbell paper, p. 99.

[147] Anne Twomey paper, p. 16.

[148] *Maitland v R; Macdonald v R* [2019] NSWCCA 32; 99 NSWLR 376 at [84].

[149] Anne Twomey paper, p. 14.

[150] See a more detailed list of relevant laws in the Public Service Commission's *Code of Ethics and Conduct for NSW Government Sector Employees* [1.4].

[151] Anne Twomey paper, pp. 28 and 36.

[152] In contrast, at the Commonwealth level, see the *Commonwealth Grants Rules and Guidelines 2017*, which were given effect as a statutory instrument under s 105C(1) of the *Public Governance, Performance and Accountability Act 2013* (Commonwealth).

[153] NSW Government, *Review of grants administration in NSW*, April 2022.

[154] NSW Government, *Review of grants administration in NSW*, April 2022, pp. 20, 22 and 24.

[155] Anne Twomey paper, pp. 39-43

[156] NSW Government, *Review of grants administration in NSW*, April 2022, p. 29 and the Proposed Guide [6.16] and [6.17].

[157] NSW Government, *Review of grants administration in NSW*, April 2022, p. 33.

[158] In contrast, as previously noted, the *Commonwealth Grants Rules and Guidelines 2017* are given effect as a statutory instrument under s 105C(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth).

[159] NSW Government, *Review of grants administration in NSW*, April 2022, p. 7.

[160] Anne Twomey paper, p. 40.

[161] Anne Twomey paper, p. 40.

[162] NSW Government, *Review of grants administration in NSW*, April 2022, p. 24 and the Proposed Guide [1.3].

[163] Anne Twomey paper, p. 41.

[164] Anne Twomey, transcript of NSW ICAC Forum on Pork Barrelling, 3 June 2022, at 58T (see Appendix 1).

[165] Anne Twomey, *"Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay* (2021) 7 CJCCL 295, 329-330.

[166] NSW Government, *Review of grants administration in NSW*, April 2022, p. 25.

[167] P Finn, "Integrity in Government" (1992) Public Law Review, 243 at 248. Cited in David Solomon, "Public Office as/is a Public Trust" (2018) *Australasian Parliamentary Review* 33(1), 156 at 161-162.

[168] P Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters, Integrity in Government Project: Second Report* (1993), p. 30.

[169] Joseph Campbell paper, p. 28.

[170] Joseph Campbell paper, p. 37.

[171] Anne Twomey paper, p. 21.

[172] *Greiner v ICAC* (1992) 28 NSWLR 125, 163-4 (Mahoney JA).

[173] *Greiner v ICAC* (1992) 28 NSWLR 125, 164 (Mahoney JA).

[174] D Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review*, pp. 17, 20.

[175] *Porter v Ma*gill [2002] 2 AC 357.

[176] *Porter v Magill* [2002] 2 AC 357 at [21], 465.

[177] Joseph Campbell paper, p. 32.

[178] *Llewellyn v Jones* (1967) 51 Cr App R 204 at [7].

[179] *Porter v Magill* [2002] 2 AC 357 at [19], 463.

[180] D Mahoney, "The Criminal Liability of Public Officers for the Exercise of Public Power" (1996) 3 *The Judicial Review*, pp. 17, 25. See also *Greiner v ICAC* (1992) 28 NSWLR 125 at 163 (Mahoney JA).

[181] *Maitland v R; Macdonald v R* [2019] NSWCCA 32; 99 NSWLR 376 at [84].

[182] *Klein v Domus Pty Ltd* (1963) 109 CLR 467 at 473 (Dixon CJ, McTiernan J agreeing, and Windeyer J agreeing "generally").

[183] *Thompson v Randwick Municipal Council* (1950) 81 CLR 87 at 106 (Williams, Kitto and Webb JJ).

[184] Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Final Report* (1989), [3.5.1].

[185] Anne Twomey paper, p. 25.

[186] NSW Auditor-General, *Integrity of grant program administration*, 8 February 2022, pp. 2 and 3.

[187] NSW Auditor-General, *Auditor-General's report performance audit, grants administration*, May 2009, p. 9.

[188] *An Open Letter on the Establishment of a National Integrity Commission*, authorised by H Aulby, the Centre for Public Integrity, May 2022.

[189] DPC, *Good Practice Guide to Grants Administration*, 2010, p. 2.

[190] NSW Government, *Review of grants administration in NSW*, April 2022, p. 25.

[191] NSW Government, *Review of grants administration in NSW*, April 2022, p. 24.

[192] Anne Twomey paper, p. 37.

[193] NSW Government, *Review of grants administration in NSW*, April 2022, p. 3 of the Proposed Guide.

[194] Tasmanian Integrity Commission, *Paper 2: Grant commitments in election campaigns*, 6 April 2022, pp. 17 and 18.

[195] ANAO, *Administration of Commuter Car Park Projects within the Urban Congestion Fund*, June 2021, pp. 6 and 10.

[196] One alternative is to use s 23A of the *Local Government Act 1993* to issue guidance to local councils.

[197] C Wheeler, *What is the Public interest?*, Government Solicitors Conference Sydney, 6 September 2016, p. 3.

[198] NSW Legislative Council, *Proposed Standing Rules and Orders – Adopted as Sessional Orders from June 2022 for the remainder of the sittings of the House during 2022*, June 2022.

[199] NSW Government, *Review of grants administration in NSW*, April 2022, p. 26.

[200] NSW Auditor-General, *Integrity of grant program administration*, 8 February 2022, p. 4.

[201] NSW Government, *Review of grants administration in NSW*, April 2022, p. 9 of the Proposed Guide.

[202] NSW Government, *Review of grants administration in NSW*, April 2022, p. 33 of the Proposed Guide.

[203] Anne Twomey paper, p. 39.

[204] Anne Twomey paper, p. 31.

[205] Prof Twomey notes that this program is currently the subject of an ANAO performance audit, which was due to report in June 2022. Allegations have been made of pork barrelling under this program; however, they have not been formally established.

[206] Anne Twomey paper, p. 31.

[207] Letter by Michael McCormack MP to the finance minister, 16 August 2020, cited Anne Twomey paper, p. 31.

[208] Anne Twomey paper, p. 44.

[209] DPC, *Good Practice Guide to Grants Administration*, 2010, p. 13.

[210] Anne Twomey paper, p. 32.

[211] Anne Twomey paper, p. 44.

[212] Senator Bridget McKenzie, media statement, 2 February 2020.

[213] ANAO, *Award of Funding Under the Community Sports Infrastructure Program*, 15 January 2020, p. 31.

[214] NSW Auditor-General, *Grants administration for disaster relief*, 24 June 2021, p. 4.

[215] NSW Government, *Review of grants administration in NSW*, April 2022, p. 22 of the Proposed Guide.

[216] NSW Auditor-General, *Integrity of grant program administration*, 8 February 2022, p. 8.

[217] ANAO, *Administration of Commuter Car Park Projects within the Urban Congestion Fund*, June 2021, p. 10.

[218] ANAO, *Award of Funding Under the Community Sports Infrastructure Program*, 15 January 2020, p. 39.

[219] NSW Government, *Review of grants administration in NSW*, April 2022, p. 10 of the Proposed Guide.

[220] Audit Office of NSW, *Integrity of grant program administration*, 8 February 2022, pp. 2, 7 and 13.

[221] NSW Government, *Review of grants administration in NSW*, April 2022, p. 29 of the Proposed Guide.

[222] HM Government, *Government Functional Standard*, 21 July 2021, pp. 9–12.

[223] HM Government, *Government Functional Standard*, 21 July 2021, p. 21.

[224] NSW Auditor-General, *Integrity of grant program administration*, 8 February 2022, p. 27.

[225] ANAO, *Award of Funding under the 20 Million Trees Programme*, 31 August 2016, pp. 8, 46–47.

[226] NSW Auditor-General, *Waste levy and grants for waste infrastructure*, 26 November 2020, p. 4.

[227] NSW Government, *Review of grants administration in NSW*, April 2022, p. 21 of the Proposed Guide.

[228] NSW Government, *Review of grants administration in NSW*, April 2022, p. 21 of the Proposed Guide.

[229] NSW Government, *Review of grants administration in NSW*, April 2022, pp. 6 and 39 of the Proposed Guide.

[230] NSW Government, *Review of grants administration in NSW,* April 2022, p. 31 of the Proposed Guide.

[231] NSW Government, *Review of grants administration in NSW*, April 2022, p. 21.

[232] NSW Government, *Review of grants administration in NSW*, April 2022, p. 22.

[233] NSW Government, *Review of grants administration in NSW*, April 2022, p. 28 of the Proposed Guide.

[234] NSW Government, *Review of grants administration in NSW*, April 2022, pp. 9 and 28 of the Proposed Guide.

[235] NSW Government, *Review of grants administration in NSW*, April 2022, pp. 30, 33 and 39 of the Proposed Guide.

[236] NSW Government, *Review of grants administration in NSW*, April 2022, p. 29 of the Proposed Guide.

[238] HM Government, *Government Functional Standard*, 21 July 2021, p. 2.

[239] NSW Government, *Review of grants administration in NSW*, April 2022, p. 20 of the Proposed Guide.

[240] NSW Government, *Review of grants administration in NSW*, April 2022, p. 20 of the Proposed Guide.

[241] State Archives and Records Authority of NSW, *Recordkeeping Assessment matter raised by Mr Greg Warren MP*, 21 January 2021, p. 20.

[241] Joseph Campbell paper, p. 133.

[242] State Archives and Records Authority of NSW, *Recordkeeping Assessment matter raised by Mr Greg Warren MP*, 21 January 2021, pp. 14 and 18.

[243] State Archives and Records Authority of NSW, *Recordkeeping Assessment matter raised by Mr Greg Warren MP*, 21 January 2021, pp. 3 and 4.

[244] State Archives and Records Authority of NSW, *Recordkeeping Assessment matter raised by Mr Greg Warren MP*, 21 January 2021, p. 20.

[245] NSW Government, *Review of grants administration in NSW*, April 2022, p. 10.

Appendix 1: Transcript of the NSW ICAC Forum on Pork Barrelling held 3 June 2022

INDEPENDENT COMMISSION AGAINST CORRUPTION
NEW SOUTH WALES

FORUM ON PORK BARRELLING

NEW SOUTH WALES PARLIAMENT, SYDNEY

FRIDAY, 3 JUNE, 2022

MODERATOR: KERRY O'BRIEN

PANELLISTS:

THE HONOURABLE PETER M. HALL, QC
NSW ICAC CHIEF COMMISSIONER

IAN GOODWIN
NSW DEPUTY AUDITOR-GENERAL

DR SIMON LONGSTAFF, AO
DIRECTOR OF THE ETHICS CENTRE AND ADJUNCT PROFESSOR OF THE AUSTRALIAN GRADUATE SCHOOL OF MANAGEMENT AT THE UNIVERSITY OF NSW

PROFESSOR A. J. BROWN
LEADER OF THE CENTRE FOR GOVERNANCE & PUBLIC POLICY'S PUBLIC INTEGRITY AND ANTI-CORRUPTION RESEARCH PROGRAM, AND PROFESSOR OF PUBLIC POLICY AND LAW IN THE SCHOOL OF GOVERNMENT & INTERNATIONAL RELATIONS, GRIFFITH UNIVERSITY

THE HONOURABLE JOSEPH CAMPBELL, QC
ADJUNCT PROFESSOR AT THE UNIVERSITY OF SYDNEY AND FORMER JUDGE OF THE NSW COURT OF APPEAL

PROFESSOR ANNE TWOMEY
PROFESSOR OF CONSTITUTIONAL LAW AND DIRECTOR, CONSTITUTIONAL REFORM UNIT, UNIVERSITY OF SYDNEY

MR O'BRIEN: Welcome to this special forum, presented by the Independent Commission Against Corruption here in the New South Wales Parliament building, to consider the legal and ethical considerations related to politically partisan treatment by governments in targeted electorates or, to use the vernacular, pork barrelling. Interesting choice of location. There is a powerful symbolism in being here. I do want to start by acknowledging that we're on Gadigal country today and pay my respects to Elders past and present and note that sovereignty has never been ceded on this land.

I'm Kerry O'Brien and I'm very pleased to be invited here to facilitate this forum because, as a journalist for more than 50 years now, I have been increasingly concerned like so many others about what could be described as the incremental decline of our democracy. It's not hard to measure the concept of democracy but it is a little harder to measure its state of health, or it's not hard to understand but harder to measure its state of health as practised from democratic nation to democratic nation.

There is one annual global democracy index however produced by The Economist newspaper group that shows the quality of Australian democracy year by year is heading in the wrong direction. Having watched America's troubled progress through recent decades, including time there as a correspondent, and recognising that Australia shares some of the same troubled social and economic ingredients and the same public cynicism about modern party politics that afflicts America, it should be no surprise that to some degree we appear to be at least edging if not sliding down the same slope.

At such a time a democracy's robust capacity to keep government honest is surely fundamental to its good health, and if the Parliament's effectiveness in keeping executive government honest is diminished, as I believe it is, and the media's capacity has been weakened as it has also done in this time of great digital disruption and the churn of 24-hour news, and when Auditors-General release damning critiques of public spending that can sometimes disappear into the media and political ether without significant consequence or cultural change, the role of integrity commissions takes on even greater importance. To the extent that the ground-breaking, even seismic, outcome of the federal election two weeks ago was affected by the failure of the Morrison Government to fulfil its pledge to establish a federal anti-corruption body, and by the public's recognition of a need to protect the integrity of the public institutions that underpin our democracy, it was for me, and I'm sure many others, a heartening sign.

Pork barrelling is hardly new to Australian politics nor is it confined to any one level of government, but it's not hard to make the argument that it's becoming more blatant. At the federal level, the notorious car parks grants openly favouring the government's own electorates or the equally skewed sports grants that led to a minister's resignation are two examples. At the state level in New South Wales, there are other examples that we'll work around today.

A warning bell rings surely when a State Premier with a slender parliamentary majority is confronted with allegations of flagrant targeting of electorates held by her own party and is emboldened to reply, "The term 'pork barrelling' is common parlance, and if that's the accusation that's made on this occasion, I'm happy to accept that commentary. It's not something the community likes but it is something I will wear." That to me is one thin step away from legitimising the abuse of public funds for party political gain and in the process further cementing the kind of public cynicism that is corrosive to democracy.

History shows that when the bar of government or parliamentary standards is lowered, it becomes very difficult to raise it again. That, sadly, is partly the nature of politics. Democracy is only as virtuous as the people who practice it, and human nature being what it is, we are all capable of the worst behaviour as well as the best. That is one very strong reason why a healthy democracy requires strong and well-resourced guardians at the gate like integrity commissions and like auditors-general to keep our system honest.

Now, that's something that you all know, but it bears repeating again and again in this climate. To enshrine public trust and public interest at the heart of our parliamentary system of government, of executive government, of the public service and of our justice system, no one is really disputing that pork barrelling is taking place, but is it democratic, is it ethical, where does it meet a reasonable standard of public trust and public interest, and is it legal? And if it's not legal, when does it become criminal conduct?

That's the conversation we're going to pursue at some length today with five highly qualified panellists, including three law professors, one an ex-Appeals Court judge. We also have an ethicist and a Deputy Auditor-General, all of whom I will introduce shortly. It's a conversation that will have relevance not just for the Independent Commission Against Corruption

here in New South Wales and the politicians who occupy this building, but for other governments and the public at large right around Australia.

First, I want to invite the host of today's forum, ICAC's Chief Commissioner Peter Hall, to welcome participants and our online audience and explain the purpose behind what I hope and expect to be an enlightened and well-timed conversation. Before his appointment as Chief Commissioner five years ago, Peter served for 11 years on the New South Wales Supreme Court until 2016, including time in the Court of Criminal Appeal. Peter Hall.

COMMISSIONER HALL: Thank you very much, Kerry, for those introductory remarks, and I extend a welcome to all those present and to others who are participating in the forum. The forum today is what I refer to as a subject matter discussion on the issues around pork barrelling. It is not part of or related to any current investigation that the Independent Commission Against Corruption may be engaged in at the moment. In the exercise of its statutory functions, the Independent Commission Against Corruption is required to regard the public interest and the protection of the public interest and the prevention of breaches of public trust as its paramount concerns, so stated in section 12 of the ICAC Act, and to achieve those objectives the Commission may exercise its investigative, its advisory and its educative functions.

The findings and analyses of Auditors-General, and in one case a parliamentary committee in this parliament, the Public Accountability Committee, in relation to pork barrelling practices and the significance of the findings that come out of those investigations and reports to the public interest has understandably given rise to community concern. That is evident in media commentary. It's evident in professional journal articles. It's evident in reports of think tanks who are focused on public policy issues as well as other commentary.

The findings in the Auditor-General's reports in respect of particular grants are instructive. They are instructive to the matters relevant to today's discussion, and for present purposes I propose to make some brief reference to three particular grant programs as reported on by Auditors-General, so bear with me if you will. These are just synopses of certain facts but they do, as I say, provide a framework for our ongoing discussion.

The first of the three was the Community Sport Infrastructure Program. It was a federal grant program. It was a competitive grant process and it was established in 2018 to ensure that Australians had access to quality sporting facilities, and under the program $100 million was awarded to a great number of projects. Although the Australian Sports Commission, which was referred to in the report as Sport Australia, had assessed the grant programs on merit, the Australian National Audit Office considered the decisions on the applications awarded funding were underpinned by the results of what was described in his report as a parallel assessment process, that process being conducted in the then minister's office.

It was this assessment process conducted in the minister's office, rather than Sport Australia's process, that informed funding decisions in many respects. The audit determined that applications for projects located in marginal or targeted electorates were more successful in being awarded funding than if the funding was allocated on the basis of merit assessed against the published program guidelines. In other words, the ANAO identified that there was evidence of what is referred to as distribution bias in awarding of grant funding in that case.

The second is a state grant referred to as the Stronger Communities Fund Round 2. This grant, known as what's referred to as a tied grants round, was originally established to provide grants to newly amalgamated councils and other councils that had been the subject of merger proposals. However, following a decision of the Court of Appeal in one particular case, the government decided to drop the amalgamation program. The moneys however that then became available for distribution were the subject of consideration by the Auditor-General. The New South Wales Auditor-General found that the assessment and approval processes for round 2 "lacked integrity". The program guidelines were not published. The guidelines did not contain details of selection and assessment processes. Councils and projects were instead identified by relevant ministers and then referred to the Office of Local Government as it was then known to do the distribution with little or no information about the basis for the council or the project selection. There was no merit assessment for the identified projects. This ultimately led or resulted in 96 per cent of the Stronger Communities Funds, namely $251 million, being allocated to Coalition state seats.

The third was the Regional Cultural Fund, which awarded $100 million for cultural projects in regional New South Wales. The New South Wales

Auditor-General determined that the assessment process, that the relevant agency in that matter called Create NSW, which was used for the fund, was robust and it produced transparent and defensible recommendations to the minister. However, the integrity of the approval process for funding allocations was compromised by reason of the fact that the particular minister, in consultation with a more senior minister, did not follow recommendations of the independent assessment panel in very many cases. The reasons for making the changes were not documented.

The Commission has now determined that significant public interest issues concerning pork barrelling practices, and in particular the matters that have been raised in the Auditor-Generals' reports, does require what I term a subject matter investigation or inquiry into the matters dealt with in the reports. The specific issues I anticipate to be addressed in the forum today will include whether in cases such as those reported by the Auditors-General the practice of pork barrelling is lawful or unlawful. Secondly, whether such conduct associated with the practice could constitute corrupt conduct under the provisions of the Independent Commission Against Corruption Act. Thirdly, whether ministerial discretionary power in relation to grant funding is at large or whether it is subject to constraints and subject to conditions by operation of the rule of law, about which I will say something in a moment. If so, then what circumstances do these constraints and conditions exist or operate, and in relation to that last matter, whether the regulation of grant funding programs by legislation or other statutory instrument is necessary or whether it's essential to ensure in the public interest that public moneys are only expended for public purposes.

There appears to be an amount of uncertainty and disinformation as to the lawfulness or otherwise of pork barrelling practices. During the last federal election the former Prime Minister in reference to the practice of pork barrelling raised the question as reported in the *Sydney Morning Herald*, "No one is suggesting anyone has broken any laws, are they?" Some ministerial comments to similar effect have been made at the state level suggesting that pork barrelling is normal and legal.

Taken at face value, such ministerial statements or comments are concerning for they disclose that there [sic] an apparent absence or lack of appreciation, at least in some elected officials and ministers at the highest levels of government, as to the existence of the rule of law in this space in relation in particular to grant funding programs. A matter arising for discussion I anticipate in this forum concerns the legal implications

associated with public officials, elected and appointed, who intentionally exercise public powers and public functions in respect of grant funding programs for the purposes of obtaining electoral advantage.

The rule of law, as it may apply in such circumstances, in my view has four components to it. The rule of law firstly includes the public trust principles that apply to public office holding. Secondly, it includes the common law offence of misconduct in public office. The rule of law thirdly includes the New South Wales Ministerial Code and, fourthly, the jurisdiction and statutory functions of the Independent Commission Against Corruption is one of the four components. Apart from its investigative function, the Commission has the functions of advising on ways in which corrupt conduct and conduct that's liable to allow or to cause the occurrence of corrupt conduct to be eliminated, and integrity and the good repute of public administration to be promoted. I am confident that the rule of law, as it applies generally to grant funding and as it may operate in cases whereby official functions or powers are used to serve private or party or electoral interests, will be elucidated in the discussion which is now to follow.

If I could just make two final points. The first is that I acknowledge the leadership of Premier Perrottet, who has stated that he wishes to have a reform agenda around this problem established, and to that end he has commissioned the Productivity Commissioner to advise on a number of issues relating to it. The Productivity Commissioner has produced his report in recent times. It is a report that does contribute to the achievement of a responsible and accountable process. However, there are still issues that must be addressed and they will be addressed in this seminar or forum.

The other matter I just wanted to add to these little comments are a reference to the importance of the standards of ethical conduct of public officers. The duty of loyalty or fidelity as it's often called of such public officers, whereby from time to time undoubtedly there will be the potential for conflict between duty and interest, conflict between an officer's personal party interest or potential interest as against the officer's public duty. The expectation of course is that he or she will adhere in those circumstances to ethical conduct, the duty of loyalty, fidelity that they bear.

Sadly, a couple of nights ago Sir Gerard Brennan, former Chief Justice of the High Court of Australia, passed away. He was undoubtedly one of the greatest jurists, greatest lawyers Australia's every had. And by many dimensions we would say he is certainly a great Australian. He was. And I

know one person here in the room at least who was a great admirer and a friend to Sir Gerard and had the privilege of sharing many years with him.

Why do I raise this? In both when he held office as Chief Justice and after his retirement, Sir Gerard made many speeches, he wrote many articles on a whole range of issues. One of the subjects that he did address was the obligations in public office holding. He expressed with clarity on one occasion in an article, which feeds into Kerry O'Brien's reference, in an article entitled Democracy at the Cross Roads. And I'll conclude these few words of mine with Sir Gerard's. On that occasion he said, "The motivation for political action are often complex. But that does not negate the fiduciary nature of political duty. The power whether legislative or executive is reposed in members of the parliament by the public for exercise in the interests of members of the public and not primarily for the interests of members or the parties to which they belong. The cry 'whatever it takes' is not consistent with the performance of fiduciary duty."

One final comment, I said that would be my last words but I just want to say that there will be a segment, I anticipate, in the discussion which will focus in on the question of what safeguards, what protection is essential for the fair and equitable distribution of public resources. That it will advance and protect what are the requirements by way of social need for the use of public resources. I consider that issue as to what safeguards should be put in place that bind all public officers, from ministers to all other elected officials and appointed officials. Thank you. Thanks, Kerry.

MR O'BRIEN: Just leave my papers, Peter. Thanks, Peter. The Chief Commissioner will also participate from time to time in our discussions this morning. I'll keep our panel introductions relatively short.

Anne Twomey is the eminent constitutional lawyer and Professor of Constitutional Law at Sydney University, where she is also Director of their Constitutional Law Reform Unit.

Joe Campbell served as a judge on the New South Wales Supreme Court for 11 years, including five on the Court of Appeal. He's also an Adjunct Professor of Law at Sydney University. He's been there for the past 10 years.

Ian Goodwin has been Deputy Auditor-General for New South Wales since 2017 after an early career in banking and capital markets, time at the

Reserve Bank, the International Monetary Fund and the Australian National Audit Office.

Simon Longstaff is Director of the St James Ethics Centre and a prominent Australian commentator on ethics. He was inaugural President of the Australian Association for Professional and Applied Ethics and was formerly Chair of the International Advisory Board of the Genographic Project and Deputy Chair of the Global Reporting Initiative Board.

Professor A. J. Brown leads the Public Integrity and Anti-Corruption Research Program at Griffith University Centre for Governance and Public Policy in the School of Government and International Relations. He's a 25-year veteran of developments in the Australian Integrity System and is on the Australian and Global Boards of Transparency International.

Now three of our panellists – Anne Twomey, Joe Campbell, Simon Longstaff – have written papers to assist the flow of ideas and opinion and to help advise ICAC in the report it will issue in due course. And I'm going to use Anne's paper in particular to bring structure to the conversation this morning because it's quite a complicated one. For that reason, I'll ask Anne to speak briefly to her discussion paper and to give a sense of where we're headed this morning. Anne Twomey.

PROFESSOR TWOMEY: Thank you, Kerry. You're happy for me to speak from here?

MR O'BRIEN: Yep, by all means.

PROFESSOR TWOMEY: Good. So like many people I have been infuriated by ministers at both the state and the federal level asserting that they have an unfettered ministerial power and that there's nothing illegal or corrupt about pork barrelling. In my view, both propositions are wrong and that's what my paper is directed at considering. First there are many limits on ministerial powers, and if ministers are unaware of them, they should learn quick smart. There are limits in administrative law. It requires that administrative decisions are not made for improper purposes, that they not take into account irrelevant considerations, and that they not be biased. There are limits in statutes such as the legal obligation at the Commonwealth level not to approve expenditure unless a minister is satisfied that it is efficient, effective, economic and ethical use of public money.

And there are other limits as well, including in the criminal law, such as statutory offences of bribery and the common law offence of misconduct of public office. Governments have a legal and constitutional duty to act in the public interest. The High Court has said that it's a fundamental obligation of members of parliament, including ministers, to act in the public interest and to serve the people with fidelity and a single-minded concern for the welfare of the community. And that includes the court has said a duty to guard the public finances vigilantly. Now, this duty creates a public trust which is breached when MPs and ministers act not in the public interest but in their own personal interests or the interests of others including political donors and supporters.

It occurs when they act in a partial rather than an impartial way. Breach of that public trust may amount to a criminal offence of misconduct in public office. Now, this offence occurs when a public official, such as a minister or a public servant, wilfully exercises their official powers in a partial manner for a purpose other than that for which the power was granted and without any reasonable justification. The misconduct must also be so serious that it merits criminal punishment. So there is a high hurdle to be got over there. Now, this was the offence that Eddie Obeid, a former member of this parliament, was convicted. Chief Justice Bathurst said that it was "inconceivable that a politician of Mr Obeid's experience did not know that it was his duty to serve the public interest and that he was not elected to use his position to advance his or his family's own pecuniary interests".

But that case was about a politician acting for personal financial benefit. Politicians will sometimes tell you that it's completely different if you're acting in the benefit of a political party. They say that's just politics, it's part of democracy, it's what elections are all about, it's how you win. So does that argument actually stand up if it's scrutinised?

First, pork barrelling where it involves spending public money to secure votes in an election does actually have the effect of lining politicians' pockets. Success in an election may determine whether an MP has a job or not, whether or not he or she becomes a minister and the level of the remuneration and allowances that they accordingly receive. A premier, for example, earns over twice as much as an ordinary backbencher. So winning an election actually is something that does affect the hip pocket of

politicians. Spending money to buy votes in an election can therefore have a direct financial impact upon members of parliament and ministers.

Second, while it's true that actual prosecutions for misconduct in public office have been focused on conduct that more directly benefits members and their private interest are that is easier to prove and that is one of the reasons why the prosecutions are focused in that area. But the courts have recognised that conduct that advantages a political party may also fall within the scope of the offence. Now, a good example of that – and I'm taking this one from the United Kingdom because it makes it less political here – but in the United Kingdom at one stage the Conservative Party leaders of the local Westminster Council decided that the best way of shoring up their vote in the marginal seats within that council was to remove the social housing tenants, sell off the council property to property owners on the basis that people who own property are more likely to vote Conservative than social housing tenants. And this was very explicitly the reason for which they did it, which was found in the documentation after the auditor blew the whistle and the matter ended up in court.

Lord Bingham in his judgment concluded that powers conferred on a local council may not lawfully be exercised for the purpose of promoting the electoral advantage of the political party. Now, the councillors then objected. They argued that they couldn't be expected to ignore party political advantage in exercising their policy powers. Lord Bingham responded that of course politicians can exercise their powers for public purposes, hoping that their policy choices would earn the gratitude and support of the electorate. But they could not exercise a power for a purpose other than that for which it had been conferred. They could not use it to promote the electoral advantage of a political party. He concluded that "the unpalatable truth was that it was a deliberate, blatant and dishonest misuse of public power, not for personal financial gain, but electoral advantage". And he saw it as corrupt and he also said that the auditor was "right to stigmatise it as disgraceful".

Now, similar arguments about politics were also made in New South Wales in the Greiner case concerning the appointment of Dr Metherell to a public service position without going through the ordinary merit procedures. Again, it was argued that this was just politics. Now, that view was rejected. Justice Mahoney said, "One has to look at the proper objects of the power." In some cases political considerations may fall within the objects of the power, such as a minister, for example, appointing their own

ministerial advisers and using political reasons for doing so. That's perfectly fine. But appointments to public offices must be exercised for a public purpose, not a private purpose. "Partiality," he said, "involves giving a preference or advantage for an improper purpose." Now, Dr Metherell's appointment was partial because it was made for an improper extraneous political purpose. Even though he might have been successful if there had been a merit selection, this was irrelevant because the issue was not about whether the outcome was objectively good or bad. The issue was about the abuse of public power. And this partial conduct satisfied the first element of corrupt conduct under the ICAC Act. Now, you might remember also that in that particular case the ICAC's finding of corrupt conduct was overturned. It was overturned on the second element of the ICAC definition of corruption, which we will probably come to later.

Now, Justice Mahoney also gave another example of potentially corrupt conduct which is relevant here. He said, "That a decision about where a public facility is to be built must be based upon what is the proper place for it, rather than where it is most likely to assist the re-election of a party member." And in later writings he also said that "If an official is given power to allocate money to encourage cultural activities and distributes it to persons or bodies apt to support a particular political party or to procure that they do so, this too would involve the misuse of public power." In short, pork barrelling may satisfy conditions of corrupt conduct under the ICAC Act where there is partial behaviour that occurs for an improper purpose and in very serious cases it might even constitute a criminal offence of misconduct in public office. But do we have to go down the route of prosecuting and imprisoning politicians to stamp out that kind of misuse of public office? One of the ICAC's really important roles, from my perspective anyway, is actually to prevent corruption from occurring to begin with by putting in place the right laws and structures so this does not happen. So we don't have to have the inquiries about whether or not the corruption has occurred. We don't have to have findings of corrupt conduct because the structures and laws are in place so that it never happens to begin with.

Now, anyone who has read the Auditor-General's report into the Stronger Communities Fund and the Regional Cultural Fund, and I do strongly recommend that people do read it, will be – in my view anyway – appalled by what occurred. It was appalling on two levels. One, it was an indictment in the integrity of the governmental behaviour. But secondly, and I say this as a former public servant, it was appalling just in terms of terrible public

administration. Now, unfortunately these examples of criticism of grant schemes et cetera don't seem to be outlier cases. They've also been allegations of other forms of improper expenditure of public money. At the Commonwealth level as we've heard and also in New South Wales in relation to sports grants, arts grants and even bushfire relief funds. So clearly, better laws and systems need to be put in place.

Now, in November 2021 the new Premier Dominic Perrottet stated that "Taxpayers expect the distribution of public funds will be fair and I share that expectation," he said. He ordered a review of how grants should be administered and this was a very good sign that something might actually be done to prevent the recurrence of such abuses in the spending of public money. Now, that report was published quite recently in April. Some of its recommendations are very good, such as the creation of a new guide on grants management to better ensure documentation and critically transparency.

So that's the first step that needs to be taken. In my view I don't think it goes far enough. First, the obligations on ministers and their staff in relation to grants need to be imposed by law, not just in a premier's memorandum and was proposed in that report. And this is because other accountability provisions in codes of conduct and statutes such as the ICAC Act turn on whether there has been breach of a law, not a premier's memorandum, a law. So for example if a minister has behaved in a partial manner and his or her behaviour would cause a reasonable person to believe that it would bring the integrity of the office or parliament itself into serious disrepute, a finding of corrupt conduct can be made by ICAC if the minister's acts also constitute breach of a law, not a premier's memorandum, a law.

Similarly, clause 5 of the Ministerial Code of Conduct requires a minister not to direct or request a public service agency to act contrary to a law. Burying grants rules in a memorandum rather than in a law avoids consequences for ministers if they breach those rules or if they instruct others to do so. Another problem is the failure to address the issue of grants being made for the advantage of a political party including when they are election promises. Now, at the Commonwealth level the use of ad hoc non-competitive grants to give effect to election promises has resulted in rules about merit and proper assessments being tossed out the window.

Any new state grant rules should explicitly provide that grants must only be allocated in the public interest and not predominantly for party political

purposes. New grants rules should also contain express provisions to prevent avoidance and to ensure that election promises must still be subject to proper scrutiny and merit assessment. A government or opposition could still promise to establish a $100 million scheme for funding sports facilities, for example. That would be a policy. But it would then have to say that the outcome of particular grants given would depend upon making a proper merit assessment. Is this the appropriate place to put it? Can this body successfully implement this grant? Will this grant lead to the most efficient use of public money? All those sorts of things.

Voters I think would appreciate the fairness involved in those kinds of allocations. Most voters I think are fed up with election bribes and the whiff of low-level corruption that they exude which corrodes public trust in the system of government. A local member could still also promise to advocate for a new swimming pool or an upgraded sporting field in their particular electorate. It wouldn't deny the ability of members of parliament to say that they would do that during a campaign but they would still need to acknowledge that although they would advocate strongly for their electorate ultimately decisions would be made on the basis of fairness and again, I think the public would accept that that's the appropriate way for it to be done. Indeed, other candidates could make no greater commitments because they too would ultimately be bound by merit requirement if it was placed in law.

So any package of reforms needs the following. Expressed legislative authorisation of every grant scheme which clearly sets out the scheme's objectives, identifies the decision-maker, the method of grant distribution and authorises the expenditure. An expressed legal obligation on ministers as exists at the Commonwealth level that before authorising the expenditure of public money they must be satisfied, based upon evidence, that spending is efficient, effective, economical and ethical. And in addition to that I would also add that this authorisation must include that ministers must act in an impartial manner and must act in the public interest. Public servants should also be under a legal obligation to comply with relevant rules concerning the management and documentation of grant schemes. If public servants are decision-makers they must also be placed under a legal obligation to act in a manner that is impartial, efficient, effective, economical, ethical and in the public interest.

Grant rules should be given legal status by being set out in a legislative instrument and there should be a body that maintains oversight of grant

programs to ensure compliance with the grant rules and to give effect to transparency by scrutinising and publicly exposing poor behaviour. This body would be a parliamentary committee, for example, it could be, which would then be able to receive and table all the relevant grant documentation.

So the aim of all these proposed reforms is to achieve proper administration, more efficient and effective use of scarce public resources, fairness and equity in how communities are treated regardless of which electorate they're in, a more level playing field for political parties in elections, removing an unfair advantage from incumbency and also improving respect for the democratic system. The NSW Government was the first to clean up political donations by imposing caps on donations and expenditure. Hopefully, it can also be the first to clean up pork barrelling by ensuring that public money is spent fairly and in the public interest. Thanks, Kerry.

MR O'BRIEN: Thank you, Anne. That's very much to the point. A nice précis of in fact a 45-page paper with lots of backup for the points that Anne has made. And these really are the key issues that we're going to chase down today. For the sake of clarity I'd like to establish some level of commonality around what we mean by pork barrelling. Joe Campbell, you've broken it down at the start of your paper. Can you very briefly just hit the key points of what you've had to say.

PROFESSOR CAMPBELL: Well, for a start, talking about pork barrelling as a term in itself can cause confusion and lack of clarity and thought. It's a metaphor. It can mean all sorts of different things to different people and so it is necessary to be more precise about what you mean by pork barrelling. The most useful definition that has been given is one that ICAC has adopted tentatively for the purpose of this investigation, which is the allocation of public funds and resources to targeted electors for partisan political purposes, and when it talks about partisan it means giving advantage to a particular political party, not just giving advantage to some particular social group or whoever else might be in favour.

That definition is one that differs from some that have been given by in particular academic students of pork barrelling that have included a geographical element to the pork barrelling, that the pork barrelling is aimed at electors of a particular geographical area. Now, the way in which the targeting of particular electors in a geographical area is something that is excluded by the definition that ICAC proposes, is that it is possible to have electors targeted by demographic criteria rather than by geographical ones.

If you've got a policy that says we are going to give particular advantage to self-funded retirees or we're going to give particular advantages to mothers of preschool children, then that is aimed at a particular demographic of the public, and that is capable of being pork barrelling under the definition that ICAC has tentatively adopted, even though it would not fall within some of the other definitions that have proposed a geographical element to the definition.

Now, I think that the ICAC definition is one that better captures what is the vice that is aimed at by saying pork barrelling is the kind of thing that is undesirable as a matter of public policy. That doesn't mean that geographical criteria are going to be irrelevant to it because usually it will be much more difficult to prove that there is advantage for a particular political party sought in giving benefit to a demographically defined group than in giving an advantage that has a much more focused geographical structure. Basically that's all I wish to say about it.

MR O'BRIEN: Okay. AJ Brown, I know that you have got a view that there is acceptable pork barrelling and unacceptable pork barrelling. I would suggest that the actual term pork barrelling carries a clear negative connotation. So in terms of your own thinking, when a former New South Wales Deputy Premier John Barilaro, who reportedly gave himself the nickname of Pork Barilaro and was under fire over the allocation of bush fire recovery funds, claimed that what others might call pork barrelling is actually an investment in the region, or regions, he said, "When you think about it, every single election that every party goes to, we make commitments. You want to call that pork barrelling," I imagine he's talking to journalists, "You want to call that pork barrelling, you want to call that buying votes, it's what elections are for." Is he blurring the lines there or does he have a point?

PROFESSOR BROWN: Well, he does have a point, Kerry, in that you're right that the term pork barrelling has possibly generally had a pejorative meaning and is now taking on a much more pejorative meaning. So really what we're talking about here is definitions of pork barrelling and we can unpack what pork barrelling is a little bit more I think, that are defining unacceptable pork barrelling, what we don't want. So the ICAC definition when we start to identify that public money is being allocated for partisan political purposes. Simon has a very good definition that is similar to that. Not a less legalistic definition but a similar definition that starts to define what is it that we don't want in pork barrelling. But the term itself to me is,

even though it has got that pejorative connotation, it's a reflection of the fact that it is part of politics and arguably will always be part of politics and should be part of politics that elected members of parliament are able to deliver for their community, and that might be a local community as Joe was saying or it might be a community of interest, and that they be able to be seen to be delivering to their community, and that's important for public trust as well as for democracy to function. And so I think we've got to remember there's a link between the term pork barrelling and the original term bringing home the bacon. Politicians have to be able to be seen to bring home the bacon. And that's actually quite legitimate that they be able to demonstrate that they have actually delivered for the community, served community purposes and they may be local and they may be sectional and that is not necessarily illegitimate.

So we've got to sort of marry up the fact that there's a whole lot of things happening here which we are starting to much more clearly identify we do not want and are unacceptable and are probably unlawful and probably always have been unlawful and we have just forgotten that, as Anne was saying, or some people have or never knew, but at the same time we've got to marry that with the political reality where we can improve all the rules, we can make it all more robust, we can make it clearer when people are breaching the principles. And we should do all of that but at the same time we will still be left with members of parliament who will legitimately say, well, we've done all of that but we failed to fulfil the purpose of serving the community here. How do we make sure that we actually can efficiently serve the community and demonstrate that we have delivered for the community?

So we have to recognise that it's a little bit like lobbying. Lobbying has a pejorative connotation now predominantly because of the problems and the risks that have manifested with the development of commercial lobbying in particular and undue access and influence, et cetera, et cetera. So it's got a pejorative meaning now but in fact lobbying in itself is not inherently bad. In fact, democracy could not function without people lobbying. So I think we have to retain that realistic political context if we're going to get the balance right on the reforms that will work, and I think it's made even more complex by the fact that there are times when it's very difficult, it's impossible to remove a partisan or an electoral, an intent to secure some electoral advantage. It's impossible or almost impossible to remove those things totally from any kind of public expenditure program.

So we can't remove it totally and now we're dealing with definitions about well, how much do you have before it taints the decision? And I'd actually go to another extreme, which might sound slightly inconsistent with what I just said, is that there is even circumstances where the presence of that does completely contaminate the decision even if it's a tiny amount of partisan political purposes involved. And we can maybe talk about some examples for that.

So it's more complex than – I think the complexity of the political reality of the fact that it's endemic to the political process, some level of pork barrelling and its legitimacy, is part of what makes this very complex and part of why the reforms actually have to deal with the total ignorance on the part of some members of parliament as to their public duties, has to deal with that total ignorance, but it also has to match with our standards for what we expect good politicians to do, and part of what we expect good politicians to do is still a level of pork barrelling.

MR O'BRIEN: Yes. Well - - -

PROFESSOR BROWN: I haven't convinced you.

MR O'BRIEN: No. No, because, you know, what you're describing could be a pensioner, an old age pensioner or an aged pensioner, since there are now many of us who are old who aren't pensioners yet, or it might be somebody on NDIS and they certainly wouldn't think of themselves as being on the receiving end of pork barrelling because the connotation that pork barrelling carries is that it is politicians either feeding at the trough or opening the trough up to some of their constituents for a favour. So, Simon.

DR LONGSTAFF: Yeah. I think we should reserve the term pork barrelling for the pernicious activity, and I'll try to define that in a moment, and find another way to describe what AJ has just been talking about which is electoral politics and things, and Anne gave a few clues as to how it's possible to seek the good opinion of the electorate without necessarily contravening some basic principles.

The other thing I'll say just briefly before going to the definition that I'd like to propose is that one of the underlying questions, which we may or may not touch on today, is whether or not we are serious about being a democracy because democracy when you properly understand it has certain implications and limitations on what you can or cannot do, including in

some of the areas AJ was talking about. You can have a liberal oligarchy if you want it, which can give a more permissive environment for what you might do in terms of seeking preferment electorally, but democracy, once you understand it, and it's right at the ground root of the system we claim, and lots of people like to wrap themselves in the legitimacy of democracy while actually corrupting it, it has very specific limitations and we may not want to live with them but we should at least understand what they are.

In terms of the definition, with all due respect to others, I tend to be slightly idiosyncratic and want to go back to first principles. So the definition that I propose to ICAC, it's not wildly different to what you've heard, but it's just got a few subtle differences to it which reflect that understanding of democracy. So I propose that it be the commitment or expenditure of public resources. That's the first element that needs to be there, and I should say, all of the elements I'm going to propose must be present for it to account as pork barrelling in that pernicious sense. For the principal purpose of securing electoral advantage. So it's not the sole purpose. It's an issue there will be multiple purposes often in what people intend to do, but if the principal purpose is discernible as seeking electoral advantage either because there's explicit evidence, as there has been in some cases, that that was the intention or because it is evident from the actual choices made that that can only be the thing that explains the difference of treatment.

So that's the second element, by conferring a selective benefit. So one of the things which might come back to a democracy again is if there's a general benefit to the polity as a whole, then it doesn't cause a problem but if it's a selective benefit for a subsection of the polity as a whole. So all of those elements need to be there. The commitment of expenditure of public resources for the principal purpose of securing electoral advantage by conferring a selective benefit on a subsection of the polity as a whole. And that goes to, Joe was raising the question, for example, of geographic things. I think it's not so much geography, it's more the differentiation of the electorate into subsections which becomes the problematic component. I think if you think of it in those terms, then you get all of the work that I think needs to be done in relation to democratic theory and expression is captured in that definition.

MR O'BRIEN: Peter?

COMMISSIONER HALL: Kerry, I might just add a couple of comments on what Simon and AJ in particular have raised. It goes into this territory as

to ministerial discretion. Where is the boundary between legal justification for action as against political action? Where is the boundary? There is no bright line and that's what does make it difficult on occasions to say whether something is pork barrelling or not. I think in terms of the political reality that AJ spoke of, the realistic political context was another expression he used, I think that can only be understood by an analytical approach which is reflected in some of the case law.

It's been discussed in the Fitzgerald Commission of Inquiry Report and so on, but trying to pull it all together, if a politician makes a decision about giving resources, he or she sees some electoral advantage coming their way about this, is that permissible? Is this the political reality? Yes, it is. It is permissible. As one judge put it, if a politician is acting properly in office and is making a decision for the public interest but sees as what he termed as a side-wind benefit that there's some political potential expectation or benefit, that is quite permissible.

Tony Fitzgerald in his commission report, he spoke again of how do you judge whether this is on one side of the line or the other. He used the formulation, which I don't think Simon would necessarily embrace, you ask yourself the question what was the dominant purpose, the predominant or dominant purpose of this action or this decision in order to determine whether it is a proper use of the public power. That's not to say that that is the gold standard or that's the only test, but it is helpful because it starts to feed into this other area that a lot of decisions and political decisions have mixed motives, and this question of mixed motives was discussed recently by the Court of Appeal in the matters concerning Mr Maitland and Mr Macdonald.

It is a question of mixed motives so that you have to then address, well, what was the real purpose if you like, the dominant purpose, and if it did serve the public interest but there was also an expectation or a hope, as the New South Wales Ministerial Code refers to it, of some political advantage coming out of this, there's nothing wrong with that, that's quite permissible. But if you get a decision, let's take the Stronger Communities grant fund case. I mean there's no argument. There is in fact, as the Auditor-General's report discovered in that case, a document which is a briefing note in the Premier's Office, and that briefing note was to the effect "We've got the money out the door and it's hitting the political target," I mean you couldn't have it any clearer than that as to what the motive was. So that was you

would almost say the sole motive, sole purpose of that exercise was political or electoral and that's clearly on the other side of the line.

So there are gradations but I think one has to acknowledge the political reality, as AJ has been addressing, that it's not altogether quite simple because there's often more than one reason behind somebody's actions. And I think that coming back to Simon's point about selected benefit, I understand the point. I think that, however, you've got to have a tool. You've got to have an analytical tool to be able to say the particular case, looking at the facts and circumstances around that decision, what side of the line does it fall on. So that's I think the best I can do in terms of trying to find an analytical tool that does assist in deciding what part of this hypothetical line a decision falls on.

MR O'BRIEN: Okay. That's – yeah, sorry, Joe.

PROFESSOR CAMPBELL: I wonder about the ability of the third criterion that Simon has put forward to be able to actually differentiate what is understood as pork barrelling from what is not because practically all decisions of government are ones that confer a selective benefit for a subset of the polity as a whole, and if you decide to build a road between A and B then that's going to benefit the people that are near there. If you decide that you'll put a particular medication on the PBS, then it's going to benefit people who have got whatever disease is treated by that medication but not the other people.

DR LONGSTAFF: Yeah, but, Joe, that's why you've got to take the definition and all of its elements need to be satisfied. Yes, there will be times when there is a selective benefit which is done not for the principal purpose of securing electoral advantage and that would fail the test and would not be constituted as pork barrelling under what I've proposed, and there will be times when a person might be seeking some political advantage where there is no selective benefit and the whole of the general community is benefitting from the policy and that would not be counted as pork barrelling.

It's the alignment of those different elements. And I think when it comes to analytical tools, I mean there are some cases where there will be evidence clearly of the kind that you cited, but there will be other times, and I think we saw it in the end of last year, was it, with the floods in northern New South Wales, where people in objectively identical circumstances had had

their lives ruined by those floods. One group were being supported because of their political allegiance or proposed allegiance and another was ignored.

MR O'BRIEN: That was the allegation.

DR LONGSTAFF: Well, that was the claim. So I would say in those circumstances, if you see identical circumstances and differential treatment I'd be looking at some kind of rebuttable presumption that this has, you know, if the other elements that were quoted, is failing the test and those who are exercising a public office should be able to explain why that distinction was made. And a rebuttable presumption of that kind is a very useful tool in these circumstances because it puts the onus back on the public official to give good public reasons for why they acted as they did.

MR O'BRIEN: Now, I'm going to – Anne, I think we're already pretty clear on where you stand, but for clarity's sake what I'm going to do, I think we take on board that this is just a classic illustration of the complexity of the area that we are moving in, and for the purposes of this discussion I'm sure that ICAC people are taking copious notes as we go and I imagine there will be a lot further conversation around the points that have already been made. But for the purposes of where we go from here, I think we take it that we are talking specifically about, primarily about the allocation of public funds and resources to target electors for partisan political purposes, and I thought it might further assist the clarity of the discussion if I ask Ian Goodwin, as Deputy Auditor-General for New South Wales, to walk us through the Audit Office report that was released just a few months ago and analysing the integrity of the way two Berejiklian government grant programs were assessed and approved, the same state programs that Peter referred to in his opening and referred to in the same spirit. The first program, round 2 of the Stronger Communities Fund designed to provide $252 million to newly amalgamated councils and other councils that have been subject to a merger proposal. So the Audit Office report found that the process for that grant program fundamentally lacked integrity. What standards would the Audit Office have expected and where did those standards break down?

MR GOODWIN: Thank you, Kerry. I probably would just make an opening comment that, I mean, we did use the title Integrity of Grant Program Administration, so the focus there is the important word "integrity". And integrity is not just about the integrity of the actions of

individuals, it is also about the design and implementation of systems and processes that ensure integrity in decision-making.

So in the case of the Stronger Communities Fund audit, the guidelines that we looked at were deficient. They were not clear in terms of the criteria that councils would be selected. They were not clear in terms of the decision-makers or how councils would receive funds, and indeed they probably didn't align to DPC, Department of Premier and Cabinet, guidance that existed extant at that time. I mean what we would be expecting to see, and I think the work that has now been done by the Productivity Commissioner and the Secretary of the Department of Premier and Cabinet, outlines those safeguards that we would expect to see. But we would be expected to see that the process of selecting councils was, there was an objective criteria, a measurable criteria, a criteria that you can apply evidence to and that there was a clear line of who were the decision-makers and accountability and transparency around that.

Ultimately the recommendations of the Auditor-General were that we would expect to see that decisions around grants are based on ethical principles, bearing in mind that the Government Sector Finance Act and Employment Act does set out principles around impartiality, equity and transparency and accountability. We would ensure the assessments and decisions can be made against clearly directable criteria and eligibility criteria, ensure the accountability for decisions and actions involved are very clear, and indeed that is an important point, because when we looked at the Stronger Communities Fund it was not very clear as to who the decision-maker was, and include minimum administrative and documentation standards. And that's relevant. I mean there are obligations on public servants under the State Archives Act to retain records, and in this case there was a deficiency of records and has certainly been played out around some records that were destroyed in ministerial offices.

I think we do recognise that there will be times when a minister might, having established the guidance and eligibility criteria, that the minister might make a decision to override that criteria. Now, we would expect that that would normally be where there's a flaw in the decision, but at the very minimum we would expect that any override would be documented in a transparent and accountable way. And in both cases, both the Regional Cultural Fund and the Stronger Communities Fund, that documentation on how ministers made those decisions weren't [sic] evident.

I would acknowledge, as I said, that post that audit that the Auditor-General tabled on 8 February, the work on the review of grants administration by the Productivity Commissioner and by the Secretary of the Department of Premier and Cabinet if implemented in its entirety, it does pick up the safeguards that you would expect to mitigate against the risks that were identified in that audit. I guess the question is, you know, implement in its entirety is probably the word I've just used but there's also a question as to how you codify that to ensure it is robust and it has meaning.

MR O'BRIEN: We might come to reforms and actions towards the end of the discussion, but the report, this is still the first report that I'm talking about, the Stronger Communities Fund, found that 96 per cent of available funding was allocated to projects in Coalition held state government electorates. What was the significance of that, if any, in the eyes of the Audit Office? Is that a part of your, you know, does it fit your bill to look at that and analyse what that means and what is the context in which you're looking?

MR GOODWIN: Normally we would not identify grants by electoral seats but I think it was sort of compelling that there was a clear outcome that favoured a particular side of the political spectrum. The reason for calling that out by electorate was because there was an absence of clear process. The Commissioner of ICAC did point out that there was a memorandum, and the memorandum does talk about getting money out to meet political objectives but the guidelines were deficient in terms of clear criteria.

The distribution of the money from the Office of Local Government was being made on emails, effectively from emails from staff in the Premier's Office or Deputy Premier's Office. It had informal language so that everyone is comfortable and indeed I think there was probably one would argue, and we do say this in the Auditor-General's report, that there was probably an expectation of the staff in the Premier's and Deputy Premier's Office that the Office of Local Government would not contest those decisions. And that's somewhat evident by the fact that the staff in those offices were asking the Office of Local Government to prepare press releases on the same day as they were being told that this is where the council would receive that grant funding. So there was probably an absence of that contestability there.

MR O'BRIEN: Okay. So with the second of the programs the Audit Office reported on, this is the Regional Cultural Fund which was designed to

support cultural projects in regional New South Wales, you found that although the assessment process by Create NSW – the government's arts policy and funding body which advised the Arts Minister – was robust, tick, the integrity of the approvals process was compromised and I think one in five of Create NSW's recommendations were effectively ignored. They received no funding and the second round 7 of the independent panel's top 10 ranked applications were not funded. Now, I guess it's pretty clear why that was significant but you say "it creates a clear perception that factors other than the merits of the projects influence funding decisions". When you say "clear perceptions" how are you judging that? Are you judging that on process again?

MR GOODWIN: Judging that I guess on process and environment. So what I would say about the Regional Cultural Fund is that the process there as defined in the guidance, that was a good process, it was a robust process and it had an independent panel and that panel had experts and they had a criteria and so there was objectivity around it. And as you point out, of the 253 projects the Minister for Arts after consultation with the Deputy Premier overturned 56 of those and that effectively meant that there was 22 projects to the tune of about 9 million, $9.3 million that were not assessed meritorious by the panel but did get funding and in some cases didn't meet all the criteria that the panel was looking for. So it was a good process. The thing you also have to understand environmentally is that a lot of those projects were announced one month before the 2019 election.

MR O'BRIEN: Okay. So across the two grants we're talking 350 million. You found both processes, well, there was a lack of integrity as part of both of those applications to one significant degree or another. The report made a number of recommendations. What has happened with those recommendations? Has there been any action or has there been any indication of action?

MR GOODWIN: So I'll probably answer that on two levels. So I guess the follow up of the recommendations, the normal process is that the Public Accounts Committee, which is the standing committee that we report to, will follow up on the Auditor-General's recommendations but that's usually done 12 months after we table the report, so that would be February next year. But at another level I do take comfort that the Premier did institute this review.

MR O'BRIEN: Yeah.

MR GOODWIN: And as I said, that particular body of work by the Productivity Commissioner and the Secretary of the Premier and Cabinet, it does actually address. So we've gone through and it does actually address the recommendations made by the Auditor-General.

MR O'BRIEN: Okay.

MR GOODWIN: So there has been I guess good progress and comforting progress. What now needs to occur is is it implemented in its entirety and how it's codified.

MR O'BRIEN: Now, public interest is in there somewhere in the elements of what an audit office does and this is what I want to come to now. I will come back to the, or we will come back to the grants programs later for further discussion, but to focus on this concept or these concepts public trust, public interest or public benefit as they apply to the executive arm of government, that is the way premiers and ministers who make up the Cabinet exercise their power, first from the point of view of the law. Anne Twomey.

PROFESSOR TWOMEY: Sure. So we have a number of judgments of courts where they have pointed out that being elected to a position or being appointed to a public office, a senior public servant or whatever, involves a level of public trust. So you take on responsibility to the public when you are appointed or elected to those positions and the courts have said you must exercise that trust with fidelity. So you must be faithful to the public and you must act in the public interest and that doctrine flows through all levels of law. So it flows through even to the criminal law but it also, as Joe would be much more of an expert on, flows through to other aspects of, you know, tort and equity and all those sorts of things. The notion of public trust in law is a very important one, but basically it's saying to politicians that you're not there for your own interest, you are only there to fulfil the public interest, and courts recognise that when they apply the law in relation to politicians and public servants.

MR O'BRIEN: So public trust and public interest go hand in hand?

PROFESSOR TWOMEY: They do. I don't know whether, Joe, you want to add to that.

PROFESSOR CAMPBELL: Well, I think that in understanding the notion of public trust, a bit of legal history is helpful. The notion of a trust in relation to public officers is one that feeds on the notion of a trust in private law. In private law you're familiar with the notion that one person can hold property on trust for another, and when one person holds property on trust for another then that imposes huge limitations on what the person who holds the property can do in relation to the property that he is the legal owner of. In particular, he must not obtain any benefit for himself and he always has to exercise any powers that he's given for the purposes for which they were conferred. And historically the notion of this private trust developed in the late 17th century and it was by drawing on that that the notion of public trust came to be applied in the public sphere, and what is involved in public trust has got concepts that are very closely analogous to those that apply to public trust, to private trusts rather. You must not exercise powers for any purpose other than that for which they were conferred. You must not seek to benefit yourself in any way by the exercise of the powers.

MR O'BRIEN: So just quickly, for both Joe and Anne, the question of public trust is one that broadly you might say is a bit amorphous, but are you both saying that in legal terms public trust is a well-defined term that, I mean is it hard to establish in a court of law?

PROFESSOR CAMPBELL: What is meant by it has got a long legal history.

MR O'BRIEN: We're not going to go there.

PROFESSOR TWOMEY: No.

PROFESSOR CAMPBELL: No. But that - - -

MR O'BRIEN: But I mean let's take the perspective – yeah.

PROFESSOR CAMPBELL: That lets you know what a person who has an obligation of public trust can and can't do.

MR O'BRIEN: Okay. So - - -

DR LONGSTAFF: Can I just ask why it's so apparently so not understood. If it's got such a long history why is it not understood by people exercising public power?

PROFESSOR CAMPBELL: I have no idea.

COMMISSIONER HALL: I think we can say this, though, it does reach back through the centuries. I'm talking now about the 17th century and beyond but it seemed to then die out. It became what Paul Finn called The Forgotten Trust and it was Paul Finn, who was a very imminent professor of law at ANU, later a judge of the Federal Court, he personally was the one to resuscitate this doctrine, which is ages old, the public trust, and he is really the pioneer again to ensure that it is front and centre of a public office. And when we're talking about obligations and fiduciary duties and so on, this is all part of the public trust obligation. His writings are extensive, beautifully written and they have influenced the development of the law since. I think everyone here probably would agree with that. And the public trust, it's not so much being able to define it but to recognise it goes with the territory, with all political public office.

PROFESSOR BROWN: Kerry, if I can chime in. I think what's really interesting about this and why it's so reassuring, every time we remind ourselves that the concept of public trust is so well embedded in our law and is so available, shock horror to some politicians, to actually rein in some of the behaviour where we're talking about here, is that in some societies more than others, but certainly in our society, this concept is actually well understood and expected by the community. And if you go to something like Transparency International's definition of corruption, which is not a legal definition, it's a holistic definition if you like, which is simply that corruption is the abuse of entrusted power for private or political gain, then that concept that, we're talking about public resources, we're talking about a community, we're talking about the fact that these people have been elected to serve the community and that with that goes a public trust and we expect to see that trust honoured and when it's breached we start to recognise it. And I think that's why we are having this conversation now is because of the extent to which not only the Auditor-General in New South Wales or federally has done a fantastic job of actually pointing out the extent to which normal systems have broken down or been sidelined, and I think Anne did a bit of a service to describing something like the Stronger Communities Fund in New South Wales, describing public administration as having been broken down. I don't think there was any public administration. I think there was just political administration involved in that.

PROFESSOR TWOMEY: Yes.

PROFESSOR BROWN: Whereas at least when you see that there's a tension between what the public administration is producing and what the politicians are doing you've got, you know, you've got direct evidence of a clash there, you can see that something is going wrong. But I think the reason why we're, I think the reason why the community, why it's so important that the Auditor-Generals have done such a good job of revealing the extent of this sort of collapse in what we typically regard as due process to support the discharge of public trust goes way beyond the type of significance that might come from what, you know, what we're describing as being the solutions here.

It's very easy for a politician to listen to this and hear, and we'll talk more about the reforms later as you said, but to hear, okay, all we've got to do is make sure we get the criteria right and we keep the records. Okay, that's what we'll do. But the reason, in fact what's been exposed is much more significant than simply that sort of interpretation of the solutions would suggest because what's been exposed is, and this goes back to what I was saying earlier, is pork barrelling, and I'm quite happy to accept the pejorative definition of that, on an industrial scale and increasingly in the last few years on an industrial scale such as we've never seen before, both at a state level and a federal level. And I think it's the extent to which these programs have transmogrified from once upon a time it was okay, a little bit of pork barrelling at the electorate level, you expect that. That's really what I was referring to before. But this system-wide, government-wide industrial scale pork barrelling is where we've clearly seen, you know, the evidence that we've gone way down a slippery slope that the public is recognising is causing them, causing enormous amounts of concern.

MR O'BRIEN: Now, I'm going to come to Ian first.

MR GOODWIN: Thanks. I just wanted to pick up on that term public trust and part of, it's so important embedded within that is public interest.

MR O'BRIEN: Yes.

MR GOODWIN: And I would just recognise that the concept of public interest over private interest is not absent in New South Wales legislation. So section 3.7 of the Government Finance Act and section 7 of the Government Sector Employment Act does lay out that a public servant in execution of their duties should place public interest over personal interest

as well as upholding, you know, the law and provide apolitical and impartial advice. The reason I draw that out is just to say that it's not absent but one of the key findings in the Auditor-General's audit was that the public service, which is the system that we audit, could have done better to provide advice to ministers on the deficiencies in the design and administration of those respective programs and provide advice on the merits of the projects they received. So there is a recognition of public interest is there but the learning, because not only do our audits call things out but there are learnings but the learnings is the public service and the public servants have responsibility to provide advice on these matters, you know, where you can have a question around whether the public interest has been served.

MR O'BRIEN: And of course, I mean this is a personal observation on my part but the public service of today generally around Australia is a very different animal to the public service of 20 or 30 or 40 or 50 years ago and the kinds of processes of integrity that were kind of a given in those times. We have a circumstance today where it is possible that a public servant is acting on signals and assumptions of what the minister wants rather than necessarily on the kinds of standards that we might be talking about here.

MR GOODWIN: And just to - - -

MR O'BRIEN: I'm not referring that to any specific case.

MR GOODWIN: Yeah. And just, I mean the job of a public servant is a difficult job and the other thing I'll just point out is what is in the Government Sector Employment Act. There's also a very clear statement that apart from doing work on a merit basis, a political basis, the public service is there to implement the decisions of the government for the day. And so there is a tension there.

MR O'BRIEN: Yeah. Now, I want to keep this moving, Simon, but just quickly, yeah.

DR LONGSTAFF: Well, I want to go just to some of the philosophical stuff around the public interest and duty as well but perhaps just by way of an anecdote first if I may, just to partly answer the question. I was sitting with a New South Wales Government minister, whom I won't name, some years ago and this person was telling me with considerable pride that they had finally achieved their goal in which every person in New South Wales was now a customer of the government, and big beaming face and thought

that I was going to be saying oh, well done. And I was absolutely appalled because I said to this person, I said, "Well, that's terrible." He said, "Why?" I said, "Because I'm not a customer, I'm a citizen." And the minister said, "Well, what's the difference?"

Now, that chilled me to the bone because if you understand political theory, political philosophy the way that we distinguish between political systems is according to where authority ultimately is located. So in a theocracy the ultimate source of authority is in God, in a plutocracy it's the wealthy, in an aristocracy it's supposed to be the virtuous, but in a democracy the ultimate source of authority lies in the persons of the governed, the people. And so this is what I was saying about the implications of democracy itself. If you actually spend any time trying to understand what it actually is as a political system, then apart from the very honourable legal traditions which were being discussed before, it is in the heart of what a democracy is that you can only act in a disinterested way for the sake of all because there's no way to distinguish between who counts or doesn't count within that because all the governed are standing equal amongst others.

And then there are issues to do with consent and other things which we might get to later and how that can be corrupted. But it's that basic idea and the failure I think maybe, Joe, when I was asking, wondering aloud why don't they get it? Maybe it's because they've forgotten that their relationship as a government to the citizens is around a duty owed to those who ultimately guarantee the authority that they then exercise and they've forgotten it.

MR O'BRIEN: Yes, Anne.

PROFESSOR TWOMEY: So, yes, I just wanted to add to that point and what Kerry raised before which is why don't the politicians understand this point. And I think that's a really important issue because there is insufficient education of members of parliament and ministers as to their roles and the limits on them. Members of parliament and ministers don't get educated in any formal way in relation to their roles. They get educated by an apprenticeship basis, and in that apprenticeship basis that's where they learn about pork barrelling and all those sorts of things and it becomes totally normalised. If you speak to members of parliament about this sort of thing, they think that people like me are completely crazy and unrealistic, et cetera, because this is just the way it is, this is normal, this is how it operates. But it's because they have been acclimatised and accustomised to

that through working in the political system and being apprenticed to it. No one has actually ever taught them things like administrative law and what the limits are on ministerial powers and how decisions are supposed to be made and all those sorts of things. They honestly don't know. And more to the point, it's the ministerial advisers in their office that don't know, again, that work through the political system but are not properly educated in what these limits are on their powers.

MR O'BRIEN: But they have a Ministerial Code of Conduct and I would have thought that it would be explicitly expected not just for the minister to understand the ministerial conduct but the senior staff around the minister to understand ministerial – so how does the - - -

PROFESSOR TWOMEY: The Ministerial Codes of Conduct are, frankly, useless. I mean, let's just be clear about this. They are deliberately written - - -

MR O'BRIEN: Don't disillusion me, completely, Anne. I want to cling to something.

PROFESSOR TWOMEY: Well, they are deliberately written to allow as much misbehaviour as you can possibly get away with. Here is something I probably should not admit publicly, but I'm going to do it anyway, when I did work in the New South Wales public service, there was a point at which we were, I was – the Legal Branch I ran was tasked with forming a code of conduct, and we formed a beautiful one on the basis of best practice, and it went to Cabinet, and I got called up to the Cabinet door and they said, "No, we're not doing any of that. Stand there and I'll read out to you what the code of conduct is going to say." And it was just dictated to me from the Cabinet room. They didn't want proper rules and restrictions on their powers in the code of conduct at all. They deliberately put in a provision in there about how wonderful parliamentary parties are and that you can't be sort of limited from doing things in that way.

MR O'BRIEN: Well, the preamble to the Ministerial Code of Conduct says that "Ministers have a responsibility to maintain the public trust by performing their duties with honesty and integrity in compliance with the rule of law and to advance the common good of the people." I would have thought, I mean maybe there's lots of caveats underneath there.

PROFESSOR TWOMEY: No, but look where it is, Kerry. Look where it is. It's in the preamble. So they deliberately put it so that it looks like it's doing something, but it's not something they have to comply with.

MR O'BRIEN: Okay.

PROFESSOR TWOMEY: They put it in the preamble so they don't need to.

MR O'BRIEN: Although I think the law does occasionally take preambles into account, doesn't it? Anyway, to what extent – I've got to keep this moving – but to what extent do a minister's powers come under administrative law? I know you sort of passed through it, but the key fundamentals.

PROFESSOR TWOMEY: Well, look, the real issue here is, and this is a particular problem in New South Wales, is it's very clear when it comes to statutory powers. So where a minister is exercising a power that has a statutory source, there are obviously purposes for the powers, there are restrictions on the powers, and administrative law will clearly apply so that you can't exercise the power for an improper purpose or take into account irrelevant considerations. You have to take into account the relevant considerations. You can't act in a biased manner. It does get more murky, however, once you move out of statutory powers and into non-statutory executive power, and there is a deal of uncertainty there as to the extent to which these administrative law rules apply, and that's one of the reasons that I would strongly suggest that with all these grant schemes in New South Wales, we should move to a statutory basis for them so we can see that there is a particular proper purpose for this power, and if it's being exercised in a way that's not consistent with that power, then we can see that it's being exercised partially and all the consequences flow through. Now, at the Commonwealth level, the High Court has sort of resolved that problem because the High Court said in a case that at the Commonwealth level you have to have statutory authorisation for all government expenditure in grants, right. So at the Commonwealth level they're forced to do that. At the state level, no one's forcing them to do that. And that would be one of the things I think that would be really helpful in cleaning up the system, because the administrative law system works more clearly when it comes to dealing with powers that have a statutory source.

MR O'BRIEN: Joe, do you have anything additional on that or are you in agreement with Anne?

PROFESSOR CAMPBELL: I didn't want to add anything to what Anne had said, but I wanted to come back on something Peter had said about where the notion of public interest comes from. While it's true that what Paul Finn has written has been very important in reminding people about the notion of there being public interest responsibilities of people who exercise public power, there are two High Court cases in the 1920s that quite clearly say this is the law in Australia, and as a matter of precedent you've just got to continue to apply those cases.

MR O'BRIEN: Okay. I'm going to keep going through, so we've got administrative law, we've got common law, we've got the statutes and we've got ICAC's, the legislation that governs ICAC in terms of propriety generally. So where does common law sit in all of this? Again, Anne, I'll just stay with you for a minute.

PROFESSOR TWOMEY: So common law is judge-made law. It's law that has existed for an awfully long time and has been developed over time by courts. So the key one here is the common law offence of misconduct in public office. Again, this was something that wasn't really well known and certainly not by politicians, and became a lot better known once we had some ICAC inquiries that led to prosecutions of people like Eddie Obeid. So misconduct in public office has now had a lot more litigation about it as a consequence of that ICAC investigation. What's interesting is because there have been few cases about it, and because it is a common law doctrine, it does, the cases all reflect how it's been developed in other common law jurisdictions. So if you look at our jurisprudence, we'll be looking at, for example, what the Hong Kong Court of Final Appeal said, and that's partly because the judge there who developed it was Sir Anthony Mason, our former Chief Justice, while sitting on the Hong Kong Court of Final Appeal. You'll see Canadian decisions. You'll see UK decisions. So there is this commonality around the common law world about what is the test that applies to misconduct in public office. And over time that has developed and it has now become a lot clearer and more certain in the very recent cases, so the ones about Eddie Obeid and Maitland and Macdonald and the rest of it. So it's the common law offence is an important one that deals with partial conduct and breach of public trust and all those sorts of things that we're talking about today.

MR O'BRIEN: Okay. So how would you apply common law to the, broadly speaking, to pork barrelling?

PROFESSOR TWOMEY: Well, it certainly can apply to it. There's a couple of aspects to it, though, that need to be taken into account. So there's one aspect is that it has to be wilful, so there has to be an intention to behave in a way that you know is unlawful and that sometimes there's a difficulty when politicians say that they don't know what's going on, and hence that quote I gave from Chief Justice Bathurst about Eddie Obeid saying that he must have known that what he was doing was wrong. And you can sometimes have good evidence that they know, like when they destroy all the documents, it's usually a fairly good sign. But the other thing is that it needs to have, it needs to be, meet a fairly high hurdle of egregious conduct because they say it needs to be something or other that actually deserves to be treated as criminal in nature. And so that's the bit where, you know, there really is a level of discretion and uncertainty about it. It actually has to be quite serious behaviour. But what's interesting is if you match that with what the ICAC Act says as well. The ICAC Act also has a provision in there that says they can't make findings of corrupt conduct unless it's a serious matter. So that notion of seriousness falls in there as well. It's not the trivial stuff, it's the serious stuff. Sort of thing that you can be convicted and sent to jail for. Has to be quite serious.

MR O'BRIEN: So before I come to you, Peter, I just want to finish this off with Anne. So come to ICAC's powers under the legislation with regard to ministerial conduct. How broad are ICAC's powers?

PROFESSOR TWOMEY: Well, we have seen that there are many technicalities about them. So we saw that both in the Greiner case and the Cunneen case as well, so you can trip over the technicalities. But on the whole they're pretty wide. So, for example, it refers to behaving in a dishonest or partial manner in the exercise of official functions. That's one aspect of it. Breaches of public trust is another. And also committing the offence of misconduct in public office also triggers it. But the technicality with ICAC is there's two elements you have to deal with, so the first is doing those things, the breach of public trust or the behaving impartially and – so behaving in a partial manner in exercising of functions, et cetera, and then you get to the second level, which is really dealing with the seriousness aspect of it, and there you either have to have committed a criminal offence or had a serious breach of a code of conduct if you're a politician, or if you're a public servant you can also be caught there if it's a matter that's

disciplinary, would lead, give rise to disciplinary conduct against you, or indeed if it was effectively a sackable offence. There's also the provision that I mentioned to you before that even if you don't satisfy any of those but your conduct would lead a reasonable person to believe that you had brought your office or the parliament itself into serious disrepute, you can again be found to be having committed corrupt conduct, but only if you can identify a law that has been breached. That doesn't have to be a criminal law, it could be any type of law, but you do need a law.

MR O'BRIEN: Okay, and the final piece of this thread before I come to Peter, and I'm asking you rather than Peter because he may not want to go to this one himself, and this is not relating to any of the matters that we've talked about, but this is more general. If a minister goes outside the guidelines for establishing who gets grants under a particular scheme, arguably hijacks the process to favour some electorates for party political gain, and in the process of course protect their own jobs and seeks to hide or cover up that process and breaks their code of conduct, how serious a breach of the law would that be?

PROFESSOR TWOMEY: Well, as always, depends on the circumstances and it also depends on the evidence that you would have to be able to establish any of that. But that kind of behaviour could amount to corrupt conduct under the ICAC code, particularly if there was a serious breach of the Ministerial Code of Conduct. And could even possibly amount to an offence of misconduct in public office if it was prosecuted at the criminal level, but you'd have to reach that, that hurdle that I mentioned to you before of being the type of conduct that would justify criminal convictions. So it would depend on the nature of the conduct involved. But those two things are possibilities. Now, look, it doesn't happen very often in Australia that these sorts of things are prosecuted, but we have seen in more recent times with ICAC prosecutions have occurred in relation to a number of politicians who have ended up actually in jail from this Parliament. And so I think we've seen an increasing appetite in integrity agencies and, indeed, in prosecution agencies to take this sort of conduct more seriously than they have before, so politicians should be a bit more worried than they used to be.

DR LONGSTAFF: Can I just ask a question for clarification?

MR O'BRIEN: Just quickly.

DR LONGSTAFF: Just very briefly. Ministerial advisers, are they covered? Is the action of a ministerial adviser deemed to be the action of the minister? Or if they're doing things between, say, the public service and the minister, does it completely fall outside those legal requirements?

PROFESSOR TWOMEY: It gets quite complicated. They have their own legislation that governs their activities. They also have their own separate code of conduct, so there is a separate code of conduct that deals with ministerial advisers, and there's an obligation under that code of conduct, by the way, interestingly, to obey things like premier's memoranda, which actually curiously doesn't appear in any of the other codes of conduct, so why the ministerial advisers get that one and the others don't is beyond my comprehension. But anyway, it is quite interesting. There are sort of separate rules in relation to them.

MR O'BRIEN: Now, Peter?

COMMISSIONER HALL: Kerry, just a few things. You spoke about public trust and common law so far as the ICAC is concerned. The term or expression "public trust" is in fact, of course, found embedded in our Act, in the ICAC Act, in different places. So by doing that it doesn't import the common law but it reflects the common law. So again referring to the doyen Paul Finn in this area, he went back into the old cases and said, well, what is a breach of public trust or public office? And he examined the historical case law in which it's – he said it's dishonesty, obviously, it involves dishonesty. It can involve partisan conduct. And it can involve conduct such as oppression. Now, all of that still lives today. If a public official is dishonest, if he's wilfully partial in, in certain matters, or if they act in an oppressive way, all of that common law is in fact embedded into the notion of corrupt conduct through the definition of the Act. I'll just pick out one strand of that, and that is oppression. What happens if a minister, in fact, directs the public sector staff or employees to get that money out the door? The employees are usually well trained in grant administration, and this happens, circumstances like this happened recently. So the minister directs, in effect, "Get the money out the door." They know it should have gone through a proper process, that is the public sector staff, it has to go through a selection process and so on and so forth. But they know in a particular case that hasn't happened, and they are bound, as has been mentioned here, under the – Ian's referred to two pieces of legislation – whereby they are bound to ensure efficiency, ethical and sound administration. That is the statutory value which binds them in their daily

work. But what do they do? Do they say, go to the minister and say, "No, I'm not going to do that. I'm not going to do that"? Well, they've got a choice. They're between a rock and a hard place. Either they succeed in their opposition to this ministerial directive, or they'll be walking out the door and that's goodbye to their job. I would regard that as oppression. It's putting the public sector employee into an impossible position, virtually.

Now, that of itself could constitute, in my view, improper conduct, constituting oppression, constituting corrupt conduct by a minister. Leave to one side for the moment all about the decision-making around the grant. That too could create the notion of improper conduct. I think some of the reforms that are now proposed by the Productivity Commissioner will help in addressing that issue, that ministers can't do that, should not do that, must not do that. And then there's the question that Anne's picked up on, well, how are we to state that reform. Is it to be an administrative instrument or should it be written into law? In my view, no doubt, no argument. It must be written into law to stop that sort of thing happening. It has happened. It shouldn't have happened. But whether that would be regarded as improper conduct by the staff member who buckles under pressure is an issue I won't bother addressing now. So that, yes, we do have a very broad jurisdiction, we have very extensive powers. Some of them, of course, we have to apply for warrants to exercise. These are the sort of powers and jurisdiction that is absolutely necessary if we are to be an effective agency for enforcement of the public trust and obligations that go with it.

Don't want to get dragged into the federal debate and argument, but these powers that the Commission holds, they are, can be extremely intrusive. For example, telephone interception powers and so on under a warrant. But I can assure members of the public that the protocols, the procedures, the processes within the Independent Commission Against Corruption that regulate the use of those powers is extremely robust and extremely accountable, so that - - -

MR O'BRIEN: And, sorry, who are you accountable to, Peter? You're accountable back to the parliament?

COMMISSIONER HALL: We are accountable at three levels, firstly to the inspector, Bruce McClintock, who was here a moment ago. Secondly, to the Parliamentary Oversight Committee. And, thirdly, to the parliament ultimately. They do write reports. I get complaints from people. They've got to write up, was this complaint justified, was this a proper use of power.

I can say, fortunately, we haven't had many challenges since I've been Chief Commissioner, and I don't think historically there has been many, if any. But it's just a testament to the fact that a well-run organisation has to be accountable, must have oversight, must have to give account if somebody does challenge. So perhaps straying off the point a bit, but I think that, yes, the jurisdiction is adequate, the powers are not only adequate but also necessary. Anything less than that is very difficult to find the truth in a corrupt conduct case which has to go back over the past trying to recreate what happened because people don't leave records. It is a secretive activity and so on. So these powers are necessary. If we want the public trust to stand for what it is, you do need to have an enforcement process. Now, just going back very quickly, Anne, has referred to the Commonwealth legislation which is I think something of a model for us in this reform process, which does have a lot of good statutory provisions in place. But what they don't have is an ICAC or an ICAC-like body to act as enforcement. In New South Wales we have the ICAC enforcement scenario but we don't have written into law as in federal legislation what needs to be put in place. And that's, I think, Anne's point, it must be at least of the standard federal legislative prescription of safeguards and nothing less will satisfy.

MR O'BRIEN: Now, in the interests of keeping going and getting through all of the key points that I wanted today. I'm going to, AJ Brown, hear what you want to say and also Joe and then we'll move onto our next stage. Yep.

PROFESSOR BROWN: I was just going to say very quickly that, there's part of the answer to the situation of those public servants who are put in that oppressive situation is reinforces the importance of strong and effective whistleblower protection laws and public interest disclosure regime, which Joe's paper refers to. So that at least those people, even if they just go, they go ahead and they do it. They can actually trigger the response from the system. But going back - - -

MR O'BRIEN: AJ, here's the other side of that coin. Until proper protection, is absolutely enshrined and guaranteed of whistleblowers, if somebody came to me and said that they had something serious that they wanted to blow the whistle on, I would feel absolutely obliged to point out to that person the lives that have been destroyed by whistleblowers in the past in many instances.

PROFESSOR BROWN: Yeah.

MR O'BRIEN: And it's a disgrace to our system.

PROFESSOR BROWN: Yeah, and I couldn't agree with you more, which just increases the obligation both on government but on the integrity agencies to actually pursue and get in place regimes of real protection and that's relevant across the states and the federal level. But getting back to your main point about what are the fundamental legal weapons that we've got to fight here, fight pork barrelling with here. There's another one which Joe explains well in his paper, which is the offence of electoral bribery. And Joe explains in his paper that the way that that offence is written is, you know, is currently written in a way which doesn't allow us necessarily to be able to clearly identify where effectively what is happening is vote buying, it's bribery. And it's excluded from the offence or is easily defended from the way that the offences are written. And that's something else that needs to be rectified. But, I guess, the reason why I think it's really important to recognise that's how serious this is. It's not just a matter of bad record keeping. It's not just a matter of a lack of transparency or trying to do things too fast or whatever. And I think we have to recognise that this is part of why this is such a serious issue. And how, and again, putting it from an international perspective how close we're now coming in this industrial scale type of pork barrelling to the type of electoral bribery that in other countries is rife and completely undermines and destroys their democracy. We would presume that that could never ever happen in Australia. And yet, in fact, many of these schemes are a hair's breadth away from it and in fact the public perceive it.

When we did some research in 2018 before these, all these schemes started to come to light and achieve the prominence that they did, we had half of Australian citizens saying that they actually believe that electoral bribery, actual vote buying, people basically getting money in order to vote in a particular way. It happens at least occasionally and 25 per cent of people saying they think it happens frequently. What are they referring to? They're referring to pork barrelling. And there are examples of schemes, and this may be what was effectively happening behind some of the schemes we're talking about here where the documentation doesn't exist. We know of the scheme in Tasmania in the 2018 state election where the government shocked itself. And I think, out of fairness to politicians, we've generalised a lot about politicians. The fact is there are some politicians who really don't get this. But there are other politicians who simply lack the support of the system in order to be able to navigate it. In Tasmania, the

government decided they would create a fund, an election re-election fund, a grant program, a pork barrelling scheme. Said to their members, go out and find people to give money to. Go out and ring people and say, "Do you want a grant here?" So government members were going out ringing community groups in their electorates saying, "We've got some money here like we want to give it to people to help make sure they vote for us. Can I give you some money?" That is literally what was happening.

MR O'BRIEN: Cathy McGowan who was former member for Indi told me when she was in the parliament and she was rung up by a local sport's club and asked if she was coming to the minister's announcement of a grant that they were getting in the next week or so. And she said, "What grant? I know nothing about it." And the reply was, "Well, neither did we."

PROFESSOR BROWN: Yep, exactly.

MR O'BRIEN: In fact, they were rung up and told they were getting it.

PROFESSOR BROWN: Yeah. So exactly. So that's why we've really moved into the realms of electoral bribery and that's how serious and dangerous it is. And I think in Tasmania unfortunately the Tasmanian Integrity Commission commenced an investigation into this and for various reasons, including the legal blowback from people suddenly realising that this was potentially electoral bribery. Unfortunately that investigation effectively had to be shutdown. But the key - - -

DR LONGSTAFF: But the other half of this is you won't get it if you don't vote for us.

PROFESSOR BROWN: Exactly. And, again, I don't want to say that there aren't problems in our political culture because, I mean, even the then Prime Minister Scott Morrison in Brisbane, just in this election campaign, when the latest evidence of the extent of pork barrelling was revealed in terms of grant distribution says, "Yes, that's why you vote for us. Good local members get money for people, you know, we give money to people in our community, so that's why you vote for Coalition members because we will get you money." And so I mean, I safely interpreted from that that former Prime Minister Scott Morrison was one individual who didn't get it but there's - - -

MR O'BRIEN: If he was here, in fairness to him, perhaps he would argue that it would be money that was going to be spent in such a way that it was beneficial to - - -

PROFESSOR BROWN: Absolutely. Of course.

MR O'BRIEN: Yeah.

PROFESSOR BROWN: And I guess that goes back - - -

MR O'BRIEN: Not just the individual.

PROFESSOR BROWN: - - - to my original point about this needing to be realistic in terms of the political landscape but I also want to reinforce, I guess, that especially local members who are legitimately trying to get access to government resources to serve their community need the support of better codes of conduct that are then enforced, need the support of better rules that are then better enforced and probably need a bit of better leadership. And then they would be blessed to say, thank God, we've got a mechanism, you know, we've got a framework within which we can work here where we're not being compromised and we don't suddenly feel incredibly uncomfortable because what we just realised we just did was ring up and offer people money to vote for us, which is what happens, I think is a bit of what's been happening and certainly appears to be what happened in Tasmania.

MR O'BRIEN: Now, Joe.

PROFESSOR CAMPBELL: There's an additional wrinkle to what Peter was saying about the near impossible situation that a public servant can be put into when he or she is instructed to take part in a pork barrelling scheme and that arises under section 316 of the Crimes Act. What that section does is to create a positive obligation on anyone who knows or believes that a serious, indictable offence has taken place to report it to a member of the police or another appropriate authority. And so there, the public servant would be at risk of being prosecuted for this offence of concealing the pork barrelling that was going on. It's an impossible collection of laws.

MR O'BRIEN: Ian.

MR GOODWIN: Absolute agreement with all of what my colleague is saying. And what I'm about to say might be a bit odd for an auditor to say or Deputy Auditor-General but - - -

MR O'BRIEN: Feel free.

MR GOODWIN: - - - I do have to sort of give an optimistic view, as well. And the optimistic view is, you know, as the Audit Office, obviously we're auditing the entirety of the NSW Government. And we're having a very focused discussion on a particular grant or two particular grant programs where the public service could have done a better job, there was a deterioration perhaps of standards. But that's not the entirety of the public service. And it's an interesting question as to why we did do that audit. And, you know, we have a very thorough, risk-based approach in the selection of audits but this one did come to our attention through a range of means. And without going into the detail of those range of means, it does speak to the fact that the system does have the ability to identify red flags. It doesn't excuse what happened but I guess the comfort I take is that the system actually identified and there was an integrity agency in the Auditor-General to be able to respond. There was another integrity agency in terms of the ICAC to respond in its own lane. And the report is published to the parliament. And now we do have a piece of work that advances, well, perhaps public administration and we're having this conversation. And this conversation should serve not only read in build general support but this conversation should serve as, I hope, a very good reminder to public servants around their roles and responsibilities. But I do have to sort of say I remain an optimist because this audit did come to us, not by luck but by elements of the system working to, you know, identify areas where you do need to look.

PROFESSOR BROWN: Ian can neither confirm nor deny but I interpret that as saying that there were whistleblowers involved and I would say again that's a reason to be, as there usually is in these situations. And, I mean, like Ian, I would say that irrespective of the challenges of that, that's one of the reasons to be optimistic is the fact that we do still have public servants who are professional, who will actually draw attention to these things that are going wrong and provide the trigger or provide one of the triggers for making sure that these things won't go uncorrected.

COMMISSIONER HALL: Kerry, could I just make one – sorry, AJ – point? It is absolutely important to have those public sector employees that

Ian's referred to to act in a competent and ethical way. They are, after all, in a sense the gatekeepers. And I'm confident that by far the majority of them actually do their work extremely well but we can't - - -

MR GOODWIN: I would agree.

COMMISSIONER HALL: Thanks, Ian. We can't get away from the fact because it is a fact that most of the big problems with some of the more significant pork barrelling exercises that we've been discussing hasn't come from the public sector level, that is it's not some breach of duty or some negligence at the bureaucratic level, public sector level. The problem in all the cases we've been discussing has come from the ministerial level. And that is why I think what Anne has been alluding and will address in the next and final segment that there's got to be a statutory regime by which not only the public sector employees but the ministers of the Crown are obliged to act in accordance with law, not in accordance with some administrative process. Until we get to that stage, we will not solve the problem of pork barrelling. And having said that, we recognise immediately that this does not mean that we place fetters and unrealistic restrictions on politicians. They have their important role to play. There is some leeway as I - - -

MR O'BRIEN: And, sorry, Peter. And they are the elected members of parliament. They are elected.

COMMISSIONER HALL: Indeed. They've got to represent their constituents and I would think most of them do a very good job. But it is important to realise that the balance that has to be struck is at centre, front of mind all the time. We are not here to avoid real politic. The real politic, of course, is part of the democratic process. But it's a question of, as has been said here, for the law to be formulated in a way which everybody can read for themselves and understand, they don't have to go back into the law books to work out public trust obligations and how courts have applied it, the statute will speak, will make it clear and I'm confident that the standards both at the ministerial level and otherwise will be significantly lifted and safeguarded.

MR O'BRIEN: Okay. Now, that's where we're going to leave the conversation for the moment because we're going to have a short break of half an hour and return at 12.30 where we're going to look at part 2 of your paper, Anne, and particularly, we're going to chase the rabbit further down the burrow about the exercise of power for party political advantage as

opposed to the advantage of an individual. We're also going to take a closer look at that Productivity Commission and Premier's Department review of the grants processes, to look at those areas where at least some of you, I think, still regard as deficient and then we're going to look at ways we could reform the system, further ways we can reform the system. So thanks for the conversation so far and we'll be back in half an hour.

SHORT ADJOURNMENT

MR O'BRIEN: Okay. We're just going to pick up where we left off, basically. We've covered a lot of ground this morning and it was a nice, free-flowing conversation mostly that I think delivered a lot of food for thought for a lot of people out there. So I want to touch briefly on one aspect that relates back to what we have been talking about so far in terms of the exercise of power and that is differentiating between the exercise of power for party political advantage, in other words, for a political party as opposed to an individual. Anne, I will start with you but to what extent is that an issue legally? How clearly can you link the two in this case?

PROFESSOR TWOMEY: Most of the cases, as I said, are directed at private interests, so particular personal ones. There are a few cases that went beyond that. So the one in the UK, for example. And I think the main reason why it hasn't actually been something that's been prosecuted is that it's actually very difficult to prove that things have been done for party political interests and maybe also there's been a lack of will to prosecute these sorts of things because the borderline between politics and political parties is a very unclear one, so when people do go out to prosecute politicians for these sorts of things, they want to do it only when there's a very clear case because otherwise it's seen to be some kind of partisan attack. So there isn't a lot of authority on it but there's enough authority from judges to say that if you are doing something for a purpose other than the proper purpose that the power was conferred for, and that includes doing it for a party political purpose, then it can amount to misconduct in public office, it can amount to corruption. It might be difficult to prove but nonetheless, it's no excuse to say that you were just doing it for a political party purpose and therefore that's okay. That's not the right answer.

MR O'BRIEN: There's also, I mean, you know, complexity on complexity, but any individual politician who is on the one hand hopefully there to serve

the public, on the other hand, it's also their career and it's their livelihood, and if you are a junior minister on your way to becoming a senior minister or you are a minister with pretensions to becoming a premier or a prime minister, then in practically everything you do, there's a personal motive. Now, how do you differentiate there?

PROFESSOR TWOMEY: That's right. And so this comes down to mixed purposes and this is something that's addressed in the litigation. So one way of dealing with it is the "but for" test and so sometimes courts have said, well, if you wouldn't have done X, but for the benefit it was giving to your parliamentary party, then that's an example of circumstances where you've crossed the line. There will be many cases where you're doing things that are certainly in the public interest and are perfectly acceptable because they're in the public interest and you're hoping to get a benefit because the community will think you're good for doing it and vote for you. That's all fine. That's not a problem. But if you're doing it solely for political or even perhaps predominantly for political benefit and you wouldn't have done it but for the political benefit and it's being done for a purpose which is not the purpose for which the power was given, then that's the point at which you tip into the wrong side.

DR LONGSTAFF: I think there's another layer to this, too, and it's to do with the fact that everyone who enters into politics or enters the executive as a minister, each person does so on a voluntary basis. No one is conscripted into political life in this country. And when you do that, when you make that choice, you enter one branch of the professions. And there's two worlds that sit beside each other in Australia. There's the world of the market which licenses the pursuit of self-interest and the satisfactions of wants. So someone in a corner store, you walk in, buy a block of chocolate, all they want to know is can you pay for it. But there's another group of occupations which are in the professions which are exactly the opposite to that because they begin primarily with the subordination of self-interest because of duties you owe to others and which is about satisfying needs or interests rather than merely wants. So to go back to the person coming into the corner store, if they were to walk into their doctor's surgery and say, "I want a block of chocolate," and the doctor knows them to be a diabetic, he'd say, "No, I'm not going to do that. You can yell as much as you want but it's not in your interests that I do this."
Politicians, and why politics has always been considered the most noble calling of a citizen, at least traditionally, is because you make that choice to subordinate your self-interest and that of the party ahead of these other

obligations. So lawyers on this panel know they all have overriding obligations as officers to the court which comes before a duty to the client, to the profession and only at the bottom is their own self-interest. And maybe we need to recall through some of the educational programs that Anne was talking about the people coming in to understand that because I think that's another layer of what might, if you understood it properly, prevent you or help to guard against you taking decisions which are self-interested in the way that the professions have to formally deny.

PROFESSOR BROWN: There's another element which is really captured in the first part of Simon's definition, getting back to pork barrelling, which is that when we get back to pork barrelling, we're talking here about public resources versus political party or campaign resources. And we can actually separate those. And I guess that's where we can see, maybe in the past, we've allowed it to be quite murky, the use of ministerial staff or electorate office staff for party political purposes, the use of public money, postal allowances or whatever which are meant to be there for electorate information for campaign purposes. And we've been tightening up on that too slowly probably but things like the red shirts scandal in Victoria, you know, the use of electorate office staff for campaign purposes, some of these, you know, there should be a bit of a better debate in the media, I think, about, you know, the tactic of moving your electoral campaign launch as close as possible to the election as you can because up until that point, you can use public money as a government to support your campaign and the party money only has to kick in after that for travel, et cetera.

Those sorts of things I think, you know, it's starting to become clearer, there's a clearer debate about those things. And so I think that for individual parliamentarians and ministers, et cetera, we should be able to make it easier to say, right, you know, we draw a line here, these are public resources, not political party resources. And with that focus on resources, when it comes to pork barrelling I think you can start to say, well, this is why this not actually – and in an election campaign context, and I hope we might come back to that a little bit because that's the context in which a lot of this has got really odious and pernicious. You know, we tend to forget. We tend to treat the government as if it's the government spending this money in an election campaign. It's not. It's actually a political party that is actually promising this money but they're doing it with government money. So there's a real conflation there, which if we make it a very clear distinction between the party and the government, then actually it should become much easier to say, no, no, that's not on.

COMMISSIONER HALL: If I could just add something, if I may, to what Anne's spoken about, the mixed purposes and what AJ has just been referring to where you've got the political and the self-interest or political interest. It comes back I think to understanding where that line I referred to earlier is to be drawn. I've referred to, as he then was, Professor Paul Finn before and he is not only a great academic and/or a great judge, but he's a pragmatist. And in an article written by now present judge of the Supreme Court Stephen Gageler entitled The Equitable Duty of Loyalty in Public Office, Stephen Gageler quotes from one of Paul Finn's many works but it does show the practical side of politics is not lost on the doyen of this public trust concept, Paul Finn. I just briefly mention it because he puts it so well. He's talking about the public officers and what we expect of them and the standards that apply to them. And in doing so, he talks about the conflicts between duty and interest that can arise for a politician. So he says, well, the neutral public servant he's addressing in this example is a person one would imagine has all sorts of personal beliefs, he has biases, he has interests, he has preferences, he has associations. And how does he then subordinate some of these to the important public interest?

Well, as he puts it in exercising his "conscientious appreciation" of his duty to the public interest, as he said, talking about, in particular, appointed public servants, "the neutral public servant is not expected to be the neutered public servant". He says despite the law, then you expect that those influences in that person, biases and all the rest of it, are always going to affect his or her decision-making and you can't disembowel them of, you can't act on the basis that they are to be machine-like in terms of giving effect to the public interest. But what he really does, and this is I think another alternative to the dominant purpose test, which he says is that it's permissible or acceptable for a public officer to have some regard to perhaps political considerations provided, and this is the proviso that he emphasises, provided that the power that's to be exercised is being exercised in the public interest. If it has, in effect, as I said before, as a side wind, he can see this is going to be of some political benefit, that's okay. We are talking about human beings. Politicians are made up, like all of us, with all sorts of, as Paul Finn says, all sorts of things going through our mind and we get influenced by them in any, even our professional life, to some extent.

So I think I just wanted to say that in terms of making these judgment calls on what's acceptable and what's not, I think either the dominant purpose or the Paul Finn approach. You can have some regard to these things

provided, so long as that proviso is satisfied that it's definitely in the public interest, satisfies the public interest, then you can have some regard to other factors, yeah, this might be of some political benefit to the party. Well, that's all right. So I think, you know, we've got to temper all the principles in the way Paul Finn is suggesting here. That's just my point.

DR LONGSTAFF: As long as it's a contingent benefit (not transcribable)

COMMISSIONER HALL: Yes.

DR LONGSTAFF: Like, I mean, and I'm probably a bit more strict than you might, than might be – I mean, when you were on the bench you would have had lots of personal beliefs and proclivities but I bet you that they didn't come to bear in the judgment you exercised from there, because we are capable as human beings of suppressing those things to the point that our duty requires us to do, and I think that's the kind of standard we should expect from politicians too when they're exercising public power.

COMMISSIONER HALL: Well, the function of a judge is a bit different from politicians, of course, and so I guess you've got to – yeah.

DR LONGSTAFF: Well, both functions are exercised in the public interest.

COMMISSIONER HALL: That's for sure.

MR O'BRIEN: I want to, before we get on to looking a little closer at the Productivity Commissioner's review, I want to just touch on transparency for a few minutes, and its manipulation. AJ Brown, there was, there's one other case that was controversial that goes back to the Howard years, 2007, and their distribution of grants under what they called their Building Better Regions Fund, where a ministerial panel was established to determine funding approvals, and it was then claimed that Cabinet confidentiality applied to its deliberations. In other words, not Cabinet itself but a "panel" of Cabinet ministers were set up to look at this. This was a fund where in round 3 of the proposals 112 of the 330 projects approved were chosen by this ministerial panel against the department's recommendations, which had been merit-based. The minister's reasons for overturning the department's recommendations were redacted. So the transparency of that process was severely limited by claiming Cabinet confidentiality. To what extent do you think that the principle, is the principle of Cabinet confidentiality misused or abused by governments? We talk about commercial-in-confidence as

another way that governments will use to prevent access to information. To what extent is the principle misused or abused by governments in Australia to avoid transparency and public accountability?

PROFESSOR BROWN: Oh, to a significant degree, no question about it. And that, I mean that was an example, you know, an egregious example of basically, you know, where you can clearly identify Cabinet confidentiality as being totally inappropriate because it wasn't really deliberations of Cabinet, it was basically administrative, ministerial executive decision-making, which has to be transparent. And there are other examples. I can read Anne's mind, I mean - - -

PROFESSOR TWOMEY: National Cabinet, yes.

PROFESSOR BROWN: The outgoing government tried to claim that National Cabinet for the former COAGs meeting of states and Premiers was somehow a subcommittee of the Federal Cabinet, which is impossible constitutionally.

MR O'BRIEN: As they then proved over the course of the next two years.

PROFESSOR BROWN: Yeah, exactly, but tried to use Cabinet confidentiality to keep those proceedings secret. So there's no doubt that there's, that there is abuse there. And commercial-in-confidence in grants programs as well is used as a cloak, not just in commercial dealings but in grants programs. So there's no doubt those are always really perennial problems and Cabinet-in-confidence is obviously used that way. It comes and goes, the extent to which it's badly used. But I guess, I mean, on your theme of - - -

MR O'BRIEN: Well, at the same time acknowledging that there is an argument for having confidentiality around sensitive policy that's being determined, where people can feel that they can speak without fear or favour, et cetera, et cetera. We all know the arguments. But there is some merit to the basic argument, if applied properly, isn't there?

PROFESSOR BROWN: Absolutely, yeah. I mean, there's no question about that. But on your theme of transparency, I think the key, and getting back to pork barrelling, I think one of the reasons why we, and when we really clearly know that pork barrelling is inappropriate is when transparency is being satisfied but not satisfied at the same time, because the

– and there's a conflict between what the public is being told and what the community is being told is the process and what actually happens. And the reason why that's so critical is that we have situations such as some of the cases that Ian's office has investigated, where there were no criteria, therefore there was no process, no proper process, so whatever they did was cowboy land anyway. But the key thing about something like the federal sports rorts grant which was different, because there was a public process, there was criteria. The problem – and the community was entitled to expect that that was followed. And if you applied for a grant, you were entitled to expect that it was followed. Where there was these, the breach of trust in that case was not how the money was allocated, it was in the fact that that was not the process that was actually used to make the decision. So there was actually – so getting back to whether or not that was actually political corruption, for example, I and we have been quite clear about saying, yep, that was political corruption. The reason why it was political corruption, if you apply our definition, abuse of entrusted power for private or political gain, was that the abuse of entrusted power was actually the fact that they made decisions on a different set of rules from the ones that they'd actually put out publicly as being the set of rules. That's the breach of trust and that's what corrodes public trust because that's what makes people think, yep, well, I'm never going to apply for a grant again because this is all rubbish. They're just going to give it to their mates, this is what's going to happen. So if I was in any doubt about it before, I'm no longer in any doubt about it now.

So the corrosive effect, I think as Anika Wells, the new Sports Minister, said this week, the problem with sports rorts was not only that it was potentially a waste of money, et cetera, et cetera, and all the things that Ian would be primarily concerned about, but I think her language was it was fractious for the community. It actually polarises the community. It's fundamentally corrupting of the way that democracy should work. So in that situation, in fact, that's an example where I'd go even stricter than Simon again because I'd say it didn't have to be a predominant purpose that that was done, that breach of trust was done for the purposes of some political gain. The fact that it was any purpose means that it was a breach of trust for an extraneous purpose, no matter how small that political purpose was. And that's the difference between what the Audit Office said, and then when the Secretary of Department of Prime Minister and Cabinet, as he was then, Phil Gaetjens, said, "Well, I've looked at this too and it doesn't matter that there was that political, that it had that political purpose in it because it had all these other good purposes." And the fact is that once that breach of

trust has actually occurred, which was in the dishonesty, once that breach of trust actually occurs, then if there's any extraneous purpose in there, it's corruption. So I think there are some circumstances where you would go even stricter and say a predominant, if it's, you know, it's not a matter of whether it was predominantly or principally for the purpose of political gain. If there was any extraneous purpose in there, it's contaminated in terms of its impact on public trust and the way our democracy should function.

MR O'BRIEN: Now, I'm going to come to Ian in a second but I just want to get a reaction from either Anne or Joe to what AJ has just said in terms of - - -

PROFESSOR CAMPBELL: One reaction is that it might be possible for there to be a civil law remedy in relation to this because there's a body of law that's grown up in relation to tendering that says that when either a government or any private organisation calls tenders and says they will be evaluated in accordance with criteria A, B, C and D and then goes ahead and does something completely different, a disappointed tenderer can sometimes successfully sue for breach of what is called a process contract. And that is a remedy that will be available in relation to applications for grants unless the government is then careful enough in its formulation of the criteria to say that there are no legal obligations going to arise out of these criteria that we are now announcing.

PROFESSOR TWOMEY: Yep, and just to add to that, I'm being told, although I don't know the details, but there is some kind of litigation to that effect going on at the moment.

PROFESSOR BROWN: The Wangaratta Tennis Club, I think.

PROFESSOR TWOMEY: I think there was a Beechworth one, but I think there's another proceeding as well, so - - -

MR O'BRIEN: So many to choose from.

PROFESSOR TWOMEY: There may well be litigation on that issue directly, yes.

COMMISSIONER HALL: There was one, just shortly, particular case I recall. It was in a regional area and the grant was a grant, it wasn't a huge

amount but it was one which was assessed on the basis of a proper assessment system, and there was a panel which the department of government established, independent panel. They came up with their short list, and there's, I think there was about 10 from recollection. The organisation that ranked number one on all the, they have a ranking criteria and so on, had something to do with the arts in this regional town. It was only a small town somewhere and I think it was linked to their library so it was a bit of a cultural centre. They came out hands-down winner on the panel's assessment. The relevant minister called to have a look at the outcome of the process, and fiddled with it a bit. The winner ended up getting knocked off, and some others, I've forgotten how many, ended up getting on the short list and they had not made the cut. The winner or the would-be winner, talking about disappointed tenderers, was absolutely devastated and ropeable. They knew they had won. And yet they had, they were off the list. And the disillusionment that that one little case feeds into what AJ was saying, that that destroys, just one little case like, it wasn't, as I say, a huge amount of money, I've forgotten how much it was, but it just absolutely destroys human faith in - - -

MR O'BRIEN: So if you're talking about a widespread application of pork barrelling, you are talking about a significant, potentially a significant contribution to the incremental corrosion or erosion of democracy.

COMMISSIONER HALL: Yes, yes.

DR LONGSTAFF: Corruption of democracy.

COMMISSIONER HALL: But just adding to that, I remember now, when I think about it, it did have a, I suppose you could say, a positive outcome because the person who replaced the winner had won it on the basis that they were now going to add a gym to the existing swimming pool. So there was a winner, I suppose, but it's certainly nothing to do with culture.

DR LONGSTAFF: There's a really important point about that, though, and this is again, sometimes the debate is skewed with this, those who defend these decisions will say, "Oh, but look at the positive outcomes," you know. Look, the truth of the matter is the positive outcome doesn't remedy the underlying wrong. If I - - -

MR O'BRIEN: The consequences.

DR LONGSTAFF: Yeah, if I come and steal your car and go and deliver a lot of packages of food to homeless people and things like that, the world might be better off but it doesn't undo the fact that I've taken your car without permission. And the same thing here is that, yes, there may be some good but the fundamental wrong which has just been alluded to here, and the corrupting effect that it has isn't offset by whatever good might be achieved, even an additional gym.

MR O'BRIEN: So coming back to transparency with you, Ian. How often is the work of the Audit Office hindered by lack of transparency?

PROFESSOR TWOMEY: Quite often.

MR O'BRIEN: Hang on, sorry. Ian I said.

PROFESSOR TWOMEY: Sorry. That's all right.

MR O'BRIEN: I'll come to you.

MR GOODWIN: It's a very good question. And I've got a couple of starting points. Margaret Crawford, as the Auditor-General, tabled a report on the 10th of February this year on the report to State Finances, where she made the point that the audit was frustrated around the timely provision of information to, in this case, the financial audit of the total state accounts. And there are various reasons that are called out in that report around that frustration of information. One of it, it does, I will touch on around Cabinet information. But the other point, before I get to that, is I'll just make a point around the legislative safeguards for Auditor-Generals, and those legislative safeguards are sort of grounded in what they call the inter-site principle, so this is the supreme organisation of auditor-generals at an international body, but they set out a series of principles, and one of those principles is unrestricted access to information. And every now and then, the Australian Council of Auditor-Generals do a survey and have a look at where their jurisdiction sits relative to the other jurisdictional peers in Australia and around those legislative safeguards, and this is done by Dr Robertson, and it was updated in 2020. So over a period of about 10 years, New South Wales in 2009 was ranked fifth in terms of legislative safeguards for the Auditor-General. The 2020 survey has New South Wales ranked eighth. And obviously there's been a slide in terms of the legislative safeguards, and one of those is around our ability to access information.

So turning to that report and State Finances, one of the frustrations was getting information that had been classified as Cabinet-in-confidence. So just in terms of how we audit, I mean, I always describe it in the most simplest terms. We audit advice to government, and then we audit the implementation of the decisions of government. We do have a respect around the Cabinet process, so the Cabinet process, which is where Cabinet ministers should be able to speak freely, but when they make their decision they speak as one. And that's sort of the principle around the Cabinet. I guess there's an observation I would make, is that over time there's been a bleaching of what is considered to be Cabinet, and in New South Wales it's somewhat complicated by the fact that the GIPA Act has a very wide description of what's Cabinet. And so we end up in debates – we, sorry, we have a process that we work constructively with the Department of Premier and Cabinet, where we can access information through, that is classified as Cabinet through eCabinet. There are restrictions around how we do that, but we do work that through. But I guess more recently there's a debate around emails, public service emails that are around the preparation of advice to government that have now been labelled as Cabinet, and we are now going through sometimes a fairly frustrating process to access that information. Now, going back to that survey - - -

MR O'BRIEN: Well, I was going to ask you whether you, whether that has the appearance of being a valid action that was taken to widen it out. Maybe I'm putting you on the spot.

MR GOODWIN: So I can't speak for why someone might do it, might interpret it as that. I mean, there are – going to Simon's sliding point, a point I accept, that public servants come to do their job with the best of intentions, and sometimes they do, through an email system. An email system requires them to classify is it official or is it Cabinet. So they do, because they're working on something for Cabinet, they might classify it as Cabinet. It becomes then difficult to then unravel that, but I would probably argue that a lot of that, if I go back to the starting principle, if Cabinet is a discussion within Cabinet and we are entitled, should be entitled to audit the advice to government and the decisions, implementation of the decisions of government. And so in that respect, that definition, those sort of public service emails probably wouldn't meet that more classical definition.

COMMISSIONER HALL: Wouldn't?

MR GOODWIN: Would not.

MR O'BRIEN: Okay. Anne?

PROFESSOR TWOMEY: I was just going to add to that. There are two real problems here. One is the lack of documentation at all in relation to many things, so it's very hard to establish something if no one's ever documented it at all. So we need obligations to actually do documentation.

MR O'BRIEN: Gives a whole new meaning to the paperless office.

PROFESSOR TWOMEY: Yes. And the second one is often the documentation is completely useless. So the example at the Commonwealth level is that they do have good rules that say if you are the minister and you make a decision that's contrary to the advice that's been given to you, so if the public servants say this particular grant proposal, you know, should be rejected because it's a waste of money, right, and if you're the minister and then you say, no, I'm going to override that, then you have to, at the Commonwealth level, write an explanation as to why you did that and send it to the Minister for Finance on an annual basis. But if you actually look through those letters to the Minister for Finance, most of them are completely useless. They do not explain, you know, why I thought that the public servant's decision was wrong. I mean, let me just make clear here it could be perfectly right that the politician, the minister says, well, actually I do know better and the public servant was wrong, 'cause public servants aren't always right. So let's accept in many cases the public service recommendation in where this happens might have been wrong. But your explanation needs to say, well, I overrode it because of these particular reasons, and this is why this grant actually is value for money, and I do it by reference to those criteria.

Now, if you look at those, I looked at a year's worth of those, actually two years' worth of those letters, half of them were completely useless. All they said was "This is a good project," okay. That gives you no explanation at all, really. One of them, spectacularly said, you know, "I did it for the reasons on the following table," the table obviously filled out by a public servant who had said, "No reasons given." So the minister hadn't even bothered reading that. Interestingly, though, occasionally a minister would actually come up with a proper explanation as to why they rejected the advice of the public service, which was compelling. And I just want to give a little shout out here to Bridget McKenzie, Senator McKenzie, who is often criticised in relation to the sports rorts affair. But of all these letters that I

read, she wrote one of the best ones explaining why, in a particular circumstance in another aspect of her portfolio she did reject the public servant's decision and explains why. And it explains why it would be a better thing to do something. So ministers can do this well, but nearly always they don't. That means the documentation and the transparency isn't there and nobody is checking. I mean, as far as I know, I may well be the only person who actually sat and read through two years' worth of these letters. But if no-one is checking and scrutinising, then you end up with rubbish documentation and the transparency is not there.

MR O'BRIEN: Now, with the half hour or so that we've got left, I want to move to what do we do about the problems? How do we fix rather than fixate totally on finding people guilty of things? So to start off that reform discussion, Anne, I want to take – you've ticked off a number of the things that were in the Premier's Department and Productivity Commissioner's review as being good and others on the panel have given the big tick, but you've also indicated a number of things that you've got criticisms. So with regard to the legal status and enforceability of the ground rules for handing out grant money, you've pointed out differences between the Commonwealth and New South Wales where you think New South Wales is deficient. Now, is that going to be addressed by – what are they and is that going to be addressed by the review recommendations?

PROFESSOR TWOMEY: Sure. So, the key one that I was particularly concerned about was the legal status of these rules.

MR O'BRIEN: Yeah.

PROFESSOR TWOMEY: So at the Commonwealth level it's a legislative instrument, so it's part of the law and it's divided into things that are mandatory, so legally required to do, and things are guidelines. At the state level at the moment they have no legal standing at all. The recommendation was made, under this new report, that they should be put in a premier's memorandum on the basis that there are general obligations that ministers and public servants ought to comply with premier's memorandums. As I said earlier, I was critical of that because I think that it needs to be based in law because that then triggers a whole lot of other applications. Now, earlier this morning when I did say that I got a little message sent to me pointing out, correctly, that there is a recommendation, a further recommendation in that review which suggests that there could be a separate legislative requirement that there be compliance with the guides. So you

still put your guide in a premier's memorandum and you have some other separate thing saying that you need then to comply with it. Now, the suggestion is that might be in the Government Sector Finance Act or the Government Sector Employment Act.

Okay, two concerns I have with that. One is that those particular Acts focus on – particularly the Government Sector Employment Act – public servants, so it's about making public servants comply with it, whereas the real problems that we're identifying are ministers and ministers' officers. So if it's just stuck in one of those Acts and it only applies to public servants, it's not going to be good enough. So that was concern number one with it. Concern number two is that leads to a very, very weird legal issue where you actually have obligations under something that's not a law and then you have elsewhere a legal obligation to comply with the thing that's not a law. So you've got a, sort of a law by second degree. And I have to say I did try and sit down and think about how that would work when trying to connect that through to like ICAC obligations, and obligations in the ministerial code to comply with the law, and whether or not that would work it out and satisfy it or not. I'm still not convinced as to what the answer is but I think the whole point of it then is if it's not clear to me whether or not you would still be breaching those kind of provisions, then the uncertainty and lack of clarity surrounding it is in itself a problem.

Because in the end, and I come at this as a former public servant, what your public servant needs is something very clear, words on a page, so that they can come back to the minister and say, "Well, look, here the law says X." If it's just something, oh look, there's a value in the Government Sector Act that I am supposed to comply with this value, that's very unclear and uncertain and it's really hard to pin down a minister and say, "Well, actually there is a legal obligation here and I have to comply with it" because all I'm told is I have to meet a value, right? If I have an express legal obligation in law, I can then front up to the person and say, "Well, this is a legal obligation that I actually have to comply with," and it's there in black and white on the page. Let me give you a very small example of that. I once had a run-in with a ministerial adviser in the Premier's Office where there was a Freedom of Information application to the department. I was going to release documents under it and he said, "You can't release that because it's politically embarrassing," and I just went up to him and said to him very loudly in his face "Are you instructing me to breach the law? This is the law and I have to comply." And he backed off at a rate of knots. So you can do that if it's absolutely clear on the page.

MR O'BRIEN: He obviously forgot that he was supposed to be a little more devious than that. Anne, I want to sort of cut to when you're talking about the premier's memorandum. So let's say a minister is in breach of the premier's memorandum. Who resolves that?

PROFESSOR TWOMEY: Well, quite.

MR O'BRIEN: The premier?

PROFESSOR TWOMEY: The premier.

MR O'BRIEN: Okay.

PROFESSOR TWOMEY: So the only pushback there is from the premier, and if you're doing it at the premier's behest, well, who is going to stop you then, and the answer is no-one.

MR O'BRIEN: So where the premier's got the skin in the game is if the reputation of the government is going to take a hit if action is taken against that minister because of a breach of the premier's memorandum, the premier is a part of that backlash, unless the premier wants to take credit for, you know, being the one who applied it. And what if the premier himself or herself has been involved in the pork barrel?

PROFESSOR TWOMEY: Well, quite. I mean, that's the problem. So we saw this, you know, back with the Commonwealth sports rorts affair as well. You know, in the end you can end up maybe with a minister being thrown out into the sin bin for a couple of months and then, look, they're back in power and they're a minister again shortly afterwards. You know, you take one for the team and then you pop back. But did that ministerial code, was it ever taken seriously? Absolutely not. And the problem is that it's only administered to the extent that the prime minister or the premier concerned thinks that they need to in the circumstances. It's utterly flexible. Flexibility can be good sometimes but flexibility can also facilitate corruption as well and we've just got to be more careful about that.

MR O'BRIEN: Ian.

MR GOODWIN: Sorry, and I absolutely agree with everything that Anne has said and I think the point you're making is that, you know, the

guidelines would be strengthened if they were concretised in legislation. I probably just want to offer – and I'm not sort of suggesting that this is the way the government should go, because the Audit Office doesn't comment on policy, but I just offer an alternative perspective. And that alternate perspective is, so there are some good safeguards in that document and if it was, I guess there's an ease to put it in as a premier's memorandum, so it can be done quickly, and it can done in a way that doesn't get, sort of, get altered. And from an auditor's perspective then, yeah, we've got something that we can hold the government to account because we would then audit against that guideline. The trade-off is if you try and concretise in legislation, you lose, I guess, that speed. You put at risk that the guidelines can then become subject to negotiation as it tries to go through as a bill in the parliament and it can come out looking like something that could be a little bit different. And so I think the challenge here is the trade-offs around, you know, getting something in law, which is obviously a better solution, versus a memorandum that is a solution that can be done quickly and not necessarily be watered down through other processes. But even if it was a memorandum, and I would agree that there are all the weaknesses that Anne points out, I guess I just might get to the point that as a system, and we talk about integrity of systems, it is then something that the Auditor-General can actually audit against and then hold the system to account too.

PROFESSOR TWOMEY: Can I just add to that, by the way? I wasn't really suggesting that you should make it an actual Act itself but do it as a legislative instrument.

MR GOODWIN: Right.

PROFESSOR TWOMEY: So you could do it as some kind of a subordinate instrument, which the government can - - -

MR GOODWIN: A regulation.

PROFESSOR TWOMEY: - - - control, the government can make as a regulation.

MR GOODWIN: Yeah.

PROFESSOR TWOMEY: But the key thing is making it disallowable.

MR GOODWIN: Yep.

PROFESSOR TWOMEY: So if you do change it in a way that does then allow for corruption, it can be disallowed in the parliament. So - - -

DR LONGSTAFF: The key point there is the one you made this morning, isn't it, that certain triggers are only pushed or pulled if it has the force of law.

PROFESSOR TWOMEY: Correct.

DR LONGSTAFF: Otherwise people just sail through the ICAC Act and all the rest because of that deficiency.

MR GOODWIN: And that's something that is a good middle ground and (not transcribable) regulations are often used, particularly in support of the GSF Act.

PROFESSOR CAMPBELL: And any problems about speed in being able to get legislation through are solved by having a regulation. You can do that really quickly.

MR O'BRIEN: It's just struck me here that you've got this interesting contrast between the state and the Commonwealth. In the state, the situation we're talking about today is one where you've got the integrity commission, which has oversight of ministerial codes of conduct and so on, but where there clearly have been flaws and a looseness in the systems around grants. In the Commonwealth, Anne talks about the Commonwealth being ahead of the game because it's got legal status but it doesn't have an integrity commission to - - -

PROFESSOR TWOMEY: Correct.

MR O'BRIEN: - - - actually keep them honest. So, one last question to you, Anne, relating to your review of their review before we then get onto more reforms when I come to the rest of the panel. Journalists always, their ears prick up when they see words like "the elephant in the room". We like that. And here you say, in your paper, that the New South Wales review into grants administration failed to address the elephant in the room, "that it studiously avoids the issue of grants being made to advance a political party". You say that "Political party interest is left festering unaddressed between public and personal interests." Can you elaborate?

PROFESSOR TWOMEY: Yeah. I think that's right. I went back looking through it and there's a couple of odd little bits where they mention political issues and election promises but it's really not the focus of it, which is bizarre given that that was the entire point, the reason that the review was taken. There's so much more focus, and this pops up all through the legislation and the values and everything that we've got, it's all comparing public interest to private interest, but there is just this horrible area in between public interest and private interest which is the interests of the political party. So what do we do about election promises? Let's just actually be clear and upfront about it because if we just let it drop between, so on the one hand politicians say, "Well, that's not private interest, that's something else so therefore it's okay," or on the other side people are saying, "Well, hang on a minute, that's not in the public interest," it just drops in between. And it is quite astonishing that this particular report doesn't really grapple with how you deal with questions about grants administration that favour the interests of political parties, particularly during election campaigns with election promises. It needs to be addressed head-on.

COMMISSIONER HALL: I wonder if I could just add to that, Anne. I did look at the terms of reference for the Productivity Commissioner's inquiry. I'm trying to find it now, I can't put my finger on it, but it may, the explanation in part, at least - - -

PROFESSOR TWOMEY: Yes. They were quite limited in terms of reference.

COMMISSIONER HALL: Yes. Sort of value for money and other things like that.

PROFESSOR TWOMEY: That's right.

COMMISSIONER HALL: So, and as you point out, in fairness to the Productivity Commissioner, he does advert to the misconduct in public office more than once in the report but he hasn't proceeded to analyse it. That's not a criticism, because I think his line of enquiry was not really going into the legal implications and needs for legal reform on certain things. But the important thing I think I should emphasise is that as valuable, this is a valuable piece of work, the final report, April 2022, for the reasons you've said, but if it covered everything, then we wouldn't be

here today. The point of being here today is to take further into consideration matters that are essentially legally based in terms of the obligations on public officers and so on and so forth. I am hopeful that the fruits of this subject-matter investigation by the Commission, with the aid of this forum, will cover areas not yet covered or addressed in this report and I think that's why there's a need for both, the Productivity Commission report, and I would hope our report will be seen as supplementing other issues which also must be on the agenda and actioned. I'm perhaps always overoptimistic as to when our reports can be produced but in this case we're aiming for late-June/early-July.

MR O'BRIEN: Okay.

PROFESSOR CAMPBELL: I wonder whether the relevant contrast is between personal interest and public interest. I think it is probably rather between public interest and not public interest. And that if you've got an attempt being made to advantage a political party, then that is not in the public interest and therefore is the sort of thing that is just as likely to be illegal.

MR O'BRIEN: Now, has anyone else got anything to contribute on the review before – yes, AJ.

PROFESSOR BROWN: Yeah. I mean, for the purposes of the transcript and assisting Peter's report. I mean, I agree with everything that Anne has said and that we've just been discussing, but I would say there's five areas in which we really need to make sure that these reforms work and the first is actually the one that you said, and this is speaking to the Commonwealth level, is what you said about the lack of machinery at the Commonwealth level to actually enforce better rules if they're there. It reinforces why the current debate now about the implementation of a national anti-corruption commission has to be driven by a scope of corruption that is broader than just criminal offences, because we're talking here about the absolute necessity of being able to go into the political grey areas to sort out what is right and what is wrong. So it's really important now that the Commonwealth actually do the job properly so that there is that, that same capacity.

The second thing is that I think that we've got to recognise that at a Commonwealth level those statutory or the rules that have the force of law, you know, are crucial. I think we should remember that in the sports rorts

affair, the main recommendation of the Australian National Audit Office there in relation to that was to bring those grants within those guidelines, and ministerial decision-making about grants within those guidelines. It was recommendation 4 and the government accepted it on the spot. So it's a bit like saying, yep, actually we're a bit scared now but we're going to accept that recommendation. So actually to say that nothing was done is not accurate because, in fact, the system was pushed in the right direction. But I think the key problem is those mechanisms for transparency around when ministers decide to deviate from their official advice, making those mechanisms real so that there's a real deterrent to poor or partisan decision-making. Because we have the problem of corruption in plain sight. There's plenty of people, I suspect that John Barilaro might have been one of them, who would say, "Yeah, we'll just do it openly. We'll just say, yeah, these are the reasons," and, you know, and dare anybody to tell us that this is not in the public interest. So we've actually got, that's got to work in a way that actually can be a realistic disincentive to make poor decisions while not stopping the ability to make good decisions. That's quite a complex thing to get right at the end of the day in politics, I think.

The third thing is that the – and I would absolutely agree with what Joe just said, I think that goes to the problems maybe in the report and the problems with the codes of conduct at the moment, is this focus on public versus private. They have to more actively and explicitly deal with what we're talking about here, that it's not a contest between public duty and private personal gain, that it's something more complicated than that and that the guidance on that in codes of conduct that are then properly enforced is as crucial as anything else, because it's one of the few ways that we've got to actually support good decision-making culture amongst politicians and actually influence their understanding of what they're doing. Otherwise it just turns into Whac-A-Mole, you know, what they're currently getting away with over here they will just try and get away with over there because they believe that they're doing the right thing. We've got to create a framework where it's more clearly understood why this is not the right thing. So that's number three.

Number four is, I would go back to the electoral bribery offence and actually recast the electoral bribery offences to make it clear that pork barrelling can be electoral bribery, which is currently not, it's currently written in the other direction so that it's actually a clear warning in criminal law where it needs to be. You don't need to be an expert in public trust and misconduct in public office to say giving people money to influence how

they vote, or how that immediate community votes, is actually problematic in criminal law directly.

And then finally, my fifth point would be, getting back to election campaigns, a lot of this is being driven by using this money in election campaigns and making the announcements in election campaigns and so we need a much stronger process for basically saying, no, that's not, for separating what is campaign activity and expenditure and promises, and part of that is actually creating much more robust systems after the election for having official processes to assess the value for money for election promises so that actually this current culture of saying, "I've issued a media release." I, the prime minister or the premier, "I have issued a media release saying we're giving these people this money. That's legal authority for the fact we have to give them this money."

PROFESSOR CAMPBELL: It's not.

PROFESSOR BROWN: No way, no way is it legal authority for, but that's actually the way that it's being interpreted and used within the public sector. So we've actually got to create a system where actually politicians know that when they make these promises, they've actually got to already be backed up by the right principles to say this will be a public purpose program that will benefit these particular communities and those particular communities can go, right, well, we'll vote accordingly. But actually the program itself is designed from the get-go to be of a proper public purpose and that will actually be a gateway after the election that means it just can't get into the budget, it can't become an appropriation unless it actually meets those tests, no matter what was in the prime minister's media release or what was in the election commitment. Those are my five.

MR O'BRIEN: There's your five. Anyone want to speak to AJ's five?

COMMISSIONER HALL: Well, I'd like to respond, certainly in relation to the last point. But before I get to that, I think there seems to be almost unanimous, there is a unanimous agreement amongst the panel that the matters Anne has raised in terms of the approach to reform involving these matters be the subject of a statutory or statutory instrument, a statutory reform being perhaps a statutory instrument is clear. It must be done for all of the reasons that Anne has articulated but I do also have in mind, and Ian might be able to clarify this, that the Auditor-General's report did contain a number of proposals for reform. One of them, as I recall it, touched on a

comparative analysis of other jurisdictions. I may be mistaken but I think in New Zealand they have a different approach. The minister doesn't make the decision, somebody else does. There's a panel of experts. But then, of course, the panel's decision goes to the minister who formally signs off. It would be hard to reverse the whole process. Ian, can you recall some more detail around that?

MR GOODWIN: So two points there. So I will just sort of reaffirm, you know, the Auditor-General made five recommendations that should go into the guidelines, and a read of the document prepared by the Productivity Commission and the head of Premier and Cabinet, it addresses those, I would say. And I just, you know, one can always chase ground looking for more but it does address those. To the point that the Commissioner just made, so in the Auditor-General's report, we did do some comparative analysis, so looking, you know, what happens in the model in New Zealand and the model in the UK. And the model there gives a clear separation between the role of the government to set policy and then for the public service to implement the decisions of government. And, in that case, a public servant, what's important is that the government is quite clear in what its policy and program designs are for a particular grant distribution, but there is a public servant that then makes that final decision. And so it ensures the risks that we saw in the audit of Stronger Communities Fund doesn't arise. But it is a model and government would need to form a view as to where it lands on that.

COMMISSIONER HALL: Thanks, Ian. And if I could just come back to the second point that AJ raised and that is the election promises. I think it's well accepted that election promises, if elected, then usually the new government feels compelled to implement them - - -

PROFESSOR CAMPBELL: Sometimes.

COMMISSIONER HALL: - - - but because for the reasons that AJ has said when no groundwork really has been done, no business case has been done before the election about whether this proposal is viable and worthwhile or not, ministers can often be compelled because they've made this promise not to back off and do nothing about it. They feel they have to implement it. They might get advice saying, look, there's all sorts of problems about this pre-election promise that might be financial or it might be other issues but then the temptation is to try and retrofit the grant program into mirroring in some degree the promises that were made. And trying to retrofit something

after the sort of gate has opened and the horse has bolted is always notoriously difficult. So I endorse everything AJ has said about that. Something's got to be done in that space, too, I think, that election promises can be the source of a problem, that governments then go ahead and waste money on things that they shouldn't or they get hooked up on a program they never had any idea of before they made the promise. And I think that's a very important point.

MR O'BRIEN: Okay. There's two things I want to raise. One is let's say that you've got a particularly effective integrity commission and/or you've got a particularly effective auditor-general's office and you've got a government that doesn't like the extent to which they've been embarrassed and they're tempted to consider how they might nobble the process. And one obvious way to be to cut funding. And that might be an efficiency exercise or it might come up as, you know, and it might be excused in some other way, competing priorities. But let me test this. Peter, you told a budget estimates hearing in NSW Parliament that ICAC had been forced to abandon some of its investigations and scale back others because of a lack of resources, and that key performance indicators for the Commission had been revised down. I'm going to ask a similar question to Ian, with a slightly different twist. But are you comfortable that it's not open to a government in New South Wales to use the threat of a funding cut, even an unspoken threat of a funding cut, to reduce the effectiveness of ICAC?

COMMISSIONER HALL: There's no protection against a decision by government to reduce funding.

MR O'BRIEN: And is it possible to have a protection?

COMMISSIONER HALL: Yes, it is. So for about the end of 2018, I commenced what I regard as something of a campaign to, and the Commission decided to really put an end to the funding system that had been in place for some 30 years whereby the obvious anomaly of those who we oversight, including ministers of the Crown, can decide our funding. I mean, the conflict is obvious. And many of those ministers who sit on the ERC, of course, could be the subject of an investigation by us at any time and if we do commence an investigation, then the opportunity, theoretically at least, is there to hold us back. In 2016, there was a marked reduction in Commission's [sic] funding. This was before I joined the commission as Chief Commissioner. That had very, very significant effects, not only on morale but on capacity of the Commission. Now, as I understand it at that

time, there was nothing provided by way of explanation or justification for cutting our budget at that time.

That just goes to show, and it's driven my campaign to try and get a truly independent funding model, it goes to show that the vulnerability that the Commission had in 2016 continues to this very day. There's nothing in law to stop it from happening. As I said at the very outset of my introductory remarks, we are here to serve the public interest, to prevent breaches of public trust and so on. To serve the public interest, we need obviously to have the resources but if we don't have the staff and can't afford to have the required number of investigators, for example, legal officers and so on, then we've got to cut our cloth and say we just simply cannot pursue that investigation, either put it to one side and park it or terminate it and concentrate on the others. That's not a good decision but it does result from the funding variables.

And the final point is that we did put up, well, firstly, we took Senior Counsel's advice on the legal question of our independence and the ability through funding to impair it from Bret Walker of Senior Counsel. He gave two opinions which we annexed to our special report to parliament. We got no feedback at all from those special reports and those special reports are meant to be the chain of communication between the Commission and the parliament. The Auditor-General's Office was requested then by government to do a performance audit on us and the other integrity agencies. I think there might have been a belief harboured somewhere that we don't manage our funding properly. Well, the Auditor-General put that to bed and gave us a clean bill of health and, in fact, we're audited every year, anyway, and we've never been criticised, so there's nothing in any suspected mismanagement issue. So more recently, as you'd be aware, the Premier has announced a much more improved position on funding in terms of we will get what we have sought in the budget case for the next financial year. That's never happened before. There's always been chiselling away at whatever we put up and we end up with something less than our business case. I hasten to add, we have never put up a business case as an ambit claim in order to try and put a little bit of padding in there. I also, in order to reinforce the validity of our business cases, got an independent consultant, KPMG, in to validate everything we sought, every dollar we sought. We still ended up with a business case that had been chipped away and was something less. No explanation that we had overreached or suggestion that we'd overreached in our estimates.

So these are the problems with funding, they do go right to the heart of the capacity of what I regard as a Commission here to serve the people. Our budget is not high compared to, you know, the major departments of government. It really is, it is really a very small budget, so it is not the financial impact on the state that is at stake as far as I see it, because it's relatively miniscule in budgetary terms.

MR O'BRIEN: So it's a big question mark there in your mind? Ian, the Commonwealth Auditor-General has made warnings about a lack of funding affecting their statutory duties. To look at how that might or might not apply here, I want to refer to the New South Wales Upper House Public Accountability Committee inquiry into WestConnex project urged NSW Government to ensure that the Audit Office had the resources required to undertake a detailed and comprehensive performance audit of the WestConnex project in 2019/20. Now, were you able to conduct that comprehensive performance audit? Did the government pick up on that committee recommendation that you should conduct this comprehensive performance audit? In other words, was the office capable? Because I would imagine with the amount of money that you would set aside for those kind of big audits, there'd be a serious limit on how many you could do.

MR GOODWIN: Yeah, thank you. So, probably the right point to start is just how much resources we have to conduct performance audits. So we get a government contribution of about $8.5 million to conduct performance audits. 1.3 million is for the local government sector, so that leaves about 7.2 million for the state government sector. To translate that, I often translate it as that's 7 cents for every $1,000 of government spend that's invested in performance audit. So it's a fairly modest, modest investment and relative to our peers, fairly modest. That's important because, you know, we're auditing an entire system and we have to be able to make sure that we're judicious and where we put our resources, and certainly auditing WestConnex in its entirety would be a very large audit. We did do an audit of WestConnex that was tabled in mid-2021, but it looked at the, how the changes from the original business case in 2014 have been justified, and highlighted that $4.26 billion of projects were funded outside the original budget by excluding them from the scope of the work, but still completed. So, in essence, they were part of WestConnex. But to do it in its entirety it has a complication of two-folds. One is just scale and how much resources we have, but since that point the government's divested of its controlling interest in WestConnex, and by doing that it's no longer a controlled entity of the NSW Government. The NSW Government has a significant

remaining interest at a point in time, but what that means is once it's no longer a controlled entity, we no longer have the mandate to do a performance audit.

MR O'BRIEN: Well, just very quickly, was the committee's recommendation a well thought through recommendation? Was it a justifiable recommendation? And, I suppose, was it important that that comprehensive performance audit be done?

MR GOODWIN: Look, I think we would respect any recommendation made from the parliament and that recognises the fact that the Auditor-General reports to the parliament, and we would recognise that WestConnex is both large in scale and in risk complex. And anything of scale and complexity does warrant, often, a look at. But as it stands, we wouldn't have the mandate to do that audit now.

MR O'BRIEN: Yes, okay. So one last question to you, and this relates to another recommendation from that same committee, which was that the NSW Government should establish "follow the dollar" powers for the Audit Office of New South Wales. What, very briefly, what in a nutshell are the "follow the dollar" powers and what would you potentially achieve if you had them, because you still don't have them, do you?

MR GOODWIN: No, no we don't, and we're the only jurisdiction in Australia that doesn't have "follow the dollar" powers. So that's a big reason why, in terms of how we're measured relative to our peers in terms of independent safeguards, we're slid back. The "follow the dollar" powers recognises that government has evolved how they deliver services to citizens, so going from every service delivered to citizens from government departments to contracting with third parties to deliver for our citizens, whether they are private institutions or non-government institutions. So the Auditor-General's performance audit mandate is limited to entities that are controlled entities that we would do a financial statement audit of, and so therefore if it doesn't meet that test, but the government is still delivering services such as aged care, schools, private prisons, private hospitals, we don't have that mandate to follow the dollar to see how well those resources are being used. We sort of stop at the government department who then grants that money across. So it is a limitation, and in a sense because government has evolved how it's delivered its services to citizens, by the Auditor-General's mandate not evolving with it, it's, I guess, we're sort of seeing a degrade in terms of that mandate.

COMMISSIONER HALL: Could I just add a brief comment on that? Outsourcing of public services, contracting services, sometimes it's a chain of connections, is all public money. It's the same public money flowing down through that system. The corruption profile changes over time, and the corruption risk has certainly increased with outsourcing. At any one point there are risks of money being fraudulently misused or abused. I wrote, some years ago now, supporting the "follow the dollar" legislation. I heard nothing further since about it, but I would certainly support it.

MR O'BRIEN: Do you mean you didn't get an answer.

COMMISSIONER HALL: No. But I do support it, and I think it's essential, it makes sense. Why not have a "follow the dollar" powers to follow the money, New South Wales money through the system to ensure that it's being properly used? I don't see any disadvantage, there's no downside, it's only upside.

MR GOODWIN: If I may, and I know you're probably pushing time now, Kerry, but the Auditor-General has made, and I have to apologise, I misspoke, I said (not transcribable) out of home care. But the Auditor-General has issued a number of reports where she has said, for example, in 2018 that there's $1.2 billion to grants to non-government schools that she is not able to give assurance to the parliament on how it's used. Recognise that in a 2019 audit, contracting in non-government organisations, about 500 NGOs valued to 784 million, we're not able to assess how that money's being used. So we are talking some fairly sizable money that, sort of, sits outside the mandate of the Auditor-General. It is a recommendation - - -

MR O'BRIEN: And you are the only audit office in Australia that doesn't have those powers?

MR GOODWIN: Correct. It's a recommendation that's gone to the parliaments in 2013 and 2017. And if I could just correct one other thing, one thing I should have probably answered your question on when you talked about Cabinet-in-confidence, what I should have made clear is the legislative impediment there is that the Auditor-General, while she is entitled to request any information of the public service and get that within 14 days, she is not entitled to Cabinet information or information that's legal privileged. Now that was an amendment, that sort of sits at odds with some of the other jurisdictions, but there was an amendment put through back in

the ’90s, so there was that authority and, you know, it would be a most welcome reform if that was, sort of, reversed.

MR O’BRIEN: We’re going to finish now, but I had a sense over the course of the conversation that nobody was in a rush to go down a road that sees a number of ministers going to jail, but at the same time, a warning note that we are talking, potentially, about criminal abuse of power.

PROFESSOR CAMPBELL: It never hurts to have the threat there, because it’s the sort of thing that public servants can advise their ministers about.

MR O’BRIEN: Oh that would be interesting. “Minister, Minister, should I point out to you that what you’ve just done might incur a sentence of up to 20 years.” But I noticed in Anne’s, I think it was in your paper, Anne, the consequential loss, the idea of consequential loss which has been applied in Britain?

PROFESSOR TWOMEY: So in the UK, so that, the case about the Westminster Council and the selling off the council properties and kicking out the tenants, it also involved losing quite a significant amount of money, so they sold the properties off cheap. And in the UK they had a provision that said that if you, through your wilful act, cause loss to the council, then you have to repay it. The amount that they had to repay went into the millions of pounds. However, one of the two leaders of the council who was subject to this was the heiress of the Tesco supermarket chain, and actually did have millions of pounds. In the end they settled it, I think she paid something like, it’s in the paper, but I think it was something like 12 million pounds, but that was a discount on the 30 or 40 million pounds that was owed. The other one that wasn’t an heiress of a supermarket chain, I think, paid something like 40,000 pounds. But it does raise the issue of, well, maybe concentrations of minds might be greater if the consequential loss to the public of the misuse of public money, you know, if that did become a liability - - -

MR O’BRIEN: Could be recovered.

PROFESSOR TWOMEY: - - - if you had to pay it back, that might make people a little more careful.

MR O’BRIEN: Now, we’re going to end but does anyone have a last word that’s going to add significantly to the sum of what we’ve talked about today before I come to Peter? No?

PROFESSOR BROWN: I'd just add, again, just sort of leading with a bit of an international perspective, and I mean I've already been emphasising how close we've been getting to the type of electoral corruption in other countries that we would never imagine we could. I think we've got to recognise that even if pork barrelling isn't corrupt, it drives corruption. It drives people to think that this is all about getting favours from government. It drives people in government to want to misappropriate money in order to create the slush funds, or to steal money, indeed. A lot of the kleptocracy around the world is driven by powerholders who steal money from the public purse, not just to buy their own shoes and their luxury yachts, but actually to create the funds that they then use to pay other people to vote for them in order to entrench themselves in power. So I think we have to recognise just what the implications are of pork barrelling if we let it go unchecked, and it actually includes driving corruption risks up even when pork barrelling itself is not technically corrupt. Just to really emphasise the significance of what we're talking about here.

DR LONGSTAFF: And I would say technically it is corrupt.

PROFESSOR BROWN: It can be corrupt, absolutely, it can be corrupt.

MR O'BRIEN: Ian Goodwin?

MR GOODWIN: If I can just say one final comment just on your question around the "follow the dollar" I just wanted just to clarify because I wouldn't want, particularly colleagues, to think that this is an extensive power that the Auditor-General would have. So, there's two myths, there's one that that would involve the Auditor-General doing financial audits of private entities and it would not, it's simply a performance audit mandate. And the other is that would it put a burden on the private sector, and the answer to that, that are transactive of the government, and the answer to that would be not, it would be an authority to look at something in very judicious circumstances, and often in rare circumstances, but only when there's an obvious governance failure or potential fraud. So it would be in the public interest to look at, but it wouldn't be a widely used mandate.

MR O'BRIEN: Okay. So that's where we're going to end the discussion, and terrific discussion it's been. But I want to ask Peter, again, as the host, just to round it out with any final comments he might want to make.

COMMISSIONER HALL: Thanks, Kerry. Well, to close this forum I'd like to thank a number of people, firstly our moderator, Kerry O'Brien. Kerry would be well known to all of us having been the anchor man for many years on The 7.30 Report as I recall, and Kerry's experience in that area over many years in the political domain. But not only was his experience so valuable for ICAC's use, calling upon him to do the role of moderator for this forum, but he has consumed an enormous amount of data and material we have sent to him, because he wanted to read into it to master what we were talking about and he's certainly done that. I want to thank you, Kerry, very much indeed for the conscientiousness, the hard work you've put into identifying the issues and the problems and some solutions, and directing our attention in this forum to those issues. So I thank you very much indeed for your very helpful, constructive input which has elevated this forum, I hope, to be seen by everyone as being a very worthwhile exercise. To our expert panellists, Anne, Joe, Simon, Ian and AJ, every one of you as soon as I asked whether you would assist and be involved in this, without any hesitation, accepted and were quite enthused about making a contribution to the public interest in this way. We could not have had more suitable and expert panellists than you.

This is a slightly new venture by the Commission. We normally do most of our work behind closed doors except for public inquiries. This issue of pork barrelling is an important community issue as I said at the outset. A lot of questions being raised, a lot of confusion, a lot of misinformation being put out there as to whether it's okay, normal or not. These are important issues because they do go right to the heart of trust and confidence in government and public administration, and without that, cynicism takes off like a bushfire and our institutions suffer consequently. So, thank you each one of you for your contributions and thank you, Ian, for having worked with the Commission in relation to this matter and indeed in our professional relationship over time, which I have thoroughly enjoyed and we've had enormous support from the Auditor-General Margret Crawford and her staff and Ian, in relation to a number of matters. It's been a very good relationship to date between the ICAC and the New South Wales Auditor-General's office, and her staff. And that's as it should be, of course. And those of you who have viewed this forum via livestreaming, I trust and hope that the forum has been informative.

If I could just briefly address some next steps, it's important for politicians and the public to be aware, of course, of the legal and ethical issues associated with pork barrelling as has become evident. Consequently, this forum will issue a report setting out its views on pork barrelling, in particular whether

the conduct associated with the practice of pork barrelling could constitute corrupt conduct under the provisions of the ICAC Act. As I've earlier indicated in the course of our discussions, we are hopeful of having that report finalised and published by sometime early July next. We are endeavouring to expedite that process because it is an important issue, because there are reform agendas now, fortunately, out there. We wish to work with the NSW Government, with the Productivity Commissioner, so that we can get the best outcome for the public of New South Wales. We should not be working separately, we are in touch with the Secretary of the Department of Premier and Cabinet, Mr Coutts-Trotter, and he has indicated that he wants to work with us. We are happy at that situation, that's as it should be also. So I am optimistic that we will have a constructive dialogue with the Premier, the Government of New South Wales and those others who have contributed from the government point of view.

Anyone who might wish to express a view or make some form of submission are encouraged to contact the Commission at the address ICAC@ICAC.nsw.gov.au, all of that's on our website. These comments should be sent within the next week if you'd like them to be considered by the Commission in the compilation and consideration of the issues and compilation of this report. In addition, in the course of the recording of today's forum, the livestreaming will be available on the Commission's YouTube site, that is to say it will be recording available on the YouTube and a transcript will also be prepared. The papers prepared by the Commission, by Anne, Jo and Simon, will also be made available on our website later this afternoon. It remains to thank you all, and I wish you a good afternoon.

FORUM CONCLUDED

Appendix 2: *When is pork-barrelling corruption and what can be done to avert it?* by Professor Anne Twomey

WHEN IS PORK-BARRELLING CORRUPTION AND WHAT CAN BE DONE TO AVERT IT?

By Professor Anne Twomey*

'Pork-barrelling' involves the exercise of public powers, such as the making of grants or commitments to build infrastructure, in a biased or 'partial' manner that favours the interests of a political party, rather than in the public interest. Politicians on all sides engage in such behaviour, asserting that it is not unlawful and that it is 'just politics'. Is that so?

The exercise of power for an improper purpose, being a purpose other than that for which the power was granted, or in a biased manner, may be the subject of judicial review in accordance with administrative law. Such a decision is not lawfully made. It may be quashed upon judicial review and the decision-maker required to re-make the decision according to law. This paper does not directly deal with this administrative law aspect, although it would be wise for Ministers to become better acquainted with the administrative law constraints upon their exercises of power.

Instead, the first part of this paper addresses the duties imposed by law upon Members of Parliament and Ministers and considers when a breach of those duties may result in the commission of the common law criminal offence of misconduct in public office or give rise to a finding of 'corrupt conduct' by the Independent Commission Against Corruption ('ICAC'). The NSW Government has recognised that misconduct in grants administration may give rise to statutory and common law offences, including misconduct in public office.[1] Its Review into grants administration noted that:

> Conduct arising from pork-barrelling may be unlawful depending on the circumstances. The conduct may be unlawful where it amounts to, for example, corruption, or bribery, or maladministration or records mismanagement/destruction. Criminal sanctions following prosecution may also arise.[2]

It is corruption and the criminal offence of misconduct in public office that this paper concentrates on.

The second part of the paper then focuses more narrowly on the political aspects involved. If a decision is made by a Minister for the purpose of aiding the interests of his or her political party, does this fall within the criminal offence or the ICAC definition of corrupt conduct? Where is the dividing line between policy commitments, especially during election campaigns, and partiality in the exercise of public power?

The third part of the paper considers allegations of pork-barrelling that have been made at both the Commonwealth and State levels, the existing legal mechanisms that govern the making of such commitments, a recent review of grants administration carried out by the NSW Government and what reforms could be made to prevent or limit improper conduct in the future.

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* Professor of Constitutional Law, Sydney Law School, University of Sydney. This paper represents the author's views, not those of the University. It provides an academic view and should not be taken as providing any legal advice.

[1] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 17.

[2] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 37 and [5.7] of the proposed Guide.

PART I – BREACH OF DUTY BY MPS AND MINISTERS

The Duty of Members of Parliament and Ministers

It is well-recognised that Governments are constitutionally required to act in the public interest.[3] But that obligation extends beyond the executive government to Ministers and Members of Parliament in the exercise of their constitutional offices.

In *Re Day,* Kiefel CJ, Bell and Edelman JJ observed that 'parliamentarians have a duty as a representative of others to act in the public interest' and have 'an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations.'[4] Their Honours read the disqualification provision in s 44(v) of the Commonwealth Constitution in the context of this existing duty, noting that one of its objects is to ensure that Members of Parliament will not 'put themselves in a position where their duty to the people they represent and their own personal interests may conflict.'[5] In a similar vein, Nettle and Gordon JJ said that the 'fundamental obligation of a member of Parliament is "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".'[6]

Edelman J added in *Hocking v Director-General of the National Archives of Australia,* that holders of high public offices exercise their powers and perform their duties on trust for the public. They have a duty of loyalty to act for the benefit of the State. This 'duty falls to be determined against a background of general expectations, based upon custom, convention and practice, which impose upon the public officer "an inescapable obligation to serve the public with the highest fidelity".'[7]

This duty to act in the public interest is reflected both in the Constitution and the common law. At the constitutional level, it is reflected in the disqualification provisions of ss 44 and 45 of the Commonwealth Constitution. Section 45(iii) provides that the place of a Senator or Member becomes vacant if he or she takes any fee for services rendered in Parliament to any person or State (eg being paid to ask questions in Parliament). Section 44(v) provides for the disqualification of any Member who has a direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth. The High Court has in recent times interpreted this disqualification broadly, capturing a Member's beneficial interest in a family trust which holds such an interest in an agreement with the public service.[8]

In distinguishing between interests that give rise to disqualification and ordinary relations between governments and citizens, Kiefel CJ, Bell and Edelman JJ observed that one must look to 'the personal financial circumstances of a parliamentarian and the possibility of a conflict of

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[3] *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, [34] (Gummow, Hayne, Heydon and Kiefel JJ); *Attorney General (UK) v Heinemann Publishers Pty Ltd* (1987) 10 NSWLR 86, 191 (McHugh JA); *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J).
[4] *Re Day [No 2]* (2017) 263 CLR 201, [49] (Kiefel CJ, Bell and Edelman JJ). See also [183] (Keane J).
[5] *Re Day [No 2]* (2017) 263 CLR 201, [48] (Kiefel CJ, Bell and Edelman JJ).
[6] *Re Day [No 2]* (2017) 263 CLR 201, [269] (Nettle and Gordon JJ), quoting from *R v Boston* (1923) 33 CLR 386, 400 (original emphasis). See also: *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, [243] (Edelman J) and *McCloy v New South Wales* (2015) 257 CLR 178, [171] (Gageler J).
[7] *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, [243] (Edelman J), quoting from *Driscoll v Burlington-Bristol Bridge Co* (1952) 86 A 2d 201, 221.
[8] *Re Day [No 2]* (2017) 263 CLR 201.

duty and interest' as this is the mischief towards which the provision is addressed.[9] Nettle and Gordon JJ described s 44(v) as applying only when by reason of the existence, performance or breach of the agreement with the Public Service, the person 'could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty'.[10]

An equivalent constitutional disqualification of Members of Parliament is contained in s 13 of the *Constitution Act 1902* (NSW). It can be traced back to the *Constitution Act 1855* (NSW)[11] and was included in the *Constitution Act* with 'a view to prevent corruption'.[12] It has therefore applied in New South Wales for as long as responsible government has existed in the State. It is likely that the High Court would apply it in the same context of a duty of Members of Parliament to serve in the public interest, without consideration of private benefit.

At common law, the duty to act in the public interest was regarded in 1783 as a consequence of accepting an office of trust concerning the public. Any person who does so 'is answerable to the King for his execution of that office' and can be punished for any misbehaviour by way of a criminal prosecution.[13] The High Court has applied the same duty to Members of the NSW Legislative Assembly, describing it as a duty to 'advise the King', which must be done in accordance with what a Member considers is 'right and proper'.[14] The ultimate requirement is the pursuit of the public interest. If a Member is influenced by money, he 'violates a duty in which the public is interested' and 'puts himself in a position in which his interest and his duty conflict'.[15] The Member's duty is 'to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community'.[16] That duty extends to 'the function of vigilantly controlling and faithfully guarding the public finances'.[17]

This approach has also been applied by courts at the State level in New South Wales. In *Sneddon v State of New South Wales,* Basten JA and Meagher JA both referred to the duty of Members of the New South Wales Parliament to serve with fidelity for the welfare of the community.[18] In *Obeid v R,* the NSW Court of Criminal Appeal observed:

> Members of Parliament are appointed to serve the people of the state, including their constituents, and it would seem that a serious breach of the trust imposed on them by using their power and authority to advance their own position or family interests, rather than the interests of the constituents whom they are elected to serve, could constitute an offence of the nature alleged.[19]

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[9] *Re Day [No 2]* (2017) 263 CLR 201, [66] (Kiefel CJ, Bell and Edelman JJ).
[10] *Re Day [No 2]* (2017) 263 CLR 201, [260] (Nettle and Gordon JJ).
[11] Note, that the terms of the provision were copied from the *House of Commons (Disqualification) Act 1782* (UK). It had been enacted in the United Kingdom in response to concerns about corruption, particularly in relation to contracts to supply the navy and army.
[12] NSW Report from the Select Committee on the Proposed New Constitution, 17 September 1852, *Votes and Proceedings,* Vol 25, No 1, 477-8.
[13] *R v Bembridge* (1783) 22 State Tr 1, 155-6 (Lord Mansfield). For an analysis of this passage, see: Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 308-13.
[14] *R v Boston* (1923) 33 CLR 386, 409 (Higgins J).
[15] *R v Boston* (1923) 33 CLR 386, 409 (Higgins J).
[16] *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ).
[17] *R v Boston* (1923) 33 CLR 386, 401 (Isaacs and Rich JJ)
[18] *Sneddon v State of New South Wales* [2012] NSWCA 351, [62] (Basten JA) and [218] (Meagher JA), both quoting from *R v Boston.*
[19] *Obeid v R* [2017] NSWCCA 221, [62] (Bathurst CJ).

Bathurst CJ, with whom the rest of the Court agreed, rejected an argument by Mr Obeid that the duty imposed upon a parliamentarian is a matter of conscience only, and not subject to legal sanction.[20] It is a public duty which is subject to legal sanction.

While the cases mentioned above focus on circumstances where the Member of Parliament obtained a personal financial gain, these cases do not cover the full scope of the offence. The duty to act in the public interest and the legal sanctions that attach to it, extend beyond a requirement to avoid being influenced by personal financial gain. An offence may occur when the public trust has been abused by the misuse of power, regardless of whether it results in personal gain.[21] The South Australian Court of Criminal Appeal approved of a passage by Finn where he stated that:

> official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.[22]

Finn observed that improper purposes that had founded convictions for misconduct in public office included showing favouritism to some individual or group, harming or disadvantaging an individual, and 'advancing the interests of a political party, as where known supporters of one party are deliberately omitted from an electoral roll'.[23]

A breach of public trust can also occur, even when the actual outcome of a decision achieves a valuable end. It is the abuse in the exercise of the power, being an exercise for an improper purpose, which is relevant, rather than the end achieved. As Finn noted, misconduct in public office does not concern 'the correctness or otherwise of the decision as an exercise of official power', but is, rather, directed at 'the state of mind which informed the decision'.[24] If the public official acts dishonestly, corruptly or in a partial manner in exercising an official power for a purpose other than that for which the power was granted, then there is a breach of public trust, regardless of 'whether the act done might, upon full and mature investigation, be found strictly right'.[25]

Hence the two arguments most commonly made by politicians in response to allegations of pork-barrelling – that it is not corrupt or unlawful because they weren't lining their own pockets and the community received valuable support – do not hold water. Such conduct can still be regarded as both corrupt and unlawful if it involves the partial exercise of public power for a purpose other than that for which the power was granted.

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[20] *Obeid v R* [2017] NSWCCA 221, [63] and [148] (Bathurst CJ).
[21] *Director of Public Prosecutions v Marks* [2005] VSCA 277, [35] (Nettle JA). An example is where a police officer accesses confidential police information to do a friend a favour. As Campbell J has noted in this context, 'it is notorious that doing a friend a favour may be a most insidious form of corruption': *Jansen v Regina* [2013] NSWCCA 301, [11].
[22] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, 64-5 (Doyle CJ), quoting from Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 308. See also: *R v Quach* [2010] VSCA 106, [20] (Redlich JA).
[23] Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 319. See Lord Mansfield's scathing judgment about those who 'would engross the whole franchise, and right of election to themselves': *R v Phelps* (1757) 2 Keny 570; 96 ER 1282, 1282-3.
[24] Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 319.
[25] *R v Borron* (1820) 3 B & Ald 433, 434; 106 ER 721, 721 (Abbott CJ).

When does a breach of the duty to serve in the public interest become a breach of the law?

Justification for the criminalisation of misconduct by politicians

As noted above, the failure on the part of a public official to exercise a public power for a proper purpose in the public interest is most commonly dealt with by courts under administrative law. This is appropriate where the public official acted in good faith and made a mistake in the exercise of his or her power. But as Mahoney JA pointed out, judicial review under administrative law does 'not deal with the vice in the misuse of public power'.[26] He considered that civil remedies are 'not adequate to prevent – to deter – such misuse'.[27] He correctly observed that the 'obloquy upon the official is seldom great', with the matter being attributed to the 'technicalities' of administrative law.[28] If the deliberate misuse of public power is to be deterred, then criminal action must be a genuine threat.

Apart from deterrence, the other main reason for criminalising the corrupt behaviour of Members of Parliament and Ministers is because it undermines faith in the democratic system and the application of the rule of law.[29] This point was stressed by Lee J in the sentencing appeal of a former NSW Minister, Rex Jackson. Lee J noted that Jackson had engaged in a 'consistent course of gross abuse of high office involving the receipt of bribes for favours'.[30] He added:

> A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex. Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the preservation of integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position.[31]

The type of political corruption that undermines public trust in the system of government is not confined to that which involves obtaining a personal pecuniary advantage. Lord Scott, in dealing with a case concerning misconduct at the municipal level in London, noted that there are other forms of corruption that are 'less easily detectable and therefore more insidious'. These include:

> any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption?

[26] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17.
[27] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17, 18.
[28] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17, 22.
[29] *Marin and Coye v Attorney General of Belize* [2011] CCJ 9, [44] (de la Bastide PCCJ and Saunders JCCJ).
[30] *R v Jackson* (1988) 33 A Crim R 413, 436 (Lee J, with whom Finlay J agreed).
[31] *R v Jackson* (1988) 33 A Crim R 413, 435 (Lee J).

> Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government.[32]

This connection between public duty and the democratic imperative to maintain public trust has also been recognised by the Supreme Court of Canada, where McLachlin CJ observed:

> The crime of breach of trust by a public officer… is both ancient and important. It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power.[33]

The duty of Members of Parliament and Ministers to serve the public interest with fidelity, if breached, can accordingly give rise to a criminal offence.[34] This is most notably the case when bribery[35] or fraud is involved. But there is also a common law offence variously known as 'breach of public trust' or 'misconduct in public office', about which there has been less awareness. The criminalisation of such conduct, even when the same actions may not be criminal when performed by persons who hold positions in the private sector,[36] is a consequence of the importance placed by the courts on protecting the system of government from corruption. Lord Mansfield noted in 1783 in *R v Bembridge,* that a breach of trust by a public officer is indictable because it is 'essential to the existence of the country'.[37]

The common law offence of misconduct in public office

As early as 1834 in New South Wales, the Supreme Court recognised that malfeasance by a public official may amount to criminal conduct where there is a positive breach of a duty and a corrupt motive.[38] At common law, if a public official, being placed in a position of trust and confidence, commits a breach of duty, such as accepting a secret commission, then this amounts to a criminal offence.[39] That common law offence of 'misconduct in public office' continues to operate in New South Wales. In some other States it has been displaced by statutory provisions.

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[32] *Porter v Magill* (2002) 2 AC 357, [132] (Lord Scott).
[33] *R v Boulanger* [2006] 2 SCR 49, [1] (McLachlin CJ).
[34] Note the finding in *Obeid v R* (2015) 91 NSWLR 226, at [20]-[24] and [55] that Members of Parliament are subject to the ordinary criminal jurisdiction of the courts and that Parliament does not have exclusive jurisdiction with respect to the misconduct of its Members. See also: *R v Chaytor* [2011] 1 AC 684, regarding prosecution of MPs in the UK for the misuse of expenses; and A W Bradley, 'Parliamentary privilege and the common law of corruption' [1998] *Public Law* (Autumn) 356.
[35] See *R v Jackson* (1988) 33 A Crim R 413 regarding the making of corrupt payments to Rex Jackson to induce him, in his capacity as Minister for Corrective Services, to show favour to certain persons in violation of his official duty. See also: *R v White* (1875) 13 SCR (NSW) 322; and *R v Boston* (1923) 33 CLR 386, both of which concerned members of the NSW Parliament.
[36] 'Every public officer commits a misdemeanour who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person': Lewis Frederick Sturge, *Stephen's Digest of the Criminal Law,* (Sweet & Maxwell, 9th ed, 1950), 112-4.
[37] *R v Bembridge* (1783) 22 State Tr 1, 156 (Lord Mansfield).
[38] *Ex parte Wilson, Windeyer and Slade* [1834] NSWSupC 15.
[39] *R v Jones* [1946] VLR 300, 303 (O'Bryan J).

Finn has noted that the common law offence of misconduct in public office has been variously described, including as 'breach of official trust' and 'misbehaviour in a public office'.[40] It covers a range of conduct, including:

- fraud in office;
- nonfeasance (wilfully neglecting a public duty);
- misfeasance (wilfully misusing or abusing an official power, including doing an otherwise lawful act in a fashion which is wrongful);
- malfeasance (wilfully acting in excess of actual authority).[41]

These aspects of misconduct in public office are recognised in s 8(2)(a) of the *Independent Commission Against Corruption Act 1988* (NSW) ('*ICAC Act'*), which nominates the offence of 'official misconduct' as one that can trigger a finding of corrupt conduct, and describes it as including: breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition. As the NSW Court of Criminal Appeal has observed, the 'object of the offence is to prevent public officers (in the case of misfeasance) from exercising their power in a corrupt and partial manner'.[42] Those public officers are persons upon whom powers and functions have been conferred by the State, giving rise to a public trust. The NSW Court of Criminal Appeal confirmed in *Obeid v R* that a Member of the NSW Parliament is a public officer for these purposes.[43]

As this is a common law offence, it has also been developed by courts in other common law jurisdictions, such as the United Kingdom, Canada and Hong Kong.[44] Drawing upon that jurisprudence, the Victorian Court of Appeal, in *R v Quach,* set out the elements of the offence of 'misconduct in public office', noting that it occurs when:

> (1) a public official;[45]
> (2) in the course of or connected to his public office;[46]
> (3) wilfully misconduct[s] himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
> (4) without reasonable excuse or justification; and

[40] Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 307.
[41] Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 310 and 313-325.
[42] *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [68].
[43] *Obeid v R* (2015) 91 NSWLR 226, [121]-[125]. See also *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187, for the application of 'misconduct in public office' to a Member of the NSW Parliament.
[44] See, eg, in the United Kingdom: *Porter v Magill* (2002) 2 AC 357; and *Attorney-General's Reference (No 3 of 2003)* [2005] QB 73. In Hong Kong, see: *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; and *Sin Kam Wah & Lam Chuen Ip v HKSAR* [2005] 2 HKLRD 375. In Canada see: *R v Pilarinos and Clark* [2002] BCTC 452; and *R v Boulanger* [2006] 2 SCR 49. Note that in Canada the common law offence has been codified to an extent by s 122 of the Canadian *Criminal Code.*
[45] This includes Members of Parliament and Ministers. See further: David Lusty, 'Revival of the common law offence of misconduct in public office' (2014) 38 *Criminal Law Journal* 337, 344 and the cases mentioned there. Compare *Ex parte Kearney* (1917) 17 SR (NSW) 578, where fettlers and a ganger employed on NSW railways were held not to be public officers.
[46] In relation to whether an act occurs in the course of one's office, see further *Herscu v The Queen* (1991) 173 CLR 276, 283 (Mason CJ, Dawson, Toohey and Gaudron JJ) and 287 (Brennan J), where influence wielded by an office-holder, such as a Minister, was regarded as falling within the scope of a codified anti-corruption provision, even though the Minister had no formal power to make the decision.

> (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.[47]

That formulation was accepted by the NSW Court of Criminal Appeal in 2017 in *Obeid v R*[48] and special leave to appeal to the High Court was refused.

The two critical and often related aspects of the offence, which are relevant to accusations of pork-barrelling, are intention in step 3 of the test and seriousness in step 5.

Intention: From as early as 1758, the British courts distinguished between cases of mere error of judgment and those that involve clear and apparent partiality or corruption.[49] Finn has noted the many cases in which the courts emphasised that 'it is not the province of the criminal law to punish an honest official who makes a mistake or error of judgment in the exercise of his office'.[50] For example, McLachlin CJ noted in *Boulanger,* 'perfection has never been the standard for criminal culpability in this domain; "mistakes" and "errors of judgment" have always been excluded' from criminal culpability for misconduct in public office.[51]

Punishment is instead directed at those who abuse the public trust by acting from a dishonest or corrupt motive, or with partiality. Malice is not required – it is enough that the official 'knows that what he is doing is not in accordance with the law'.[52] Sir Anthony Mason, in his capacity as a non-permanent judge of the Hong Kong Court of Final Appeal, considered that the 'misconduct must be deliberate rather than accidental in the sense that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful'.[53] In considering such matters, a jury could take into account the experience of a parliamentarian.

Such consideration was given by the NSW Court of Criminal Appeal in *Obeid v R,* where Bathurst CJ observed that it 'is inconceivable that a politician of [Mr Obeid's] standing and experience [i.e. 16 years in Parliament, including four as a Minister] did not know that his duty was to serve the public interest and that he was not elected to use his position to advance his own or his family's pecuniary interests.' He considered that it was not enough for the jury to be satisfied that Mr Obeid knew that his actions were morally and ethically wrong, but that it was 'entitled to conclude that he knew what he was doing was wrong in law, or at least recognised the risk that it was unlawful and proceeded in any event.'[54]

Reliance on legal advice to evince a lack of intention will not always be effective. In *Porter v Magill,* two local councillors acknowledged that they knew that the local council could not use its powers for electoral advantage. They were found to have 'acted in a way they knew to be unlawful'.[55] They claimed, however, that they had relied upon legal advice and were therefore

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[47] *R v Quach* (2010) 27 VR 310, [46] (Redlich JA).
[48] *Obeid v R* [2017] NSWCCA 221, [60]. See also *Obeid v R* (2015) 91 NSWLR 226, [136] and [139] and *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [67].
[49] *R v Young* (1758) 1 Burr 557, 562; 97 ER 447, 450 (Lord Mansfield).
[50] Paul Finn, 'Official Misconduct' (1978) 2 *Criminal Law Journal* 307, 312.
[51] *R v Boulanger* [2006] 2 SCR 49, [52].
[52] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17, 25.
[53] *Sin Kam Wah & Ip v HKSAR* [2005] 2 HKLRD 375, [46].
[54] *Obeid v R* [2017] NSWCCA 221, [196] (Bathurst CJ).
[55] *Porter v Magill* (2002) 2 AC 357, 471 [31] (Lord Bingham).

not guilty of wilful misconduct. But the legal advice had told them only that their initial proposal to sell social housing properties in marginal wards so as to alter voting patterns was unlawful. The fact that they responded by also selling some property in other wards, to dilute the perception of corruption, while maintaining the same number of sales in marginal properties to achieve the same electoral end, did not result in their exculpation.[56]

Seriousness: To move beyond an administrative failing to a criminal offence, the conduct must be sufficiently serious.[57] The English Court of Appeal observed that there must be a 'serious departure from proper standards', and that a mistake, even a serious one, would not suffice.[58] It noted that the 'threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder.'[59]

The same view has been taken in Australia. Olssen J in the South Australian Supreme Court drew together the mental element and the seriousness element by concluding that 'there must be an element of culpability which is not restricted to corruption or dishonesty, but which is of such degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.'[60] The point at which condemnation and punishment is merited remains a matter of debate. The WA Inc Royal Commission considered that 'conduct which demonstrates a conscious use of official power or position for private, partisan or oppressive ends, is so contrary to the very purposes for which power and position are entrusted to officials as to warrant public condemnation in a criminal prosecution'.[61]

The factors that should be considered in making this assessment were considered by Sir Anthony Mason in *Shum Kwok Sher v HKSAR* . He concluded that consideration should be given to 'the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.'[62]

Definition of 'corrupt conduct' in the *ICAC Act*

'Corrupt conduct', for the purposes of the *Independent Commission Against Corruption Act 1988* (NSW), is defined in ss 8 and 9. The relevant parts of ss 8 and 9 provide as follows:

> **8 General nature of corrupt conduct**
>
> (1) Corrupt conduct is—
>
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

[56] *Porter v Magill* (2002) 2 AC 357, 471-475 [34]-[40] (Lord Bingham) and 507 [146]-[148] (Lord Scott).
[57] Gerard Carney, *Members of Parliament: law and ethics* (Prospect Media, 2000) 265.
[58] *Attorney-General's Reference (No 3 of 2003)* 2004 EWCA Crim 868, [56].
[59] *Attorney-General's Reference (No 3 of 2003)* 2004 EWCA Crim 868, [56]. See to the same effect: *R v Boulanger* [2006] 2 SCR 49, [52].
[60] *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, 78 (Olsson J), drawing on the language of Lord Widgery CJ in *R v Dytham* [1979] QB 722, 727. See also: *Obeid v R* [2017] NSWCCA 221, [222] (Bathurst CJ).
[61] *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (1992), Part II, Ch 4, [4.5.1].
[62] *Shum Kwok Sher v HKSAR* [2002] 5 HKCFA 27, [86] (Mason NPJ).

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

(2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters—
(a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
….
(i) election bribery,
(j) election funding offences,
(k) election fraud,
(l) treating,
….
(x) matters of the same or a similar nature to any listed above,
(y) any conspiracy or attempt in relation to any of the above.

(2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters—
….
(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
(d) defrauding the public revenue,
….

9 Limitation on nature of corrupt conduct

(1) Despite section 8, 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.

….

(3) For the purposes of this section—
applicable code of conduct means, in relation to—
(a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

(4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

(5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

In summary, a 'public official' (which includes a Minister, a Member of the NSW Parliament, their staff and public servants) may be found to have engaged in 'corrupt conduct' if the person:

- adversely affects the honest or impartial exercise of official functions by another public official (eg a Minister influencing a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function such as providing an assessment of the merits of grants, in a dishonest or partial way) (s 8(1)(a)); or
- acts in a dishonest or partial manner in the exercise of official functions (eg a Minister deliberately exercises a power to approve grants in a manner that favours family members, party donors or party interests in electorates, contrary to the guidelines of a grant program that state that the grants are to be made on merit according to criteria) (s 8(1)(b)); or
- acts in a manner that breaches public trust (eg a Minister acts partially by exercising a power to make grants in favour of marginal electorates, when this is contrary to the purpose for which the power was given) (s 8(1)(c)); or
- adversely affects the exercise of official functions by any public official where the conduct involved amounts to 'official misconduct', including a breach of trust and misfeasance (eg a Minister advises, instructs or pressures a public servant to exercise official powers in a deliberately partial manner to achieve a party political advantage, where the conduct is sufficiently serious to constitute a crime) (s 8(2)); or
- acts in a manner that impairs public confidence in public administration and which could involve dishonestly obtaining or benefiting from the payment of public funds for private advantage (eg a Minister conducts a merit-based grants scheme in such a way as to favour political and private advantage over merit, undermining public confidence in public administration, and benefitting political donors and family members) (s 8(2A)(c)),

AND

- the conduct could constitute or involve a criminal offence (s 9(1)(a)); or
- the conduct could constitute or involve a substantial breach of a code of conduct applicable to the Minister or Member of Parliament (s 9(1)(d)); or
- the conduct would cause a reasonable person to believe that it would bring the integrity of the office or of Parliament into serious disrepute and the conduct constitutes a breach of a law (which does not need to be a criminal law) (s 9(4) and (5)).

The focus of the definition of 'corrupt conduct' in the *ICAC Act,* is therefore on conduct that is dishonest, partial or in breach of the public trust and which adversely affects the performance of official functions.

Partial conduct and breach of public trust

Sometimes conduct will amount to a breach of trust because it is partial, effectively satisfying both ss 8(1)(b) and (c), as occurred in *Greiner v Independent Commissioner Against Corruption.*[63] The Commissioner of the ICAC concluded that the actions of Greiner, Moore and Humphry were 'partial' because they failed to give all applicants for a position equal or similar consideration and favoured Dr Metherell for the position.[64] It was not relevant whether Dr Metherell may have been the best candidate for the job. The issue was that there had been partial behaviour in the process of choosing to appoint him.

In *Greiner,* Mahoney JA considered the meaning of 'partiality' by reference to the mischief that the *ICAC Act* is directed at addressing. He observed:

> It is concerned to prevent the misuse of public power. Public power may be misused in a way which will involve a criminal act: see, eg, s 8(2)(b) (bribery). But the proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is this that "partial" and similar terms in the Act are essentially directed.
>
> It is wrong deliberately to use power for a purpose for which it was not given: partiality is a species of this class of public wrong.[65]

Depending upon the circumstances, therefore, partial behaviour may still satisfy the s 8 element of the definition of corrupt conduct, either on its own in s 8(1)(b) or as a breach of public trust under s 8(1)(c), even where it does not involve a breach of the common law criminal offence of misconduct in public office because the requisite intention was not met or the degree of

[63] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 135 (Gleeson CJ).
[64] See the Commissioner's reasoning, set out in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136.
[65] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 160 (Mahoney JA).

seriousness was not satisfied. This means that s 8 addresses partial behaviour both at the criminal level, as also noted in s 8(2)(a), and at a level that amounts to less than criminal conduct, but which still breaches the public trust through the exercise of a public power for an improper purpose. It operates both in circumstances where the partial conduct is that of the public official, such as a Minister, and where the conduct adversely affects[66] the exercise of official functions by another public official, such as a public servant in an agency or statutory corporation which falls within the Minister's portfolio.

Conduct that satisfies s 9

In addition, at least where the conduct is that of a Member of Parliament,[67] it must also be conduct that 'could' constitute or involve a criminal offence or a substantial breach of an official code of conduct, or would cause a reasonable person to believe that it would bring the integrity of the office or Parliament into serious disrepute and which constitutes a breach of a law.[68]

The ICAC is not a court and cannot make findings of criminal guilt. Section 74B of the *ICAC Act* provides that the Commission is not authorised to include in its reports any finding that a person is guilty of, or has committed, a criminal offence. Accordingly, where reliance is placed upon s 9(1)(a), the ICAC Commissioner must first make findings of fact and then ask 'whether, if there were evidence of those facts before a properly instructed jury, such a jury could reasonably conclude that a criminal offence had been committed'.[69] The Commission is not authorised to make a finding of corrupt conduct unless the conduct is 'serious' corrupt conduct (s 74BA).

Where misconduct in public office by a Member of Parliament is involved, s 9 will be satisfied if the findings of fact are such that a properly instructed jury could reasonably conclude that the common law criminal offence of misconduct in public office has been committed. Alternatively, s 9 may also be satisfied if the conduct could constitute or involve a substantial breach of the code of conduct of the House in which the Member sits, or the Ministerial Code of Conduct, if the Member is a Minister.

Legislative Code of Conduct for Members

Each House of the NSW Parliament has adopted a Code of Conduct which forms part of its Standing and Sessional Orders.

The preamble to the Code, which is not part of the substantive Code, recognises the responsibility of Members 'to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution and conventions of Parliament, and using their influence to advance the common good of the people of New South Wales'.

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[66] Note the interpretation of this phrase in: *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, [51] (French CJ, Hayne, Kiefel and Nettle JJ).
[67] In *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136, Gleeson CJ noted that 'when dealing with a Minister or a Member of Parliament the concept of a disciplinary offence is irrelevant'.
[68] The word 'law' here means a civil, rather than a criminal, law. See further: Independent Commission Against Corruption, *Report on Investigation into Conduct of the Hon J Richard Face,* June 2004, 45.
[69] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136 (Gleeson CJ).

Clause 1 of the Code provides that 'Members shall base their conduct on a consideration of the public interest, avoiding conflict between personal interest and their duties as a Member of Parliament'. Members must not 'act dishonestly for their own personal gain'. The focus of this clause is on avoiding the misuse of power for personal benefit. It notes the role of political parties as part of the democratic process. The clause asserts that participation in 'the activities of organised political parties is within the legitimate activities of Members of Parliament'. It leaves unaddressed the misuse of public power for party-political gain, rather than personal gain (although note the discussion below about the circumstances where these may coincide).

Clause 7 deals with conflicts of interest and states that the 'public interest is always to be favoured over any private interest of the Member'.

Ministerial Code of Conduct

The more relevant code of conduct in relation to issues concerning pork-barrelling is the Ministerial Code of Conduct. It is prescribed as an applicable code of conduct by cl 5 of the *Independent Commission Against Corruption Regulation 2017* (NSW)[70] and is set out in an Appendix to that Regulation.[71]

The preamble to the Ministerial Code, which is not part of the Code itself but may be used to interpret it,[72] recognises in recital 3 that: 'Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales'. It therefore recognises the duty to act in the public interest (or 'common good'), the necessity of maintaining the public trust, and the requirement to act with honesty and integrity in performing duties. Recital 1 also refers to the need to maintain public confidence in the integrity of the Government and that Ministers must 'pursue, and be seen to pursue, the best interests of the people of New South Wales to the exclusion of any other interest'.

Within the Ministerial Code itself, the most relevant provisions are sections 3, 5 and 6. Section 3 provides that: 'A Minister must not knowingly breach the law…' This covers any type of law,[73] not just a criminal law. It would therefore not only cover breaches of the common law offence of misconduct in public office, but also breaches of other laws, such as those dealing with public finances or maintaining public records, even where no criminal offence is involved. It may also include administrative law. If this were the case, if a Minister acted for an improper purpose, took into account irrelevant considerations or acted in a biased manner in exercising his or her powers to make grants or approve the construction of infrastructure, knowing this to be outside the scope of the Minister's powers, the Minister might be found to have engaged in a breach of s 3 of the Ministerial Code.

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[70] Note that the NSW Ministerial Code commenced on 20 September 2014. Prior to that, there was an earlier iteration of a Ministerial Code but it had not been deemed to be an applicable Code for the purposes of the *ICAC Act.*

[71] See also the preamble to the Ministerial Code of Conduct which notes in recital 7 that the Code has been adopted for the purposes of s 9 of the *Independent Commission Against Corruption Act 1988* (NSW) and in recital 9 that a substantial breach of the Ministerial Code may constitute corrupt conduct for the purposes of that Act.

[72] NSW Ministerial Code of Conduct, s 12(1). See an example of such use in: *Obeid v R* [2017] NSWCCA 221, [144] (Bathurst CJ).

[73] It applies to the laws of the State of NSW and any Commonwealth laws applicable in NSW: Ministerial Code of Conduct, s 12(3).

Section 5 of the Ministerial Code provides that: 'A Minister must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law'. The section recognises that a Minister is entitled to disagree with the advice of a public service agency and make decisions contrary to that advice. The Minister can also direct an agency to implement the Minister's decision. But the Minister cannot direct the agency to act contrary to the law. Hence, a Minister who directed or requested a public servant to breach the public servant's legal obligations under the *Government Sector Employment Act 2013* (NSW), the *Government Sector Finance Act 2018* (NSW) or the *State Records Act 1998* (NSW),[74] or act outside of the public servant's powers by exercising a decision-making power for an improper purpose or taking into account irrelevant considerations, could be found to have breached s 5 of the Ministerial Code.

Section 6 of the Ministerial Code provides that: 'A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.' This key clause is qualified in a number of respects. First, the assessment of the public interest is a subjective one – '*what they consider to be* the public interest'. This makes it more difficult to establish that a substantial breach has occurred. A Minister may argue that he or she genuinely considers that the provision of grants or the funding of infrastructure is in the public interest even though it is skewed towards marginal electorates or those held by his or her own party. Second, the reference to improper behaviour is confined to acting for the Minister's *private* benefit or for the *private benefit of any other person.*

In *Obeid v R,* the NSW Court of Criminal Appeal held that a Code of Conduct adopted for the purpose of s 9 of the *ICAC Act* could not be said to oust or limit a duty on a Member under the common law.[75] Nor does a Code 'define the totality of a Member's obligations'.[76] Section 9 of the Act contemplates that conduct breaching s 8, such as a breach of public trust might constitute a criminal offence or a breach of an adopted code of conduct, without suggesting that one would exclude the operation of the other. Hence, even if an act did not amount to a breach of the Ministerial Code of Conduct, it might still give rise to a finding of corrupt conduct if it satisfied one of the other requirements in s 9.

PART II – THE EXERCISE OF POWER FOR PARTY POLITICAL ADVANTAGE

While it is clear that a Member of Parliament cannot favour his or her 'private' interests over the public interest, there is less clarity about where political party interests fit. If public money is spent in such a way as to prefer political party interests over the public interest, does that breach the duty of a Member of Parliament and could it amount to corruption?

Where political interests coincide with private financial interests

It is ordinarily in the private financial interest of a Member of Parliament that the political party, of which he or she is an endorsed member, be successful at an election. This is because

[74] See a more detailed list of relevant laws in the Public Service Commission Code of Ethics and Conduct for NSW Government Sector Employees, [1.4]: https://www.psc.nsw.gov.au/sites/default/files/2020-10/PSC%20Code%20of%20Ethics%20and%20Conduct.pdf.
[75] *Obeid v R* [2017] NSWCCA 221, [78] (Bathurst CJ).
[76] *Obeid v R* [2017] NSWCCA 221, [269] (Bathurst CJ).

the Member's job, and therefore his or her salary, allowances and superannuation,[77] is conditional upon success at the election, which is primarily dependent upon the success of a political party in attracting public support. Further, if the political party is so successful that its members can form a government after the election, then the financial circumstances of the Member of Parliament may be significantly improved as it opens up the possibility of becoming a Minister or Premier. The difference between the salary of a backbencher in Opposition and a Government Minister is significant.[78] The success of a political party at an election has the potential to double a Member's remuneration if it means he or she becomes a Minister, or wipe it out altogether if the Member loses his or her seat.

Hence, acting in a manner that favours the interests of a political party advances the personal financial interests of a Member of Parliament, including a Minister. While this may be an indirect interest, so too is holding a beneficial interest in a family trust which has an agreement with the public service.[79] The same principle of avoiding a conflict between a Member's private financial interests and his or her public duty may be activated. Hence, there is an argument that exercising an official power to engage in pork-barrelling for the purpose of achieving electoral success for a political party involves acting in a Minister's private financial interests. For there to be a finding of corrupt conduct or for there to be misconduct in public office, all the other factors discussed above would still have to be satisfied.

Can the interests of a political party be treated as those of any 'other person'?

Where a code of conduct or a law prohibits a Member from acting in the private interest of any 'other person', does that include acting in the interests of a political party? From a legal point of view, most political parties (including all the major political parties) are unincorporated associations and therefore not legal persons.[80] But as s 11 of the NSW Ministerial Code defines 'person' as including an unincorporated association, it would extend to the inclusion of a political party.

Section 6 of the NSW Ministerial Code of Conduct provides that a Minister 'must not act improperly for their private benefit or for the private benefit of any other person.' 'Private benefit' is defined in s 11 to exclude a benefit that 'comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing'. This appears to be directed specifically at 'pork-barrelling' and excluding it from the reference to private benefit in s 6. There may be a difference, however, between actions that involve a mere 'hope or expectation' of enhanced political standing, and more closely directed pork-barrelling, such as that which directly benefits party donors. Further, the requirement in s 6 to act only in what the Minister considers to be in the public interest would still stand.

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[77] Note also that there may be benefits that attach to the longevity of a Member's or Minister's service in Parliament, which can also amount to a significant private benefit. See *Cunningham v The Commonwealth* (2016) 259 CLR 536.

[78] As at July 2021 the total remuneration of the NSW Premier (including allowances other than electoral allowances) was $407,980, of a non-senior Minister was $309,621 and of an ordinary backbencher was $169,192.

[79] As noted above, the High Court treated such an interest as being one that gives rise to disqualification under s 44 of the Commonwealth Constitution: *Re Day [No 2]* (2017) 263 CLR 201.

[80] See *Cameron v Hogan* (1934) 51 CLR 358; and *Camenzuli v Morrison* [2022] NSWCA 51. See further: Graeme Orr, *The Law of Politics – Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 118-122.

Other provisions of the Ministerial Code may also apply, as would a breach of the criminal law, and in some cases a breach of non-criminal law. The mere fact that such conduct is excluded from breaching a provision in a Code of Conduct does not mean it is also excluded from amounting to a breach of the criminal law.[81]

When does favouring political party interests amount to misconduct in public office?

In practice, the offence of misconduct in public office has most commonly been prosecuted where the public office holder acted for personal gain, or to benefit a friend or family member. This is the case in Canada, where Premiers have been prosecuted for taking actions that influenced the approval of a casino proposal[82] or promoted a financial interest in the sale of a property.[83] The Canadian Supreme Court has accepted, however, that while 'receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public', 'the offence may be made out where no personal benefit is involved'.[84]

The most pertinent discussion of how taking actions for a party-political benefit may amount to misconduct is to be found in the British case of *Porter v Magill.* In this case, the leaders of the Conservative Party on the Westminster City Council, Dame Shirley Porter and Mr David Weeks, established a 'Building Stable Communities' policy which involved selling council social housing properties in eight marginal council wards, to increase the Conservative Party vote in those wards at the next election. They believed that home-owners, rather than social housing tenants, were more likely to vote for Conservative Party candidates and they sought to 'push Labour voters out of marginal wards'.[85] To this end, they offered grants of £15,000 to tenants to move out of social housing properties, which they then renovated and sold at a discount. It became known as the 'homes for votes' scandal. The auditor of the Council's accounts found that Porter and Weeks had engaged in 'wilful misconduct' and were obliged, under statute,[86] to compensate the Council for the £31.6 million resulting financial loss.[87]

Lord Bingham of Cornhill, with whom the rest of the House of Lords agreed, set out a number of basic underlying principles. They were:[88]

1. Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise.
2. Such powers are exercised by or on the delegation of councillors. It is misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred.

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[81] *Obeid v R* [2017] NSWCCA 221, [144] (Bathurst CJ), drawing upon the preambular statements in the Legislative Council's Code of Conduct.
[82] *R v Pilarinos and Clark* [2002] BCSC 452; 219 DLR (4th) 165 – the former Premier was acquitted.
[83] *R v Vander Zalm* [1992] BCJ No 1390 – the former Premier was also acquitted. He was found to have acted in a manner that was 'foolish, ill-advised and in apparent or real conflict of interest or breach of ethics', but there was insufficient evidence to establish guilt beyond a reasonable doubt.
[84] *R v Boulanger* [2006] 2 SCR 49, [57].
[85] *Porter v Magill* (2002) 2 AC 357, [7] (Lord Bingham).
[86] *Local Government Finance Act 1982* (UK), s 20.
[87] The amount owed increased to £42 million once interest and costs were included. Porter settled for the repayment of £12.3 million. The Council concluded that the costs of litigation to reclaim the rest of the amount owed would be disproportionate to any amount it was likely to receive. Weeks, who unlike Porter had not inherited a significant fortune, settled for £44,000.
[88] *Porter v Magill* (2002) 2 AC 357, 463-465 [19] (Lord Bingham).

3. If the councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct.
4. If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council.[89]
5. Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party.

The fifth point was contested by Porter and Weeks who stressed the realities of party politics. They argued that councillors who are elected as members of a political party cannot be expected to ignore party political advantage when making decisions. They contended that as 'long as they had reasons for taking action other than purely partisan political reasons their conduct could not be impugned'.[90] They relied upon having 'mixed motives'. In the Court of Appeal, Schiemann LJ had recognised that actions may be taken for mixed motives, particularly when they are group decisions. He observed that:

> It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved.[91]

The distinction to which Schiemann LJ appears to be alluding is between policies which a party pursues in the belief that the policies are in the public interest, and actions taken to buy votes in order to win an election so that its policies might be pursued. A policy that is, in the view of a party, in the public interest may also be popular and win the party votes. But that is a different matter from actions taken, not in the public interest, but simply for the purpose of winning votes in an election by handing out prizes, such as giving grants, building facilities or selling off housing at a discount in an electorate, where there is no genuine public interest assessment.

On appeal, Lord Bingham, after considering the various authorities on the role of political purposes, observed:

> Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of

[89] In this case the rule was given effect by a statutory provision, s 20 of the *Local Government Finance Act 1982* (UK), but Lord Bingham noted at [19] (p 464) that it is not a new rule, and that it had been recognised both by prior statutes and the common law.
[90] *Porter v Magill* (2002) 2 AC 357, 465 [19] (Lord Bingham).
[91] *Porter v Magill* [2002] 2 AC 357, 391 (Schiemann LJ).

> the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council.[92]

Lord Bingham therefore focused more narrowly on the particular public purpose for which the power was conferred. As this was a statutory power to sell property, consideration had to be given to the intended public purpose of the exercise of the power. That would not include a purpose of altering the political make-up of the electorate by moving out social housing tenants and moving in affluent home-owners in order to ensure that marginal electorates become safe electorates at the next election. Hence, the action taken by the Council was not for a 'public purpose' in pursuit of a policy and nor was it for a purpose permitted by the conferral of the power.

Lord Scott added the observation that 'there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage'.[93]

Lord Bingham noted that there was nothing in the prior authorities 'to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage'.[94] He recognised 'the unpalatable truth that this was a deliberate, blatant and dishonest misuse of public power… not for the purpose of financial gain but for that of electoral advantage'. He added that in 'that sense it was corrupt' and he thought that the auditor was 'right to stigmatise it as disgraceful'.[95]

Since then, this decision has been applied in relation to decisions taken for the purposes of electoral advantage rather than the proper purpose of the power. In a case concerning whether a decision to pull a controversial advertisement from public transport in London was taken to gain a political advantage during a mayoral election, the Court of Appeal accepted that:

> It is common ground that a public body cannot exercise a statutory power for an improper purpose… It is not disputed… that, if the decision to disallow the advertisement had been taken for the purpose of advancing the Mayor's election campaign and not for the purpose of fulfilling the objects of the [Greater London Authority Act 1999] and implementing the Policy, it would have been an unlawful decision.[96]

The role of politics in official decision-making has also been raised in Australia in the Obeid and Greiner cases. In *Obeid v R,* Mr Obeid contended that the duty imposed upon Members of Parliament to act *only* according to what they believe to be in the public interest, was too broad and would catch examples of common conduct, such as acting in support of party policy regardless of whether the Member believed it to be in the public interest, and 'engaging in

[92] *Porter v Magill* (2002) 2 AC 357, 466 [21] (Lord Bingham).
[93] *Porter v Magill* (2002) 2 AC 357, 506 [144] (Lord Scott).
[94] *Porter v Magill* (2002) 2 AC 357, 467 [22] (Lord Bingham).
[95] *Porter v Magill* (2002) 2 AC 357, 478, [48] (Lord Bingham).
[96] *R (on the application of Core Issues Trust Ltd) v Transport for London* [2014] EWCA Civ 34, [34]. See further, on the findings of fact, *R (on the application of Core Issues Trust Ltd) v Transport for London, The Mayor of London* [2014] EWHC 2628 (Admin).

fundraising activities'.[97] He also contended that it would catch action that a Member believed was in the public interest where the Member was also motivated by a personal, but benign, motive.[98] Bathurst CJ noted that these examples were 'far removed from the present case'[99] and considered that he did not need to address whether acting in a political party's interests, rather than the public interest, could constitute misconduct in public office. But in distinguishing these examples raised by Mr Obeid, Bathurst CJ noted that they involved 'conflicting public duties which do not lead to criminal sanctions' and that even if it could be shown that a public official acted contrary to the public interest, the elements of wilfulness and seriousness of the conduct would still have to be made out.[100]

In the *Greiner* case, the challenged finding of corrupt conduct against Greiner related to actions which the ICAC Commissioner found had mixed motives, including personal benefit and political benefit. The ICAC Commissioner explained:

> A member of Parliament was given a job for extraneous reasons. One of them was Metherell's friendship with Moore. Another was political advantage. It accrued to the Liberal Party, but also to Greiner and Moore, whose prospects of remaining in Government were enhanced by the deal. Ministers are better off than ordinary members of Parliament, not just in material terms although that is true, but also because they have greater opportunities to exercise power and discharge functions. Except when something goes wrong it is more satisfying being a Minister than not. Greiner and Moore were entrusted by the public with powers which were to be used impartially. But that did not happen.[101]

The Commissioner later concluded with respect to the Premier that:

> Greiner sanctioned the appointment of a man who had become a political opponent, without interview. He did that with a view to a change in the composition of the Legislative Assembly which would favour the Government, Greiner's party and Greiner personally.[102]

The NSW Court of Appeal accepted that s 8 of the *ICAC Act* had been breached. Gleeson CJ observed that for Mr Greiner and Mr Moore, 'there was a conflict between duty and interest'.[103] They were not able, in the political circumstances, to give proper consideration to Dr Metherell's comparative merit to fill the position. Section 26 of the *Public Sector Management Act* required that appointment to such positions be made upon merit. Gleeson CJ noted that the actions of Greiner and Moore, as Ministers, put the public servant in whom the power of appointment was vested, Mr Humphrey, 'in a position of extreme difficulty in fulfilling his responsibilities' and that at the very least this brought the case within s 8(1)(a).[104]

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[97] *Obeid v R* [2017] NSWCCA 221, [51] (Bathurst CJ).
[98] *Obeid v R* [2017] NSWCCA 221, [51] (Bathurst CJ). Note, that on the point of mixed motives, Bathurst CJ stated that the case had been run on the basis, favourable to Mr Obeid, that the jury had to be satisfied that his sole purpose was an improper purpose. His Honour therefore found at [96] that it was unnecessary to consider whether the offence would be made out if the improper purpose were the dominant or causative purpose, rather than the sole purpose.
[99] *Obeid v R* [2017] NSWCCA 221, [51] (Bathurst CJ).
[100] *Obeid v R* [2017] NSWCCA 221, [80] (Bathurst CJ).
[101] See the extract at: *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136-7.
[102] See also the extract at: *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 139.
[103] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145 (Gleeson CJ).
[104] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145 (Gleeson CJ).

Mahoney JA observed that where power derives from an office, including the office of a Minister, the power may only be exercised to achieve its proper public purpose. He added:

> If a Minister or officer exercises a public power merely to, for example, comply with the wishes of a political party, an employer or a trade union official, that exercise of power, though apparently within the terms of the legislation or office, is wrong and may constitute a crime.[105]

Mahoney JA noted the argument made on behalf of Greiner and Moore that there was no partiality because they acted for a political reason. It was argued that 'it is acceptable to give preference in such a way if the reason why it is given is to achieve a political advantage such as, as in this case, to bring about an advantageous by-election or to repay a political debt'.[106] It was further argued that 'public life involves the exercise of power so as to further political ends' and that achieving those ends by an appointment of Dr Metherell to the public service was therefore not partial in the terms of the *ICAC Act*.[107]

Mahoney JA rejected this reasoning. While he acknowledged that Parliament may enact legislation to achieve political ends and that political factors may sometimes fall within proper purposes in the exercise of executive power (eg where a decision-maker is obliged to take into account government policy), he stressed that the ends for which executive power may be exercised are 'limited by the law'.[108] He considered that public power to appoint to a public office 'must be exercised for a public purpose, not for a private or a political purpose' and that a decision about where a public facility is to be built must be based upon what is the proper place for it, rather than where it is most likely to assist the re-election of a party member.[109] He also later noted that if an official is given power to allocate money to encourage cultural activities, and distributes it to 'persons or bodies apt to support a particular political party – or to procure that they do so', this too would involve the misuse of a public power.[110]

In the *Greiner* case, the appointment of Dr Metherell involved partiality because it was not done for a purpose permitted by the Act, which required appointment on the basis of merit, but for an extraneous political purpose. In contrast, taking political considerations into account in appointing the staff of Members of Parliament or ministerial advisers may be appropriate because there is no statutory limit on the purpose of the appointment. Mahoney JA, writing extra-judicially, summarised the position as follows:

> There are cases in which it is lawful for an official to use the legal power vested in him to achieve a political (a party political) advantage, for himself or for his party or those associated with him. Thus, some employees or officers may be appointed by a Minister for political reasons. I mean by this that the official is not bound by statute law as to the purpose to be achieved by the appointment; he may take into account political matters in making the appointment…. [I]t is proper to recognise that in some cases the exercise of public power may legitimately have a political purpose or be influenced by

[105] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 161 (Mahoney JA).
[106] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 163 (Mahoney JA).
[107] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 163 (Mahoney JA).
[108] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 163-4 (Mahoney JA).
[109] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 164 (Mahoney JA).
[110] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17, 20.

> pure politics. The present offence [i.e. misconduct in public office] does not, I think, apply in such a case.[111]

Difficulties arise where there are mixed motives. It may be the case that a decision-maker acts in a partial manner in distributing grants but also acts for a permissible purpose in the public interest. The NSW Court of Criminal Appeal took the view that in such circumstances, a criminal offence is only made out if the power would not have been exercised but for the presence of the illegitimate purpose.[112]

A blind-eye has been turned by political parties to these issues when it comes to pork-barrelling. The aspirational view has instead been taken that public money can be used with impunity for a party in government to buy favour in the electorates it holds and in marginal electorates, without any consideration of the proper purposes for the use of public money, whether proposals meet the criteria of merit, need and capacity to complete, and whether they are in the public interest. Richard Denniss has argued that politicians want to be accused of engaging in pork-barrelling because this is how they show their electorate that they are valuable and have achieved things for it. He pointed to the absence of a deterrent, stating:

> [T]here is no mention of corruption in our Constitution, no federal anti-corruption body to investigate it and literally no law to stop a minister from drawing up a spreadsheet of key marginal seats, thinking up a program to pour public funds into those seats and appearing with candidates wielding novelty cheques to promote their largesse with our money….
>
> Under existing Australian law, and in the absence of shame, there are literally no costs to a minister or government that just hands over public money to projects in their marginal seats because it helps them and their party. None.[113]

But this does not appear to be the case. There are relevant laws, such as the criminal offence of misconduct in public office, and there is certainly the potential for prosecution to be considered when misconduct is wilful and serious.

Partiality and the making of government grants

In what circumstances might the exercise of powers to confer grants involve the 'partial' exercise of a Minister's or public servant's official functions, for the purposes of s 8(1)(b)? In the *Greiner* case, Mahoney JA gave a detailed analysis of the meaning of partiality for the purposes of s 8(1)(b), breaking it down to its elements.

First, he considered that it arose in a context where there were competing claims, such as two or more applicants applying for government grants.[114] Second, a preference or advantage is given to one of them, which has not been given to another. The advantage might lie in the award of a grant to one applicant over another, or it might lie merely in giving an applicant an advantage in the process, such as waiving an eligibility requirement or admitting a late

[111] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17, 25.
[112] *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [84].
[113] Richard Dennis, 'Roll out the pork barrels', *The Monthly,* 1 September 2021, https://australiainstitute.org.au/post/roll-out-the-pork-barrels/.
[114] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 161 (Mahoney JA).

application when others were not admitted. Third, the advantage must be given in circumstances where there was a duty, or at least an expectation, that applicants would be treated equally. 'Ordinarily, there will be no partiality if there be no duty to be impartial'.[115] Fourth, the applicant was advantaged for an unacceptable reason. 'Preference is not, as such, partiality'.[116] An applicant may be preferred for valid reasons which the rules of the contest allow. Partiality involves giving a preference or advantage for an improper reason that is outside the rules. Fifth, the official giving the preference or advantage must be conscious of the fact that it was done for an unacceptable reason.[117] Indications of recognition of wrong-doing may include concealing the evidence, such as by shredding documents, or failing to keep records setting out reasons or refusing to produce (or disclaiming knowledge of) spreadsheets which show that the electorate where the grant applicant was based was a factor influencing the outcome.

On this basis, if a grant scheme were established with grants to be determined on a merit basis, with rules published setting out the eligibility conditions, the criteria for merit-ranking and a closing date, and if a public official, such as a Minister, instead awarded grants to applicants because of matters outside the merit criteria, such as their location in a particular parliamentary seat, or required certain late applications to be accepted or ineligible applications to be assessed and approved for political reasons, or if the decision-maker rejected the ranking of projects based upon merit and substituted rankings based upon party-political considerations, then that would constitute partial conduct as it would involve giving a preference or advantage for an improper purpose when there is a duty to act in the public interest. It would therefore be likely to satisfy s 8(1)(b) of the *ICAC Act,* as a 'dishonest or partial exercise of any of his or her functions' and possibly s 8(1)(c), because exercising an official power for an improper purpose amounts to a breach of public trust.

In addition, if the power to allocate grants was vested in another public official, such as a public servant, and the Minister acted to influence that public servant, affecting the impartial exercise of an official function by advising or instructing that lowly ranked applications be awarded grants over applications of higher merit so as to achieve a political benefit, then s 8(1)(a) may also be satisfied. If a Minister has no formal power to make a decision, as the power is conferred upon a statutory authority or an official or even another Minister, but the first Minister either directly, or through his or her office, seeks to influence the decision-maker to make a decision that is partial, then that too could amount to misconduct in public office. As Brennan J noted in *Herscu v The Queen,* corruption may occur when the holder of a public office uses 'the influence of his office to secure an object' that is within the legal power of others.[118]

But before a finding of 'corrupt conduct' can be made under the *ICAC Act,* the terms of s 9 must also be met. This could be satisfied by a finding that the conduct 'could constitute or involve' a criminal offence, under s 9(1)(a), such as the offence of misconduct in public office. As noted above, this would require particular consideration of whether the public official has wilfully misconducted himself or herself, without reasonable excuse or justification, where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which

[115] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 162 (Mahoney JA).
[116] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 162 (Mahoney JA).
[117] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 162 (Mahoney JA).
[118] *Herscu v The Queen* (1991) 173 CLR 276, 287 (Brennan J). See also Mason CJ, Dawson, Toohey and Gaudron JJ at 283.

they serve and the nature and extent of the departure from those objects. This constitutes a higher hurdle than satisfaction of the terms of s 8.

Alternatively, the conduct would also satisfy the terms of s 9 if it could constitute or involve a substantial breach of the Ministerial Code of Conduct. This might be enlivened, for example, if the Minister knowingly breached the law or knowingly directed, pressured or requested a public servant or agency to breach the law. This gives rise to questions concerning the establishment of intent and knowledge as well as an assessment of what amounts to a 'substantial' breach. Further, the ICAC can only make a finding of corrupt conduct if it is 'serious corrupt conduct'.[119]

Some might argue that pork-barrelling is increasingly common and as it has not so far resulted in prosecution for misconduct in public office or a finding of corrupt conduct by the Independent Commission Against Corruption, this is a strong indication that it is not regarded as unlawful or corrupt. They might argue that it is simply part of 'politics as usual', and while it might be frowned upon, it is a perfectly legitimate exercise of power. However, as the discussion of the cases above has shown, such an argument is unlikely to withstand scrutiny. There would certainly be circumstances in which a form of pork-barrelling could constitute misconduct in public office or otherwise satisfy the requirements of ss 8 and 9. The mere fact that it has not yet been tackled at this level, does not mean that it will not be dealt with in this manner in the future.

Priestley JA noted in the *Greiner* case:

> The law has always set high standards for official conduct. The fact that departures from the standards may have been unhappily frequent, difficult to detect and more difficult to prove, has not meant that the standards are low, but that they have been difficult to enforce. It was to deal with this situation that the Act was designed and the [ICAC] was given its formidable powers of investigation.[120]

PART III – PORK-BARRELLING AND THE NEED FOR REFORM

One of the ICAC's significant roles is to act to pre-empt corruption, by educating and seeking to implement measures to prevent corruption occurring. Section 13(1)(f) describes one of the ICAC's principal functions as:

> to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration.

This Part addresses recent allegations of pork-barrelling at the Commonwealth and State levels, the existing legal mechanisms that are intended to protect the public interest and restrain or prevent the misuse of public money in this way, and what reforms could be made to improve these legal mechanisms, which the ICAC could recommend in fulfilment of its function under s 13(1)(f) of its Act.

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[119] *Independent Commission Against Corruption Act 1988* (NSW), s 74BA(1).
[120] *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 180 (Priestly JA).

Allegations of pork-barrelling at the Commonwealth level

Cases of pork-barrelling have occurred under both sides of politics and over a long time. They are most notable in the field of grants to community organisations under programs concerning sport and cultural activities, regional programs and under the meaningless but all-encompassing description of 'building stronger communities'.[121] Much of the spending is unlawful, as it falls outside the Commonwealth's constitutional powers.[122] It is also commonly an inefficient and ineffective use of public money, as it is distributed for the purposes of gaining political favour rather than dealing with genuine needs. The amounts involved are large, running annually to billions of dollars.[123]

The exposure and criticism of that conduct, particularly in reports by the Auditor-General and parliamentary inquiries, occurs at regular intervals, but lessons are not learned as the same conduct keeps being repeated, despite its condemnation.

Amongst the more memorable examples at the federal level was Minister Ros Kelly's use of a whiteboard to determine the distribution of sports grants under the Hawke Labor Government in 1993,[124] leaving no record of the decision-making process, and the Howard Coalition Government's distribution of grants under the Regional Partnership Program between 2003 and 2007.[125] Both were severely criticised by the Australian National Audit Office ('ANAO').

In relation to the sports grants, which became known as the first 'sports-rorts affair', the ANAO noted that while the Department administered the program, the assessment and selection of projects to be funded was made personally by the Minister.[126] No records were maintained to preserve the reasons for each decision. The distribution of the grants favoured Labor seats over Coalition seats, and gave grants of higher value to marginal seats. The ANAO conceded that it could not demonstrate political bias, as the money might have gone to fund areas where there was the greatest need for facilities. The lack of documentation also meant that the ANAO could not assess whether the approved grants were those most likely to achieve the program aims, or the community's highest needs, or that the program was providing value for money.[127]

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[121] See, eg, the 'Strengthening Communities' program and the 'Stronger Communities' program, *Financial Framework (Supplementary Power) Regulation 1997,* schedule 1AB, part 4, item 46 and item 91.
[122] See further: Anne Twomey, "Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay' (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 293, 297-306.
[123] The Senate Standing Committee for the Scrutiny of Delegated Legislation keeps a tally of some of these programs: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure#:~:text=The%20Financial%20Framework%20(Supplementary%20Powers,instruments%20made%20under%20those%20Acts.
[124] ANAO, *Efficiency Audit of the Community, Cultural, Recreational and Sporting Facilities Program,* (Audit Report No 9, 1993-4). See further: Clive Gaunt, 'Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants' (1999) 34(1) *Australian Journal of Political Science* 63; and David Denemark, 'Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants' (2000) 62(3) *The Journal of Politics* 896.
[125] ANAO, *Performance Audit of the Regional Partnerships Programme,* (ANAO, Audit Report No 14, 2007-8, Vol 1).
[126] ANAO, *Efficiency Audit of the Community, Cultural, Recreational and Sporting Facilities Program,* (Audit Report No 9, 1993-4) 9.
[127] ANAO, *Efficiency Audit of the Community, Cultural, Recreational and Sporting Facilities Program,* (Audit Report No 9, 1993-4) 17; and House of Representatives Standing Committee on Environment, Recreation and the Arts, 'The Community Cultural, Recreational and Sporting Facilities Program', February 1994, p 16, quoting from evidence from the Auditor-General.

In short, the lack of documentation destroyed accountability and had the potential to hide improper behaviour.

A parliamentary committee, with a government majority, in its inquiry into the matter concluded:

> The Auditor-General did not allege ministerial fraud or misappropriation, however, the Minister's failure to document her administration left open the question of whether her management was competent and her decisions fair…
>
> Proper administrative procedures, particularly in relation to documentation, are a prerequisite for proper accountability. They are also essential for the administration and evaluation of the program….
>
> The Auditor-General suggested that, at a minimum:
> - administrative decisions should be fair and open;
> - decisions should be based on principle and supported by documented reasons; and
> - those involved in the decision making should be accountable for their decisions.
>
> It is clear from the evidence that, in relation to supporting decisions with documented reasons, the Minister's management of the program was deficient.[128]

Minister Kelly resigned shortly after the parliamentary committee's report was released.

In the case of the Regional Partnership Program under the Howard Government, the ANAO described the expected standard of ministerial decision-making as follows:

> Ministers are expected to discharge their responsibilities in accordance with wide considerations of public interest and without regard to considerations of a party political nature. Where they are approving the making of a grant, Ministers are approving the expenditure of public money. This role brings with it particular accountability obligations, including statutory requirements which govern the circumstances in which Ministers may provide such approvals. In particular, the financial framework requires that a grant not be approved by Ministers unless reasonable inquiries have been undertaken that demonstrate that the proposed expenditure will make efficient and effective use of public money.[129]

The ANAO noted that guidelines for the Regional Partnership Programme were published, setting out the basis upon which applications would be assessed and funding decisions made. It observed that applicants could have reasonably expected that decisions would be made on that basis. But in fact, 'departures from the published guidelines were a feature of the Programme'. This included instances of funding being approved before an application was made, funding decisions not being informed by assessment about the published guidelines and

[128] House of Representatives Standing Committee on Environment, Recreation and the Arts, 'The Community Cultural, Recreational and Sporting Facilities Program', February 1994, p 36.
[129] ANAO, *Performance Audit of the Regional Partnerships Programme,* (ANAO, Audit Report No 14, 2007-8, Vol 1) [29].

criteria and projects being approved even though criteria had not been met.[130] In addition, the ANAO's 'analysis revealed that Ministers were more likely to approve funding for "not recommended" projects that had been submitted by applicants in electorates held by the Liberal and National parties and more likely to not approve funding for "recommended" projects that had been submitted by applicants in electorates held by the Labor party'.[131]

The ANAO noted that resulting perceptions that funding decisions were not merit-based were elevated by the fact that the basis for ministerial decisions was not recorded.[132] The ANAO found that departure from the guidelines and the proper decision-making process led to funding for projects that did not proceed as planned or did not result in the anticipated community benefits.[133]

Since these criticisms were made the degree and brazenness of such conduct has only increased.[134] The ANAO has produced critical performance audits of programs including the Community Sport Infrastructure Program,[135] the Urban Congestion Fund with respect to commuter car parks[136] and the Safer Communities Fund.[137] For example, in relation to the Community Sport Infrastructure Program, the ANAO found that while the Australian Sports Commission had assessed the grant projects on the basis of merit, the office of the Minister for Sport had run a parallel process which was based on factors other than those identified in the Program Guidelines, 'such as project locations including Coalition "marginal" electorates and "targeted" electorates'.[138]

The ANAO added that there was 'evidence of distribution bias in the award of grant funding'. It concluded:

> The award of funding reflected the approach documented by the Minister's Office of focusing on "marginal" electorates held by the Coalition as well as those electorates held by other parties or independent members that were to be "targeted" by the Coalition at the 2019 Election. Applications from projects located in those electorates were more successful in being awarded funding than if funding was allocated on the basis of merit assessed against the published program guidelines.[139]

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[130] ANAO, *Performance Audit of the Regional Partnerships Programme,* (ANAO, Audit Report No 14, 2007-8, Vol 1) [33].
[131] ANAO, *Performance Audit of the Regional Partnerships Programme,* (ANAO, Audit Report No 14, 2007-8, Vol 1) [40].
[132] ANAO, *Performance Audit of the Regional Partnerships Programme,* (ANAO, Audit Report No 14, 2007-8, Vol 1) [34].
[133] ANAO, *Performance Audit of the Regional Partnerships Programme,* (ANAO, Audit Report No 14, 2007-8, Vol 1) [34].
[134] See, eg: Hannah Melville-Rea, Robyn Seth-Purdie and Bill Browne, 'Grants with ministerial discretion – Distribution analysis', *The Australia Institute,* November 2021: https://australiainstitute.org.au/wp-content/uploads/2021/11/P1111-Grants-with-Ministerial-Discretion-Web.pdf.
[135] ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20).
[136] ANAO, *Administration of Commuter Car Park Projects within the Urban Congestion Fund* (ANAO Audit Report No 47, 2020-21).
[137] ANAO, *Award of Funding under the Safer Communities Fund* (ANAO Audit Report No 16, 2021-22).
[138] ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20) [18]. Breaches of the guidelines included the funding of projects which had already commenced works, and in some cases completed the works, and the funding or alteration of applications made after the submission deadline.
[139] ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20) [24].

It also concluded that there was no evident legal authority for the Minister to be the decision-maker in making the grants.[140]

Financial accountability mechanisms at the Commonwealth level

Overall, the Commonwealth has superior legal mechanisms in place to ensure financial accountability and probity with respect to grants, than New South Wales.

Legal regulation of Commonwealth grant-making

First, as a consequence of the High Court's judgment in *Williams v Commonwealth,*[141] the Commonwealth must legislate to authorise the expenditure of money on grants. This means that in addition to the appropriation, there is a legislative authorisation for the expenditure of public funds on grants, which must fall within a head of constitutional power. The purpose of the grant scheme can therefore be identified with greater clarity through statutory interpretation of the authorising provision.

Second, s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the '*PGPA Act'*) provides:

> (1) A Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money.
>
> (2) If a Minister approves a proposed expenditure of relevant money, the Minister must:
>
> > (a) record the terms of the approval in writing as soon as practicable after giving the approval; and
> >
> > (b) comply with any other requirements prescribed by the rules in relation to approvals of proposed expenditure.

'Proper' is defined in s 8 as meaning 'efficient, effective, economical and ethical' and 'relevant money' is money held by the Commonwealth or a corporate Commonwealth entity.

The consequence of this provision is that Ministers are under a legal obligation not to approve grants unless satisfied, after making reasonable inquiries, that the expenditure is an efficient, effective, economical and ethical use of the money. To be 'satisfied', a Minister must 'in fact form a state of mind that can be described as one of satisfaction' and must 'form the requisite state of mind reasonably and on a correct understanding of the Act'.[142] Further, as Gageler J has noted:

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[140] ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20) [10], [13] and [2.19]. For a more detailed analysis of the problems with the decision-making process under this program, see: Anne Twomey, "Constitutional Risk", Disrespect for the Rule of Law and Democratic Decay' (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 293.
[141] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.
[142] *Palmer v Western Australia* [2021] HCA 5, [158] (Gageler J).

> To fulfil the condition of reasonableness, the state of mind formed by the Minister must be one that is open to be formed by a reasonable person in the position of the Minister on the basis of the information available to the Minister and must be one that is in fact formed by the Minister through an intelligible process of reasoning on the basis of that available information.[143]

This places a significant burden on the Minister, which can be tested at law. While there are no sanctions in the *PGPA Act* for breaching this provision,[144] any breach would be a breach of the law for the purposes of the Statement of Ministerial Standards and would be relevant to any challenge under administrative law.

Third, the *Commonwealth Grants Rules and Guidelines 2017* (the 'CGRGs') were given effect as a statutory instrument under s 105C(1) of the *PGPA Act.* This means that they have the force of law. They are comprised of two parts – mandatory requirements in Part 1 and guidance on key principles in Part 2. Within the mandatory requirements in Part 1 are rules applying to Ministers and public servants in their administration of grants.

Paragraph 3.3 requires Ministers to comply with relevant legislative requirements in the *PGPA Act* and with the CGRGs, while officials are required to advise Ministers about these obligations. Paragraph 3.11 repeats the *PGPA Act* requirement that Ministers must not approve expenditure unless satisfied, after reasonable inquiries, that the expenditure would be 'proper', but adds that the 'terms of the approval *must* be recorded in writing as soon as practicable after the approval is given'. Paragraph 4.4 requires officials to develop grant guidelines for all new grants and paragraph 4.6 requires them to advise Ministers about the selection criteria and process and the merits of the grants relative to the guidelines and the need to achieve value for money.

Paragraph 4.10 states that a Minister must not approve a grant without first receiving written advice from officials on its merits. The Minister must record, in writing, 'the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money'. The same obligation applies to any official who approves a grant. Where a Minister approves grants within his or her own electorate, paragraph 4.11 requires the Minister to write to the Finance Minister advising of the details.

Paragraph 4.12 provides that while Ministers may approve grants that are not recommended by relevant officials, they must report annually to the Finance Minister by 31 March about all instances where they have approved a grant which the officials recommended be rejected. The report must contain a brief statement of reasons for the approval of each grant.

These provisions are aimed at ensuring that there is documentation, transparency and the provision of reasoning to support grant decisions, particularly when the Minister acts contrary to the recommendations of officials.

Flawed processes regarding election promises

While these legal requirements are all appropriate, clear and laudable, there are loopholes which permit their avoidance. A large loophole concerns 'election promises'. Prior to

[143] *Palmer v Western Australia* [2021] HCA 5, [158] (Gageler J).
[144] Compare the liability of Ministers and officials to repay money lost under ss 67-69, including as a result of misconduct.

elections and by-elections, promises are frequently made to fund infrastructure or make grants within electorates without any assessment having been made about the value of the project, its feasibility and the capacity of the recipient to deliver the project and make best use of it. There are no guidelines, eligibility criteria, applications or assessments of merit before commitments are made to provide the funding. The consequence is that the resulting infrastructure and grants lead to poor outcomes which do not provide value for the community and that more needy areas miss out.

Politicians could, of course, recognize a public interest in spending on a particular subject, announce an election policy to expend $X on that subject and state that the money will be spent on a fair basis according to merit and need, once applications have been made and assessments completed after the election. This would allow them to be elected on the basis of policies, rather than electoral bribes. However, many politicians appear to prefer to be seen to be handing out gifts to their electorate, even if it is unfair, inefficient, ineffective and a misuse of public funds for party gain. They justify this to themselves as being an aspect of 'democracy', but this degrades the meaning of the term.

The *PGPA Act* and the CGRGs do not include any exemptions for election promises. Ministers are still obliged not to approve a grant unless it is a 'proper' (i.e. an efficient, effective, economical and ethical) use of public money. But in practice, blind eyes are turned to such matters where an election commitment has already been given. The CGRGs recognise a species of 'ad hoc grants', which are described as 'one-off or ad hoc grants' that do not have planned selection processes, but are 'designed to meet a specific need, often due to urgency or other circumstances'. It is into this category that election promises are commonly shoe-horned.

For example, on 30 March 2019, the Female Facilities and Water Safety Stream program ('FFWSS') was announced, allocating $150 million over four years, of which $20 million was budgeted to be spent in 2019-20.[145] Parliament was dissolved shortly afterwards on 11 April 2019. During the ensuing election campaign, 41 promises were made by the Coalition Government for funding under the program, almost exhausting the entire four year allocation, despite there being no guidelines, no eligibility criteria, no merit selection and not even any applications for the grants. Eighty per cent of the funding was allocated to the construction or renovation of swimming pools, all in seats held by the Coalition Government at the time,[146] with only twenty per cent of the fund being allocated to female change rooms. Many bodies awarded funding did not know about it until they read the publicity, and problems arose when the relevant land was not available for use for a pool[147] or the relevant body was not in a position to fund its ongoing maintenance.[148]

Guidelines were only issued for the FFWSS program after the award of the grants was confirmed. These Guidelines were addressed to the delivery of the grants, rather than eligibility and merit selection.[149] The role of public servants was limited to confirming with Ministers'

[145] Commonwealth, Budget Paper No 2, 2019-20, pp 92-3.
[146] One marginal Coalition seat was lost at the election. The rest were retained.
[147] Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 27 August 2020, p 17.
[148] Jack Snape and Andrew Probyn, 'Government's $150 million female sports program funnelled into swimming pools for marginal Coalition seats', *ABC News,* 7 February 2020: https://www.abc.net.au/news/2020-02-07/government-cash-splash-swimming-pools/11924850.
[149] Letter by Senator Richard Colbeck to Senator Scott Ryan, President of the Senate, 24 February 2020, in response to an order for the production of documents.

offices the identity of the recipients of the grants and then overseeing delivery.[150] The Guidelines addressed the selection process by simply stating 'You are not eligible to apply if you have not been identified by the Australian Government to receive funding under this grant opportunity' and that general applications will not be accepted.[151] The Department took the view that the design and selection process had been overtaken by the making of election promises, and that they should be treated differently as ad hoc grants.[152]

According to para 9.3 of the CGRGs, at a 'minimum, guidelines for one-off or ad hoc grant opportunities should include the purpose or description of the grant, the objectives, the selection process, and reporting and acquittal requirements and the proposed evaluation mechanisms'. In the case of the FFWSS program, there was no selection process other than the making of election promises and the objective appeared to be a partisan one of winning the election.

While the CGRGs do not expressly permit such deviations from the basic grant requirements, they have been interpreted, as a matter of convenience, as so doing when it comes to election promises. The result is poorly planned infrastructure, grant outcomes which do not adequately serve the public interest, and the misuse of public money for political party purposes.

The use of 'Cabinet confidentiality' to defeat transparency

In the case of the 'Building Better Regions Fund',[153] a ministerial panel was established to determine funding approvals. It was then claimed that Cabinet confidentiality applied in relation to the decisions of this body, so that any reasons for its allocation of funding were redacted from documents before they were publicly released, removing any transparency or accountability. In relation to Round 3 of the program we know that of the 330 projects approved, 112 were chosen by the ministerial panel against the merit-based recommendations of the Department. The list of these projects, their location and the reasons for overturning the merit-based recommendations of the Department were all redacted from the relevant letter to the Finance Minister.[154] The same redactions occurred in relation to Round 4 of the program, where 49 of the 163 projects were approved despite not being recommended for funding by the Department.[155]

Failure to produce genuine reasons for overriding merit recommendations

Further, where requirements are imposed, they are often ignored or compliance is perfunctory in nature. There is no adequate oversight of ministerial actions (except when Performance

[150] See the heavily redacted email, 3 October 2019, produced on 24 February 2020 in response to an order by the Senate for the production of documents, p 171.
[151] Female Facilities and Water Safety Stream Program Grant Opportunity Guidelines, 28 February 2020, [2].
[152] Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 27 August 2020, pp 7-8.
[153] Note that this program is currently the subject of an ANAO performance audit, which is due to report in June 2022. Allegations have been made of pork-barrelling under this program, but have not been formally established. See: Katina Curtis and Shane Wright, 'Tapping the pork barrel: How the government grants data was compiled', *The Age,* 15 December 2021; Andrew Tillet, 'Pork-barrelling in Coalition seats "worrying": study', *Australian Financial Review,* 29 November 2021; and Vince O'Grady, 'How an Empowering Idea for the Regions Turned into Pork Barreling Rort for Political Gain': https://www.thevogfiles.com/building-better-regions-fund-analysis.html.
[154] Letter by Michael McCormack MP to the Finance Minister, 3 April 2019.
[155] Letter by Michael McCormack MP to the Finance Minister, 16 August 2020.

Audits are undertaken by the ANAO), there is no scrutiny of poor and inadequate reasons and there are no penalties for breaches.

For example, the brief to the Minister for Sport in relation to funding under the Community Sport Infrastructure Program stated that the Minister must 'provide reasons for rejecting or changing the recommended grant applicants'. The brief was returned with 'agreed' marked on it, but changes were made to the recommended recipients of the grants and no reasons were provided for making those changes.[156]

The requirement to write a letter to the Minister for Finance giving reasons for overturning the merit advice of public servants is often respected only in form, not substance. Sometimes the excuse is given that the decision was made by a former Minister, so no reason is known.[157] In one case, the Minister wrote that he was enclosing the details of the grants and 'the reasons for my decisions', only to attach a table which in relation to one grant said 'no reason provided'.[158] On occasion, the reasons focus on matters other than merit, need and value, such as the statement that the grant distribution 'ensures geographical coverage of grants across Australia'.[159] Most commonly the reasons simply describe what the program is intended to do. Almost none explain why the recommendation of the public servants was wrong and needs to be overturned.[160]

Failure to make grants within the scope of the power and purpose of the grant program

While at the Commonwealth level, the constitutional requirement for legislative authorisation of expenditure means that there is legislation that identifies the purpose or object of grants, this is sometimes ignored in actually making the grants.

For example, the FFWSS program was funded under a budget allocation for the purposes of 'Regional Development'. The Department of Infrastructure recorded that its purpose was supporting 'women's participation in sporting activities in our regions and strengthening regional sustainability, capacity and diversity'.[161] Yet most of the funding commitments were neither directed at regions, nor women's participation in sport. Notoriously, a considerable amount was allocated to the renovation of a swimming pool in North Sydney,[162] which was

[156] See the copy of the brief in: Senate, Select Committee on Administration of Sports Grants, Answers to Questions on Notice received from Sport Australia, 17 July 2020, p 1459. Note that the Minister argued that the CGRGs did not apply because the Australian Sports Commission was a corporate Commonwealth entity. But the Australian Sports Commission had its own Grant Management Framework based upon the CGRGs, which also required the giving of reasons. The Minister's office was reminded of this on 5 and 9 December 2018 and in the final brief, but failed to comply.

[157] See, eg, the letter by Senator Marise Payne to the Finance Minister, 7 April 2020 with respect to decisions made by the Minister for Women. One might wonder why the former Minister for Women did not provide reasons at the time the decisions were made or why such reasons could not be found and reported.

[158] Letter by Ken Wyatt MP to the Finance Minister, 29 March 2019.

[159] Letter by Paul Fletcher MP to the Finance Minister, 31 March 2018 with respect to grants by the Minister for Social Services.

[160] Rare examples of genuine, properly explained reasons being given include: Letter by Greg Hunt MP to the Finance Minister, 28 March 2018 regarding grants by the Minister for Health; and Letter by Senator Bridget McKenzie to the Finance Minister, 31 March 2019, regarding a grant that the Department of Communications and the Arts had recommended be rejected.

[161] Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 22 July 2020, p 27. The Department confirmed that it was a regional development program: Senate, Rural and Regional Affairs and Transport Legislation Committee, *Estimates Hansard,* 2 March 2020, p 54.

[162] Other grants were also made to swimming pools in State capitals, such as $20 million for a pool in South Perth and $5 million for a pool in Kogarah in suburban Sydney.

hardly a regional area. The ANAO has previously been critical of the Commonwealth Government for making grants intended for 'regional' purposes to projects in cities.[163]

It is also not uncommon for particular grants to be given outside the scope of the constitutional power relied upon to authorise the expenditure. This results in a great deal of unlawful Commonwealth expenditure of public funds.[164]

Overall, while the Commonwealth legal model for regulating the making of grants is a good one, aspects of it need improvement, including cutting off avoidance mechanisms, ensuring supervision of the system and providing mechanisms for enforcement and punishment for breaches of it.

Allegations of pork-barrelling at the State level

Allegations of pork-barrelling have also occurred at the State level. In recent times, they have been directed at sports grants,[165] arts grants[166] and bushfire relief funds,[167] amongst other funding programs.

In November 2020, the then Premier, Gladys Berejiklian, admitted that the payment of grants to local councils from the Stronger Communities Fund in the period prior to the previous election amounted to pork-barrelling, but claimed it was 'not an illegal practice'.[168] The Premier also later justified 'throwing money at seats to keep them', arguing that this was part of 'democracy'. In response to questions about why grants were made contrary to the advice of public servants she observed that Departments were not expert at 'winning byelections'.[169] It seems, however, politicians are not expert at it either[170] and that pork-barrelling is not terribly effective, despite the strong, but misguided, belief of politicians that they can use public money to buy electoral success.[171]

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[163] Australian National Audit Office, *Design and Implementation of Round Two of the National Stronger Regions Fund,* Report No 30, 2016-17, 32-3.
[164] For a detailed analysis, see: Anne Twomey, 'Executive Power Following the *Williams* Cases', in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law – Tributes to Professor Leslie Zines* (Federation Press, 2020) 33.
[165] Paige Cockburn and Michelle Brown, 'NSW Government faces pressure over sports cash splash in Liberal-held seats', ABC News, 18 January 2020: https://www.abc.net.au/news/2020-01-18/nsw-sports-funding-attracts-accusations-of-pork-barrelling/11879518.
[166] Michaela Boland and Greg Miskelly, 'NSW Deputy Premier John Barilaro, Don Harwin accused of "pork-barrelling" in Coalition seats before state election', ABC News, 25 May 2020: https://www.abc.net.au/news/2020-05-25/nsw-ministers-accused-of-favouritism-in-arts-spending/12271392.
[167] Lucy Cormack, 'New Allegations of pork barrelling over a $177 million bushfire relief fund' *Sydney Morning Herald,* 30 January 2021: https://www.smh.com.au/politics/nsw/new-allegations-of-pork-barrelling-over-a-177-million-bushfire-relief-fund-20210129-p56xuj.html.
[168] Anne Davies, 'Berejiklian concedes $140m grant scheme was pork-barrelling but says "it's not unique to our government"' *The Guardian,* 26 November 2020: https://www.theguardian.com/australia-news/2020/nov/26/berejiklian-admits-140m-grant-scheme-was-pork-barrelling-as-approval-documents-revealed.
[169] Christopher Knaus, 'Gladys Berejiklian says pork barrelling would not "be a surprise to anybody" – but it's not democracy either', *The Guardian,* 1 November 2021: https://www.theguardian.com/australia-news/2021/nov/02/gladys-berejiklian-says-pork-barrelling-would-not-be-a-surprise-to-anybody-but-its-not-democracy-either.
[170] Bruce MacKenzie, 'Does pork-barrelling actually change the way people vote?', *ABC News,* 11 February 2022: https://www.abc.net.au/news/2022-02-11/pork-barrelling-in-nsw-hasnt-always-worked/100823744.
[171] See the detailed study: Andrew Leigh and Ian McAllister, 'Political Gold: The Australian Sports Grants Scandal' (2021) *Political Studies* ('online first').

In February 2022, the NSW Auditor-General produced a performance audit concerning the 'Integrity of grant program administration'. It focused on two grant programs – the Stronger Communities Fund and the Regional Cultural Fund.

Round two of the Stronger Communities Fund, which distributed $233 million in grants, was, by any measure, appallingly managed. In the absence of legislation that could clarify the matter, it appears that the responsible Minister was the Minister for Local Government and the expenditure of the fund was administered by the Office of Local Government ('OLG') within the Department of Planning and Environment under a financial delegation.[172] In fact, the Minister for Local Government only approved the funding of projects for two of the 24 councils that received funding.[173]

The projects for the other 22 councils appear to have been approved by the Premier and Deputy Premier, without any formal authorisation,[174] and notified to OLG through emails by staff members. Many millions in public money was paid out without the approval of the responsible minister and upon the say-so of staff in the offices of Ministers who were not responsible for the Fund.[175] Any documentation recording the process in the Premier's Office was destroyed, both in hard copy and in electronic copy, in breach of the *State Records Act*.[176] In the Deputy Premier's office, no documentation was created at all in relation to approval of grants. The Deputy Premier was advised orally of proposed projects and his approval was then conveyed by a staff member to the OLG by email.[177] The Auditor-General's Office concluded that it could not rule out that 'the lack of formal documented approval from the former Premier and Deputy Premier, was a purposeful attempt to avoid transparency and accountability over [their] involvement … in approving grant allocations. Deficient record-keeping and program

[172] Note that the OLG considered that its role was limited to administrative execution of funding agreements and that it was not responsible for making the decisions on funding: NSW Legislative Council, Public Accountability Committee, *Integrity, efficacy and value for money of NSW Government grant programs,* Report 8, March 2021, [4.54]-[4.58].
[173] Note that there 'is no evidence of a merit assessment or documented rationale for why particular projects at those councils were chosen for funding': Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 9.
[174] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 16.
[175] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 16. Note the assertion that the Premier was simply providing 'advice' on the proposed allocation of funds and that the decision was made by the Chief Executive Officer of the OLG under delegation from the Minister for Local Government: State Archives and Records, 'Alleged non-compliant disposal of records relating to the Stronger Communities Fund', Final Report, 21 January 2021, p 8. Note, in contrast the contents of the destroyed 'Working advice notes' (which were electronically recovered), which expressly sought the Premier's 'approval of funding'. Nonetheless, the Premier and Deputy Premier denied that they were approving the grants, and no one would take responsibility for having done so: NSW Legislative Council, Public Accountability Committee, *Integrity, efficacy and value for money of NSW Government grant programs,* Report 8, March 2021, Appendix 3 and [4.69]-[4.78]. The question of whether a Minister is actually approving a grant or merely advising on it also arose in relation to the Commonwealth Community Sport Infrastructure Program. It seems that clarity about responsibility for the making of grants is absent at both the Commonwealth and State levels.
[176] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 16; and State Archives and Records, 'Alleged non-compliant disposal of records relating to the Stronger Communities Fund', Final Report, 21 January 2021, p 14.
[177] NSW Legislative Council, Public Accountability Committee, *Integrity, efficacy and value for money of NSW Government grant programs,* Report 8, March 2021, [4.25].

guidelines have meant in practice that no person involved in the grant allocation process is specifically accountable for decisions about the grant allocations'.[178]

The guidelines for the grant program did not say how projects would be selected and did not provide for assessment of projects against criteria. The guidelines were not published.[179] The Auditor-General's Office reported that 'we cannot rule out that deficiencies in the guidelines were an attempt to avoid accountability for and transparency over the government's decision to use round two of the Stronger Communities Fund to assist councils that supported the merger process rather than to achieve the objectives of the program.' [180]

Ninety-six percent of available funding was allocated to projects within coalition-held state electorates. A briefing note by the Premier's staff revealed that a key consideration in providing funding was to ensure they did not 'provide funds to unfriendly merged councils'.[181] Another briefing note to the Premier by her staff recorded:

> We have continued to work on how we allocate this funding to get the cash out the door in the most politically advantageous way.[182]

This, combined with the Premier's admission of pork-barrelling, suggest that the grants were largely made for party-political purposes rather than in the public interest.

The Regional Cultural Fund was better managed, but its integrity was still compromised. There was a proper robust and transparent process for the assessment of projects and the making of recommendations to the Minister for the Arts. Those recommendations, however, were overturned by the Minister in more than one in five cases, in consultation with the Deputy Premier, without the reasons for doing so being documented.[183] Thirty-four recommended projects were not funded (including seven of the top ten ranked applications), while 22 applications that were not recommended were funded.[184] Most of the Minister's acts in overturning recommendations occurred in the second round of the program, the results of which were announced one month prior to the 2019 State election.[185]

Overall, applications from Coalition-held electorates received 87% of total funding (being $85.5 million in grants) and applications from organisations in electorates held by the ALP received less than 1% of funding (being $602,970). Other grants went to marginal electorates

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[178] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 13.
[179] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, pp 7-8.
[180] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 8.
[181] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 7.
[182] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 14.
[183] Note, however, the subsequent comment by the Minister in an interview that he reallocated money to good projects in smaller volunteer-run museums in the regions and that 'I think if I'd explained it, if I'd given written reasons for why I did it, a lot of the criticism would have been avoided, but I was advised not to by … Create NSW': Linda Morris, "Only a fool would write off the PM" – Lunch with Don Harwin', *Sydney Morning Herald,* 9 April 2022, News Review, p 25.
[184] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 20.
[185] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 20.

held by the Shooters, Fishers and Farmers Party and The Greens.[186] The Audit Office noted that in one case an application from Coffs Harbour was approved despite the fact that the application had not been recommended and did not meet any of the four assessment criteria. It was approved after a request to do so was made by the former Deputy Premier. The grant was for $2.7 million, which was one of the largest grants given to any organisation.[187]

The Auditor-General concluded that the failure to provide reasons compromised the ability of the relevant government agency, 'Create NSW', to 'demonstrate integrity and value for money' in the approval process and created 'a clear perception that factors other then the merits of the projects influenced funding decisions'.[188]

In November 2021, the Premier, Dominic Perrottet, stated that 'taxpayers expect the distribution of public funds will be fair – I share that expectation.'[189] He announced a review of how grants should be administered and assessed, to be conducted by the Department of Premier and Cabinet and the NSW Productivity Commissioner, which reported in April 2022. The terms of reference for the review stated that its purpose was to 'deliver value for money for the NSW taxpayer by ensuring that the administration, assessment and assurance of grants programs in NSW is in line with best practice'. Its objectives included delivering value for public money in achieving the stated purposes of grants and to 'adopt key principles of transparency, accountability and probity'.[190] The Report of the Review is discussed below.[191]

Financial accountability mechanisms at the State level

New South Wales is deficient in its legal framework to ensure financial accountability and probity with respect to the making of grants.

There are rather vague 'core values' of the government sector set out in s 7 the *Government Sector Employment Act 2013* (NSW). These include placing 'the public interest over personal interest', upholding the law, providing non-partisan advice and providing services fairly. The most significant, for the purposes of this paper, is the 'value' of being 'fiscally responsible and [focusing] on efficient, effective and prudent use of resources'. There does not appear to be any legal obligation in the Act to give effect to these inaptly described 'values'. However, the 'Code of Ethics and Conduct' for NSW government sector employees provides that breaching these values can lead to disciplinary action.[192] It also states:

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[186] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 20.
[187] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 22.
[188] Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 3.
[189] Alexandra Smith, 'NSW to review how grants are handed out amid pork-barrelling concerns', *Sydney Morning Herald,* 3 November 2021: https://www.smh.com.au/politics/nsw/nsw-to-review-how-grants-are-handed-out-amid-pork-barrelling-concerns-20211102-p595cr.html.
[190] See: NSW, Department of Premier & Cabinet, 'Review of Grants Administration in NSW – Terms of Reference': https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/files/Updates/Terms-of-Reference-Review-of-Grants-Administration-in-NSW.pdf.
[191] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022: https://www.dpc.nsw.gov.au/publications/reviews/review-of-grants-administration-in-nsw/.
[192] A breach could therefore trigger the application of 9(1)(b) of the *ICAC Act,* if conduct satisfying s 8 had occurred.

> You must use public resources in an efficient, effective and prudent way. Never use public resources – money, property, equipment or consumables – for your personal benefit, or for an unauthorised purpose.[193]

The *Government Sector Finance Act 2018* (NSW) is also directed at 'values'. It provides in s 3.7 that a 'government officer' should be guided by values and associated principles when exercising functions in connection with financial management. These include the value of 'accountability' and the associated principle that the 'government officer should take reasonable care so that the officer's use of government resources or related money is efficient, effective and prudent'. It is directed at how the officer uses those resources, rather than whether government funds are spent efficiently, effectively and prudently in the public interest. There does not appear to be an equivalent requirement to that in s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) that a Minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money.

The State equivalent of the CGRGs is the 'Good Practice Guide to Grants Administration'. It is, however, no more than a guide. Unlike the CGRGs, it is not set out in a statutory rule and it has no legal standing. It is contained in a Circular issued by the Department of Premier and Cabinet,[194] and applies only to Departments, agencies and statutory authorities. It is not directed at binding Ministers or ministerial advisers.[195]

The Guide is primarily addressed at procedure rather than ensuring probity in the expenditure of money. Public servants are told that grants should be 'compatible with department objectives' and allocations to recipients should be 'consistent with government priorities'.[196] What if the priority is to use money in a manner that is not consistent with the public interest but is for the purposes of benefitting a political party, its donors or its members?

There is recognition, but no requirement in the Guide, that programs should be 'based on evidence of need' and that eligibility and selection criteria should be consistent with program objectives.[197] The Guide describes it as 'good practice' for recommendations and decisions to be fully documented, as this will make the decision easier to audit.[198] The Premier's office failed to engage in this good practice with respect to the Stronger Communities Fund.

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[193] Public Service Commission Code of Ethics and Conduct for NSW Government Sector Employees, [3.8]: https://www.psc.nsw.gov.au/sites/default/files/2020-10/PSC%20Code%20of%20Ethics%20and%20Conduct.pdf.

[194] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16): https://arp.nsw.gov.au/c2010-16-good-practice-grants-administration/.

[195] Note that while ministerial advisers are required by the NSW Office Holder's Staff Code of Conduct to comply with laws, applicable codes of conduct and 'Premier's Memoranda', this does not appear to extend to Circulars: Ministers' Office Handbook, Attachment B, (June 2020) p 54: https://publications.dpc.nsw.gov.au/assets/dpc-publications/ministerial-handbook/Ministers-Office-Handbook-published-24-06-2020.pdf.

[196] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16) p 3: https://arp.nsw.gov.au/c2010-16-good-practice-grants-administration/.

[197] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16) pp 3 and 8.

[198] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16) p 11.

The Guide states that the grants assessment 'should be as transparent as possible'.[199] To this end, it states that grants programs 'must have criteria against which applications are assessed'. The full criteria 'should be published' and 'decisions must be made on the basis of the published criteria'.[200] Again, this was not followed in relation to the Stronger Communities Fund.

Finally, in a table summarising the various steps in the grants process, the Guide states that the Minister's approval is to be based upon whether the financial assistance is in line with the goals of the program, whether the costs and other aspects appear reasonable and there are sufficient funds available. The assessment must be 'fully justified and documented' and any 'variance to [a] recommendation' must be recorded with reasons. In addition, the reasons for any variation are to be disclosed upon the Department's website.[201] This was not followed by the Minister in relation to the Regional Cultural Fund.

It appears that even if public servants make an effort to comply with the Good Practice Guide to Grants Administration, neither Ministers nor their offices feel any obligation to do so, which is a serious flaw in the system. In addition, pressure from ministerial offices may cause public servants to dispense with 'good practices' when it comes to documentation, written justifications and transparency.

Finally, the *State Records Act 1998* (NSW) also contains provisions that protect State records. It requires in s 21 that a person must not damage or alter a State record. Breaching the provision is an offence with a maximum penalty of 50 penalty units. Section 12 requires each public office (which includes political office holders, such as ministers, as well as departments) to make and keep full and accurate records of activities of the office and s 11 requires each public office to ensure the safe custody and proper preservation of State records under its control. Section 10 states that the chief executive of each public office has a duty to ensure that the public office complies with the requirements of the Act.

In relation to the Stronger Communities Fund, the State Archives and Records Authority of NSW found that 'the Office of the Premier breached section 21(1) of the *State Records Act* with the unauthorised disposal of the working advice notes'.[202] These notes were briefs to the Premier which summarised facts, contained comments and recommended actions, which were then noted as 'approved' or 'not approved'. Nonetheless, the Authority decided not to seek the prosecution of the breach on the basis that this would not be 'consistent with the Authority's regulatory model, which emphasises education and information to assist voluntary compliance by public offices with obligations of the *State Records Act*.'[203] It also contended that any prosecution may have been out of time, expensive and difficult to prove. However, failure to take action means that there is no effective deterrent to the destruction of records and the failure to keep records in circumstances where records might indicate action had been taken for improper purposes.

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[199] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16) p 12.
[200] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16) p 12.
[201] NSW, Dept of Premier & Cabinet, 'Good Practice Guide to Grants Administration', (Circular C2010-16) p 13.
[202] State Archives and Records, 'Alleged non-compliant disposal of records relating to the Stronger Communities Fund', Final Report, 21 January 2021, p 14.
[203] State Archives and Records, 'Alleged non-compliant disposal of records relating to the Stronger Communities Fund', Final Report, 21 January 2021, p 20.

Report of the Review of Grants Administration in NSW

The April 2022 'Review of Grants Administration in NSW' recommended that a revised 'Grants Administration Guide' be issued to replace the existing 'Good Practice Guide to Grants Administration'.[204] It would extend beyond public servants to apply to Ministers and ministerial staff and include some mandatory requirements.[205]

Documentation and transparency

The Review makes important recommendations about identifying and documenting roles and responsibilities in grant-making, including basic matters such as identifying who has the power to make the decision, along with clear selection criteria, published guidelines[206] and the assessment of grant applications against the selection criteria.[207] Given the failures in the administration of the Stronger Communities Fund, this is clearly necessary. However, as discussed below, for these recommendations to be effective, measures will have to be taken to ensure that there are no easy avoidance mechanisms, such as classifying grants as 'election promises' so they can evade going through a proper assessment and selection process.

The Review accepts that input from MPs 'may be relevant' to grant applications, but not determinative, and that assessments should be based on merit.[208] It appropriately recommends that the input from Members of Parliament should be documented and that any changes in the ranking of applicants as a consequence should also be documented 'in the brief to the designated decision maker'.[209] It also recommends the documentation of any input by the Minister or ministerial staff in the assessment of grant applications and changes to their ranking.[210] In implementing these recommendations, the Government should go further and require that all such documentation should immediately be made public on the designated grants website.[211] Hiding it in an unpublished brief is not sufficient to achieve the relevant level of transparency and accountability.

The Review also makes important recommendations that a Minister must not approve or reject a grant application without first receiving written advice assessing the merits of the grant.[212] Approvals of grants must be documented, including the basis for the approval, having regard to the grant guidelines and the imperative to achieve value for money. When a Minister or other decision-maker departs from the assessment recommendations, they must record the

[204] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 20.
[205] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 22 and p 24.
[206] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 29 and proposed Guide, [6.16] and [6.17].
[207] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 33.
[208] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 34.
[209] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 34 and proposed Guide, [6.3.3].
[210] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, pp 35-6 and proposed Guide, [6.3.1].
[211] The Review recommends that grants information be made publicly available on a central website, including records of ministerial grant award decisions that vary from the recommendations of officials, and the reasons for those decisions. But it does not specify the inclusion on the web-site of documentation of the involvement of MPs and Ministers in the assessment process. NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, pp 39-40 and proposed Guide [6.5].
[212] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, proposed Guide, [6.3.2].

reasons for that departure.[213] A decision maker must not approve a grant that has been assessed as ineligible unless a decision is made to waive eligibility criteria where this would not lead to perverse or unfair outcomes, be contrary to the policy intent or damage the reputation and integrity of the grant program, and reasons for the waiver are documented.[214] This is all appropriate and addresses some of the problems that arose in relation to the Stronger Communities Fund.

The examples above, however, of the weak documentation provided at the Commonwealth level suggest that greater rigour is required for there to be genuine transparency. For example, if the decision-maker departs from recommendations, then he or she should be required to identify what further information was relied upon to reach a different conclusion and explain why the original advice was wrong. Just saying something to the effect that 'this is a good project and will help the community' ought not to be regarded as sufficient. Further, there needs to be scrutiny of such documentation, preferably by a parliamentary committee, so that inadequate responses can be questioned and criticised.

The Review also recommended the establishment of a central web portal where grants administration disclosures would be uploaded in a timely manner.[215] This would make a significant improvement in the current transparency measures.

Legal status and enforceability of revised Guide

The Review recommended that its proposed Guide not be given a legal status, unlike the Commonwealth's CGRGs which are in a legislative instrument. Instead, in the name of 'flexibility', it recommended that its proposed Guide be issued under the cover of a Premier's Memorandum.[216] This is apparently so that it can be 'readily updated in line with evolving best practice'.

While flexibility can be a virtue, it is in 'flexibility' that most avoidance of the rules occurs. This is obvious from the discussion of scandals above, including the abysmal failure to give effect to the existing NSW Guide, despite its inclusion in a Department of Premier and Cabinet Circular, and the rampant avoidance of Commonwealth grant rules. In particular, the type of 'flexibility' which permits grants made as election promises to avoid measures of transparency, accountability and impartiality, would undermine both the purpose of the Guide and trust in government. Accordingly, if there is to be flexibility in altering the Guide (remembering that the current Guide has not been altered since 2010, suggesting that the evolution of best practice does not appear to be very fast), it should be done by way of a legislative instrument, such as a regulation. This would give the mandatory aspects of the Guide a legal status and would enhance accountability by enabling any future changes to be scrutinised by the Houses and the relevant parliamentary committee and disallowed if they did not constitute the 'evolving best practice' that is desired.

[213] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 36 and proposed Guide [6.3].
[214] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, proposed Guide [6.3.2].
[215] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 41.
[216] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 23.

The argument that the Guide is not amenable to being given the status of a legislative instrument because some measures in it are mandatory and others are principle-based[217] is a very weak one. Such a distinction is perfectly functional in the Commonwealth's CGRGs, of which one part is mandatory and the other is clearly stated to be non-binding guidelines. No adequate answer was given in the Review's Report as to why the same approach could not be taken in New South Wales. While there has been avoidance of some of the mandatory aspects of the CGRGs, as noted above, the aim should be to adopt the beneficial aspects of the CGRGs, such as their legal status as a legislative instrument, while avoiding the detriments, by enhancing enforceability and cutting off avoidance mechanisms.

The difference between a Premier's Memorandum and a legislative instrument is that the latter is a 'law', whereas the former is not. This is relevant, for example, to the application of ss 9(4) and 9(5) of the *ICAC Act,* where the conduct of a Minister satisfies s 8 and would cause a reasonable person to believe that it would bring the integrity of the office or Parliament into serious disrepute. A finding of corrupt conduct can only be made in such a circumstance if the relevant conduct 'constitutes a breach of a *law*'. The difference is therefore not just one of flexibility, but one which could potentially protect a Minister, who had brought his or her office or Parliament into serious disrepute, from a finding of corrupt conduct if that conduct breached a Premier's Memorandum rather than a 'law'. Another example is cl 5 of the Ministerial Code of Conduct which requires that a Minister not direct or request a public service agency to act 'contrary to the law'.[218] The status of the Guide as 'law' is therefore important due to the application of other statutory provisions and codes to 'laws' but not Premier's Memoranda.

There are also questions about the extent to which a Premier's Memorandum binds persons and is enforceable. The Review and its proposed Guide assert that a Premier's Memorandum 'is binding on officials, Ministers and ministerial staff'.[219] Yet it appears that the only consequence of failure to comply with a Premier's Memorandum might be disciplinary action,[220] and only if the relevant official or minister decides to take such action, which is unlikely where the failure to comply occurred for the purpose of favouring the political interests of the minister and his or her political party, and occurred at the behest or suggestion of the Minister or his or her staff.

The Review states that 'Premier's Memoranda are also binding on ministers, with any sanctions for a breach to be determined by the Premier'.[221] There does not appear to be any legal basis for this assertion, beyond the convention that the Premier advises the Governor on the appointment and removal of ministers and that they must therefore hold the Premier's confidence. This kind of enforcement is ineffective if it is the Premier who has decided to act in a way inconsistent with the Guide, or other ministers act in a manner that aids the Government or the political party or parties to which the ministers belong. In short, inserting the proposed Guide in a Premier's Memorandum does not make it 'enforceable' in the same

[217] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.
[218] See, to the same effect, the requirements of the NSW Office Holder's Staff Code of Conduct which provides that Officer Holder staff must not encourage or induce a public official to breach the 'law'.
[219] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 24 and [1.3] of the Guide.
[220] Cl 1.3 of the proposed Guide asserts that failure by a government sector employee to comply may result in disciplinary action under the *Government Sector Employment Act 2013* (NSW), although there is no reference to any specific provision to this effect. Failure to comply with the 'values' in s 7 of the Act may result in disciplinary action, according to the 'The Code of Ethics and Conduct for NSW government sector employees', but Premier's Memoranda do not appear to be captured by this.
[221] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.

way as a law and leaves any action against Ministers on enforcement to be exercised on political grounds by the Premier.

The Review also claimed that the 'integrity framework in NSW' is 'comprehensive and robust' and that any 'significant breach of the requirements under the draft Guide would likely be unlawful conduct under that framework'.[222] It is hard to see how this is so. As noted above, that framework largely consists of principles rather than legal obligations and that at most a breach of a principle might result in disciplinary action, but would not ordinarily be unlawful, unless it amounted to a criminal offence, such as misconduct in public office. A breach of the CGRGs, however, amounts to a breach of a law and even though no direct penalties apply, there are numerous statutory obligations on public servants and Ministers to comply with the law. The conclusion in the Review that 'issuing the draft Guide under a Premier's Memorandum is no different in effect from the approach taken in the Commonwealth'[223] would therefore appear to be inaccurate.

In an attempt to ameliorate some of these problems, the Review suggests that there could be a separate legislative requirement that there be compliance with the Guide.[224] It suggests that this could be included in the *Government Sector Finance Act 2018* (NSW) or the *Government Sector Employment Act 2013* (NSW), leaving open the possibility that any such obligation would be confined to public servants, rather than extended to Ministers and ministerial advisers. As the actions of Ministers and ministerial advisers more commonly give rise to scandals and allegations of corruption with respect to grants than the actions of public servants, there is a clear need to ensure that all are bound by law to comply with the mandatory aspects of the Guide. Anything less would not address the problems that caused the initiation of the report.

The failure to deal with party interests and election promises

One of the problems with the report of the Review is that it fails to address the elephant in the room. It studiously avoids the issue of grants being made to advantage a political party. As with the various 'frameworks' of principles applicable to the public service, all obligations to act in the public interest are balanced against an obligation not to act in one's 'personal interest'. Political party interest is left festering, unaddressed, between public and personal interests.

For example, the Review proposed that the Guide give effect to principles including placing 'the public interest over personal interest'.[225] It says that decision makers should not make a grant decision that confers a private benefit on their family members.[226] But the problem which caused this Review to be initiated was instead the failure to place the public interest over political party interests and the conflict of interest of ministerial decision makers when making decisions that favour party interests, supporters and donors. While, as noted above, political party interests may in some cases be regarded as falling within personal interests (eg to the extent that they are likely to affect the remuneration and employment of politicians and their staff), any genuine attempt to deal with the concerns that caused the initiation of this Review

[222] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.
[223] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.
[224] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.
[225] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 28.
[226] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 30.

must address the fact that public money should only be spent in the public interest and not for the predominant purpose of benefiting a political party.

Another example is that the Review accepts that there may be circumstances in which non-competitive processes may be justified.[227] Some of these, such as grants directed at providing immediate aid after a natural disaster, may clearly be justified. But the category of 'one-off or ad hoc grants' directed by ministerial decision,[228] as has been shown at the Commonwealth level, is the gateway for abuse where grants are made in a biased fashion for political purposes. The proposed Guide requires that such grants must still have guidelines, although they may remain unpublished,[229] and that the Minister must receive advice on the merits before making such a grant and document the basis for the approval.[230] It would be wise, however, to ensure that strict scrutiny is applied to such grants, including by a parliamentary committee. There should also be public reporting of any input from Ministers and MPs and the justification for any departure from merit recommendations. Such grants should not be justified simply by declaring that they are 'election promises' and asserting that they may therefore be made without merit assessments.

Options for reform

A significant difficulty in bringing prosecutions for misconduct in public office is the burden of establishing an improper purpose. There will commonly be insufficient evidence to found a prosecution. This is why it is essential that there be properly funded investigatory bodies, such as the Audit Office and the Independent Commission Against Corruption, which can access the relevant communications and establish a case.[231] This is one area where New South Wales, unlike the Commonwealth, is well-served. Areas, in which reform should be considered, however, include the following.

Clarity: There should be a legal requirement that grant schemes be specifically authorised by legislation, or subordinate legislation, which identifies the purpose of the grant and the person or body that is the decision-maker. The allegations of the misuse of grant schemes frequently involve uncertainty as to who is the actual decision-maker (with other Ministers effectively deciding outcomes) and a lack of clarity as to the purpose of the grant scheme. Giving such matters a legislative basis would improve transparency and accountability.

Legal obligation on Ministers only to approve proper expenditure: An equivalent of s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) should be enacted at the State level. There needs to be a legal obligation on Ministers to be satisfied, based upon evidence, that expenditure of funds is efficient, effective, economical and ethical. To this, I would add that they must not behave in a partial manner and must act in the public interest. There should be a legal requirement that no money may be expended without a formal authorisation, signed and dated by the person who has the legal authority to approve the expenditure.

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[227] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 32.
[228] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, proposed Guide, [6.1.3].
[229] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, proposed Guide, [6.17] and [6.2].
[230] NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, proposed Guide, [6.3.5].
[231] Dennis Mahoney, 'The Criminal Liability of Public Officers for the Exercise of Public Power' (1996) 3 *The Judicial Review* 17, 26.

Legal obligations on public servants in grant management: In addition to the 'values' referred to in the *Government Sector Employment Act 2013* and the *Government Sector Finance Act 2018,* there should be clear legal obligations on public servants to comply with rules concerning the management of grant schemes, such as those requiring that grants be assessed on the basis of merit and those requiring public servants to advise Ministers on their obligations to provide reasons. Where public servants are decision-makers, they should be legally obliged to act in a manner that is impartial, efficient, effective, economical, ethical and in the public interest. Again, there should be a legal requirement that no money may be expended without a formal authorisation, signed and dated by the person who has the legal authority to approve the expenditure.

Grant rules: The existing guidelines need to be replaced by rules which have a legal status – eg by setting out the rules in a statutory instrument. These rules should specify requirements for grant guidelines, eligibility criteria and fair selection processes based upon merit and published criteria. They should specify that Ministers may not approve grants until they have received advice assessing grant applications against criteria and ranking them according to merit. They should require Ministers to act fairly (eg not favouring particular applicants by accepting their late applications, not advising them how to alter their applications so that they are successful, not altering the selection criteria after submissions have closed, and not agreeing to make a grant to a body before it has applied for it or before the scheme has even opened).

If a Minister decides to act contrary to the advice of public servants, which a Minister may legitimately do, the Minister should be obliged to give written reasons which explain why the altered outcome is more meritorious than that recommended, assessing this by reference to the criteria in the grant guidelines, and specify the additional evidence relied upon by the Minister to reach that conclusion. The Grant Rules should require the Minister to publish such reasons on the relevant grant website, with no redactions for Cabinet confidentiality, before such funds can be paid to the recipient. This would drastically improve the transparency of grant schemes and would provide a basis for genuine scrutiny of such decisions.

The Grant Rules should also formalise the role of the local Member of Parliament in relation to grants in his or her electorate, including when the local Member is a Minister. Members should be permitted to advocate in favour of projects within their electorate and to provide supporting evidence, but such advocacy and evidence should be only one input into the assessment which is made in a fair, unbiased process, of the merits of applications against the criteria in the grant guidelines. All such inputs should be published, as well as whether they had any effect upon the distribution of grants.

Oversight: There needs to be a body that maintains oversight of such schemes to ensure that there is compliance with the grant rules and that adequate reasons are provided and published. This could be a standing parliamentary committee or an integrity agency. Penalties for non-compliance could include critical publicity, directions to public service agencies to ensure their compliance, and parliamentary censure of Ministers who fail to meet the required standards.

Penalties and compensation: Consideration might also be given to what kind of penalties might be applied to serious breaches of mandatory grant rules or of any legal obligation regarding the approval of expenditure. It may be that the existing offence of misconduct in public office and the risk of a finding of corrupt conduct by the ICAC amount to sufficient deterrence – if Ministers and public servants were better educated about such matters. But

there may be cause to establish offences directed specifically at the misuse of public money in order to stamp it out.

Another option, as seen in the UK case of *Porter v Magill,* is to provide that where wilful misconduct occurs, the relevant decision-maker is required to compensate the public for the consequential loss. In *Porter v Magill,* Lord Scott noted that the procedure of auditing, identifying wilful misconduct and issuing a certificate specifying the amount of the loss, provided 'powerful and valuable protection to the public'.[232] He lamented the fact that while such a statutory procedure was available at the time this particular scandal occurred, it had since been repealed. He concluded that: 'Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law'.[233] A specific provision directed at identifying the loss and requiring its repayment, might be considered in New South Wales.

[232] *Porter v Magill* (2002) 2 AC 357, 504 [139] (Lord Scott).
[233] *Porter v Magill* (2002) 2 AC 357, 504 [140] (Lord Scott).

Appendix 3: *Some legal implications of pork barrelling* by Professor Joseph Campbell

Some Legal Implications of Pork Barrelling

J C Campbell*

Part 1 - Introduction

This article was written at the request of the Independent Commission Against Corruption of New South Wales (ICAC"), for the purposes of an enquiry it is conducting into the phenomenon of pork barrelling in New South Wales.

"Pork barrelling' is a term that has become part of the ordinary language of political discourse, rhetoric and insult in Australia. During the 2022 Federal election campaign in April 2022 it, or a grammatically related expression, appeared in a headline in the *Sydney Morning Herald* on three consecutive days[1]. The *Guardian Australia*, in preparation for its coverage of the 2022 Federal elections announced that it would be "tracking electorate-specific or regional spending promises in real time with the **Pork-o-meter**, to monitor the money pouring into marginal seats as the promises are made, rather than finding out about it afterwards, when the audit office investigates allegations of pork-barrelling."[2]

"Pork barrelling" is a metaphor, that conjures up images of something desirable being given away in large quantities. There is possibly a hint that it might be a bit greasy. However, the images are not precise about by whom the gift is made, to whom it is made, in what circumstances it is made, or why it is made. Like all metaphors, its imprecision can give the expression a significant rhetorical force. And like many metaphors, its imprecision makes it unsuitable for being the basis of any sort of precise analysis.

ICAC has sought to lessen the imprecision for the purposes of this article by asking me to take as a working definition of "pork barrelling" "the allocation of public funds and resources to targeted electors for partisan political purposes". I take it that by "partisan" is meant "seeking to give an advantage to a particular political party", rather than the more general meaning of favouring, or being prejudiced in favour of, some particular cause or group or person. That is the meaning to be given to "pork barrelling" in this article, unless the context makes clear that some other meaning is intended.

This working definition is the same as one adopted Susanna Connolly[3]. As she points out[4], this definition differs from some others that have been given in that it lacks a geographical

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[1] SMH Monday 25 April p 4 "It's a pork-barrelled circus across our marginal seats"; SMH Tuesday 26 April p 21 "Time to rule out the pork barrel"; SMH Wed 27 April p 21 "All the pork talk is now boar-ing"

[2] Lenore Taylor, "From Fact Checks to Pork Barrell tracking, here's why Guardian Australia's election reporting will count", press release 11 April 2022

[3] Susanna Connolly, "The Regulation of Pork Barrelling in Australia" (2020) 35 Australasian Parliamentary Review 24 - 53

[4] Ibid at 26

element – under this definition, the targeting might be to the electors of a particular electorate or electorates, or it might instead be to electors selected by demographic criteria rather than geographical ones. The sort of allegation of pork barrelling that might involve demographic criteria are that a particular expenditure has been made or promised to attract self-funded retirees, or mothers of preschool children, regardless of the electorate they live in.

Even with this widened definition, the geographical element of any alleged pork barrelling will be important in practice because it will often be harder to demonstrate that a particular allocation of public resources has been made for party-political reasons when the allocation is made to a demographically identified group than to the electors in a geographically defined electorate. Part of the reason for this is that it is likely that it will be harder to identify a motivation of seeking a party-political benefit from an expenditure made or promised to electors in a multi-member electorate, such as the entire state for an election to the Legislative Council or the Senate, than will be the case in a more geographically confined single member electorate for the Legislative Assembly or the House of Representatives.

There is quite a volume of writing on pork barrelling as an empirical phenomenon[5]. My brief is to write on the *legal* implications of pork barrelling. Because my brief is from ICAC, which is a New South Wales governmental institution, I will consider only the law as it applies in New South Wales. In so far as statutory provisions are relevant as part of that law, I will confine attention to New South Wales statutory provisions. However, the law of the Commonwealth, or of other States or territories, will in many cases contain provisions that are analogous to the New South Wales statutes that I discuss, so the relevance of the article should not be confined to New South Wales.

There is already a volume of writing on individual aspects of the law that in fact have a potential relevance to pork barrelling, though the articles in it do not concentrate on the relevance of that aspect of the law to pork barrelling[6]. The aim of this article is to consider the *breadth* of legal provisions that have a potential relevance to pork barrelling.

[5] A small sample is: Anthony Hoare, 'Transport Investment and the Political Pork Barrel: A Review and the Case of Nelson, New Zealand'. Transport Reviews 12(2) 1992, p. 134; Clive Gaunt, 'Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants'. Australian Journal of Political Science 34(1) (1999) p 63; David Denemark, 'Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants'. The Journal of Politics 62(3) 2000, p 898; Hannah Kite and Eric Crampton, 'Antipodean Electoral Incentives: The Pork Barrel and New Zealand's MMP Electoral Rule'. (Paper presented at the New Zealand Association of Economists Annual Conference, 27-29 June 2007); Andrew Leigh, 'Bringing Home the Bacon: An Empirical Analysis of the Extent and Effects of Pork-Barrelling in Australian Politics'. Public Choice 137 2008, p. 279; Graeme Orr, 'The Australian Experience of Electoral Bribery: Dealing in Electoral Support'. Australian Journal of Politics and History 56(2) 2010, p. 240.

[6] A very incomplete list is Max Spry, Misfeasance in public office and public sector employment (1997) 5 Tort Law Journal 193; David Lewis, Employment Protection for Whistleblowers: on what principles Should Australian Legislation be Based? (1996) 9 Aust Jnl Labour Law 135; Colin A Hughes, Electoral Bribery (1998) 7 Griffith LR 209; John McCarthy QC, General Principles of Australian electoral Law (2000) 19 Aust Bar Rev 109; Tina Cockburn and Mark Thomas, Personal liability of public officers in the tort of misfeasance in public office (2001) Torts Law Journal 80; Justice P W Young Crime: Common law offence of misconduct in public office – can a volunteer be convicted? (2011) 85 (11) ALJ 731; Mark Aronson. Misfeasance in Public Office: A Very peculiar tort (2011) 35 Melb Uni Law Rev 1; Alison Doecke Misfeasance in public office: Foreseen or foreseeable harm (2014) 22 Torts Law Jnl 20; David Lustry, Revival of the common law offence of misconduct in public office (2014) 38 Crim LJ 337; Anona Armstrong and Ronald Francis, Legislating to protect the whistleblower: The Victorian experience (2014) 29 Aust Jnl corporate Law 101 and Marco Bini Misconduct in Public Office and Directors of Public entities in Victoria (2015) 39 Crim LJ 236

It has not been possible to come to any conclusions at a high level of generality, like saying that pork barrelling is always wrong because it breaches some identified particular legal standard. However, neither is it possible to say that it never breaches any legal standard. Rather, it is necessary to take into account the *particular provisions* of the law, both statutory and judge-made, that govern the *particular* fund of money or other resource concerning which one is enquiring whether pork barrelling, in the sense of the Commission's definition, has occurred. It is also necessary to take into account the *particular way* in which it happened that that fund or resource came to be applied for partisan political purposes.

It is quite possible for pork barrelling, in the Commission's sense, to occur in a way concerning which there is no legal ground for complaint. There is no legal ground of objection if legislation is passed that empowers public money to be spent in a way that benefits some particular sections of the community but not others, and a public authority acts in accordance with that legislation. For example, if legislation establishes a fund from public money for the explicit purpose of assisting the victims of a natural disaster in a specific geographical area that is less than the entire state, and the motive that the legislators who proposed and passed the bill had for seeking to advantage that geographical area rather than any other is to give themselves a partisan political advantage, that legislation is still the law, and there is no ground for legal complaint if money is spent in accordance with it.

No legal grounds of objection exist to such legislation because it is elementary that, in general, there are no legal grounds for objection to a provision of the law itself[7]. The legislative power of the NSW Parliament arises under section 5 ***Constitution Act 1902 (NSW):***

> "The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever"

The power of any state legislature

> "…. to make laws for the peace, order and good government of a territory is as ample as the power possessed by the Imperial Parliament itself. That is, the words "for the peace order and good government "are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that it does not promote the peace, order and good government of the colony… the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score."[8]

When s 5 of the ***Constitution Act*** expressly subjects the power of the NSW legislature to make laws to the Commonwealth of Australia Constitution Act, it recognises that a state statute can sometimes be held invalid in whole or part pursuant to section 109 of the ***Constitution*** when the state statute is inconsistent with a Federal statute. As well, there are

[7] In addition to the qualification mentioned below in the text concerning the effect of the Commonwealth constitution on State statutes, this statement requires a little qualification, also arising from the operation of the Commonwealth Constitution, so far as statutes of the Commonwealth are concerned. A statute of the Commonwealth Parliament can sometimes be held invalid in whole or part on the ground that it is beyond the powers conferred on the Commonwealth legislature under the Constitution, or inconsistent with a mandatory requirement of the Constitution like s 92 or s 116.

[8] ***Union Steamship Co of Australia Pty Ltd v King (***1988) 166 CLR 1 at 10 per Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ

some other provisions of the Constitution, such as sections 52, 90, 92, or 114, that might be breached by a particular state law. However, these possible constitutional grounds of invalidity of a State statute seem unlikely to have any potential operation concerning pork-barrelling.

There is High Court authority that:

> "If the state legislature enacts what is prima facie within its power, why should it matter that the legislators advert to a particular consequence and desire it to occur? Does it matter than but for such advertence or desire the legislation would not be passed? If not, what difference does it make if the further inference is warranted that it was only in order to achieve the fulfilment of this desire that the statute was passed? Surely the answer to all three of these successive questions is, no. Nor can it matter whether the purpose or motive is inferred from the circumstances or from the statute or, indeed, is stated therein in terms"[9]

Though it is thus highly unlikely that there are any *legal* grounds upon which there could possibly be grounds of objection to NSW legislation that sought a partisan political advantage, there might sometimes be objections to such legislation based on other grounds. There might be objections to a piece of legislation based on ethics, or theories of how political power should be used, or economic efficiency, or that it takes insufficient account of the interests of future generations (whether in material things like having a realistic possibility of owning a house, or non-material things like having a sustainable environment), or that it offends ordinary human decency, or on the basis of some other standard for evaluating human conduct. However, any such grounds of objection, considered in themselves, are nearly always outside the scope of this article[10].

In the journalistic commentary on politics the term "pork barrelling" is sometimes applied not to the actual expenditure of money or other public resources, but to *promising* or *holding out* the prospect that money or other public resources will be provided for very particular projects. Such promising or holding out is not always done to targeted electors for party-political reasons, and it is only when it is done to targeted elected for partisan political purposes that it falls within the scope of the type of pork-barrelling concerning which ICAC seeks advice.

Because of the need for close attention to the particular facts and legal controls that are relevant to any expenditure of funds or resources that might be pork barrelling, and I am not asked to express a view about any particular expenditure of funds or resources that has occurred, this article includes a list of possible legal standards that *might* be infringed in a situation where there is pork barrelling. I cannot claim that that list is an exhaustive one – there may well be some statutory standards, in particular, that I do not mention – but it illustrates how many different legal standards can be involved in deciding whether some particular example of alleged pork barrelling infringes the law.

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[9] ***Grannall v Marrickville Margarine Pty Ltd*** (1955) 93 CLR 55 at 79 per Dixon CJ, McTiernan Webb and Kitto JJ, repeated by Taylor and Owen JJ in ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177 at 196-7. See also ***Greiner v ICAC*** (1992) 28 NSWLR 125 at 152-3 per Mahoney JA (dissenting, but not on a basis that affects the passage just referred to.)

[10] A slight qualification to that is that lack of economic efficiency in the operation of a statute can trigger a legal consequence, in the form of action by the Auditor-General

When there is no practical scope for legal objection to legislation itself, outside the constitutional grounds mentioned, the situations of a possible breach of legal standards will be ones that involve the administration, or purported administration, of a provision of legislation, or of a power or purported power of a governmental official that is not based in legislation. It will be necessary for those who need to decide the legality of a particular expenditure of public funds or resources to decide, on the facts of the particular case, what particular legal standard or standards might possibly be applicable, and whether there has actually been an infringement of that standard or those standards.

The definition of pork barrelling that ICAC has adopted has the potential to apply to expenditure of public funds or assets at any level of government, Federal, State or local. This article does not seek to deal with pork barrelling at the Federal level. The potential for there to be pork barrelling in local government elections or using local government funds or other assets would in practical terms be small, because the ability of local government entities to distribute money or other public assets in a way that could favour one political party is quite limited. However, it could not be said to be non-existent – if a council dominated by one political party were to spend money with a view to improving the electoral prospects of a member of that party in a state election, and the members of the council who instigated or approved the expenditure could be shown to have the intention to benefit that party, those members could in some circumstances be guilty of the type of pork barrelling that is illegal.

The "legal implications" of pork barrelling that are considered in this article are not restricted to what actions can be brought in the courts when public funds have been expended, or promised to be expended, for targeted electors for partisan political purposes. The actions that can be brought in the courts are sometimes criminal actions, sometimes civil actions seeking damages or an injunction, or civil actions seeking a remedy like a declaration that certain conduct is not authorised. Sometimes a legal standard might be infringed but there is no action in the courts that can be brought by anyone. **Part 3, Part 4** and **Part 5** will consider the various legal standards that might be infringed by pork barrelling, and the remedies available concerning them.

As well, the legal implications of pork barrelling extend to what courses of investigation, reporting and publicity the law allows, and to whom, when that sort of conduct has occurred. It would not be possible to give a full account of those matters without considerably lengthening this article, but some account of them is given in **Part 6**.

Further, there are some provisions of the law that facilitate establishing, or that relate to how one can establish, whether there has been the type of pork barrelling that infringes a legal standard. Again, it would unduly lengthen this article to try to give a full account of them, but some indication of them is given in **Part 7**.

Part 2 - The concept of an office of public trust

Before starting to describe the particular legal obligations that can arise in a situation where there is pork barrelling, and the powers that various institutions within the framework of the government have to investigate or deal with pork barrelling, it is appropriate to consider a concept that is a central one in various parts of the law relevant to pork barrelling. It is the concept of an office of public trust. Frequently a situation where there is pork barrelling will be one where there is also a breach of public trust.

Many positions that involve the exercise of public power are also positions of public trust. The office of Member of Parliament, in particular, has been held by the High Court to be an office of public trust[11]. The concept of an office of public trust appears expressly in the Code of Conduct adopted by each of the Houses of the NSW Parliament[12], the preamble to which states:

> "Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and institutions and conventions of parliament, and using their influence to advance the common good of the people of New South Wales"

Similarly, the NSW Ministerial Code of Conduct includes in its preamble:

> 1 It is essential to the maintenance of public confidence in the integrity of government that ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their officers and that they pursue and be seen to pursue the best interests of the people of NSW to the exclusion of any other interest…
>
> 3. Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law and to advance the common good of the people of NSW

The notion of "public trust" appears expressly in the ***ICAC Act,*** where one of the possible species of "corrupt conduct", under s 8 (1) (c), is:

> any conduct of a public official or former public official that constitutes or involves a breach of public trust,

and Section 12 ***ICAC Act*** requires that:

> In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.

It is common for the preamble to a piece of legislation, or a legislative instrument, to state various background facts to the adoption of that legislation or legislative instrument, which can provide an aid to construction of the operative provisions of the legislation or legislative instrument, but which usually do not themselves create obligations. At first glance that seems also to be the case with the Ministerial Code of Conduct. Clause 12 (1) of the preamble says:

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[11] ***R v Boston*** (1923) 33 CLR 386.

[12] Legislative Assembly code adopted 5 March 2020, Legislative Council code adopted 24 March 2020

"The preamble, headings and notes do not form part of the NSW Ministerial Code of Conduct but regard maybe had to them in the interpretation of its provisions."

However, Clauses 10 and 11 of the preamble to the Code say:

> 10 The NSW Ministerial Code of Conduct is not intended to be a comprehensive statement of ethical conduct by Ministers. It is not possible to anticipate and make prescriptive rules for every contingency that might raise an ethical issue for a Minister. In all matters, however, Ministers are expected always to conform with the principles referred to above.
>
> 11 In particular, Ministers have a responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity.

Thus, those clauses of the preamble speak as though there are obligations on a Minister to act in the ways described in the preamble, including to pursue the interests of the people of NSW to the exclusion of any other interest, and to maintain the public trust that has been placed in them by acting in accordance with Clause 3. That impression of the preamble is confirmed by clauses 4, 5 and 6 of the preamble, which also speak as though there are obligations on a Minister to act in the ways described in the preamble:

> 4 Ministers acknowledge that they are also bound by the conventions underpinning responsible Government, including the conventions of Cabinet solidarity and confidentiality.
>
> 5 Ministers also have a responsibility to ensure that they do not act in a way that would place others, including public servants, in a position that would require them to breach the law or their own ethical obligations including those prescribed in the Government Sector Employment Act 2013. That duty does not, however, limit Ministerial discretion to make decisions and direct departments in accordance with the principle of departmental responsibility to Ministers, including to disagree with advice and recommendations put to them by public servants.
>
> 6 To further those principles, the NSW Ministerial Code of Conduct has been established, which prescribes standards of ethical behaviour and imposes internal governance practices directed toward ensuring that possible breaches of ethical standards are avoided.

The better view is that these clauses in the preamble do not impose new obligations on a Minister, but rather fulfill the usual role for a preamble of stating facts about the background against which the operative provisions of the document operate. However, the background facts that they state are legal facts – statements of what the draftsperson of the Code took to be legal obligations to which a Minister was already subject, and that the operative provisions of the Code were intended to supplement. This is confirmed by the cases I shall mention shortly, which show that, independently of the Code, a Minister was already, by virtue of his or her office, under an obligation to act in the way that clauses 1 and 3 of the preamble require.

Clause 11 of the Code contains an extended definition of "Minister";

> Minister includes:
> (a) any Member of the Executive Council of New South Wales, and
> (b) if used in or in relation to this Code (other than Parts 1 and 5 of the Schedule to the Code)—a Parliamentary Secretary, and
> (c) if used in or in relation to Part 5 of the Schedule to the Code—a former Minister

Para (a) of the definition covers Ministers in the ordinary sense of the term. Under para (b) of the definition, Parliamentary Secretaries are also covered by the Code, except so far as

Parts 1 and 5 of the Schedule to the Code are concerned. Part 1 of the Schedule relates to certain interests (like shareholdings, directorships and secondary employment) that a Minister must not hold. Part 5 relates to employment after leaving Ministerial office. Thus, a Parliamentary Secretary would be a Minister, within the meaning of the preamble to the Code. In particular, a Parliamentary Secretary is presumed by the draftsperson of the Code to already be subject to obligations stated in clause 1 and 3 of the Preamble[13].

There is an extensive literature on the concept of public trust and how it applies to public office-holders. The WA Inc Royal Commission Final Report[14] deserves particular attention. There is also much academic writing on the topic[15]. I will seek to do no more than sketch an outline.

2.1. Political Power as a Public Trust in non-legal writing

The notion that positions that exercise public responsibility are ones of trust, in which the power attached to the position must be exercised in the public interest and must not be exercised for the benefit of the holder of the office or those he or she favours, has a long history. It is by no means just a legal notion. The trust as an institution in the private law, under which one person held property subject to an obligation to hold and use it for the benefit of another and to derive no personal benefit from it unless that benefit had been expressly allowed, was well established from the late seventeenth century. It was the principal means through which families with property held and transmitted their wealth. Many of the writers who theorised about how political power should be exercised either came from or were familiar with families who had the benefit of a private law trust. They drew

[13] See page 98 below for more on Parliamentary Secretaries

[14] G A Kennedy, R D Wilson and P F Brinsden, Report of the Royal Commission into Commercial Activities of government, Part II, 12 Nov 1992, (more commonly known as "the WA Inc Royal Commission") accessible at https://www.parliament.wa.gov.au/intranet/libpages.nsf/WebFiles/RC+1992/$FILE/0015319.pdf (hereinafter "WA Inc Royal Commission Report"). The Commissioners who wrote that report had reputations and experience that entitles their work to particular attention. G A Kennedy was Geoffrey Alexander Kennedy, a serving judge of the WA Supreme Court at the time of his appointment to the Commission, R D Wilson was Sir Ronald Darling Wilson, a former judge of the High Court of Australia, and Peter Frederick Brinsden was a retired judge of the WA Supreme Court. Roger Macknay QC, a Commissioner of the Crime and Corruption Commission of Western Australia, said of the report that "its exploration of the trust principle in relation to public officials has been described as the most sustained elaboration of it": Roger Macknay QC, "Trust in Public Office", a paper presented at Annual Public Sector Fraud and Corruption Conference, Melbourne 6-7 December 2012, accessible at https://www.ccc.wa.gov.au/sites/default/files/Trust%20in%20Public%20Office.pdf

[15] Just a sample is PD Finn, "Integrity in government" (1992) 3 Public Law Review 243; Paul Finn, "Public Trust and Public Accountability"(1994) 3 Griffith Law Review 224; PD Finn, 'The Forgotten ''Trust'': The People and the State' in M Cope (ed), Equity: Issues and Trends (Federation Press, 1995) 131;Paul Finn, "A Sovereign people, a Public Trust" in P D Finn (ed) Essays on law and government Vol 1 Principles and Values (Law Book Co 1995 p 1; John Barratt "Public Trusts" (2006) 69 Modern Law Review 514-542; Robert French AC, Public Office and Public Trust" (seventh annual Sir Thomas More forum Lecture 22 June 2011 https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22jun11.pdf; Sir Gerard Brennan (2013) Presentation of Accountability Round Table integrity Awards Canberra 11 Dec 2013 https://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/; S Gageler, "The Equitable Duty of Loyalty in Public office" is Chapter 5 in Tim Bonyhardy (ed) Finn's Law: An Australian Justice (2016), also accessible at https://www.hcourt.gov.au/assets/publications/speeches/current-justices/gagelerj/Gageler_Chapter_from_Bonyhady_Text_File.pdf

upon it as an analogy for how public power should be exercised. John Locke[16] wrote in 1689[17]:

> "Political power, then, I take to be a right of making laws, with penalties of death, and consequently all less penalties for regulating and preserving of property, and of employing the force of the community in the execution of such laws, in the defence of the Commonwealth from foreign injury, and all this only for the public good."

And Locke's famous myth of how government came about, to avoid the dangers of the state of nature, has an essential part of it that it is given on a trust:[18]

> "… men give up all their natural power to the society they enter into, and the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws, or else their peace, quiet, and property will still be at the same uncertainty as it was in the state of Nature."

Timothy Wilson, Rector of Great Mongeham, Kent in "Conscience Satisfied; in a cordial and loyal submitting to the present government of King William and Queen Mary"[19] wrote:

> "We must consider that all government is a trust. The dominion of one man over another is by consent, and is founded in covenant"

Edmund Burke, *Reflections on the Revolution in France* [20] wrote:

> "All persons possessing any portion of power ought to be strongly and awfully impressed with an idea that they act in trust, and that they are to account for their conduct in that trust to the one great Master, Author, and Founder of society."

Jeremy Bentham[21] wrote:

> "All government is a trust. Every branch of government is a trust, and immemorially acknowledged to be so.; it is only by the magnitude of scale that public differ from private trusts"[22]

Benjamin Disraeli, wrote[23]:

> "We must not forget… that it is the business to those to whom Providence has allotted the responsible possession of power and influence (that it is their duty, our duty…), to become guardians of our weaker fellow-creatures; that all power is a trust; that we are accountable for its exercise; that from the people, and for the people, all springs, and all must exist; and that, unless

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[16] Locke's father was a lawyer. Locke never married or had children, but was close to his nephew, Peter King, who later became Lord King, the Lord Chancellor 1725 -1733.

[17] *Two Treatises on Civil Government* (1689) Book II Chapter 1 [3]

[18] ***Ibid*** Chapter XI [136]

[19] London 1690 p 53.

[20] 1790 https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/burke/revfrance.pdf), p 77. Burke was the son of an Irish solicitor, and for a time studied law at the Middle Temple in London.

[21] Bentham was also the son of a solicitor, and for a time studied law at Lincoln's Inn in London.

[22] *The Works of Jeremy Bentham, published under the superintendence of his executor, John Bowring."* Vol. II, Chapter IV, p. 423, London (1843); repeated in a review of Bentham's Book of Fallacies originally published in the Edinburgh Review in 1825, and republished in the Works of the Rev Sydney Smith Vo II London 1854 p 417

[23] *Vivian Grey*, (1826) Book VI, Chapter VII.

> we conduct ourselves with the requisite wisdom, prudence, and propriety, the whole system of society will be disorganised; and this country, in particular, will fall a victim to that system of corruption and misgovernment which has already occasioned the destruction of the great kingdoms mentioned in the Bible, and many other states besides, Greece, Rome, Carthage, &c"

Thomas Babington Macaulay wrote in 1833 that in the time of Walpole[24]:

> "The English principles of toleration, the English respect for personal liberty, the English doctrine that all power is a trust for the public good, were making rapid progress."

Henry, Lord Brougham, wrote in 1853[25]:

> "The people must thus be the great object in view whenever we inquire as to the rights of the ruler and the duty of the subject. For the benefit of the people it is that government exists…. all government is a trust for the people - that kings have no rights in themselves, and for their own sakes as rulers, and beyond those enjoyed by the community at large."

2.2. Political Power as a public trust as a legal concept

Turning to how the concept of power being held on a public trust, to be exercised for the benefit of the public, has been applied in the law, the word "trust" was used in statutes from at least the late seventeenth century[26] to describe the personal obligation of those exercising governmental power. To give just a few examples, the ***Oaths Act 1672 (Eng)*** required that certain oaths be taken by any person who

> "shall have Command or Place of Trust from, or under his Majesty or from any of his Majesty's Predecessors or by his or their authority, or by authority derived from him or them within [certain named geographical areas]"[27]

It also provided that if any person educated or instructed a child in the "Popish religion":

> "every such person being thereof convicted shall be from thenceforth disabled of bearing any Office or place of Trust or Profit in Church or State; And all such Children as shall be so brought up instructed or educated, are and shall be hereby disabled of bearing any such Office or place of Trust or Profit"[28]

The ***United States Constitution,*** adopted in 1787 and a product of the same thought-world as the English law of the time, contains the concept (though with slightly different wordings) of an "office of trust under the United States" in four separate places[29].

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[24] *Essays on Horace Walpole* (1833) p 12. Macaulay studied law and was called to the bar in 1826, but never practiced seriously.

[25] Political Philosophy Vol I (London 1853) p 50-1. https://books.google.ne/books?id=Ygmv3VtUxokC&pg=PA33&hl=fr&source=gbs_toc_r&cad=3#v=onepage&q=trust&f=false. Brougham read law at Lincoln's Inn, and was Lord Chancellor 1830-34

[26] It is probably no coincidence that it was the late seventeenth century that this talk of a "public trust" acquired frequency. It was in the late seventeenth century, and in particular during the Chancellorship of Lord Nottingham (1673 – 1682) that the trust came to be recognised as an institution in *private* law where property was held by one person for the benefit of others, or for a charitable purpose, with personal obligations imposed on the trustee to make that institution workable: see J C Campbell, "The Development of Principles in Equity in the Seventeenth Century" in Peter R Anstey (ed), ***The Idea of Principles in Early Modern thought: Interdisciplinary Perspectives*** Taylor & Francis 2017 p 45 – 76.

[27] An Act for preventing Dangers which may happen from Popish Recusants,1672 s 1, s2 (spelling modernised)

[28] Ibid, s 7 (spelling modernised)

[29] Article I Section 3, Article I section 9, Article II section 1, Article VI

The ***Government Offices Security Act 1810 (Eng)***[30] required that whenever a person was appointed to any "Office or Employment of Public Trust under the Crown" security should be given "for the due Performance of the Trust reposed in him, and for the duly accounting for all Public Monies entrusted to him or placed under his Control".

The concept was also used in the courts concerning offices that involved public responsibilities. In 1783 in ***R v Bembridge***[31] the office of accountant to the paymaster of the armed forces was said to be "a place and employment of great public trust and confidence". In ***R v Borron***[32] Abbott CJ described the office of a justice of the peace, when acting as a magistrate, as "gratuitous exercise of a public trust."

2.3 Distinction of the public trust from a private law trust

However, the type of public trust that the holder of a public office had differed in important respects from the type of private trust that was enforced in the courts of equity. It was not essential for the person who had an office of public trust to hold any property that was subject to the trust – though sometimes the office itself was recognised as a species of property, and some offices were ones that required the holder to hold or administer property in his or her role as office-holder. Further, there was no person or definite group of people who were the beneficiaries of the trust, and had power to enforce it. Rather, the office was treated as requiring the holder to use the powers that attached to it for the benefit of the public. The office-holder had an obligation that was similar to the fiduciary obligation of a private law trustee in that it required the office-holder to avoid being in a situation where there was any conflict between his public duty and his self-interest, and required him to act in a way that was not motivated by self-interest, only by the public interest. Because there were no individual people who were beneficiaries, these obligations were enforceable by a public official, through the processes of the criminal law. Thus, they were enforced in the common law courts, not in the equity court where private law trusts were enforced.

2.4. Remedies for breach of public trust

In an anonymous case from the second year of the reign of Queen Anne[33] the Court of Kings Bench held:

> "If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misbehaviour in his office."[34]

R v Bembridge[35] was a criminal information brought against an accountant in the office of the paymaster-general of the armed forces. He had omitted from the accounts some sums of money that he knew were owing by a particular person. He was criminally liable because his

[30] 50 Geo III c 85 (spelling modernised)
[31] (1783) 3 Dougl 327; 93 ER 679 (also reported [1783] 22 State Trials 1
[32] (1820) 3 B & Ald 432 at 434; 106 ER 721 at 722
[33] 1703 or 1704
[34] Case 136, ***Anonymous*** 6 Mod 96, 87 ER 853 (spelling modernised)
[35] (1783) 3 Dougl 327; 93 ER 679 (also reported [1783] 22 State Trials 1). In ***R v Obeid*** (2015) 91 NSWLR 226; [2015] NSWCCA 309 (the ***Obeid Preliminary Points Appeal)*** at [59] – [62] the relative authority of the two reports is considered, and some doubt is cast on the reliability of both reports.

office was an "office of trust concerning the public", and he had engaged in "misbehaviour". Lord Mansfield said[36]:

> Here there are two principles applicable: first, that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office; this is true, by whomever and in whatsoever way the officer is appointed. … Secondly, where there is a breach of trust, fraud, or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between King and the subject it is indictable. That such should be the rule is essential to the existence of the country.

R v Whitaker[37] was a criminal charge of conspiracy to pay money to induce a violation of the official duty of the holder of a public office. There was a system in the army whereby the canteen for the officer's regiment would be operated by a tenderer chosen by the commanding officer. The charge was brought against a regiment's commanding officer and a man connected with a tenderer for the operation of the canteen for agreeing, in return for money, to favour the application of that tenderer. Lawrence J, delivering the judgment of himself Lush and Atkin JJ, said[38]:

> "A public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public."

He also said[39]:

> "When an officer has to discharge a public duty in which the public is interested, to bribe that officer to act contrary to his duty is a criminal act. To induce him to shew favour or abstain from shewing disfavour where an impartial discharge of his duty demands that he should shew no favour or that he should shew disfavour, is to induce him to act contrary to his duty; where this is done corruptly it is an indictable misdemeanour at common law which abhors corruption and fraud. "

And[40]:

> " … a person in the position of a trustee for the performance of public functions would commit a misdemeanour if he took a bribe for the corrupt exercise of his public duty… It is a complete fallacy to say that corruption of voters or electors comes within the principle which makes bribery with a view to procuring an office a misdemeanour. That is not the principle. The offence is in bribing the voter to vote in accordance with the wishes of the briber and to exercise his vote corruptly and not according to his views of what is right and proper.

This principle applies even concerning an office who duties are not explicitly spelled out[41], where "what his duty is can only be learned from what he has always done".

R v Pinney[42] concerned an allegation that a man who was mayor of Bristol and a JP had neglected his duty by taking insufficient steps to control a riot. Littledale J said, in summing

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[36] (1783) 3 Dougl at 332, 93 ER 679 at 681 (Willes and Buller JJ agreeing). The first of these principles was quoted by Sly J in ***Ex parte Kearney*** (1917) 17 SR (NSW) 578 at 582

[37] [1914] 3 KB 1283

[38] at 1296

[39] At 1297

[40] At 1298

[41] An office where "there is no written constitution" – 3 Dougl at 331, 93 ER at 681

[42] (1832) 5 Car & P 254; 172 ER 962

up to the jury[43] "there can be no doubt that, if a public officer be guilty of neglect of his duty, he is liable to be prosecuted by information or indictment".

In time the common law courts also recognised that an action for damages could be brought by a person who had suffered special damage, greater than that suffered by ordinary members of the public, as a consequence of a public official not performing his public duty. ***Henly v Mayor of Lyme*** [44] was an action for damages brought by a landowner against a local government corporation. The corporation had received from the Crown a grant of certain land, and a pier or quay with tolls, on terms that it would repair. The plaintiff was a landowner who suffered damage when the sea came onto his land and demolished buildings, in a way that would not have happened if the repairs had been done properly. A defence taken was that because the obligation to repair was imposed by the terms of the letters patent that had made the grant it was only the King who could sue for the breach. Best CJ upheld the verdict that had been given for the plaintiff, saying[45]:

> … if a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them.
>
> Then, what constitutes a public officer? In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer.
>
> Bishops, certainly, are paid by the crown, not in money, but by estates which have been granted to them; and in consequence of the grant of such estates certain duties have been imposed on the bishops; such, for instance, as holding ecclesiastical courts. Does any man doubt, if a bishop, by neglect to hold an ecclesiastical court, prevents an individual from obtaining probate of a will, by which he sustains an injury, an action might be maintained against such bishop for the consequence of that neglect? Clergymen are public servants to a certain extent, although undoubtedly they are not paid by the public. The emoluments which they receive have not been derived from the public; they have been derived from the owners of particular lands, who have endowed them with the glebe or tithes which they possess; yet they have duties cast on them as the consequence of the tenure of those lands and tithes, such as, for instance, to administer the sacrament; and it has been decided, that if a clergyman refuse to administer the sacrament to a man who is thereby prejudiced in his civil rights, an action is maintainable against the clergyman. So if a clergyman were to neglect to register a person brought to be baptized, and in consequence of that, such person should lose an estate, does any man doubt an action could be maintained against him? If the Bank of England, refuse to transfer stock, an action may be maintained against them. Lords of manors hold courts, which courts they are obliged to hold, as one of the considerations on which the lands have been granted to them. If a lord of the manor were to refuse or neglect to hold a court, by which a copyholder should be prevented from having admission to his copyhold, does any man doubt an action could be maintained against such lord? It seems to me that all these cases establish the principle, that if a man takes a reward,- whatever be the nature of that reward, whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from any individual,- for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action.

[43] At 258 of Car & P, 964 of ER, in a passage quoted by Sly J in ***Ex parte Kearney*** (1917) 17 SR (NSW) 578 at 582
[44] (1828) 5 Bing 91, 130 ER 995
[45] At 107-8 of Bing, 1001 of ER The first four sentences quoted, and the final sentence quoted, were repeated by Brennan J in ***Mengel*** at 355

2.5 Reception of the law concerning public trust in Australia

These notions, of the public trust of public office-holders, and the quasi-fiduciary duties that they owe, have become part of Australian law. In ***R v White***[46] Hargrave J said that the prohibition against bribery of judicial officers extends "to all persons whatever holding offices of public trust and confidence", and thus to members of parliament. He said the offence is "complete at the moment the offer is made"[47]. In the same case Faucett J said "any person who holds a public office or public employment of trust if he accepts a bribe to abuse his trust … is guilty of an offence at common law."[48]. That "is applicable concerning all public offices to which a trust is attached."[49] Faucett J also said it "cannot be doubted that a member of parliament holds a public office. The parliament exists … for the sake of public government; and everyone elected by the people undertakes, and has imposed upon him, a public duty and a public trust."[50]

Horne v Barber[51] held that an agreement to pay a commission to an agent engaged to obtain a sale of land was void. The mode of performance of the contract that was mutually intended by the agent and the landowner was that the agent would employ a parliamentarian as his representative, to act, for a share of the commission, in seeking to persuade the government to buy the land. Isaacs J said:

> When a man becomes a member of Parliament, he undertakes high public duties. Those duties are inseparable from the position: he cannot retain the honour and divest himself of the duties. One of the duties is that of watching on behalf of the general community the conduct of the Executive, of criticizing it, and, if necessary, of calling it to account in the constitutional way by censure from his place in Parliament – censure which, if sufficiently supported, means removal from office. That is the whole essence of responsible government, which is the keystone of our political system, and is the main constitutional safeguard the community possesses.[52]

He added:

> ... the law will not sanction or support the creation of any position of a member of Parliament where his own personal interest may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation of due watchfulness, criticism, and censure of the Administration. [53]

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[46] (1875) 13 SCR (NSW) (L) 322, at 332 and 334. They had also been recognised earlier, in 1830, in ***Cokely v Simpson*** (T D Castle & B Kercher (eds), ***Dowling's Select Cases 1828-1844*** (Francis Forbes Society Sydney 2005) p 216 fn 132

[47] Ibid at 333

[48] Ibid sat 336-7. These statements of Hargrave and Faucett JJ were repeated by Higgins J in ***R v Boston*** (1923) 33 CLR 386 at 408

[49] Ibid at 337

[50] Ibid at 338, and repeated by Higgins J ***in R v Boston*** at 408

[51] (1920) 27 CLR 494

[52] (1920) 27 CLR 494 at 500

[53] (1920) 27 CLR 494 at 500. Both this and the immediately preceding quotation were repeated by Isaacs and Rich JJ in ***R v Boston*** (1923) 33 CLR 386 at 401-2, and by Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ in ***Re Lambie*** [2018] HCA 6; (2018) 263 CLR 601 at [24]

Isaacs J also said:

> "Whether the price asked was a fair price or not in this particular case is quite immaterial: the law will not inquire. It discountenances such a transaction because it is inherently dangerous that a man in such a position should place himself in a situation of temptation."[54]

Rich J put the responsibilities of a member of parliament in terms of a trust:

> Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid. ... Courts of equity, in dealing with transactions between private persons, have always avoided as contrary to the policy of the law purchases by trustees from themselves ... This applies with greater force to public affairs and the obligations and the responsibility of the trust towards the public implied by the position of representatives of the people.[55]

R v Boston was a conspiracy charge against a member of parliament and two other people. The alleged conspiracy was for the MP to use his influence to procure the acquisition of certain land by the government. He argued that the agreement alleged was so wide that it could cover activities conducted solely outside parliament, and could cover a transaction that never came before parliament, and that he genuinely believed was for the benefit of the State. The Court rejected the argument. Again, Isaacs and Rich JJ described Members of Parliament as 'public officers' and invoked the definition of 'office' in the Oxford Dictionary of the day which included 'a position of trust, authority, or service under constituted authority'. They said[56]:

> The fundamental obligation of a member. In relation to the Parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation.... is the duty to serve, and, in serving, to act with fidelity and with a single mindedness for the welfare of the community".

By entering into an agreement to use his influence to secure a particular decision from the government he "became guilty of a breach of high public trust."[57]

Higgins J made a comparison with private trusteeship when he said of cases concerning bribery of members of Parliament and the criminal liability attaching to it[58]:

> All the relevant cases rest on the violation of a public trust. 'The nature of the office is immaterial as long as it is for the public good' (***R v Lancaster***[59]). An agreement between a trustee and an

[54] At 501. The similarity to the obligation of the private aw trustee to avoid any situation in which there is a realistic possibility of a conflict between his duty and his interest is clear.
[55] (1920) 27 CLR 494 at 501-2
[56] at 400. The core of this passage was quoted with approval in ***Re Day (No 2)*** (2017) 263 CLR 201 at [49] per Kiefel CJ, Bell and Edelman JJ, at [179] per Keane J and [269] per Nettle and Gordon JJ
[57] ***R v Boston*** at 405
[58] (1923) 33 CLR 386 at 410-1
[59] (1890) 16 Cox CC 737 at 739

> estate agent to share commission on a sale is void and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust — a trust 'concerning the public' (***R v Bembridge***[60]). Bribery of electors for Parliament is a crime at common law (***R v Pitt***[61]; ***Hughes v Marshall*** [62]); so is bribery of one who can vote at an election for alderman (***R v Steward***[63]); so is bribery of a clerk to the agent of French prisoners of war, to procure exchange of some out of their time (***R v Beale***, cited in note to ***R v Whitaker***[64]); so is a promise to bribe a municipal councillor as to the election of mayor (***R v Plympton***[65]); bribery of electors for assistant overseer of a parish (***R v Jolliffe***, cited in ***R v Waddington***[66]; ***R v Lancaster***[67]). So that the application is not confined to public servants in the narrow sense, under the direct orders of the Crown.

His Honour went on to say[68] that a member of parliament holds "a fiduciary relation towards the public" and had previously said that he "undertakes and has imposed on him a public duty and a public trust."[69]

The continuing relevance of this notion appears in ***McCloy v New South Wales***[70] where French CJ, Kiefel, Bell and Keane JJ referred to "the expectation, fundamental to representative democracy, that public power will be exercised in the public interest."[71]

The notion of certain public office-holders having offices of trust has been recently affirmed by Edelman J In ***Hocking v Director-General of the National Archives of Australia***[72]:

> Holders of high public offices such as that of the Governor-General have been described as "trustees of the public"[73]. Public powers to act in the performance of duties are said to be conferred "as it were upon trust"[74]. These loose references to trusteeship are expressions of the duty of loyalty owed by holders of public offices created "for the benefit of the State"[75]. Like all implied duties of loyalty, the content of the duty falls to be determined against a background of general expectations, based upon custom, convention and practice, which impose upon the public

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[60] (1783) 3 Dougl KB at 332 [***Bembridge*** is more readily found at 99 ER 679, and is discussed at p 11-12 above]
[61] (1762) 1 W Bl 380
[62] (1831) 2 Cr & J 118 at 121
[63] (1831) 2 B & Ad 12
[64] [1914] 3 KB at 1300 (discussed at p 13 above)
[65] (1724) 2 Ld Raym 1377
[66] (1800) 1 East 143 at 154
[67] (1890) 16 Cox C C 737
[68] At 412
[69] At 408
[70] (2015) 257 CLR 178 at 204, [36]
[71] similar remarks are made at 204-5 [35] - [39] and 248 [181] - [183], 249 [185] - [188] per Gageler J
[72] (2020) 379 ALR 395, [2020] HCA 19 at [243] giving his own reasons for orders that all members of the Court agreed should be made
[73] Finn, "The Forgotten 'Trust': The People and the State" in *Equity: Issues and Trends*, Cope (Ed), 1995, 131 at 143. See also ***R v Bembridge*** (1783) 22 State Tr 1 at 155 (an office of trust and confidence, concerning the public); ***R v Whitaker*** [1914] 3 KB 1283 at 1296–7.
[74] ***Porter v Magill*** [2002] 2 AC 357; [2002] 1 All ER465; [2001 UKGL 67 at [19], quoting ***R v Tower Hamlets London Borough Council; Ex parte Chetnik Developments Ltd*** [1988] AC 858 at 872, in turn quoting Wade, *Administrative Law*, 5th ed, 1982, p 355. See also ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1 at 235; [2001] 2 All ER 513; [2001] UKHL 16 (power "held in trust for the general public").
[75] Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject*, 1820, p 83

> officer "an inescapable obligation to serve the public with the highest fidelity"[76]. Thus, a member of Parliament has a duty to "act with fidelity and with a single-mindedness for the welfare of the community"[77].

One of the authorities that Edelman J cited with approval in that passage was the following passage from ***Driscoll v Burlington-Bristol Bridge Co***[78]:

> "[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve ... As fiduciaries and trustees of the public weal they are under an obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity ... They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves ... their actions are inimical to and inconsistent with the public interest… These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office ... The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people."[79]

2.6 More on the Distinction between the Public Trust and the Private Law Trust

The distinction between the sort of public trust that a public office-holder is subject to, and a private trust of the type enforceable in equity, has been long recognised. In 1845 the House of Lords decided ***Skinners' Co v Irish Society***[80]. As part of King James I's plan for settling Protestants in Northern Ireland, on land that had been escheated to the Crown following the rebellion of the Catholic owners of the land, the City of London contributed a sum of money raised from its member companies. A corporation, the Irish Society, was established and received grants of land and certain other rights and privileges subject to an obligation to carry out various public works. The Skinners' Company was one of the livery companies that were members of the City of London, and had contributed to the funds raised. It contended that the Irish Society held the lands and other rights and privileges on a private trust for the companies that had made the contributions[81], and had breached that trust. The House of Lords held that no private trust was created. The Irish Society were "public officers, invested with a public trust, having a right to apply those funds in discharge of that public trust, and they, therefore, cannot be accountable in a suit of this kind by the companies of London, or

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[76] ***Driscoll v Burlington-Bristol Bridge Co*** (1952) 86 A 2d 201 at 221.
[77] ***R v Boston*** (1923) 33 CLR 386 at 400; 30 ALR 185. See also ***Re questions referred to the Court of Disputed Returns pursuant to section 376 of the Commonwealth Electoral Act concerning Day (No 2)*** (2017) 263 CLR 201; 343 ALR 181; [2017] HCA 14 (***Re Day (No 2)***) at [49], [179], [269].
[78] 86A 2d 201 (1952) at 221-2 per Vanderbilt CJ (Supreme Court of New Jersey) It was a case in which "The facts … present a disillusioning picture of public officials surrendering their independence and abnegating their obligation of public trust under the influence of prominent persons seeking to further their private interests." (at 207)
[79] Cited in WA Inc Royal Commission report at para 4.4.2
[80] (1845) 12 Cl & F 425; 8 ER 1474. The principal judgment was given by Lord Lyndhurst LC.
[81] The trust relied on was the sort of resulting trust that is commonly recognised in private law when one person acquires property with the purchase money provided by another person.

by any particular company, as if they were trustees for private objects and private purposes"[82]. Lord Lyndhurst said "if they are public officers, and having any respect neglected their duties, they are liable to account; but they are not liable to account to the companies. They may be liable to account to the Crown; They may be liable to account for misconduct to the Corporation of the City of London…"[83]

Even when there is a clearly identifiable fund of property held by a body that holds it subject to a public trust, the trust involved is different to the type of trust that equity enforces. The distinction was recognised in the House of Lords in ***Kinloch v Secretary of State for India in Council***[84]. The defendant in that case was a body corporate established by statute to be the repository of certain claims that could have been brought against the East India Company, and the appropriate defendant to be sued if a claim could have been brought against the East India Company[85]. Lord Selborne LC said that the Secretary was "no doubt a very high public officer"[86]. Certain war booty had been captured in India. An Order in Council notified an intention of the Queen that the booty should be divided amongst the forces responsible for its capture. Various claims to participate having been put forward, the Crown referred the question of who should be entitled to participate in the booty to the Court of Admiralty[87]. When the Admiralty court had decided the manner of division of the booty a royal warrant issued granting the booty to the Secretary of State for India in Council "in trust for the use of" the people to whom the Admiralty Court had adjudged it[88]. Lord Selborne said[89]:

> "Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust — a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect. "

Notwithstanding that there was a specific fund of property held by the Secretary of State "in trust", the trust established by the Order in Council was a trust in the "higher sense", and so was not the sort of trust over which an equity court had jurisdiction.

Similarly, Lord Diplock in ***Town Investments Ltd v Department of the Environment*** said[90]:

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[82] At 487 of Cl & Fin, 1499 of ER
[83] At 489 of Cl & Fin, 1500 of ER
[84] (1882) 7 App Cas 619.
[85] At 622
[86] At 622
[87] There was power under 3 & 4 Vict c 65 for the Crown to refer to that court any question concerning the distribution of booty of war, and for that court to have jurisdiction to decide the matters so referred.
[88] A fuller account of the facts giving rise to the ***Kinloch*** case appears in the judgment of Megarry V-C in ***Tito v Waddell (No 2)*** [1977] Ch 106 at 212 – 216 than appears in the report of the ***Kinloch*** case itself.
[89] At 625-6. Lord O'Hagan at 630 made remarks to similar effect. A Privy Council case expressing similar views is ***Te Teira Paewa v Te Roera Tareha*** [1902] AC 56
[90] [1978] AC 359 at 382, in a judgment which all bar one of the other Lords sitting agreed. Lord Simon of Glaisdale made similar remarks at 397. In ***Tito v Waddell (No 2)*** [1977] Ch 106 at 216 223 and 233 Megarry V-C had drawn a similar distinction between a true trust or "trust in the lower sense", and a "trust in the higher sense" which was a governmental obligation not enforceable in the courts.

> " … "trust" is not a term of art in public law and when used in relation to matters which lie within the field of public law the words "in trust" may do no more than indicate the existence of a duty owed to the Crown by the officer of state, as servant of the Crown, to deal with the property for the benefit of the subject for whom it is expressed to be held in trust, such duty being enforceable administratively by disciplinary sanctions and not otherwise"

And in ***Bathurst City Council v PWC Properties Pty Ltd*** the High Court[91] accepted that "an obligation assumed by the Crown, even if it be described as a trust obligation, may be characterised as a governmental or political obligation rather than a "true trust"". [92] Their Honours accepted Lord Diplock's statement that "the term "trust" is not a term of art in public law[93]. They said that when land had been vested in a local Council on the basis that it was to be to be used to provide car parking spaces for any development that occurred on certain adjacent land there was not a trust of the kind recognised by equity, but there was a "trust for a public purpose" within the meaning of a statute that imposed restrictions on what a council could do with land it held "subject to a trust for a public purpose"[94].

The importance of the difference between the type of private law trust enforced in equity, and the public trust recognised elsewhere in the law, emerges from ***Swain v The Law Society***[95]. The House of Lords held that the Law Society was not accountable to individual solicitors when it effected insurance on their behalf against their liability for professional negligence and received a commission. This was because in so doing it was fulfilling a statutory duty. Thus, it had no intention to make itself a trustee of the policy. Lord Brightman said, at 618:

> So, there is no doubt at all in my mind that the power given to The Law Society by section 37 is a power to be exercised not only in the interests of the solicitors' profession but also, and more importantly, in the interests of those members of the public who resort to solicitors for legal advice. So, as I have said, in exercising the power conferred on it, The Law Society was performing a public duty, and not a private duty to premium-paying solicitors. This approach, which in my opinion is fundamental, has important consequences, because the nature of a public duty and the remedies of those who seek to challenge the manner in which it is performed differ markedly from the nature of a private duty and the remedies of those who say that the private duty has been breached. If a public duty is breached, there is the remedy of judicial review. There is no remedy in breach of trust or equitable account. The latter remedies are available, and available only, when a private trust has been created: see the decision of your Lordships' House in *The Skinners' Co. v. The Irish Society* (1845) 12 Cl. & F. 425. The duty imposed on the possessor of a statutory power for public purposes is not accurately described as fiduciary because there is no beneficiary in the equitable sense.

Whether a body with some governmental functions holds a particular item of property on the type of trust recognised by equity, or on the type of public trust that equity cannot enforce, is something that must be decided in relation to the individual item of property that is in question. ***Accident Compensation Tribunal v Federal Commissioner of Taxation***[96] concerned whether the Registrar of the Workers Compensation Commission was a trustee, in the full private law sense, of interest paid on awards of compensation that were invested for

[91] Gaudron, McHugh, Gummow Hayne and Callinan JJ in a joint judgment
[92] At [63]
[93] At [47]
[94] At [48]
[95] [1983] 1 AC 598
[96] (1993) 178 CLR 145

the benefit of dependants of a deceased worker. The High Court held 4:3 that it was. At 162-3 the majority[97] said:

> The legislative provisions on which the Registrar relies are to be approached, according to the argument, in the light of the principle in ***Kinloch v. Secretary of State for India*** [98]. That principle requires clear words before an obligation on the part of the Crown or a servant or agent of the Crown, even if described as a trust obligation, will. be treated as a trust according to ordinary principles or, as it is sometimes called, a "true trust"[99]; rather, in the absence of clear words, the obligation will be characterized as a governmental or political obligation, sometimes referred to in the decided cases as a trust "in the higher sense"[100] or "a political trust"[101].
>
> It is convenient to note, at this stage, that ***Kinloch*** does no more than state a rule of construction to be applied in ascertaining whether an intention to create a trust according to ordinary principles is to be discerned from the language of the instrument involved [102]. However, subject matter and context are also important and, in some cases, may be more revealing of intention than the actual language used[103] .
>
> The second matter to be noted in relation to ***Kinloch*** is that there is no rule of law or equity to prevent the imposition of ordinary trust obligations on a person who is, in other respects, a servant or agent of the Crown [104]. Moreover, it is not entirely helpful to approach cases in which it is claimed that there is a trust in the ordinary sense on the basis that the person who owes the obligation in question is a servant or agent of the Crown. As will later be made clear, that is because, in some circumstances, that person may bear that character in relation to some functions, but not those associated with the obligation in question. That may be illustrated by reference to the present case. If the Registrar's duty in relation to the money in the Payne account is merely to invest it and to hold the investments it represents and accrued income until finally distributed to the Abela family, it is difficult to see that that function involves any Crown or governmental interest. And, if that is the case, the function is not easily described as a Crown or governmental function or as a function performed for or on behalf of the Crown, even if, for other purposes, the Registrar is the servant or agent of the Crown[105]. It is thus preferable to approach cases such as the

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[97] Mason CJ, Deane, Toohey and Gaudron JJ

[98] (1882) 7 App. Cas. 619.

[99] ***Tito v. Waddell [No.2},*** (1977] Ch. 106, at pp. 211, 216-219, per Megarry V.-C See also ***Kinloch v. Secretary of State for India*** (1882), 7 App. Cas., at pp. 625- 626, per Lord Selborne L.C.; ***Town Investments v. Department of the Environment,*** (1978) A.C. 359, at p. 382, per Diplock LJ.

[100] ***Kinloch v. Secretary of State for India*** (1882), 7 App. Cas., at pp. 625-626, per Lord Selborne L.C.; ***Tito v. Waddell (No. 2),*** [1977] Ch., at pp. 216-217, 219, per Megarry V-C.

[101] Hogg, Liability of the Crown, 2nd ed. (1990), pp. 186-188. See also ***New South Wales v. The Commonwealth [No. 3)*** (1932), 46 C.L.R 246, at pp. 260-261, per Rich and Dixon 11.; p. 268, per Starke l.; ***Tito v. Waddell (No. 2)***, [1977) Ch., at p. 211, per Megarry V.-C.

[102] See ***Kinloch v. Secretary of State for India (***1882), 7 App. Cas., at p. 626, per Lord Selborne L.C.; ***Tito v. Waddell (No. 2)***, [1977] Ch., at pp. 215, 216, per Megarry V-C; ***Brisbane City Council v. Attorney-General (Q.),*** [1979] A.C. 411, at pp. 421-422; ***Aboriginal Development Commission v. Treka Aboriginal Arts & Crafts Ltd.,*** [1984] 3 N.S.W.L.R 502, at p. 519, per Priestley JA

[103] See ***Tito v. Waddell (No. 2),*** [1977] Ch., at p. 216, per Megarry V.-C.; ***Aboriginal Development Commission v. Treka Arts and Crafts Ltd,*** [1984] 3 N.S.W.L.R, at p. 519, per Priestley JA.

[104] See ***Tito v. Waddell [No. 2)*** [1977] Ch., at p. 216, per Megarry V.-C.; ***Aboriginal Development Commission v. Treka Arts and Crafts Ltd***, [1984] 3 N.S.W.L.R, at p. 519, per Priestley JA.

[105] See the discussion to similar effect in ***Bank voor HaruJel en Scheepvaart N V. v. Administrator of Hungarian Property,*** [1954) A.C. 584, at p. 618, per Lord Reid. See also ***Wynyard Investments Pty. Ltd. v. Commissioner for Railways (NS.W.)*** (1955),93 C.L.R 376, at p. 393, per Kitto J.

present on the basis that the person concerned holds a statutory office and has a number of functions, not all of which are necessarily governmental in nature. And on that basis, little, if any, significance attaches to the fact that the obligation is imposed on a statutory office holder, or, as was put in the course of argument, on a person "in his official capacity".

There is a third matter to be noted in relation to ***Kinloch***. The mere fact that the person on whom the obligation is cast is a statutory office holder cannot, of itself, require the question whether he or she is a trustee in the ordinary sense to be approached on the basis of a presumption to the contrary. As with the question whether a person is a servant or agent of the Crown, and leaving aside any question of prerogative power, there can be no basis for an approach of that kind unless it appears that there is some governmental interest or function involved.

The ongoing applicability of the notion of a public trust of public office-holders has been affirmed in extrajudicial writing by Sir Gerard Brennan[106]:

"This notion of the public interest is not merely a rhetorical device – a shibboleth to be proclaimed in a feel-good piece of oratory. It has a profound practical significance in proposals for political action and in any subsequent assessment. It is derived from the fiduciary nature of political office: a fundamental conception which underpins a free democracy.

It has long been established legal principle that a member of Parliament holds "a fiduciary relation towards the public"[107] and "undertakes and has imposed upon him a public duty and a public trust"[108]. 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. As Rich J said[109]:

> "Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit".

Sir Gerard went on to quote Lord Bingham of Cornhill[110]:

"Elected politicians of course wish to act in a manner which will commend them and their party… to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party."

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[106] Sir Gerard Brennan (2013) Presentation of Accountability Round Table integrity Awards Canberra 11 Dec 2013 https://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/

[107] ***R v Boston*** (1923) 33 CLR 386, 412 per Higgins J

[108] Ibid, p 408

[109] ***Horne v Barber*** (1920) 27 CLR 494, 501

[110] From his Lordship's judgment in ***Porter v Magill*** [2002] 2 AC 357, [2001] UKHL 67 at [21]

Sir Gerard continued:

> "Public fiduciary duties depend for their content on the circumstances in which power is to be exercised. The obligations cast on members of Parliament and officers of the Executive Government are many and varied and the law takes cognizance of the realities of political life, but asserts and, in interpreting statutes, assumes that the public interest is the paramount consideration in the exercise of all public powers. The many and varied demands made upon Parliamentarians – by constituents, by party, by lobbyists, by family and by friends – all call for a response. Fred Chaney spoke of these demands when he delivered the Inaugural Accountability Round Table Lecture at the Melbourne Law School in October 2011. He spoke of the compromises needed in government and the many claims on the loyalty of practising politicians. But he did not suggest that any of these claims should subvert consideration of the public interest. Whenever political action is to be taken, its morality – and, indeed, its legality – depends on whether the public interest is the paramount interest to be served.
>
> True it is that the fiduciary duties of political officers are often impossible to enforce judicially – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry "whatever it takes" is not consistent with the performance of fiduciary duty."

It is this concept of an office of public trust that is an important one in explaining the controls that the administrative law imposes on the makers of administrative decisions, and that could be breached by some examples of pork barrelling. It also underlies the obligations that the criminal law and the civil law impose that are relevant to pork-barrelling. It is presupposed by some of the legislation that establishes integrity agencies in New South Wales. It is fundamental to the way the system of government operates in New South Wales.

Part 3 - Administrative law controls on pork barrelling

3.1. The reach and relevance of administrative law to pork barrelling

There is a "fundamental principle that all power of government is limited by law."[111] Any governmental power is one that arises through the operation of law, and it is the administrative law that sets and to some extent enforces the limits within which that governmental power operates.

The limits are sometimes expressly stated in the legislation that confers the power. Sometimes, indeed frequently, they are ones that the court recognises as arising by implication from the statute that confers the power, unless the statute makes quite clear that there is no such limitation. Mason J. in ***FAI Insurances Limited v. Winneke*** said[112]:

> "…The court will not ordinarily regard a statutory discretion the exercise of which will affect the rights of a citizen as absolute and unfettered. If Parliament intends to make such a discretion absolute and unfettered it should do so by a very plain expression of its intent. The general rule is that the extent of the discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment ***(Swan Hill Corporation v. Bradbury*** (1937) 56 CLR 746 at 757-758; ***Water Conservation and Irrigation Commission (NSW) v. Browning*** (1947) 74 CLR 492 at 505)). In the words of Kitto J. ***in R. v. Anderson; Ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177, at 189:
>
> > "…a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, confident to discharge the duties of his office, ought to confine himself…""[113]

A specific manifestation of this is that it is well established that decisions of a Minister[114], or even of the Crown, in exercising a statutory power can be examined by the courts[115]. In ***Padfield v. Minister of Agriculture Fisheries and Food*** [116] Lord Upjohn said that, even if a statute were to say that it conferred upon a decision maker an "unfettered discretion",

> "…The use of that adjective [unfettered] even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully and that in a manner to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than by the use of adjectives."[117]

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[111] Per Leeming JA, ***Obeid v Lockley*** at [210]
[112] (1982) 151 CLR 342, at 368:
[113] In ***Minister for Immigration v Li*** (2013) 249 CLR 332 at [24], 349 French CJ also approved this statement of Kitto J
[114] ***Padfield v Minister of Agriculture, Fisheries and Food*** [1968] AC 997 at 1032-4, 1041, 1045-6, 1049, 1053-4, 1060-2 and other cases listed by Stephen J ***in R v Toohey (Aboriginal Land Commissioner); ex parte Northern Land Council*** (1981) 151 CLR 170 at 202-4 and at 235 per Aickin j,
[115] ***R v Toohey (Aboriginal Land Commissioner); ex parte Northern Land Council*** (1981) 151 CLR 170 at 192-3 per Gibbs CJ, 215-6 per Stephen J,221-2
[116] [1968] AC 997
[117] At 1060

The principle is stated in ***Ron Caralli v. Duplessis*** [118], a case where a liquor licence had been cancelled for extraneous political reasons, purportedly under an Act which said that the Liquor Commission "may cancel any permit at its discretion". Rand J. said:

> "In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action may be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an application be refused a permit because he had been born in another Province or because the colour of his hair? The ordinary language of the legislature can not be so distorted."

This Part of the article will consider the administrative law controls on decision making that are relevant to pork barrelling, and the remedies that the administrative law itself provides if there is a decision that breaches those controls and is thus an invalid decision. Whether a particular action or decision that involves pork barrelling is invalid by administrative law criteria will sometimes have consequences under the administrative law itself, such as having the decision set aside, or an injunction against a governmental authority giving effect to a decision, or an order that the governmental authority try again to make a valid decision. These are discussed at page 41 below and following. For the reasons there given, there will often be practical problems of standing and of shortness of time in obtaining such a pure administrative law remedy concerning an example of pork barrelling.

Invalidity of an administrative decision will more often be part of what is needed for some legal consequence to arise under an area of the law other than administrative law. Invalidity of the decision will sometimes be an element in whether some breach of the criminal law has occurred. The possibility of such breaches is discussed in **Part 4** below. Invalidity of an administrative decision will sometimes be an element in whether some civil liability has arisen. The possibility of there being civil liability for pork barrelling is discussed in **Part 5** below. It will sometimes enable action to be taken by one of the integrity agencies as discussed in **Part 6** below.

3.2. Requirements for Valid Administrative Decision-Making

There are various different requirements for an administrative decision which, if not met, can result in the decision being invalid under the administrative law. It is not uncommon for a particular decision or action to be attacked on the ground that more than one of these requirements is not met. A decision to expend public resources in a way amounting to pork barrelling might be invalidated because of failure to comply with any of these requirements. The way in which any failure to comply occurs will be very dependent on the facts about the particular decision, and the particular legal power under which it purports to be made, so the discussion will necessarily be in quite general terms.

[118] (1959) 16 DLR (2d) 689 at 705; [1959] SCR 121 at 140. A restauranteur had irritated the government by providing bail for 375 Jehovah's Witnesses charged with breaking laws limiting distribution of pamphlets. The government caused his liquor licence to be cancelled.

3.2.1. The decision maker must have lawful authority to make the decision

The most basic reason for invalidity of a purported decision, what might be called "naked ultra vires", arises when a governmental authority does an action of a type that it has no power at all to do. There will be some occasions when some administrative decision to expend money, that fall within the scope of pork barrelling, is not within the scope of any power that the decision-maker has.

An example is ***Prescott v Birmingham Corporation***[119]**.** It concerned a decision by the Birmingham Corporation that it would allow free travel on its bus services during certain off-peak times to recipients of certain types of pension who were over a particular age. This necessarily involved a smaller amount of fares, about £90,00 per annum, being collected than would be collected if the scheme did not operate. Even before introduction of the scheme the transport operations of the Council were conducted at a loss, so necessarily the cost of the scheme would be borne by the general body of ratepayers. The Council had power to conduct the transport undertaking, and, subject to the fares not exceeding certain maximum amounts, to charge such fares to passengers as the council thought fit[120]. There was no statutory permission for waiving the fares for any class of passenger, but neither was there any statutory prohibition on doing so. A ratepayer challenged the legality of the scheme, and succeeded both at first instance and on appeal in obtaining a declaration that the scheme was invalid and ultra vires.[121] .

The first instance judge, Vaisey J, said[122]

> "The subsidising of particular classes of society is, I think, a matter for parliament, and for parliament alone."

He also said, taking an act of pork barrelling as an example of an invalid decision:[123]

> "I think that the corporation have no general inherent power to offer free seats in their vehicles or other benefits in money or money's worth to particular individuals or to particular classes of individuals, and to discriminate between the citizens of Birmingham on a large scale and to the wide extent which they do in the present case. Where is the process of discrimination and favouritism to stop? Let me suppose that the council of the corporation were honestly of the opinion that the success of a particular political party at the polls was essential to the public welfare. Would they be entitled to confer pecuniary benefits on the supporters of that party? Plainly not; but where is the difference in principle between that and the proposals of the present scheme? For myself, I cannot see it. Of course, there is no element of venality or corruption here, but only, if I am right, an excess of misplaced philanthropic zeal."

The Court of Appeal[124] gave a single judgment. In it their Honours said:

> "Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by

[119] [1955] 1 Ch 210
[120] S 104 of ***Road Traffic Act 1930***, set out at p 216 of the report
[121] See the order of Vaisey J at 227
[122] At 225
[123] At 226
[124] Evershed MR, Jenkins and Birkett LJJ

> the latter. Thus local authorities running an omnibus undertaking at the risk of their ratepayers, in the sense that any deficiencies must be met by an addition to the rates, are not, in our view, entitled, merely on the strength of a general power, to charge different fares to different passengers or classes of passengers, to make a gift to a particular class of persons of rights of free travel on their vehicles, simply because the local authority concerned are of opinion that the favoured class of persons ought, on benevolent or philanthropic grounds, to be accorded that benefit. In other words, they are not, in our view, entitled to use their discriminatory power as proprietors of the transport undertaking in order to confer out of rates a special benefit on some particular class of inhabitants whom they, as the local authority for the town or district in question, may think deserving of such assistance. In the absence of clear statutory authority for such a proceeding (which to our mind a mere general power to charge differential fares certainly is not) we would, for our part, regard it as illegal, on the ground that, to put the matter bluntly, it would amount simply to the making of a gift or present in money's worth to a particular section of the local community at the expense of the general body of ratepayers.

This reasoning shows how the quasi-fiduciary nature of the power that the council exercises influences the construction of a power granted to it in general terms, so that the power given in general terms to charge fares is treated as limited to not including charging fares in a way that confers a gift on a sub-set of the passengers.

Even though the decision in ***Prescott*** that a discriminatory charging of fares to passengers was ultra vires has been reversed in England by amendment of the relevant statute, the principles on which it was decided have been held by the House of Lords to remain good[125].

3.2.2. The decision-maker must act for a proper purpose

Even if an action or decision is on its face a type of decision that the decision-maker is given authority to make, so there is no naked ultra vires, the purpose for which the action is done or the decision is made can result in its invalidity. When a power has been conferred for a specific purpose, the court will not permit the donee of the power to use the power for some different purpose[126]. The court regards any decision that is purportedly made under a legislative power, but for an improper purpose, as not being within the scope of the power conferred. Thus, a decision made for an improper purpose is a species of ultra vires decision.

Discovering for what purpose expenditure is authorised by a statute is a matter of construction of the individual statute.

Expending public funds to obtain an advantage for a particular political party will frequently involve acting for an improper purpose. Mahoney JA recognised this in ***Greiner v ICAC***[127]:

> "Public power, for example, to appoint to a public office must be exercised for a public purpose, not for a private or a political purpose. In some cases, it may be proper to take into account in the exercise of that power a political factor. That is so, in such cases, because such factors are, by the

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[125] ***Bromley London Borough Council v Greater London Council*** [1983] 1 AC 768 at 815 per Lord Wilberforce, 831 per Lord Keith of Kinkel, 838, 839, 842 per Lord Scarman, 851 per Lord Brandon of Oakbrook

[126] ***Municipal Council of Sydney v Campbell*** [1925] AC 338 at 343; ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177 at 189.

[127] (1992) 28 NSWLR 125 at 164. Mahoney JA's judgment was a dissenting one, but his Honour's difference from the majority was on the question of whether the Commission's conclusion that the precondition to a finding of "corrupt conduct" required by section 9 (1) (c) ***ICAC Act*** was satisfied, not on the question of whether the prima facie definition of 'corrupt conduct" in s 8 had been satisfied. (These provisions of the ICAC Act are set out and discussed at. pages 91 to 96 below.)

> intendment of the legislature or the law, accepted as proper to be taken into account in that way. Thus, if in the determination of wage levels, the relevant legislation requires that a wage consensus reached between government and employers or employees be taken into account, that consensus may be taken into account notwithstanding that the purpose of the consensus was or included the achievement of party political objectives. It does not follow that, for example, the place where a public facility is to be built may be selected, not because it is the proper place for it, but because it will assist the re-election of a party member."

Whether a power has been exercised for the purpose for which it was conferred is a question of fact[128]. Concerning proof that pork barrelling has occurred, the powers of an integrity agency to investigate and obtain documents, discussed in Part 6 of this article, and the legal provisions discussed in Part 7 of this article that facilitate discovering the purpose with which an administrative action was taken, will often be of critical importance in demonstrating what really was the purpose with which some particular expenditure of public assets was made.

3.2.2.1. Identifying the purpose for which the power was conferred

Sometimes when legislation confers a power it will be explicit about the purpose for which that power is conferred. However, frequently a power will be conferred by legislation that says nothing explicit about the purpose for which a power is conferred, and sometimes a power arises under the general law without a specific statutory source. Even in relation to those decisions the principle that the decision-maker must act for a proper purpose can have scope for application.

3.2.2.2. Limits on powers granted in terms without any explicit limits

Where a discretion is given without defining the grounds on which it is to be exercised it is often possible to ascertain the purpose for which it is to be exercised by considering "the scope and purpose of the provision and what is its real object."[129]

That a power to make a particular type of decision is given to a person who is identified by the title of his office is an indication that the power is "not given to him for his own benefit or otherwise than for purposes relevant to his office"[130]. This limitation on a power can apply to both powers that have a statutory source, and powers that do not. Just what it entails, so far as any particular exercise of power is concerned, will depend on what are the powers relevant to the particular office that the donee of the power holds.

In a joint judgment of Mason CJ., Brennan, Dawson and Gaudron JJ. in ***O'Sullivan v. Farrer***[131] their Honours said:

> "Where a power to decide is conferred by statute, a general discretion, confined only by the scope and purposes of the legislation, will ordinarily be implied if the context (including the subject matter to be decided) provides no positive indication of the considerations by reference to which a decision is to be made. See ***Water Conservation and Irrigation Commission (NSW) v. Browning*** (1947) 74 CLR 492 at 504-505 per Dixon J.***; R. v. Australian Broadcasting Tribunal; ex parte***

[128] ***Municipal Council of Sydney v Campbell*** [1925] AC 338 at 343
[129] Per Dixon CJ (McTiernan J agreeing, and Windeyer J agreeing "generally") ***Klein v Domus Pty Ltd*** (1963) 109 CLR 467 at 473
[130] Per Kitto J, ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177, at 189
[131] (1989) 168 CLR 210 at 216

> ***2HD Pty Ltd*** (1979) 144 CLR 45 at 49-50***; Murphyores Incorporated Pty Ltd v. The Commonwealth*** (1976) 136 CLR 1 at 12-13, 24; ***Re Coldham; Ex parte Brideson*** (1989) 166 CLR 338, at 347."[132]

That a particular policy has been put before the electors, and the electors have provided a majority to the party that put forward that policy, is not sufficient to justify expending public money on that policy[133]. The expenditure must be within the scope of a power conferred by the law, and also comply with the administrative law requirements about the manner in which a decision to expend money is made.

Sometimes it might not be possible to give anything like a full account of the purpose for which some power was conferred but it will be possible to say that it was not conferred for one identifiable purpose. The relevance, for present purposes, is that it will sometimes be possible to say "I can't identify all the purposes for which this power was conferred, but it was not conferred to enable public money to be spent for the purpose of giving an advantage to a particular political party."

3.2.2.3. Two examples of invalid decisions made to advantage a political party

How the requirement that a power be exercised for a proper purpose can invalidate a decision that was made to give an advantage to a political party can be illustrated, and made more concrete, by two examples. The first is ***Bromley London Borough Council v Greater London Council***[134].

The Greater London Council ("GLC") had the function conferred on it by section 1 of its enabling Act[135] "to develop policies, and to encourage, organise, and where appropriate, carry out measures, which will promote the provision of integrated efficient and economic transport facilities and services for Greater London." The London Transport Executive ("LTE") was the body which carried out the actual running and financing of the operation of those facilities and services. The GLC issued a precept to the councils of all London boroughs to levy a supplementary rate, of a particular number of pence in the pound, to enable the GLC to finance by a grant to LTE the cost of LTE of reducing bus and tube fares by 25%. The precept was issued after the Labour Party had won an election for the GLC in which it had had as one of its stated policies that if elected it would cut the fares by 25%. The Bromley Council, one of those to which the precept had issued, sought judicial review of the decision. Both the Court of Appeal and the House of Lords held that the precept was ultra vires and void.

As Oliver LJ pointed out in the Court of Appeal[136], there are two questions – first whether the decision is intra vires at all, and second whether it is an appropriate exercise of a statutory discretion. He described the difference between the questions as one concerning "the question of the existence as opposed to the exercise of the statutory power."[137]

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[132] Similarly, "every statutory discretion is confined by the subject matter, scope and purpose of the legislation under which it is conferred" – per French CJ, ***Minister for Immigration v Li*** (2013) 249 CLR 332 at [23]
[133] ***Bromley*** at 815 per Lord Wilberforce, citing ***Roberts v Hopwood*** at 596 per Lord Atkinson, 607 and 609 per Lord Sumner, 613 per Lord Wrenbury.
[134] [1983] 1 AC 768.
[135] The ***Transport (London) Act 1969 (Eng)***
[136] At 778
[137] At 780

Oliver LJ applied the principle that if a power is conferred in general terms it must be construed in a way that is consistent with the overall purposes of the statute that confers it. The ***Transport (London) Act 1969*** gav***e*** a general power to the GLC, that: "the council may direct the executive to submit proposals for an alteration in the executive's fare arrangements to achieve any object of general policy specified by the council in the direction." Oliver LJ said[138]:

> "Now the object of general policy cannot I conceive, be an object arbitrarily selected by the council for reasons which have nothing to do with the functions which it is required to perform under the Act - for instance, the provision of free travel for members of a particular political party or social group. It must be an object of general policy which the council is empowered to adopt under Section 1, that is to say an object for the promotion of an integrated efficient and economic transport system."

One reason why the precept was ultra vires was that "the general object of reducing fares by 25 per cent … had nothing whatever to do with integration, efficiency or cost-effectiveness."[139]

In the House of Lords Lord Wilberforce said[140]:

> "it makes no difference on the question of legality (as opposed to reasonableness …) whether the impugned action was or was not submitted to or approved by the relevant electorate: that cannot confer validity upon ultra vires action.".

Porter v Magill[141] provides another example of a decision made by an administrator being invalid when it was made to confer an advantage on a particular political party. The case arose concerning the Westminster City Council at a time when the Conservative Party had had its majority in the council reduced at the latest Council election. The Council resolved to sell 500 of its houses, with a target minimum number of 250 sales in certain marginal wards, because it believed houseowners were more likely than tenants to vote Conservative.[142] The auditor of the council found that the wilful misconduct of the council leader and her deputy, the promoters of the scheme to sell the houses, had caused the Council loss, by selling the houses for less than their market value. The auditor ruled that, under a particular provision of the English local government legislation,[143] they were liable to make good the loss the Council had thereby suffered. The remedy granted was to require the leader of the Conservative Party in the council and her deputy to repay an amount of about £31 million, which with interest and costs increased to about £45 million**.**

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[138] At 784 – 5, in what Lord Wilberforce described at 814 as "his valuable judgment", and with which Lord Wilberforce broadly agreed

[139] Per Oliver LJ as 785

[140] At 814. Lord Diplock at 830-1 is to similar effect.

[141] [2002] 2 AC 357

[142] The policy, despite having this political purpose, was given a name suggesting worthy aspirations, namely "Building Stable Communities" – Lord Bingham at [5], 454. "The references in contemporary documents to 'new residents' , 'more electors' and 'new electors' in many instances were euphemisms for 'more potential conservative voters' " – Lord Bingham at [5], 455

[143] The NSW analogue of that legislation is contained in the ***Government Sector Finance Act 2018 (NSW)***, discussed at page 84 ff below

On appeal to the House of Lords the auditor's decision was upheld. Lord Bingham of Cornhill[144] stated some "underlying legal principles". First:

> "Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended.[145]"

Second:

> "It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle.[146]"

Third:

> "If councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct[147]"

Fourth:

> "If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council"[148]

Though the particular obligation to make good loss that his Lordship gave effect to was one arising under the relevant English local government legislation, he recognised that an obligation to the same effect arose under the general law[149]:

> "Even before these statutory provisions the law had been declared in clear terms. One such statement may be found in ***Attorney General v Wilson*** (1840) Cr & Ph 1, 23–27[150] where Lord Cottenham LC said:
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> > "The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining because the act done was

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[144] Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough agreeing, and Lord Scott of Foscote giving his own reasons to reach the same conclusion

[145] [2002] 2 AC 357 at [19], 463 citing Wade & Forsyth, ***Administrative Law***, 8th ed 92000) p 356-7, Lord Bridge of Harwich in ***R v Tower Hamlets London Borough Council Ex p Chetnik Developments Pty Ltd*** [1988] AC 858, 852 and Neill LJ in ***Credit Suisse v Allerdale Borough Council*** [1997] QB 306 at 333

[146] [2002] 2 AC 357 at [19], 463, citing ***Attorney-General v Belfast Corporation*** (1855) 4 Ir Ch R 119, 160-1

[147] Ibid at [19], 463. Though his Lordship was here concentrating on a statutory provision which made liability dependent on wilful misconduct, his remarks are consistent with the general law about misfeasance in public office

[148] Ibid at [19], 463

[149] Ibid at [19], 463-4

[150] [The case is more conveniently found at 41 ER 389 and the quoted passage from it at 396 - 398]

> ostensibly an act of the corporation? … As members of the governing body, it was their duty as the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them; instead of which, having previously, as they supposed, placed the property, by the deeds of the 30 May 1835, in a convenient position for that purpose, they take measures for alienating that property, with the avowed design of depriving the corporation of it; and, with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other defendants in this cause, for purposes in no manner connected with the purposes to which the funds were devoted, and for which it was their duty to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of spoliation against all the inhabitants of Leeds liable to the borough rate; every individual of whom had an interest in the fund, for his exoneration, pro tanto, from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would, in this court, be made responsible for so much of the alienated property as could not be recovered in specie? But if Lord Hardwicke was right in the Charitable Corpn case[151], and I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then the two cases are identical. I cannot doubt, therefore, that the plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of; and it is proved that the five defendants fall under that description."

Lord Bingham's fifth proposition was:

> "Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party. Support for this principle may be found in ***R v Board of Education*** [1910] 2 KB 165, 181 where Farwell LJ said:
>
> > "If this means that the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby."
>
> This passage was accepted by Lord Upjohn in ***Padfield v Minister of Agriculture, Fisheries and Food*** , [1968] AC 997, 1058, 1061. In ***R v Port Talbot Borough Council, Ex p Jones*** [1988] 2 All ER 207, 214, where council accommodation had been allocated to an applicant in order that she should be the better able to fight an election, Nolan J regarded that decision as based on irrelevant considerations."[152]

Though Lord Bigham formulated these propositions by reference to the limits on the power of a local authority, the principles apply more generally, and in particular apply concerning the exercise of power by state government officials. The judgment in ***Padfield*** that Lord Bingham cited was one that arose when a Minister had refused to exercise a discretion to order an investigation into whether certain charges under a milk marketing scheme were justifiable. The Court ordered a Minister to give proper consideration to whether he should direct that the investigation be held. The passage in the speech of Lord Upjohn in ***Padfield*** at 1058 to which Lord Bingham referred is:

[151] [***The Charitable Corporation v Sutton*** 2 Atkyns 400; 26 ER 642]
[152] Ibid at [19], 465

> "[The Minister] may have good reasons for refusing an investigation, he may have, indeed, good policy reasons for refusing it, though that policy must not be based on political considerations which as Farwell L.J. said in ***Rex v. Board of Education*** are preeminently extraneous. So I must examine the reasons given by the Minister, including any policy upon which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or, as it is frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so, the court has no jurisdiction to interfere."[153]

One of the reasons why the Minister refused to order the investigation in ***Padfield*** was because, if the investigation recommended a change to the milk marketing scheme, the Minister might face trouble in Parliament. Later in his speech, at the second of the places to which Lord Bingham referred, Lord Upjohn explained why that was an irrelevant consideration for the Minister to take into account:

> "This fear of parliamentary trouble (for, in my opinion, this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament if a statute has cast upon him an obligation in the proper exercise of a discretion conferred upon him to order a reference to the committee of investigation."[154]

Returning to Lord Bingham's speech in ***Porter***, his Lordship accepted that, provided a power was exercised for the purpose for which it was conferred, it was not a ground of invalidity if the decision-maker hoped that the decision made through exercise of that power would be well received politically.

> "Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council"[155]

After referring to several cases that had considered the role that political allegiance could properly play in decision making by a local government authority[156] his Lordship concluded:

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[153] ***Padfield v Minister of Agriculture, Fisheries, and Food*** [1968] AC 997 at 1058

[154] ***Padfield*** at 1061. Sir Gerard Brennan has quoted part of this passage – see p 21 above.

[155] ***Porter*** at [21], 465

[156] ***R v Sheffield City Council, ex p Chadwick***. (1985) 84 LGR 563; . ***R v Waltham Forest Borough Council ex p Baxter*** [1988] QB 419; ***Jones v Swansea City Council*** [1990] 1 WLR 54; ***R v Bradford Metropolitan Council ex p Wilson*** [1990] 2 QB 375; ***R v Local Comr for Administration in North and North-East England; ex p Liverpool City Council*** [2001] 1 All ER 462.

> "These cases show that while councillors may lawfully support a policy adopted by their party they must not abdicate their responsibility and duty of exercising personal judgment. There is nothing in these cases to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage."[157]

Lord Scott of Foscote expressed much the same thought in different words:

> "In the Court of Appeal Kennedy LJ commented on the political reality that many government decisions, whether at local government level or in central government, are taken with an eye to the electoral effect they may have. He said, ante, p 386d:
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> > "Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct … In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it."
>
> Kennedy LJ was, of course, correct. But there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. The agreed statement of facts places the policy adopted by the chairmen's group on 5 May 1987 fairly and squarely in the former category."[158]

Lord Scott had opened his speech in ***Porter*** in uncompromising language, that made clear that in his view if powers that had been conferred in general terms were used to achieve political ends, that amounted to corruption:

> "My Lords, this is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola's "worm i' the bud" it feeds upon democratic institutions from within (Twelfth Night)."[159]

Notwithstanding the rhetorical force of what Lord Scott here said, denouncing conduct as corrupt does not, by itself, mean that any legal consequences follow. However, Lord Scott went on to say that the law provided for there to be consequences for the particular type of corrupt conduct that he had identified. First, the power of the auditor to obtain documents, obtain information, and make a report provided "an institutional means whereby political corruption consisting of the use of municipal powers for party political advantage might be

[157] ***Porter*** at [22], 466
[158] Ibid at [144], 505
[159] Ibid at [132], 502

detected and cauterized by public exposure."[160] New South Wales law contains provisions, discussed in Part 6 of this article that can similarly enable any illegal pork-barrelling to be "detected and cauterised by public exposure." As well, Lord Scott said, "where the misconduct in question had caused loss to the local authority, section 20 of the 1982 Act enabled the auditor to require those responsible to make good the loss."[161].

By the time the case reached the House of Lords section 20 of the 1982 Act had been repealed and not replaced. But, and of particular relevance for this article, that did not stop there being a remedy available under the general law: "Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law. "[162]. In New South Wales a provision analogous to the former English section 20 is still operative[163].

3.2.2.3. Causal role of the improper purpose

It is common for a decision or action to be made for several reasons, or to achieve several different purposes, all of which play a role in reaching the decision or performing the action. That gives rise to a question of just how important an improper purpose must be, in arriving at a decision or action, before the decision or action is vitiated.

It is not necessary that the improper purpose be the sole purpose before the resulting decision or action is vitiated[164].

Short of being the sole purpose, how important the improper purpose has to be in reaching the disputed decision or action is a topic on which the courts have expressed much the same idea in different words. One formulation is that "If it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion."[165] Another is that it is sufficient to invalidate a decision if the improper purpose is "a substantial purpose in the sense that no attempt would be made to act in the same way the decision required if that improper purpose had not existed"[166]: This approach is coherent with the approach the courts take to the causal significance of the improper purpose concerning the crime of misfeasance in public office, considered at page 57 below.

3.2.2.4. Relevance of on whom a discretion is conferred

In ***R v Anderson; ex parte Ipec-Air Pty Ltd***[167] (1965) 113 CLR 177 Menzies J said:

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[160] Ibid at [136], 503 - 4
[161] Ibid at [137], 504
[162] Ibid at [140], 504
[163] Under the ***Government Sector Finance Act 2013***, discussed at page 84 **ff** below
[164] ***Thompson v Randwick Municipal Council*** (1950) 81 CLR 87 at 106 per Williams Kitto and Webb JJ.
[165] Per Dixon CJ (McTiernan J agreeing, and Windeyer J agreeing "generally") ***Klein v Domus Pty Ltd*** (1963) 109 CLR 467 at 473
[166] ***Thompson v Randwick Municipal Council*** (1950) 81 CLR 87 at 106 per Williams Kitto and Webb JJ
[167] (1965) 113 CLR 177 at 202

> There is … a significant difference between a discretion given to a minister and one given to a departmental head. When the latter is nominated, he must arrive at his own decision upon the merits of the application and must not merely express a decision made by the government. The position in which such an officer is put is not an easy one, but the sound theory behind conferring a discretion upon a departmental head rather than his minister is that government policy should not outweigh every other consideration. A sound governmental tradition of respect for those who shoulder the responsibilities of their office in making unwelcome decisions makes the choice of a departmental head, rather than his minister, as the one to exercise a discretion conferred by the legislature a real and important distinction. There are, it seems to me, sound grounds for treating a decision to be made at departmental level as something substantially different from a decision to be made at the political level.

In ***Bromley*** Lord Diplock was of the view that the scope of discretion open to a local authority was not as great as the scope of discretion that might have been open, under similar conferring words, to a minister of the Crown[168]:

> "powers to direct or approve the general level and structural fares to be charged by the LTE for the carriage of passengers on its transport system, although unqualified by any express words in the act, may nonetheless be subject to implied limitations when expressed to be exercisable by a local authority such as the GLC that would not be implied if those powers were exercisable, for instance, by a minister of the Crown."

These remarks falls a long way short of freeing a Minister from all controls of administrative law.

3.2.3 The decision-maker must act in good faith

Important though this requirement is, whether it is met will be very dependent on the facts of the particular case – see the quote from Lord Simmonds at p 40 below. All that can be said at a general level is that it is possible that a decision to distribute public assets in a way that amounted to pork-barrelling might breach it.

3.2.4. The decision-maker must take into account relevant factors[169], and ignore irrelevant factors

The determination of what is a relevant consideration is not something which is decided in the abstract by reference only to the words of the statute which creates the decision-making power – the factual context in which the power comes to be exercised, and the particular decision which it is proposed be made in that factual context, can also generate matters which are relevant to be considered if the power is to be exercised. One example is that if a decision maker fails squarely to address the substance of the case of a person affected by the decision, and fails to give reasons which could rationally support the rejection of that case, the decision maker has failed to take into account a material consideration[170].

One particular example of the requirement to ignore irrelevant factors is that when a power or discretion has been conferred on some particular official, that person should not act in

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[168] At 821

[169] ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177 at 189.

[170] ***Minister of State for Immigration, Local Government and Ethnic Affairs v Pashmforoosh*** (1989) 18 ALD 77 at 80. This passage from ***Pashmforoosh*** was specifically approved by Mason CJ in ***ABT v Bond*** ((1990) 170 CLR at 359

accordance with someone else's direction as to the way in which the power or discretion should be exercised[171].

In ***Bromley London Borough Council v Greater London Council***[172], after holding that the precept issued by the GLC was invalid because it was ultra vires, Oliver LJ went on[173], assuming contrary to his own view that the precept was intra vires, to consider whether it was a proper exercise of an administrative discretion. Although there was "evidence from permanent officials of the council as to the documents and information put before the council and its committees"", there was "no evidence from any member of the Council indicating how the decisions were arrived at or what considerations were taken into account"[174]. In that situation "the court is left to draw such inferences as it legitimately can from the documents about the considerations which it gave to relevant matters."[175]. In doing that,

> "the question is not one of what is socially just or desirable but of what parliament has authorised and of the propriety of the exercise of the statutory discretions entrusted to a statutory body… whatever other considerations may be taken into account by a statutory body such as the council in exercising its powers, an advance commitment to or so-called mandate from some section of the electors who maybe supposed to have considered the matter is not one of them."[176]

Whether legal advice was taken and considered is not relevant to whether a purported decision is ultra vires – the decision is either within power or it is not – but it is significant in deciding another matter relevant to whether a decision adheres to administrative law standards, namely whether all and only relevant considerations have been taken into account. In ***Bromley*** it was relevant that

> "not one of the persons involved seems to have thought for one moment of looking at the statute to see whether they were within the powers which it conferred upon them and if they were, to look at the steps to be taken and the conditions to be satisfied before they were implemented."[177]

Having legal power to make a decision is an absolutely essential relevant consideration to making a valid decision. If an administrative decision-maker does not turn his mind to whether he has power to make the decision he is contemplating making, a basis for the invalidity of the decision arises almost inevitably.

Oliver LJ considered[178] the role of the courts in controlling administrative decisions:

> "Now I think that it behoves the court to be very wary indeed of interfering with an exercise of discretion by an elected body, and it should only do so if it is convinced either that the decision is one to which no body reasonably and properly instructed could reasonably have come or if it is convinced that the body has taken into account wholly impermissible factors or has failed to take into account factors which it ought to have done. This is a delicate area, lying as it does at that

[171] ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177 at 189.
[172] [1983] 1 AC 768.
[173] At 787 ff
[174] P 788
[175] P 788
[176] At 789-90
[177] At 793
[178] At 795 - 6

> narrow interface between administration and the law, and the court should only interfere if it is so convinced. It is to concern itself only with the integrity of the process of decision and not at all with evaluating the convictions of those who seek to uphold it or to attack it. It cannot and must not arrogate to itself the right to interfere with an administrative decision properly arrived at simply because the decision is not one which individual members of the court might have reached on the same material. But equally the public is entitled to expect and the law demands that the statutory discretions which Parliament has conferred upon those who assume the responsibilities of conducting local government should be fairly and properly arrived at; and if the court is convinced on the available evidence that an impropriety has taken place it must not be deterred from saying so by the fear that its determination may be criticised as an officious meddling in an area where it has no business to be. An impropriety is no less an impropriety because it is or can be said to be a politically motivated impropriety.

3.2.4.1. Role of government policy in discretionary decisions

> " it may be conceded that where the law confers a power of discretionary decision upon an officer of the civil service in his official capacity government policy is not in every case an extraneous matter which he must put out of consideration."[179]

This rather back-handed way of saying that government policy might sometimes be taken into account in making an administrative decision does not deny that it is to the statute that creates the power to make the decision, and the role of the officer upon whom the decision-making power is conferred, that one must look to find out what are the matters that can be taken into account in making some particular decision. It is on the basis of the statute, and the role of the decision-maker, that one decides whether it is legitimate to take into account some governmental policy, or not.

As well, how far does "government policy" go in applying this principle? The dictionary definition of "policy"[180] includes:

> **1.** a definite course of action adopted as expedient or from other considerations: *a business policy.*
>
> **2.** a course or line of action adopted and pursued by a government, ruler, political party, or the like: *the foreign policy of a country.*
>
> **3.** action or procedure conforming to, or considered with reference to, prudence or expediency: *it was good policy to consent.*
>
> **4.** prudence, practical wisdom, or expediency.
>
> **5.** sagacity; shrewdness.
>
> **6.** *Rare* government; polity.

The general idea of a policy is that it is an objective, expressed in general terms, that has been adopted as one to aim for, and that is to operate and be applied repeatedly or continually over a fairly long period of time, in some particular area of action or decision-making. In the ***R v Anderson; ex parte Ipec-Air*** case the government policy that the judges were referring to was the two airline policy, that there should be two, and only two, airlines operating regular interstate flights within Australia. At one time Australia had a White Australia policy, that

[179] ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177 at 192 per Kitto J. Taylor and Owen JJ at 200, and Menzies J at 201-2 are to similar effect. Windeyer J at 204 was alone in taking the view that the only consideration by which the Director-General could properly be guided was the policy of the government.
[180] Macquarie Online dictionary

related to who should be permitted to immigrate. A policy like these concerns how a particular type of government decision-making will generally be made. It is different to an objective that a particular political party should succeed in a particular election.

As well, the approval that the High Court gave to taking policy into account was to taking into account *government* policy. If a particular party has an objective of success at an election, then even though that party might be the one that is in government such a policy is not a policy that it has in its role *as* government – it is not a *government* policy.

3.2.5. The decision-maker must act reasonably[181] .

This requirement for valid administrative decision-making is one that looks at both how the decision will operate in practice, and what was the reasoning process through which the decision was arrived at. A decision arrived at by a reasoning process that does not comply with the requirements for valid decision making, like being exercised for a proper purpose and in good faith, might be struck down because the reasoning process did not meet the standards of the administrative law, and also because the decision itself was unreasonable. But an unreasonable decision can be struck down even if it is not possible to pinpoint any defect in the reasoning process by which it was arrived at.

> "…public bodies, are liable to be controlled by this Court if they proceed to exercise their powers in an unreasonable manner; whether induced to do so from improper motives or from error of judgment."[182].

A statutory discretion is presumed to require that it be exercised reasonably, even if the statute giving the discretion does not expressly say so[183]. But that presumption is displaced if the terms in which the discretion is given show that the there is some other or different condition for the exercise of the power[184].

An exercise of a power could be unreasonable if the outcomes were ""partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men"[185]. "Whether a decision maker be regarded, by reference to the scope and purpose of the statute, as having committed a particular error in reasoning, giving disproportionate weight to some factor or reasoned illogically or irrationally, the final conclusion will in each case be that the decision maker has been unreasonable in a legal sense."[186] "Even where some reasons have been provided … it may nevertheless not be possible for a court to comprehend how the

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[181] ***Westminster Corporation v London and North-Western Railway Co*** (1885) 25 Ch D at 519, cited with approval in ***Thompson v Council of the Municipality of Randwick*** (1950) 81 CLR 87 at 105; ***Minister for Immigration v Li*** (2013) 249 CLR 332

[182] ***Vernon v The Vestry of St James, Westminster*** 49 LJ (Ch) 130 at 136 per Malins V-C, cited by Griffiths CJ in ***Local Board of Health of Perth v Maley*** (1904) 1 CLR 702 at 712 and by French CJ in ***Minister for Immigration v Li*** (2013) 249 CLR 332 at [25], 349

[183] ***Minister for Immigration v Li*** (2013) 249 CLR 332 at [28] – 29], 350-1 per French CJ; [63] - [67], 362-4 per Hayne, Kiefel and Bell JJ, [88] – [89], 370 per Gageler J and cases there cited

[184] Ibid at [92]

[185] Per Lord Russell of Killowen in ***Kruse v Johnson*** [1898] 2 QB 91 at 99-100, cited by Hayne Kiefel and Bell JJ in ***Minister for Immigration v Li*** (2013) 249 CLR 332 at [70], 365.

[186] ***Minister for Immigration v Li*** (2013) 249 CLR 332 at [72], 366 per Hayne Kiefel and Bell JJ

decision was arrived at. Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification."[187]

A specific manifestation of the requirement to act reasonably is that a public office-holder must exercise a discretion upon reasonable grounds. In ***Campbell v Municipal Council of Sydney (No 2)***[188] a resolution was set aside as outside power when the decision-makers "acted without inquiry and came to a determination without information on which within reason an opinion could be formed"[189], and the resolution was made "without information on which to form a reasoned decision as to whether"[190] the facts that would justify the decision actually existed.

There is no general always-applicable right to obtain reasons for any administrative decision[191]. Sometimes, though, an entitlement to reasons can be given by statute concerning a particular type of decision. As well, sometimes some of the other requirements of valid decision-making, like exercising procedural fairness, might require reasons to be given concerning a particular type of decision.

Absence of reasons for a decision where there is no duty to give them does not suggest irrationality of the decision — but the court may draw an inference that the decision-maker had no rational reason for the decision[192]. If all the prima facie reasons point in favour of taking a particular decision, and the decision-maker takes a different decision, the court can infer that he had no good reason for doing so[193].

Roberts v Hopwood [194] was decided partly on the basis of naked ultra vires, and partly on the obligation of a decision-maker to act reasonably. In ***Roberts*** a local authority had power to employ workmen and pay them such wages as the Council may think fit. The power was not one to pay such "reasonable wages" as they thought fit, or subject to any similar express qualification. In 1921 the council resolved to keep on paying its workers the same minimum wage as in the previous year, even though the cost of living, and the level of wages generally, had fallen significantly. There was no suggestion of mala fides, or of negligence or

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[187] Ibid at [76], 367 per Hayne Kiefel and Bell JJ

[188] (1923) 24 SR (NSW) 193, a decision upheld upon appeal to the Privy Council: ***Municipal Council of Sydney v Campbell*** [1925] AC 338

[189] At 207

[190] At 209-10

[191] ***Public Service Board of NSW v Osmond*** (1986) 159 CLR 656 at 662-3 (Gibbs CJ)

[192] ***Public Service Board of NSW v Osmond*** (1986) 159 CLR 656. The same proposition was stated in ***Lonrho plc v Secretary of State for Trade and Industry*** [1989] 1 WLR 525 at 539 - 40. Per Lord Keith of Kinkel (Lord Templeman, Lord Griffiths, Lord Ackner and Lord Lowry agreeing). However, this principle was not the basis on which ***Lonrho*** was decided. In ***Lonrho*** after the controlling company of Harrods had been taken over a company inspector was appointed to investigate the circumstances. Lonrho had for years been trying itself to gain control of Harrods, and had made submissions to the inspector. The relevant Minister decided not to refer the takeover to the Monopolies and Mergers Commission, and to defer publication of the report of the inspectors. One of the reasons for deferring publication was that the takeover had been referred to the Serious Fraud Office, which was still investigating, and had asked that the report not be made public. Lonrho sought judicial review of those decisions. It alleged that the Minister had adopted the decision of the Serious Fraud Office rather than make up his own mind – this was rejected. It also alleged the Secretary of State's decision was influenced by incorrect advice – this was also rejected. It was also alleged the decision was perverse or irrational. This was also rejected.

[193] ***Padfield v Minister of Agriculture, Fisheries and Food*** [1968] AC 997 at 1053-4 per Lord Pearce, accepted by Gibbs CJ in ***Public Service Board of NSW v Osmond*** (1986) 159 CLR656 at 663-4

[194] [1925] AC 578.

misconduct on the part of anyone – the sole question was whether the payment was contrary to law because it was outside the scope of the discretion conferred. All members of the House of Lords held that the payment was beyond power. Lord Buckmaster was particularly influenced by the fact that the council had resolved to pay the same minimum wage to all its workers, whether men or women, regardless of the type of work they performed. This was not the determination of a "wage" but of an arbitrary sum.

Lord Atkinson accepted[195] that the Council was not bound "by any particular external method of fixing wages, whether by trade union rates, cost of living, payments of other local or national authorities or otherwise". However,

> "it is only what justice and common sense demand that, when dealing with funds contributed by the whole body of the ratepayers, they should take each and every one of these enumerated things into consideration in order to help them to determine what was a fair just and reasonable wage to pay their employees for the services which the latter rendered. The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all those aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour."

Lord Sumner held that the council's power to pay wages was subject to limitations not only of good faith, but also of honesty and reasonableness:

> "Is the implication of good faith all? That is a qualification drawn from the general legal doctrine, that persons who hold public office have a legal responsibility towards those whom they represent- not merely towards those who vote for them - to the discharge of which they must honestly apply their minds. Bona fides here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is bona fide a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public whose money and local business they administer … I do not find any words limiting [a council auditor's] functions merely to the case of bad faith, or obliging him to leave the ratepayers unprotected from the effects on their pockets of honest stupidity or unpractical idealism. The breach in the words "as they may think fit" which the admitted implication as to bad faith makes, is wide enough to make the necessary implication one both of honesty and of reasonableness."

Lord Wrenbury arrived at his conclusion first by construing the word "wages". It is[196]:

> " … such sum as a reasonable person, guiding himself by an investigation of the current rate in fact found to be paid in the particular industry, and acting upon the principle that efficient service is better commanded by paying an efficient wage, would find to be the proper sum. The figure to be sought is not the lowest figure at which the service could be obtained, nor is it the highest figure which are generous employer might, upon grounds of philanthropy or generosity, pay out of his own pocket. It is a figure which is not to be based upon or increased by motives of philanthropy nor even of generosity stripped of commercial considerations. It is such figure as is the reasonable pecuniary equivalent of the service rendered. Anything beyond this is not wages. It is an addition to wages, and is a gratuity. The authority is to pay not such a sum but such wages as they think fit."

[195] At 594
[196] At 612

He then went on to consider the expression "as they may think fit"[197]:

> " A person in whom is vested a discretion must exercise his discretion upon reasonable grounds. A discretion does not empower a man to do what he likes merely because he is minded to do so - he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by use of his reason, ascertain and follow the course which reason directs. He must act reasonably."

3.2.6. An administrative decision-maker must afford procedural fairness.

One aspect of this is that "a person or body which is considering making a decision which will adversely affect another should generally give notice to that other of the reasons why the proposed action is intended to be taken so that the person affected will have a fair opportunity to answer the case against him."[198].

There will be occasions when a decision-maker is thinking of denying some benefit that an applicant has applied for, and this principle requires that a decision-maker to notify the applicant of the reasons that tentatively lead the decision-maker to reject the application. If there is an obligation of natural justice to give such reasons, they will provide relevant evidence of whether the decision-maker is proposing to breach some other administrative law requirement, such as not taking into account irrelevant considerations.

In ***Osmond*** Gibbs CJ also recognised the possibility that natural justice might require reasons to be given for a decision once it had been made, but thought it was "difficult to see how the fairness of an administrative decision can be affected by what is done after the decision is made."[199]

3.3. Remedies for inappropriate exercise of administrative discretions

That an action by an administrator is ultra vires is not itself a crime, and is not sufficient to give rise to liability in tort[200]: As Brennan J said[201]:

> "a purported exercise of power is not necessarily wrongful because it is ultra vires. The history of the tort [of misfeasance in public office] shows that a public officer whose action has caused loss and who has acted without power is not liable for the loss merely by reason of an error in appreciating the power available. Something further is required to render wrongful an act done in purported exercise of power when the act is ultra vires."

A specific example is that a decision concerning which there was a failure to accord natural justice "cannot by itself amount to a breach of the duty of care sounding in damages."[202].

A court order of mandamus can sometimes require the administrator to take the action that the court is satisfied he should have taken, or the order can take the weaker form of ordering

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[197] At 613
[198] Per Gibbs CJ ***Public Service Board v Osmond*** (1986) 159 CLR 656 at 666 (Wilson Brennan and Dawson JJ agreeing)
[199] ***Public Service Board v Osmond*** (1986) 159 CLR 656 at 670 per Gibbs CJ (Wilson Brennan and Dawson JJ agreeing)
[200] ***X (Minors) v Bedfordshire County Council*** [1995] 2 AC 633
[201] ***Northern Territory v Mengel*** (1995) 185 CLR 307 at 356
[202] ***Dunlop v Woollahra Council*** [1982] AC 158 at172

the decision-maker to consider the application according to law[203]. If there is a purported decision that is invalid on one or more of the administrative law criteria, the court can set it aside. Often, as well as setting the decision aside, the court will order the decision-maker to make a new attempt to make a decision, this time according to law. Sometimes a declaration that a decision is invalid can be obtained, or an order of prohibition or an injunction against giving effect to the invalid decision. If public money has been given away by an ultra vires disbursement, sometimes it is possible for a court to make an order for it to be paid back[204], sometimes with interest.

However, there are significant limitations on when it is possible for a person disappointed by an administrative decision to seek such a remedy from the court, arising from the requirement that the applicant for the remedy have standing to seek to review the decision. As well there are sometimes quite stringent limitations arising under the rules of court concerning the time at which any such relief is sought.

3.3.1. Limitations arising from the need for standing to seek review

The traditional common law method of seeking judicial review of any administrative action was for the Attorney-General to seek a prerogative writ from the Supreme Court. The thinking behind this procedure was that the requirements of valid administrative action were matters of public law, that if they were not followed it was the public generally rather than any private individual who was harmed, and thus it was appropriate for the Attorney-General, as the guardian of the public interest, to protect the rights of the public.

A private individual could sometimes obtain the permission (called a "fiat") of the Attorney-General to instigate action in the name of the Attorney-General to enforce such public rights, usually on terms that the private individual bear the costs of running the action. Such an action was a "relator action", because its title showed that the Attorney-General sued "at the relation of" the private individual.

The traditional English view has been that if the Attorney-General refuses to lend his or her name to the action, the courts will not review that decision[205]. Those authorities received obiter approval from the High Court of Australia in ***Barton v The Queen***[206]. More recently, Gaudron, Gummow and Kirby JJ have accepted that the courts cannot examine the grant or refusal of a fiat in connection with a relator action[207]. However, their Honours recognised that:

> "in many instances it is the Attorney General who determines whether there is to be curial enforcement of the requirement that statutory bodies observe the law. This, it has been said, "is a

[203] Per Kitto J, ***R v Anderson; ex parte Ipec-Air Pty Ltd*** (1965) 113 CLR 177 at 189

[204] K Mason, J W Carter & G J Tolhurst, ***Mason & Carter's Restitution Law in Australia*** (4th ed 2021) ch 21

[205] ***London County Council v Attorney-General*** [1902] AC 185 at 168-9, 170***; Gouriet v Union of Post office Workers*** [1978] AC 435, at 488; ***Reg v Labouchere*** (1884) 12 QBD 320

[206] (1960) 147 CLR 75 at 91 per Gibbs A-CJ and Mason J, a judgment agreed to by Stephen J at 103 and Aicken J at 109. ***Barton*** concerned the reviewability of an ex office indictment, so the reference to the power to refuse permission to bring a relator action was quite incidental.

[207] ***Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty*** **Ltd** (1998) 194 CLR 247 at 259 per Gaudron, Gummow and Kirby JJ. See also ***Batemans Bay*** at [82], 276 per McHugh J

> matter which should be determined by known rules of law, not by the undisclosed practice of a minister of the Crown"[208]" .[209]

They also recognised that:

> "It may be "somewhat visionary" for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible"[210]

The common law also came to recognise that a private individual could sue to enforce a public right, without obtaining the Attorney-General's fiat, in circumstances recognised in ***Boyce v Paddington Borough Council***[211], mentioned below.

The basic rule about standing to seek a declaration or injunction concerning an alleged breach of a public right was stated by Gibbs J ***in Australian Conservation Foundation Inc v The Commonwealth***[212]:

> It is quite clear that an ordinary member of the public, who has no interest other than that which any member of the public has in upholding the law, has no standing to sue to prevent the violation of a public right or to enforce the performance of a public duty. There is no difference, in this respect, between the making of a declaration and the grant of an injunction. The assertion of public rights and the prevention of public wrongs by means of those remedies is the responsibility of the Attorney-General, who may proceed either ex officio or on the relation of a private individual. A private citizen who has no special interest is incapable of bringing proceedings for that purpose, unless, of course, he is permitted by statute to do so.
>
> The rules as to standing are the same whether the plaintiff seeks a declaration or an injunction. In ***Boyce v. Paddington Borough Council***, Buckley J. stated the effect of the earlier authorities as follows:
>
> > "A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ; and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right."
>
> … Although the general rule is clear, the formulation of the exceptions to it which Buckley J. made in ***Boyce v. Paddington Borough Council*** is not altogether satisfactory. Indeed the words which he used are apt to be misleading. His reference to "special damage" cannot be limited to actual pecuniary loss, and the words "peculiar to himself" do not mean that the plaintiff, and no one else, must have suffered damage. However, the expression "special damage peculiar to himself" in my opinion should be regarded as equivalent in meaning to "having a special interest in the subject matter of the action".

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[208] Wade and Forsyth, ***Administrative Law***, 7th ed (1994) p 607

[209] ***Batemans Bay*** at 260

[210] ***Bateman's Bay*** at 262-3, quoting Gibbs J in ***Victoria v The Commonwealth and Hayden*** (1975) 134 CLR 338 at 383. Similarly, Gageler and Gleeson JJ in ***Hobart International Airport Pty Ltd v Clarence City Council*** [2022] HCA 5; 96 ALJR 234 at [68] said "it would defy our experience of government to expect an attorney general to act as an apolitical guardian of the public interest in all cases of granting to, or withholding from, some other person a "fiat"". That is a statement that recognises the reality that an Attorney-General will have political proclivities, but without approving of it.

[211] [1903] 1 Ch 109, affirmed in the House of Lords in ***Paddington Corp v Attorney-General*** [1906] AC 1

[212] (1980) 146 CLR 493 at 526

After rejecting counsel's invitation to widen the scope of applicants who had standing, Gibbs J continued:[213]

> I would not deny that a person might have a special interest in the preservation of a particular environment. However, an interest, for present purposes, does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi. If that were not so, the rule requiring special interest would be meaningless. Any plaintiff who felt strongly enough to bring an action could maintain it.

A somewhat wider standing rule applies concerning an application for relief in the nature of prohibition or certiorari where the application is made on the basis that the decision-maker lacked jurisdiction to make the decision in question. A person who is a stranger to such a decision has standing to seek to have the administrative body ordered to not carry the decision into effect (prohibition), or to have the decision itself quashed on the basis that it is not a valid decision (certiorari)[214]. This basis for standing has potential application to a decision to distribute funds in a way that involves invalid pork-barrelling if that decision has not been carried into effect, or not fully carried into effect. However, a practical problem with using it would be the time taken to obtain a decision is such that there could well be a practical need for an applicant to seek an interlocutory injunction, which brings with it the risk arising from giving the usual undertaking as to damages[215].

Since the decision in ***Australian Conservation Foundation*** the courts have expanded the basis on which relief can be obtained without obtaining the Attorney-General's fiat concerning a proposed expenditure of public money where that expenditure would infringe administrative law requirements. The expansion has been by widening the scope of the circumstances in which it is recognised that a person has a "special interest" in such a legal requirement being observed, even if that person will not necessarily suffer "special damage" from the breach of that legal requirement[216]. The courts have recognised a wide variety of interests as a "special interest" sufficient to give standing to enforce a public right. In ***Onus v Alcoa*** it was the special cultural and historical connection of the Aboriginal plaintiffs to certain relics that they contended would be interfered with if some construction work went ahead, in a way they contended breached the ***Archaeological and Aboriginal Relics Preservation Act 1972 (Vic***). In ***Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)***[217] it was that a union had a special interest in challenging exemption certificates from hours of work set under the ***Shop Trading Hours Act 1977 (SA)*** because union members who worked in shops would have the terms and

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[213] At 530; cited by Gageler and Gleeson JJ in ***Hobart International Airport Pty Ltd v Clarence City Council*** [2022] HCA 5; 96 ALJR 234 at [65], 253

[214] ***R v Licensing Court and McEvoy; ex rel Marshall*** [1924] SASR 421; ***John Fairfax & Sons v Police Tribunal of New South Wales*** (1986) 5 NSWLR 465 at 468; ***Batemans Bay*** at [77], 275

[215] ***Uniform Civil Practice Rules*** (hereinafter "***UCPR***") 25.8

[216] ***Onus v Alcoa of Australia Ltd*** (1981) 149 CLR 27; ***Wentworth v Woollahra Municipal Council*** (1982) 149 CLR 672; ***Shop Distributive and Allied Employees Association v Minister for Industrial Affairs (SA)*** (1995) 183 CLR 552 at 558.

[217] (1995) 183 CLR 552

conditions of their employment affected if those exemptions were allowed to be given effect to. In ***Bateman's Bay*** it was admitted, by the time the matter reached the High Court, that the action of the respondents in setting up a funeral fund and life insurance business were ultra vires – the sole question was whether the appellant had standing to seek relief. Gaudron Gummow and Kirby JJ held that whether a plaintiff has a special interest in a piece of litigation is a "flexible" matter, dictated by "the nature and subject matter of the litigation"[218]. Their Honours warned against "adoption of any precise formula as to what suffices for a special interest"[219], and disapproved of the primary judge in that case having held that the special interest "*must* be of a kind which it was the intention of the relevant legislation to protect"[220]. In ***Bateman's Bay*** the "special interest" of the applicants was that if the administrative actions concerning which the appellants sought relief were allowed to stand, the appellants would suffer a larger financial loss than would other members of the public.

Even within the categories of standing recognised in ***Boyce***, if there was the type of pork-barrelling alleged which involved calling of applications for grants or some other governmental benefit, and actually distributing the grants or benefits to people thought likely to favour one particular party, a disappointed applicant for a grant or benefit would have standing to contend that the rejection of its application, and the granting of the applications of other favoured applicants, involved a breach of administrative law. Its standing could arise from it suffering "special damage", at the least in the form of loss of a chance of being a successful applicant for a grant. While the outer limits of the "special interest" requirement are still far from clear, it also seems likely that such an applicant would be regarded as having a "special interest".

Such an application was involved in the litigation in ***Beechworth Lawn Tennis Club Inc v Australian Sports Commission***[221]**,** where a tennis club's application for a grant from the Sports Commission had been rejected, allegedly at the dictation of the Minister, while the application of a clay target shooting club had been granted. The orders sought were a quashing of the decision to reject the tennis club's application, a writ of mandamus requiring Sports Australia to reconsider the tennis club's application according to law, a declaration that the decision not to grant the application of the tennis club was affected by jurisdictional error, and a writ of certiorari quashing the decision to make the grant to the clay target club. It was not a case where pork barrelling was alleged, but the same sort of relief could be open to a disappointed applicant for a grant or benefit in a case where it was alleged that the grant or benefit had been refused because of pork barrelling.

Hobart International Airport Pty Ltd v Clarence City Council[222] casts some light on the current rule concerning standing, even though it was not itself an administrative law case. Airports owned by the Commonwealth were leased to private operators. Because the airports were owned by the Commonwealth, the Commonwealth had no liability to pay rates to the local council concerning them. However, by the terms of a lease between the Commonwealth and the operator of the airport the operator agreed to pay to the local council an amount in lieu of rates on part of the leased land. In broad terms, the lease obliged the operator to pay the rates substitute on those parts of the airport that were sublet to tenants, or

[218] ***Shop Distributive*** at 102, quoted in ***Batemans Bay*** at [46], 265
[219] ***Bateman's Bay*** at [46], 265 (emphasis added)
[220] The primary judge's test is cited in ***Bateman's Bay*** at [18], 255, and disapproved at [46], 265-6
[221] [2021] FCA 990. The decision was an interlocutory one about the scope of discovery, but its present relevance is as an illustration of the type of final relief that is open to a disappointed applicant.
[222] [2022] HCA 5; 96 ALJR 234

on which trading or commercial operations were carried out, but not on areas like runways used for what might be called strictly aviation purposes. A dispute arose between the council and the Commonwealth about how the area of the land in the airport should be divided between those on which the rates substitute was payable, and those on which it was not. The Commonwealth and the operators agreed about how the lease required that division to occur, and therefore how much of the airport was subject to the rates substitute. The operators paid amounts to the Council in accordance with the agreement it had reached with the Commonwealth. However, the Council disputed that the Commonwealth and the operators had interpreted the lease correctly. The Council began proceedings seeking declaratory relief about the correct construction of the lease, even though it was not a party to the lease. It was common ground that rights arising under the lease were private rights, not public rights.

At first instance the application was dismissed on the ground that the Council lacked standing. On appeal to the Full Federal Court, and on further appeal to the High Court, it was held that the Council had standing to seek the declaration. Kiefel CJ Keane and Gordon JJ said that "the applicant must have a "sufficient" or "real" interest in obtaining the relief. There is no requirement that an applicant for declaratory relief has a cause of action in order to obtain it."[223] They recognised that usually, when a declaration is sought concerning private rights, whether an applicant has a sufficient or real interest depends upon whether that applicant has legally enforceable rights or liabilities. But as well, an applicant can sometimes have a sufficient interest if it is of real practical importance to a party to know the answer to the question concerning which the declaration is sought. Their Honours warned that a "mere commercial interest" would not always be sufficient to give rise to a sufficient or real interest in obtaining declaratory relief about a contract to which the applicant is not a party, and in the present case factors that showed the Council's interest included that under the lease it had a role to play in the ascertainment of the amount of the rates substitute, the amount of money was significant in the Council's financial position, and the lease was a long-lasting one.

Gageler and Gleeson JJ stated the test for standing to obtain a declaration as being that the applicant "is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding the principle or winning a contest, if [the order is made] or to suffer some disadvantage other than a sense of grievance or a debt for costs, if [the order is not made]"[224]. Importantly for present purposes, their Honours rejected any suggestion that there was a distinction between standing in private law contexts and standing in public law contexts. They said[225]:

> [68] Nor has the course of authority in this Court followed that in the United Kingdom in the manner in which it has accommodated considerations of public interest. The plurality in ***Bateman's Bay*** specifically rejected, as inconsistent with Australian conditions, the view expressed in ***Gouriet*** that an Attorney-General has an "exclusive right … to represent the public interest". True it remains that, within our system of government, "[i]t is an ordinary function of the Attorney-General, whose office it is to represent the Crown in Courts of Justice, to sue for the protection of any public advantage enjoyed under the law as of common right". But it would defy our experience of government to expect an Attorney-General to act as an apolitical "guardian of the public interest" in all cases of granting to, or withholding from, some other person a "fiat" ("simply a contraction of the expression *fiat justitia,* meaning 'let justice be done'") authorising that other person to sue in a "relator action" in the name of the Attorney-General. As the plurality observed in ***Bateman's Bay***, given that an Attorney-General is commonly here a member of

[223] At [32]
[224] At [64]
[225] At [68] – [69], omitting footnotes

> Cabinet, "it may be 'somewhat visionary' for citizens in this country to suppose that they may rely upon the grant of the Attorney-General's fiat for protection against ultra vires action of statutory bodies for the administration of which a ministerial colleague is responsible". The plurality emphasised that the approach to standing that has developed in Australia recognises "that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter".
>
> [69] Where a person is shown to have a material interest in seeking a declaration or other order, considerations bearing on the public interest can contribute to the sufficiency of that material interest to justify a court entertaining the proceeding in which the order is sought. A weighty public interest consideration, where it is applicable, is that the person's interest is within the scope of interests sought to be protected or advanced by the exercise of a statutory power or executive authority through which the right or obligation in controversy has come into existence. Another weighty consideration where it is applicable, is that a party by or against whom the right or obligation is held and against whom the declaration is sought is a public authority or an executive government, which "acts, or is supposed to act, not according to standards of private interest, but in the public interest".

3.3.2. Limitations arising from the procedure concerning judicial review

Pt 59 of the ***Uniform Civil Procedure Rules (NSW) ("UCPR")*** creates some significant limitations to the bringing of some actions that challenge the validity of an administrative decision.

There is a stringent time limit for commencing some but not all proceedings for judicial review – 3 months from the date of the decision, unless the Court extends the time[226]. In deciding whether to extend the time the court is to take account of "such factors as are relevant to the particular case"[227]. A non-exhaustive list of such factors[228] is

(a) any particular interest of the plaintiff in challenging the decision,
(b) possible prejudice to other persons caused by the passage of time, if the relief were to be granted, including but not limited to prejudice to parties to the proceedings,
(c) the time at which the plaintiff became or, by exercising reasonable diligence, should have become aware of the decision,
(d) any relevant public interest.

The prima facie 3 month time limit does not apply to proceedings in which there is a statutory limitation period for commencing the proceedings[229], nor to proceedings in which the setting aside of a decision is not required[230]. Whether proceedings that challenged a pork barrelling decision were ones in which the setting aside of the decision was required would depend on the particular decision that had been made and the particular relief that was sought. For example,

> "The effect of a failure [to accord natural justice in making a decision] is to render the exercise of the power void and the person complaining of the failure is in as good a position as the public

[226] ***UCPR*** 59.10 (1) & (2)
[227] ***UCPR*** 59.10 (3)
[228] ***UCPR*** 59.10 (3)
[229] ***UCPR*** 59.10 (4)
[230] ***UCPR*** 59.10 (5)

> authority to know that that is so. He can ignore the purported exercise of the power. It is incapable of affecting his legal rights."[231].

Even so, when a decision involving pork barrelling has been made in a way that contravenes natural justice, or is invalid on some other administrative law ground, a person disappointed with the decision will often want to be able to do more than ignore the decision.

Another limitation on the usefulness of litigation seeking a pure administrative law remedy concerning a decision that breaches one of the requirements of administrative law is that discovery and interrogatories are available only by leave of the court, and any application for leave must include a draft list of categories of documents to be discovered or draft interrogatories[232].

However, the court rules confer a slight benefit to the applicant for administrative law relief. The Rules modify the general law position that there is no general always-applicable right to obtain reasons for any administrative decision[233]. UCPR 59.9 provides that, once judicial review proceedings are already on foot, the applicant can serve a notice requiring the public authority to provide a copy of its decision, and a statement of reasons for the decision. That notice must be served within 21 days of commencing proceedings, unless the court allows a longer time[234]. If the respondent does not comply with the notice within 14 days, the applicant can seek an order for compliance from the court [235].

[231] ***Dunlop v Woollahra Council*** [1982] AC 158 at172
[232] ***UCPR*** 59.7 (4)
[233] ***Public Service Board of NSW v Osmond*** (1986) 159 CLR 656 at 662-3 (Gibbs CJ)
[234] UCPR 59.9
[235] UCPR 59.9 (4)

Part 4 - Potential criminal liability concerning pork barrelling

4.1. Misconduct in public office is a common law misdemeanour, capable of being tried on indictment. Being a common law offence, there is no prescribed maximum penalty[236].

As the Commissioners in the WA Inc Royal Commission[237] said:

> "For over 700 years in the common law system, the criminal law has had an indispensable place in proscribing serious misconduct in public office. This is entirely appropriate. Conduct which departs significantly from the standards of probity to be expected of officials, conduct which demonstrates a conscious use of official power or position for private, partisan or oppressive ends, is so contrary to the very purposes for which power and position are entrusted to officials as to warrant public condemnation in a criminal prosecution." [238]

Notwithstanding its long history, it is a crime that has received greater attention in the last 40 or 50 years than it previously did. In 2014 a commentator could write: "The offence now ranks as the charge of choice for anti-corruption investigators and prosecutors in a host of jurisdictions."[239]

There is also a tort of misconduct in public office, discussed in Part 5 of this article, which has some similarities to the crime of misconduct in public office. The same concept of "public office" appears in both the crime and the tort, and cases concerning the tort can assist in elucidating the meaning of "public office" concerning the crime, and vice versa.

4.1.1. The litigation concerning Mr Obeid and Mr Macdonald

Some aspects of the law concerning the crime of misconduct in public office have been clarified recently through numerous pieces of litigation in New South Wales. Some of them arise from activities in which a former member of Parliament and Minister, Mr Edward Obeid, had been involved. Others arise from activities in which another Member of Parliament and Minister, Mr Ian Macdonald, had been involved. One strand of that litigation concerns both Mr Obeid and Mr Macdonald. It is useful to mention now the more important parts of that litigation that have occurred so far (ie by early 2022), and only later move to consider the substance of the crime of misconduct in public office.

One group of cases arose concerning Mr Obeid having had a discussion with a public servant about the terms on which lessees from a NSW government instrumentality occupied some premises at Circular Quay, but not disclosing to the public servant the financial interest that his family had in two such leases. He was charged with the offence of misbehaviour in public office concerning this matter ("the Circular Quay Matter") and was ultimately found guilty and sentenced to a term of imprisonment.

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[236] Cf ***Obeid Substantive Appeal*** at [341] per R A Hulme J
[237] See footnote 14 above
[238] WA Inc Royal Commission report para 4.5.1
[239] David Lusty, ***"Revival of the common law offence of misconduct in public office"*** (2014) 38 A Crim LJ 337 at 337 (hereinafter referred to as "Lusty, ***Revival***")

There were two relevant appeals to the NSW Court of Criminal Appeal concerning the Circular Quay Matter. The first of them, ***Obeid v R***[240] ("***the Obeid Preliminary Points Appeal***") was brought and decided before there had been a trial. The second, ***Obeid v R***[241] ("***the Obeid Substantive Appeal***") was an unsuccessful appeal brought against his conviction at the trial and the sentence imposed. The Circular Quay Matter has received the attention of the High Court only concerning unsuccessful applications for leave to appeal to the High Court against the ***Obeid Preliminary Points Appeal,*** and for a stay pending that application for special leave [242], and an unsuccessful application for special leave to appeal against the ***Obeid Substantive Appeal***[243]**.**

Mr Macdonald was charged with misconduct in public office concerning the circumstances in which some mining permits and leases were granted to Doyles Creek Mining Pty Ltd. A Mr Maitland, who was not any sort of a public official, was charged with being an accessory before the fact to the crime with which Mr Macdonald was charged. Both men were convicted of the charges against them, and each was sentenced to a term of imprisonment. They appealed successfully to the Court of Criminal Appeal concerning the correctness of the directions the trial judge had given to the jury[244] ("***the Doyles Creek Conviction Appeal***"). Each conviction was quashed, and a retrial was ordered. That retrial has yet to occur[245].

Mr Obeid and Mr Macdonad were also two of the three accused in the trial of a charge of conspiracy to commit the crime of misconduct in public office, relating to the terms on which certain mining rights in the Bylong Valley were granted to companies in which Mr Obeid and members of his family had a financial interest. That charge has now been tried at first instance, resulting in a conviction of all three accused, and a sentence of imprisonment for each of them: ***R v Macdonald; R v E Obeid; R v M Obeidi***[246] ("**the Bylong Valley Trial Decision**"). Each of the men convicted in the Bylong Valley Trial Decision has now lodged an appeal, not yet decided, against his conviction and sentence. Each applied in December 2021 for bail pending appeal, but each of those applications was refused[247].

Mr Obeid brought a civil action, unsuccessfully alleging the tort of misbehaviour in public office, against two officers of ICAC who had been involved in the execution of a search warrant while ICAC was investigating the circumstances relating to the Bylong Valley

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[240] (2015) 91 NSWLR 226; [2015] NSWCCA 309

[241] [2017] NSWCCA 221; 96 NSWLR 155

[242] ***Obeid v The Queen*** [2016] HCA 9; 90 ALJR 447 (Gageler J; stay application rejected); ***Obeid v The Queen*** [2016] HCASL 86 (special leave application, Nettle and Gordon JJ, rejected on the ground that "there is no reason to doubt the correctness of the decision of the Court of Criminal Appeal")

[243] ***Obeid v The Queen*** [2018 HCA Trans 54 (Bell Keane and Edelman JJ, application for special leave rejected on the basis that there are insufficient prospects of success to warrant the grant of the leave)

[244] ***Maitland v R; Macdonald v R*** [2019] NSWCCA 32; 99 NSWLR 376. They also appealed concerning some other aspects of the trial, but it is not possible at present to know what they were as those paragraphs of the judgment, [93] – [634], have been redacted in the version now available to the public on the court's website, and in the version of the case published in NSWLR. Their contents might become available if the redaction order is lifted when the retrial has occurred.

[245] Georgina Mitchell, "Former Labor minister and union boss to face retrial over misconduct allegations" Sydney Morning Herald 19 August 2021 reports that the retrial will occur in September 2022.

[246] [2021] NSWSC 858; 290 A CrimR 264

[247] ***Macdonald v R; Obeid v R; Obeid v R*** [2021] NSWSC 1662

leases[248]. An application for special leave to appeal to the High Court against the dismissal of the action was refused[249].

4.1.2. The elements of the crime of misbehaviour in public office

> "The kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them or has abused his official position. It follows that what constitutes misconduct in a particular case will depend upon the nature of the relevant power or duty of the officer or of the office which is held and the nature of the conduct said to constitute the commission of the offence"[250]

A more precise identification of the crime of misbehaviour in public office was given in ***R v Quach***[251] where the elements of the crime were identified as:

> (1) a public official;
>
> (2) in the course of or connected to his public office;
>
> (3) wilfully misconduct himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
>
> (4) without reasonable excuse or justification; and
>
> (5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.

The elements of the crime as identified in ***Quach*** were approved in the ***Obeid Preliminary Points Appeal***[252], again in the ***Obeid Substantive Appeal***[253] and once more in ***The Doyles Creek Conviction Appeal***[254].

In ***Quach*** Redlich JA declined[255] to approve, as an element of the offence, that the "serious departure from proper standards … must be so far below acceptable standards as to amount to an abuse of the public's trust in the office holder"[256]. In the ***Obeid Substantive Appeal*** Bathurst CJ declined to hold that Redlich JA's statement was wrong – but he accepted that it could be appropriate to refer to the conduct being a breach of public trust, in the course of explaining the requirement, in the fifth element of the crime, that the conduct merits criminal punishment[257].

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[248] ***Obeid v Lockley*** [2018] NSWCA 71; 98 NSWLR 258
[249] ***Obeid v Lockley*** [2018] HCA Trans 239
[250] Per Sir Anthony Mason NPJ, ***Shum Kwok Sher v Hong Kong Special Administrative Region*** [2002] 3 HKC 117***;*** (2002) 5 HKCFAR 381at [69]
[251] [2010] VSCA 106; (2010) 27 VR 310 at [46] per Redlich JA (Ashley JA and Hansen A-JA agreeing)
[252] At [133] – [142]
[253] At [60]
[254] [2019] NSWCA 32; (2019) 99 NSWLR 376 at [67]–[84].
[255] ***Quach*** at [44], 322
[256] A test that the English Court of Appeal had adopted in ***Attorney-General's Reference (No 3 of 2003)*** [2005] QB 73 at 90, [56]
[257] At [224] – [230]

In ***Shum Kwok Sher v Hong Kong Special Administrative Region***[258] Sir Anthony Mason NPJ said:

> "The second qualification which I attach to the elements of the offence stated in the previous paragraph is that the misconduct complained of must be serious misconduct. Whether it is serious misconduct in this context is to be determined having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities."

This passage was referred to with approval in several Australian appellate decisions[259]. It has obviously been taken into account in ***Quach***, particularly in the formulation of the fifth of the elements. However, in ***Sin Kam Wah v Hong Kong Special Administrative Region***[260] Sir Anthony varied the statement of the elements of the crime that he had given in ***Shum Kwok Sher,*** in a way that has since been followed in several Hong Kong appellate decisions[261].

Sir Anthony's reformulation in ***Sin Kam Wah*** was[262]:

> (1) a public official;
> (2) in the course of or in relation to his public office;
> (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
> (4) without reasonable excuse or justification; and
> (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.
>
> [46] The misconduct must be deliberate rather than accidental in the sense that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable."

That reformulation was said to have been made "to take account of developments in the law in respect of the concepts of wilfulness and recklessness"[263]. If there is any difference between Sir Anthon's reformulation, and the elements as stated in ***Quach,*** an Australian court would be obliged to follow ***Quach*** unless and until an Australian appellate court decided otherwise.

4.1.2.1. The public office[264]

The requirement in ***Quach*** that the accused be a public official means that he or she is a person who occupies a public office. Sometimes the requirement is explained in terms of who is a "public officer", sometimes it is explained in terms of what is a "public office". As Spigelman CJ said in ***Leerdam v Noori***[265]:

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[258] [2002] 3 HKC 117*;* (2002) 5 HKCFAR 381 at [86]

[259] ***Blackstock v R*** [2013] NSWCCA 172 at [13]; ***Obeid Preliminary Points Appeal*** at [141] and ***R v Quach*** [2010] VSCA 106; 27 VR 310 at [42].

[260] (2005) 8 HKFAR 192

[261] ***Chan Tak Ming v Hong Kong Special Administrative Region*** (2010) 13 HKCFAR 745 at [29] and ***Hong Kong Special Administrative Region v Wong Lin Kay*** (2012) 15 HKCFAR 185

[262] At [45] – [46]

[263] ***Hong Kong Special Administrative Region v Hui Rafael Junior*** (2017) 20 HKCFAR 264; [2017] HKRC 1215 at [45]

[264] A more detailed account of the case law up to 2014 than I give here is found in Lusty, ***Revival***, at p 543-5

[265] [2009] NSWCA 90; 255 ALR 553 at [3]

> "there is no authoritative statement of a test for determining what constitutes a public officer for the purposes of the tort of misfeasance. Nor is one needed. In most cases the answer will be obvious."

The same is true concerning the crime of misfeasance. However, some general tests have been put forward. One is:

> '[a]n "officer" connotes an "office" of some conceivable tenure, and connotes an appointment, and usually a salary'[266].

In ***Henly v Mayor of Lyme***[267] Best CJ said:

> "In my opinion, every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer."

In ***Faulkner v Overseers of Upper Boddington***[268] Cockburn CJ[269] regarded one of the indicia of an office as being "if the appointment involved the performance of duties of a public character".

In ***R v Boston***[270] Isaacs and Rich JJ approved a definition of "office" as including:

> " " 4. A position or place to which certain duties are attached, esp. one of a more or less public character; a position of trust, authority, or service under constituted authority." And " Officer" is defined *{inter alia)* as " 2. One who holds an office, post, or place, (a) One who holds a public, civil, or ecclesiastical office ; . . . a person authoritatively appointed or elected to exercise some function pertaining to public life."

In ***Ex parte Kearney***[271] Sly J[272] and Gordon J[273] both accepted that a common law misdemeanour was committed "if a public officer neglects to perform a duty imposed on him either by common law or statute", and thus the officer needed to be a person who had a duty imposed on him or her by the common law or the statute itself, by virtue of the position he or she holds[274]. The critical point in ***Kearney*** was that to be a public officer it was not enough that the defendant was employed by some public instrumentality and owed duties pursuant to a contract of employment. Thus, people who are in public employment, but are employed to carry out comparatively routine, lowly or menial tasks are not "public officers". Conversely, a person can have duties of a public character imposed on him by the common law or by statute, and thus be a public officer, even if he or she is not in the employ of the Crown[275].

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[266] ***R v Murray and Cormie; Ex parte Commonwealth,*** (1916) 22 CLR 437, 452. Per Isaacs J

[267] (1828) 5 Bing 91, 130 ER 995 at 107-8 of Bing, 1001 of ER, referred to with approval by Brennan J in ***Northern Territory v Mengel*** (1995) 185 CLR 307 at 355

[268] (1857) 3 CB (NS) 412 at 419, 140 ER at 803

[269] (1857) 3 CB (NS) 412 at 419, 140 ER at 803 In a judgment whose substance was agreed in by Williams, Crowder and Willes JJ

[270] ***R v Boston*** (1923) 33 CLR 386 at 402

[271] [1917] 17 SR (NSW) 578

[272] At 581

[273] At 583

[274] This statement from "and thus" to the end of the sentence, is too restrictive under more modern authority – see text at footnote 301 - 306 below

[275] Per Gordon J, ***Ex parte Kearney*** at 584

Thus, who occupies a public office has been said to be a "broad concept"[276]. In ***R v Cosford***[277] Leveson LJ listed the variety of roles of people who had been held in the United Kingdom to be public officers:

> "They include police officers[278], including officers in a period of suspension[279] and former officers doing part-time police work[280]; others working for the police including community support officers[281] and those in charge of computer systems including a civilian call handler[282]; prison officers[283]; prison visitors[284]; magistrates[285]; county court registrars (now district judges)[286]; local councillors[287]; some local authority employees[288]; army officers[289]; immigration officers[290]; DVLA employees[291] "

However, in ***Obeid v Lockley***[292] Bathurst CJ remarked that "it may be that, on the present state of the authorities in this country, the concept of "public office" is not as broad as suggested in some of the more recent United Kingdom authorities." Many of the roles listed by Leveson LJ will be of no practical concern so far as pork barrelling is concerned, because people who occupy them will usually not have the power to decide or influence whether, where, when or how public funds or other assets are expended, and to the extent that they might have power to decide how public assets are deployed it would be unusual for any of the permitted modes of deployment to be ones that could assist a political party.

On the Australian authorities, a Member of Parliament, once duly elected, has a duty to serve[293], and has a "parliamentary duty of honest unbiased and impartial examination and inquiry and criticism."[294]. Thus, a Member of Parliament holds a public office[295]. In particular, a Member of Parliament has a "public office", within the meaning of that expression in the crime of misconduct in public office, notwithstanding that a Member is elected rather than appointed[296]. So does a Minister[297]. As well, a public officer includes a

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[276] ***Calveley v Chief Constable of the Merseyside Police*** [1989] AC 1228; ***Henly v Lyme Corporation*** 5 Bing 91, 107-8; ***Three Rivers DC v Bank of England (No 3)*** [2003] 2 AC at 230
[277] [2013] EWCA Crim 466; [2014] QB 81 at [24] – [35]
[278] ***Attorney General's Reference (No 3 of 2003***) [2005] QB 73
[279] ***Attorney General v Fraill*** [2011] 2 Cr App R 271
[280] ***R v L(D)*** [2011] 2 Cr App R 159
[281] ***R v Iqbal (Amar)*** [2008] EWCA Crim 2066
[282] ***R v Gallagher*** [2010] EWCA Crim 3201
[283] ***R v Ratcliffe*** [2010] 1 Cr App R (S) 326***; R v McDade*** [2010] 2 Cr App R (S) 530; ***R v Jibona*** [2010] EWCA Crim 1390; ***R v Wright*** [2012] 1 Cr App R (S) 111);
[284] ***R v Belton*** [2011] QB 934
[285] ***R v Pinney*** (1832) 3 B & Ad 947 [and see also ***R v Borron*** (1820) 3 B & Ald 432; 106 ER 721]
[286] ***R v Llewellyn-Jones*** [1968] 1 QB 429
[287] ***R v Speechley*** [2005] 2 Cr App R (S) 75
[288] ***R v Bowden*** [1996] 1 WLR 98
[289] ***R v Whitaker*** [1914] 3 KB 1283
[290] ***R v John-Ayo*** [2009] 1 Cr App R (S) 416)
[291] ***R v Dickinson (Barry Saul)*** [2004] EWCA Crim 3525. [The DVLA is the Driver and Vehicle Licencing Agency]
[292] [2018] NSWCA 71; 98 NSWLR 258 at [113]
[293] ***R v Boston*** (1923) 33 CLR 386 at 399-401
[294] ***R v Boston*** (1923) 33 CLR 386 at 403
[295] ***R v White*** (1875) 13 SCR (NSW) (L) 322; ***R v Boston*** (1923) 33 CLR 386 at 402
[296] ***Obeid Preliminary Points Appeal*** at [56] – [125]
[297] ***Herscu v The Queen*** (1991) 173 CLR 276

senior investigator of ICAC[298]. It includes "at least" "persons who by virtue of the particular positions they hold, are entitled to exercise executive powers in the public interest'"[299]

It is worth mentioning that the purpose for which one is enquiring whether someone is a "public officer" can affect the answer given to the question. Thus, someone who is not a "public officer" for the purpose of the rule of public policy that prevents the assignment of the pay or salary of a public officer[300] might be a public officer for the purpose of the crime of misconduct in public office.

4.1.2.2. The connection between the office and the misconduct

The conduct alleged has to be a breach of one or more of the duties, functions or responsibilities of the office.

4.1.2.3. The scope of the duties, functions or responsibilities of the office

"The duties of a public office include those lying directly within the scope of the office, those essential to the accomplishment of the main purpose for which the office was created and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes. "[301] . "An act of a public official, or at all events a Minister, can constitute an act "in the discharge of the duties of his office" when he performs a function which it is his to perform, whether or not it can be said that he is legally obliged to perform that function in a particular way or at all."[302]

"in ordinary speech, "the discharge of the duties" of the holder of a public office connotes far more than performance of the duties which the holder of the office is legally bound to perform: rather the term connotes the performance of the functions of that office. The functions of an office consist in the things done or omitted which are done or omitted in an official capacity."[303] Thus, in ***Herscu v The Queen*** the "duties of his office" extended to the action of a Minister of Local Government in letting a local council know that he supported some changes to certain conditions on which the council had granted a planning approval, even though the Minister had no specific power or duty under legislation to make representations of that type. Contrary to what had been said in ***Ex parte Kearney***, there is no need for the duty in question to be one that arises under the common law or statute[304]. In the ***Obeid Preliminary Points Appeal*** the Court[305] refused to disapprove of a ruling the trial judge had made, that parliamentarians owed:

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[298] ***Obeid v Lockley*** at [116] – [118], [206], [212]
[299] Per Bathurst CJ, ***Obeid v Lockley*** at [114]
[300] E.g ***In Re Mirams*** [1891] 1 QB 594
[301] per McHugh JA, ***G J Coles & Co Ltd v Retail Trade Industrial Tribunal*** (1986) 7 NSWLR 503 at 524, citing in part from ***Nesbitt Fruit Products Inc v Wallace*** (1936) F Supp 141 at 143, and quoted with apparent approval by Mason CJ, Dawson, Toohey and Gaudron JJ in ***Herscu v The Queen*** (1991) 173 CLR 276 at 281
[302] ***Herscu v the Queen*** at 282 per Mason CJ, Dawson Toohey and Gaudron JJ
[303] Per Brennan J ***Herscu v The Queen*** (1991) 173 CLR 276 at 28. To similar effect, Brennan J said in ***Northern Territory v Mengel*** (1995) 185 CLR 307 at 355, concerning the tort of misfeasance, "The tort if not limited to an abuse by an officer by exercise of a statutory power. .Any act or omission done or made by a public official in purported performance of the functions of the office can found an action for misfeasance in public office."
[304] This follows from the quotations from judgments just given, and is argued for in more detail in Lusty, ***Revival*** at 350 - 1
[305] ***Obeid Preliminary Points Appeal*** at [143] – [147]

> " … a negative duty not to use their position to promote their own pecuniary interests (or those of their families or entities close to them) in circumstances in which there is a conflict, or a real or substantial possibility of a conflict, between those interests and their duty to the public."

In ***Bylong Valley Trial Decision*** the indictment identified the particular duties and obligations that had been breached as ones "of impartiality as a minister of the Executive Government of New South Wales" and "of confidentiality as a Minister of the Executive Government of New South Wales."[306] The precise duties and obligations that can give rise to a charge of misconduct in public office will vary with the particular office that was held by the public officer involved.

4.1.2.4. The conduct constituting the misconduct

Some cases refer to the element of misconduct by requiring that the conduct charged has been done "corruptly"[307]. The shade of "corrupt" that is involved here is that "connoting the use of a power to obtain "some private advantage or for any purpose foreign to the power"[308]. In ***Shum Kwok Sher*** Sir Anthony Mason NPJ said where the official misconduct consists of non-performance of a duty wilful intent is all that is required, accompanied by absence of reasonable excuse or justification[309]. However

> "in the absence of breach of duty, the element of wilful intent will not be enough in itself to stamp the conduct as culpable misconduct. A dishonest or corrupt motive will be necessary as in situations where the officer is exercising a power or discretion with a view to conferring a benefit or advantage on himself, a relative or friend."[310].

If, in an alleged example of pork barrelling, a public official were to have exercised a power with a view to conferring a benefit or advantage on a political party, one would first need to decide, concerning the particular power that was exercised, whether enabling the conferring a benefit or advantage on a political party was one of the purposes for which the power was given to the official. If, as in almost any conceivable case, enabling the official to confer such a benefit was not one of those purposes, the action of the official would be corrupt in the sense of being used to obtain "some private advantage or for any purpose foreign to the power". Such conduct also would fall within the explanation of "dishonest or corrupt motive" given by Sir Anthony Mason, as analogous to "exercising a power or discretion with a view to conferring a benefit or advantage on a friend". [311]

For the crime to be committed it is not necessary that the official position be abused for any sort of gain to the officer. "Official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of

[306] ***Bylong Valley Trial Decision)*** at [31]
[307] ***R v Jones*** [1946] VLR 300; ***Re Austin*** [1994] 1 Qd R 225 at 228
[308] ***Re Austin*** [1994] 1 Qd R 225 at 229
[309] At [82], 408
[310] At [83], 408
[311] See text at footnote 310 above

his office, does not intentionally abuse the trust reposed in him."[312] As the Hong Kong Final Court of Appeal said in ***Chan Tak Ming v HKSAR***[313]

> "Misconduct in public office may be committed for personal benefit to the defendant or for motives other than that one. It may be committed, for example, to benefit others or to harm others. Indeed, it may be committed for no discernible or provable motive."

A theme that runs through the cases is that, though there might also be more specific purposes that are intended to be served by investing a public official with official power, it is a misuse of the power if it is used *other than* to enable the public interest to be advanced or public benefit conferred. There are very many references to this in the case law. One example is that in ***Cannon v Tahche***[314] the Victorian Court of Appeal said that the tort of abuse of public office was 'essentially concerned with the abuse by the holder of a public office or of a public power which must be exercised for the public good." Others are in the text of this article at footnotes 299,327, 332 and 333. They all illustrate the quasi-fiduciary nature of the powers held by a public officer.

4.1.2.4.1. Causative role of an improper purpose

Where the misconduct takes the form of the accused seeking to promote some interest other than the public interest, a difference of view had arisen about whether the motivation of the accused to act for the purpose of promoting that other interest had to be a sole purpose[315], or whether it is sufficient that it is a substantial motivation[316], or the dominant or causative motivation[317]. This difference was not resolved by the ***Obeid Substantive Appeal***, which proceeded on the assumption that a sole motivation was necessary[318].

The Doyles Creek Conviction Appeal[319] resolved the question that had been left open in the ***Obeid Substantive Appeal*** about the type of causal role that had to be played by an improper purpose, before the offence of misconduct in public office was committed. It held that the improper purpose need not be the *sole* cause of the action that the public official took. However, it is necessary to prove that the action that the public official took would *not have been taken but for* the improper purpose.[320]

Thus, for example, if it is established beyond reasonable doubt that a Minister's purpose in approving a project or grant is that it will improve his own electoral prospects at the next

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[312] P D Finn, "Official Misconduct" (1978) 2 Crim LJ 307 at 308, cited with approval in ***Question of Law Reserved (No 2 of 1996)*** (1996) 67 SASR 63 at 64-5 per Doyle CJ, by Sir Anthony Mason NPJ in ***Shum Kwok Sher v HKSAR*** [2002] 2 HKLRD 793, (2002) 5 HKFAR 381 at [79], 408 and in ***R v Quach*** at [20], 316 per Redlich JA.
[313] [2010] HKLRD 766; (2010) 13 HKCFAR 745 at [26] per Bokhary PJ; Chan, Ribiero, Litton PJJ and Sir Anthony Mason NPJ agreeing)
[314] [2002] 5 VR 317; (2002) 5 VR 317 at [28], a passage that Payne JA repeated in ***Ea v Diaconnu*** [2020] NSWCA 127, 102 NSWLR 351 at [39]
[315] As Beech-Jones J had held at first instance in ***Obeid***, in a passage set out in ***Obeid Substantive Appeal*** at [32]
[316] As Adamson J had held at first instance in ***R v Macdonald*** [2007] NSWSC 337 at [39]
[317] As Bathurst CJ put it at [96] in ***Obeid Substantive Appeal***
[318] See Bathurst CJ at [84]. It is neither unusual nor contrary to principle for a criminal appeal to proceed on the basis of an assumption if, as Bathurst CJ confirmed at [84] was the case in the ***Obeid Substantive Appeal,*** that assumption is the one that is most favourable to the accused of the various assumptions available.
[319] [2019] NSWCCA 32; 99 NSWLR 376
[320] At [84]

election, or that it will improve the prospects of his party, and he would not have approved the project or grant if he had not believed it would improve the prospects at the next election of himself or his party, that can be misconduct in public office, even though the Minister might also be of the view that there is public benefit in the project. If a Minister were to leak confidential governmental information that had commercial value to a political party for the purpose of giving that party an advantage, and the Minister would not have done so if he or she had not wanted to give the party that advantage, that could constitute both pork barrelling, and the offence of misconduct in public office. The possibility of confidential information being the government resource that is misapplied by a public official, for a purpose of assisting someone who it is not part of his or her official role to help, is illustrated by the finding in the Bylong Valley litigation was that Mr Macdonald had passed on confidential information about the list of tenderers for a mining exploration licence and the process through which an exploration licence would be awarded. It was also accepted in ***R v Chapman***[321]**,** where one species of misconduct in public office that had occurred was that a prison officer had passed confidential information about a prisoner to a journalist for money, and another was that a soldier had provided information to a journalist about the activities of Prince Harry in his regiment in return for money.

R v Borron [322] was an application for a criminal information against a Justice of the Peace, for having refused to hear a criminal case, allegedly because of "fear or favour". Abbott CJ said that justices of the peace are, "like every other subject of this kingdom, answerable to the law for the faithful and upright discharge of their trust and duties."[323] But in deciding whether they have committed any crime "the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive or corrupt motive, under which description fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment."[324]. The "fear or favour" test could apply concerning pork barrelling by a public official if the motive for the official's decision is the fear of losing a political advantage held, or favour in the sense of gaining the favour of the electors.

4.1.2.5. The element of wilfulness

At Mr Obeid's trial concerning the Circular Quay Matter the element of wilfulness in the indictment was explained to the jury as "the accused knew that he was obliged not to use his position in that way, or he knew that it was possible that he was obliged not to use his position in that way but chose to do so anyway"[325] In the ***Obeid Substantive Appeal*** the court rejected an argument that this direction was erroneous[326]. The reasons for that rejection arose, though, from considering how that explanation fitted into the directions as a whole. It was not necessary to say in terms that it was necessary to be satisfied that Mr Obeid was aware that the conduct was unlawful or that he acted in wilful disregard of the risk that it was unlawful, because it had already been explained to the jury that in performing functions as a

[321] [2015] EWCA 539; [2015] QB 883
[322] (1820) 3 B & Ald 432; 106 ER 721
[323] At 434 of B & Ald, 721 of ER
[324] At 434 of B & Ald, 721-2 of ER
[325] ***Obeid Substantive Appeal*** at [28]
[326] At [149] – [184].

Member of Parliament a member must "act only according to what they believe to be in the public interest and the interest of the electorate"[327]

In the trial of Mr McDonald concerning the Doyles Creek matter the element of wilfulness was explained to the jury in exactly the same language as had been used at the trial concerning the Circular Quay Matter [328]. No challenge is made to that direction in the portion of the judgment in the ***Doyles Creek Conviction Appeal*** that is reported and has not been redacted[329]. Thus the present state of the law appears to be that the element of wilfulness can be correctly explained by that direction, provided that the jury has already been told that the accused's public position requires that he use his public power only for the benefit of the public or a section of the public.

4.1.2.6. The requirement of seriousness

One of the elements in ***Quach*** is that the conduct is "serious and meriting criminal punishment". It is not left to the uninstructed opinion of the jurors to decide what merits criminal punishment. It is a decision to be made having regard to the factors listed in ***Quach***, namely "the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects." As McLachlin CJ said in ***R v Boulanger***[330], mistakes and errors in judgment that amount only to "administrative fault" are excluded.

There are numerous judicial statements that a high degree of seriousness attaches to breaches of public trust committed by public officials. To give just a few, McLachlin CJ, writing for the Supreme Court of Canada[331] in a passage cited with apparent approval by Bathurst CJ in ***Obeid Substantive Appeal*** [332] said:

> " … public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these powers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be."

In ***R v Boston***[333] Isaacs and Rich JJ referred to the important role that members of parliament can perform by intervening in matters of public concern outside parliament itself. They continued:

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[327] ***Obeid Substantive Appeal*** at [174]
[328] As recorded in ***Maitland v R; Macdonald v R*** [2019] NSWCCA 32; 99 NSWLR 376 at [13] (5).
[329] See footnote 244 above
[330] [2006] 2 SCR 49 at [52], writing for the Supreme Court of Canada, in terms approved by Bathurst CJ in ***Obeid Substantive Appeal*** at [70]
[331] ***R v Boulanger*** [2006] 2 SCR 49, at [52]. Similarly in ***R v Borron*** (1820) 3 B & Ald 432; 106 ER 721 at 434 of B & Ald, 722 of ER Abbott CJ said: "To punish as a criminal any person who, in the gratuitous exercise of a public trust, may have fallen into error or mistake belongs only to the despotic ruler of an enslaved people, and is wholly abhorrent from the jurisprudence of this kingdom."
[332] ***Obeid Substantive Appeal*** at [70]. In ***McCloy v New South Wales*** [2015] HCA 34; 257 CLR 178 at [36] French CJ, Kiefel, Bell and Keane JJ described the expectation that public power will be exercised in the public interest as "fundamental to representative democracy"
[333] (1923} 33 CLR 386 at 403

> "…but if intervention by a public representative be impelled by motives of personal gain, if it be the outcome of an agreement based on some pecuniary, or what is equivalent to a pecuniary, consideration and constituting the members a special agent of some individual whose interests he has agreed to secure - interests that are necessarily opposed pro tanto to those of the community - the whole situation is changed….. he who had been appointed to be a sentinel of the public welfare becomes a "sapper and miner" of the Constitution. The power, the influence, the opportunity, the distinction with which his position invests him for the advantage of the public, are turned against those for whose protection and welfare they come into existence. He can never afterwards properly discharge in relation to that matter his duties of public service - the parliamentary duty of honest, unbiased and impartial examination and inquiry and criticism which must arise; And he has therefore essentially violated his legal duty to the state"

The significance of a cabinet minister breaching his or her duty was discussed in ***R v Jackson and Hakim***[334], where Lee J said[335]:

> We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex.

4.1.3. The interrelation of this crime and Parliamentary powers and privileges

As it is often Ministers or other members of Parliament who have the power to cause public funds or other assets to be expended, there is a particular importance, so far as pork barrelling is concerned, to how the powers and privileges of the parliament interact with the jurisdiction of the courts to try a crime connected with pork barrelling.

On that topic, the decision in ***Obeid Preliminary Points Appeal***:

(1) rejected[336] an argument that disciplining a Member of Parliament fell within the exclusive jurisdiction of the House of Parliament to which that Member belonged, and that thus the courts lacked jurisdiction to decide a charge of misconduct in public office brought against a Member of Parliament, and

(2) rejected[337] a submission that the operation of Parliamentary privilege would prevent evidence being given which it was necessary be given for a fair trial to occur

The ***Obeid Substantive Appeal*** held that:

(1) notwithstanding that there was a Regulation made pursuant to s 14A of the ***Constitution Act 1902 (NSW)***, imposing duties of disclosure on Members, and that a Code of Conduct governing members of House of Parliament had been adopted, a member of Parliament could still be subject to the criminal law concerning misconduct in public office[338], and

(2) There might be particular cases where the courts will decline to exercise jurisdiction concerning alleged misconduct of a Member of Parliament if the existence of parliamentary

[334] unrep, NSWCCA, 23/6/88.
[335] At p 1
[336] At [1] – [55]
[337] At 127] – [132]
[338] [74] – [76]; [291]; [336]; [470]; [474]

privilege makes it impossible fairly to determine the issues between the parties, or if the proceedings in fact interfered with the freedom of the Houses of Parliament to conduct their deliberative and legislative business without interference by the court, but otherwise there is no reason for the court not to exercise its ordinary criminal jurisdiction[339].

A relevant matter that helps explain why the courts have a jurisdiction to punish criminal behaviour by members of Parliament is that a NSW House of the Parliament has no power to punish a member or former member[340].

4.2. Bribery is a common law offence. It is constituted by "receiving or offering of an undue reward by or to any person in public office, in order to influence that person's behaviour in that office, and to incline that person to act contrary to accepted rules of honesty and integrity."[341] The prohibition against bribery extends "to all persons holding offices of public trust and confidence"[342].

The crime of bribery can be complete even if the public official never accepts or agrees to accept an offered reward[343]. It can be complete even if the public official never departs from his or her duty[344]. It can be constituted by the making or offering of a benefit with intent to induce a person in public office to act in disregard of his duty at some future time, even if the occasion for the disregard of the duty has not arisen and might never arise, and even if the precise manner in which the duty is to be disregarded is not specified[345] .

> "The mental element of the crime of bribery has been described as 'a corrupt purpose', or 'a corrupt intent' … The existence of a corrupt intent is something to be inferred from the facts of each particular case, and must depend upon many circumstances, involving, for example, the time and the place; the position respectively of the giver and the recipient; whether the gift is of a moderate or an immoderate amount; and whether it is given openly or secretly, underhandedly or clandestinely."[346]

"The existence of a corrupt intent to influence, or be influenced in, the discharge of official duties is a necessary element of the crime of bribery. The corrupt intent need not exist in the mind of both parties to the offer, solicitation or passage of money, however. It is sufficient if the intent exists in the mind of either, the one having the corrupt intent being guilty."[347]

Many cases of pork barrelling will not involve bribery, because bribery requires that there be a public official who in fact *receives* an undue reward or who the accused tries to induce to *receive* the undue reward. In the archetypal case of pork barrelling, it is the public official

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[339] At [135] – [139]
[340] ***Obeid Substantive Appeal*** per Leeming JA at [295] – [302], ***Kielley v Carson*** (1842) 4 Moo PC 63; 13 ER 225; ***Barton v Taylor*** (1886) 11 App Cas 197 at 203
[341] ***Russell on Crime***, 12 th ed 1964 Vol 1 at 381, a definition cited with approval in ***R v Herscu*** (1991) 55 A Crim R 1, by Gleeson CJ (Lee A-J and Cripps JA agreeing) in ***R v Allen*** (1992) 27 NSWLR 398 at 402, and by Allen J (Hunt CJ at CL and Finlay J agreeing) in ***R v Glynn*** (1994) 33 NSWLR 139 at 144/. See also ***R v Boston*** at 410-1, in the passage quoted at p 16 above
[342] ***R v White*** (1875) 13 SCR (NSW) (L) 322 per Martin CJ, repeated by Higgins J in ***R v Boston*** at 408
[343] ***R v Glynn*** at 144
[344] ***R v Allen*** at 403***; R v Glynn*** at 144
[345] ***R v Allen*** at 402
[346] ***R v Allen*** at 401
[347] ***R v Allen*** at 401

who *gives* or *causes to be given* a reward or benefit, not who receives it or is contemplated to receive it.

However it is possible that the crime of bribery could occur concerning pork barrelling if A (who might or might not be a public official) gives or offers a reward to B, who is a public official, when B has it in his or her power to expend public assets, and the reward given or offered on the basis that it is for expending the public assets in a way that gives a benefit to a particular political party. If the reward is only offered but not accepted, it is only A who commits the crime of bribery; if the reward is accepted it is both A and B who commit that crime. In such a situation B might *also* commit the offence of misconduct in public office, if B actually went through with the proposal and gave or conferred the benefit in circumstances where he or she would not have done so without the offer of the personal reward. But, as already mentioned, the offence of bribery, on the part of A, can be complete even if B does not deviate at all from performing his or her public duty.

4.3. Electoral bribery is a common law offence (see ***R v Boston*** at 410, quoted at p 16 above)). It is also a separate statutory offence to bribery[348], and a basis for declaring an election void. Its present relevance is that it could possibly be committed in some situations where there is pork barrelling.

4.3.1 The previous statute governing electoral bribery

Before the introduction of the ***Electoral Act 2017*** electoral bribery was criminalised by s 147 of the former ***Parliamentary Electorates and Elections Act 1912***. That section provided:

> "Every person shall be guilty of bribery who—
>
> > (a) directly or indirectly, by himself or by any other person on his behalf, gives or lends, or agrees to give or lend, or offers, promises, or procures, or promises or endeavours to procure, any money or valuable consideration to or for any elector or any other person on behalf of any elector, in order to induce any elector to vote or refrain from voting, or knowingly does any such act as aforesaid on account of such elector having voted or refrained from voting at any election; …"

Scott v Martin (1988) 14 NSWLR 663 arose under the former s 147. A candidate for election who was an employee of a government department, and was also a candidate standing for the party that was then in government, had, in the period after the election was called, distributed cheques, drawn on certain government departments, to various clubs and community organisations in the electorate in which he was standing. Those clubs and community organisations were all unincorporated associations. Needham J held that a gift to a voluntary unincorporated association was a gift "to or for" the members of the association, within the meaning of para (a) of section 147[349]. He accepted that the candidate had a genuine intention to assist the community groups in his electorate, but was "equally convinced that his intention was, by procuration of the grants, to advance his candidacy."[350] Needham J did not decide whether the statutory provision was breached if the proscribed

[348] When conduct of this general type is committed in relation to a Commonwealth election it can be an offence under s 326 ***Electoral Act 1918 (Cth).*** However, this article confines itself to the legal ramifications of pork barrelling so far as NSW laws and political action are concerned.
[349] At 671
[350] At 672

purpose was just one of several contributing causes, or whether it was required to be a dominant cause or satisfy a "but for" test. He left that matter as a hypothetical – "Even if the correct principle is that one must find the governing principle, I am satisfied that the conduct of the respondent from 13 to 18 March 1988 was dictated by a desire to achieve election on 19 March."[351]

A lengthy passage from his Honour's judgment is important:

> "It was said, in the ***Nottingham (Borough) East Division Case***[352] (at 306) that:
>
> > "… It really is, indeed, clear that gifts to hospitals, churches, chapels, libraries and clubs of all sorts and kinds have never been considered bribery."
>
> If that is considered to be a principle of law, I respectfully dissent from it. The question of whether a gift is a breach of s 147(a) of the Act is, it seems to me, a question of mixed fact and law. The factual portion is a question of degree. In ***Kingston-upon-Hull Central Division Case***[353], Ridley J said:
>
> > "… You assume for the moment that a man forms a design which at the time is unobjectionable because no election is in prospect, for that is the point; yet, if circumstances alter, and an election becomes imminent, he will go on with the design at his risk, and if he does so he will be liable to be proved guilty of corrupt practices; that is to say that he has done a thing which must produce an effect on the election contrary to the intention of the Act of Parliament."
>
> Section 147(a) does not require that the acts proscribed should produce an effect on the election; the purpose is all that is required.
>
> In the ***Wigan Case; Spencer & Presst v Powell***[354], Bowen J said:
>
> > "… Charity at election times ought to be kept by politicians in the background. … In truth, I think, it will generally be found that the feeling which distributes relief to the poor at election time, though those who are the distributors may not be aware of it, is really not charity, but party feeling following in the steps of charity, wearing the dress of charity, and mimicking her gait."

4.3.2. The present statute governing electoral brIbery

The legislative provision that Needham J was considering has now been replaced by s 209 ***Electoral Act 2017 (NSW)***. Section 209 provides:

> (1) A person must not, in order to influence or affect any person's election conduct, give or confer, or promise or offer to give or confer, any property or any other benefit of any kind to the person or any other person.
> Maximum penalty—200 penalty units or imprisonment for 3 years, or both.
>
> (2) A person must not—
> (a) ask for, receive or obtain, or
> (b) offer to ask for, receive or obtain, or
> (c) agree to ask for, receive or obtain,

[351] At 672.
[352] ***Nottingham (Borough) East Division Case*** (1911) 6 O'M & H 292
[353] ***Kingston-upon-Hull Central Division Case***[353] (1911) 6 O'M & H 372 at 374
[354] ***Wigan Case; Spencer & Presst v Powell (***1881) 4 O'M & H 1 at 14

any property or any other benefit of any kind, whether for the person or any other person, on an understanding that the person's election conduct will be in any manner influenced or affected.

Maximum penalty—200 penalty units or imprisonment for 3 years, or both.

(3) In this section, ***person's election conduct*** means—
(a) the way in which the person votes at an election, or
(b) the person's nomination as a candidate for an election, or
(c) the person's support of, or opposition to, a candidate or a political party at an election, or
(d) the doing of any act or thing by the person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector.

(4) This section does not apply in relation to a declaration of public policy or a promise of public action.

(5) An offence under this section is an indictable offence.

In addition to a person who breaches s 209 being liable to prosecution for the offence that section 209 creates, section 237 empowers the Court of Disputed Return to declare an election void if there has been a breach of section 209, but only if "the Court is satisfied that the result of the election was likely to be affected and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void."[355] However, the offence under s 209 can be committed regardless of whether the election is declared void under s 237, and regardless of whether the election conduct of any person is altered in any way.

4.3.3 Relationship of the present statute governing electoral bribery to other statutes

The new section 209 is closely similar to section 326 ***Commonwealth Electoral Act 1918 (Cth),*** though there are differences of drafting style and a slight difference of substance which is not likely to bear upon any practice of pork barrelling[356].

The prohibition that s 209 creates is wider in some respects than the prohibition of the former s 147 (a):

- Section 147 (a) prohibited conduct engaged in "in order to induce" an elector to vote or refrain from voting. Section 209 prohibits conduct engaged in "in order to influence or affect" an elector's "election conduct". "Election conduct" as defined in section 209 extends much wider than voting or refraining from voting.

- The thing prohibited to be given in s 147 (a) is "money or valuable consideration". It is possible, given the requirement that any ambiguity in a statute creating an offence be construed in a way favourable to the accused, that the expression "valuable

[355] S 237 (3) ***Electoral Act 2017 (NSW***

[356] The analogue of the NSW section 209(1) appears in subsection 2 of the Commonwealth version, and vice-versa. As well the Commonwealth Act identifies an additional species of electoral conduct to those identified by the NSW legislation, namely, "the order in which the names for of candidates for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper.". The Commonwealth provision includes an exception identical to the NSW s 209(4). I mention this Commonwealth legislation because it is possible that future cases concerning it will cast light on the NSW s 207, though none of the cases that I have found so far concerning the Commonwealth provision do so.

consideration" in s 147 import the notion that there is a meeting of minds, under which there is a consensus that one thing is to be exchanged for another. The thing given in s 209 is "any property or any other benefit of any kind", and what s 209 prohibits is the giving of such a thing for the purpose of influencing or affecting the person's election conduct, regardless of whether the person to whom it is given agrees to do anything concerning his or her election conduct.

- The person who is the recipient of benefit under s 147 must be an elector or other person on behalf of an elector. There is no such restriction under s 209; the recipient can be any person.

4.3.4 The present controls on electoral bribery

Notwithstanding those differences, ***Scott v Martin*** has not been overruled concerning what counts as giving a benefit for the purpose of influencing an elector's vote. The arguments that Needham J adopted apply to the statutory construction of s 209.

Any promise of a benefit that a candidate makes in an election campaign would be understood as being dependent on the candidate being elected. Many such promises (though not all) would also be understood as being dependent on the candidate being in a position, after the election, to give effect to the promise by being part of the government. As a matter of construction, the making of a promise that was conditional on the candidate being elected and a particular party being or being part of the government after the election would still be a "promising" (and acting in the way denoted by several of the other verbs in section 209) of property or some other benefit.

Before a breach of section 209 occurs, there must be, in broad terms, a promising or giving (or seeking the promising or giving) of property or another benefit *to a person*. While a voter or candidate (the person sought to be influenced) is necessarily a natural person[357], the person to whom property is given or sought to be given might be either a natural person or a corporation.

There will be some policies or promises of conferring benefits that will be expressed in terms that do not involve a payment or benefit to any person, but are in impersonal language. Examples would be "we will build a bridge over the X River", or "we will encourage the electronics industry to establish a hub at Y". Such promises do not involve a gift of property or other benefit to a person, except to the extent that it is necessary that various, possibly numerous, presently unidentifiable people be paid if a bridge is to be built, and a possible way, though not the only possible way, of encouraging the development of an industry hub is by the payment of money to other presently-unidentifiable people. That indirect possibility of presently unidentifiable people being paid or given a benefit from government assets is probably not enough to constitute a breach of s 209 (4) given the requirement that a statue creating a criminal offence be construed in a way favourable to the accused. Thus the question of whether the exception in s 209(4) applies does not arise concerning them.

[357] For local government elections it is possible for a corporation that is a ratepayer to nominate a representative who is then entitled to vote, but that representative must be a natural person: s 267, 270 ***Local Government Act 1993 (NSW)***. There is no analogous right for a corporation to obtain an indirect right to vote in state elections.

There are significant differences between s 209(1) and 209 (2). Section 209(1) has as its focus the conduct and purpose of the person (A) who seeks to affect or influence someone else's (B's) election conduct. The conduct that is criminalised is that of A, in giving or conferring or promising or offering to give or confer the property or other benefit. The necessary purpose, before the section is breached, is that the conduct of A is engaged in in order to influence or affect B's election conduct. That purpose, of influencing or affecting electoral conduct, is one that A must have. It is irrelevant whether A shares that purpose with anyone else. Thus, the conduct aimed at by s 209(1) is conduct likely to be engaged in by a candidate or someone who is trying to assist a candidate or political party. In any case where there is an allegation of breach of section 209 (1) it would be a question of fact whether the giving, conferring or promising was done *in order to influence any person's election conduct*.

The gift or conferral, or the promise to give or confer, might be made to B, or it might be to someone else (C). Thus it would fall within s 209(1) for a candidate or campaign worker to convey the message to an elector "If you vote for X and X is part of the government after the election X will make sure that the Y Football Club (which is incorporated under the Associations Incorporation Act) gets a new clubhouse"[358] Section 209 (1) can be breached even if A's purpose in engaging in the conduct is completely unsuccessful, and B's election conduct is in fact not altered a jot.

Section 209 (2) is directed at conduct engaged in by an elector (X). It is breached if X, broadly, seeks or obtains a benefit, either for himself or someone else (Y). The benefit might be sought from a candidate or campaign worker, or might be sought from anyone else at all (Z). For example, the benefit might be sought from the elector's employer. The seeking or obtaining must be done on the understanding that X's election conduct will in some manner be influenced or affected. I think that the force of "on the understanding that" is that X has in some fashion led Z to believe that if the benefit is given, or because the benefit has been given, X's election conduct will alter in some particular respect. Conduct falling within s 209(2) is not the sort of conduct that falls within the Commission's understanding of pork barrelling. Section 209(2) might, in colloquial language, be aimed at an elector who *seeks* pork, but not at pork barrelling itself.

The exception that is contained in s 209 (4) had no analogue under s 147 ***Parliamentary Electorates and Elections Act 1912***. The usual principle concerning onus of proof of an exception or qualification in a statute is that a person who seeks to avail himself or herself of some ground for exception or excuse in a statute bears the onus of proving the facts that bring his or her case within it[359]. In ***Director of Public Prosecutions v United Telecasters Sydney Ltd***[360] Toohey and McHugh JJ said:

> When a statute imposes an obligation which is the subject of a qualification, exception or proviso, the burden of proof concerning that qualification, exception or proviso turns on whether it is part of the total statement of the obligation. If it is, the onus in respect of the qualification, exception or

[358] Whether any such conduct falls within the exception created by s 209 (4) is a separate question, considered below

[359] ***Dowling v Bowie*** (1952) 86 CLR 137 at 139-140.

[360] (1990) 168 CLR 594 at 611

> proviso is on the party asserting a breach of the obligation. If it is not, the party relying on the qualification, exception or proviso must prove that he or she has complied with its terms.[361]

Thus, it will be a person who seeks to come within the qualification in s 209(4) who will bear the onus of proving that the qualification applies. However, in real-life litigation any problem about the application of s 209(4) is not likely to be about just what it was that was offered, promised, etc, or the terms or circumstances in which that offer, promise, etc was made but rather about the characterisation of what was said or done – about whether it amounted to the type of words or conduct to which s 209(4) applies.

The exception will save many but not all grants or promises of expenditure of public funds or assets from being illegal, where those promises are made at election time, or with an election in view.

Section 209 has not been amended since the ***Electoral Act 2017*** was first passed. The second reading speech relating to the ***Electoral Bill 2017*** was given in the Legislative Assembly on 17 October 2017[362]. It says nothing that casts light on the construction of s 209(4)[363]. The second reading speech in the Legislative Council, given on 17 November[364] and 22 November 2017[365] is similarly uninformative. Nor does the Explanatory Memorandum concerning the Bill that introduced section 209[366] explain anything about s 209(4). Thus, the usual extrinsic aids to construction of a legislative provision are not available concerning s 209(4). It must be construed in its ordinary English meaning, in so far as that may be affected by the context and purpose of the Act.

The subsection uses language that is not given any special definition in the Act, and section 209 (4) is the only place in the Act where the words "public policy" or the words "public action" appear. Thus, other parts of the Act cannot give any textual help in ascertaining the meaning of the words.

In ordinary language a "policy"[367] conveys the idea of some guide or aim to action that has been adopted, where that guide or aim will usually be applied whenever a situation of a particular type arises. A "public policy" is an expression that is imprecise in its meaning – it has a fair amount of open texture[368] – but conveys the general idea that the policy in question is one of a public authority, or one that will be applied in the public arena, or is publicly

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[361] Brennan, Dawson and Gaudron JJ at 601 spoke to similar effect

[362] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-99399

[363] Section 209(4) is in Part 7 Div 15 of the Act. Section 209 is mentioned indirectly when the Minister says "The bill before the House maintains the significant penalties that apply to some of the more serious offences, including the offence of electoral bribery.", but the introduction of the exception in s 209(4) is not referred to.

[364] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-74923

[365] https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-75128

[366] https://legislation.nsw.gov.au/view/pdf/bill/cf025043-9333-4fa4-a04c-dc79c6f7232f

[367] See also the discussion of "policy" at pages 37 - 38 above

[368] See Joseph Campbell and Richard Campbell, "Why Statutory Interpretation is Done as it is Done" (2014) 39 Australian Bar Review 1 at 9 – 10, 36 - 38

known. It will be a matter of characterisation of any particular promise that has been made whether it counts as "declaring a public policy". There will be a gradation in the specificity of election promises that are made, from perfectly general ones like "We will provide air conditioning to every school classroom in the State", which would clearly count as a declaration of public policy, to "We will pay $500 to the Newcastle Town Band", which would not. It is not a public policy because, even if it has the element of being "public" because it concerns the expenditure of public funds, it is not a *policy* because it is a one-off event that is promised – it lacks the potential for being repeatedly applied that a policy must have.

By contrast, a "promise of public action" might relate to a promise to repeatedly adopt some course of conduct, but as well the thing promised need not have any generality to it – it can be a promise that some single and quite specific thing will be done, provided it has the necessary "public" quality. A promise that "we will increase the police force by 500" is clearly a promise of public action, even though it relates a single course of action. And a promise to use public money to build or improve a specific building, bridge or other piece of public infrastructure will often be a "promise of public action", and thus within the exception created by s 209(4). The effect of the introduction of s 209(4) is that the making of a promise of a benefit to the electors of a particular area or demographic to encourage them to vote for a particular party is no longer an offence.

Construing section 209(4) in this way still leaves section 209 with real work to do. For example, it prohibits all kinds of private payments or offers to make payments if a person votes in a particular way, and private offers to provide financial assistance if a person stands as a candidate at an election.

Because section 209(2) is concerned with the conduct of an elector, it is hard to see how the exception in s 209(4) could ever apply concerning it – it is hard to think of an example of an occasion when an elector ever makes a declaration of public policy, or a promise of public action, in a way that relates to the elector's own electoral conduct, or the electoral conduct of any other elector..

There will be some situations that fall within the Commission's understanding of pork barrelling that will be an offence under section 209. Section 209(4) exempts only declarations of public policy or promises of public action – all of which are representations about what will be done *in the future.* If there were to be a situation where a governmental benefit was given *now*, in order to influence or affect the election conduct of a voter or candidate at a future election, that could be pork barrelling as understood by the Commission, and also conduct that infringed section 209 because it fell within the "give or confer" limb of s 209 (1).

Even taking into account that there must be a promising or giving of a benefit to a person before s 209 is breached, if there were to be a governmental grant to a particular corporation in order to influence or affect the future votes of the electors who would indirectly benefit from that grant, that could be a breach of section 209.

Even though section 209 has reduced considerably the situations that count as the offence of electoral bribery from those that infringed the former s 147, it is worth mentioning that the fact that a particular election promise does not breach section 209 does not give a free rein to the candidate, if elected, to implement the policy or engage in the public action. It is still necessary for any expenditure of public resources to be authorised by a law, and for the expenditure of money, pursuant to that law, to comply with the requirements of administrative law, statute law, and the common law discussed elsewhere in this article. ***Bromley London Borough Council v Greater London Council***, discussed at page 28 ff[369], provides one illustration of that necessity.

4.4. Corruptly receiving a commission or reward

There is an offence of corruptly receiving a commission or reward under s 249B ***Crimes Act 1900***. The crime is defined by using a greatly extended meaning of the word "agent". The extended meaning arises under s 249A ***Crimes Act***. The portions of section 249A that seem more likely to have any potential relevance to pork barrelling are:

> "In this Part—
> ***agent*** includes—
> (a) any person employed by, or acting for or on behalf of, any other person (who in this case is referred to in this Part as the person's principal) in any capacity…,
> (b) …and
> (c) any person serving under the Crown (which in this case is referred to in this Part as the person's principal), and …"

The expression "person serving under the Crown" does not appear in the ***Crimes Act*** anywhere else besides s 249A(c). Thus, it bears its ordinary English meaning. A person could be someone "serving under the Crown", and thus an agent, regardless of whether that person also occupied a position of sufficient responsibility to count as being a "public officer".

Section 249A also gives an extended meaning to the word "benefit":

> **benefit** *includes money and any contingent benefit*.

The crime arises under s 249B ***Crimes Act***:

> (1) If any agent corruptly receives or solicits (or corruptly agrees to receive or solicit) from another person for the agent or for anyone else any benefit—
> (a) as an inducement or reward for or otherwise on account of—
> (i) doing or not doing something, or having done or not having done something, or
> (ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,
> in relation to the affairs or business of the agent's principal, or
> (b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,
> the agent is liable to imprisonment for 7 years.

[369] And see in particular ***Bromley*** at 815 per Lord Wilberforce, citing ***Roberts v Hopwood*** at 596 per Lord Atkinson, 607 and 609 per Lord Sumner, 613 per Lord Wrenbury

(2) If any person corruptly gives or offers to give to any agent, or to any other person with the consent or at the request of any agent, any benefit—
(a) as an inducement or reward for or otherwise on account of the agent's—
(i) doing or not doing something, or having done or not having done something, or
(ii) showing or not showing, or having shown or not having shown, favour or disfavour to any person,
in relation to the affairs or business of the agent's principal, or
(b) the receipt or any expectation of which would in any way tend to influence the agent to show, or not to show, favour or disfavour to any person in relation to the affairs or business of the agent's principal,
the firstmentioned person is liable to imprisonment for 7 years.

If a governmental employee or officer were to receive or solicit, or anyone were to give or offer to give to a governmental employee or officer, any benefit as a reward for that person favouring a political party in the way that person distributed any public assets that would be a circumstance that involved the commission of a crime under s 249B, and also pork barrelling. It might also involve the crime of misconduct in public office, if the governmental employee or officer has sufficiently significant responsibilities to count as a "public officer", and if the governmental employee or officer would not have acted to favour the political party if he had not received or been offered the benefit. However, the offence under s 249B can be committed even if the governmental employee does not have sufficiently great responsibilities to count as a "public officer", and even if the "but for" test is not passed, so that the crime of misconduct in public office is not established.

Though it is possible for an offence under s 249B to arise where there is pork barrelling, the practical likelihood of such an offence arising seems quite small. One reason is that most examples of pork barrelling are ones where the person who is responsible for the public assets being distributed in a way that favours a political party does not receive any benefit from another person as a reward or inducement for favouring the political party. In most examples of pork barrelling the person who engages in it needs no persuading to favour the political party. If anything, he or she is quite keen to do so.

4.5. Attempting, Urging or Assisting in the Commission of any Crime

The ***Crimes Act 1900 (NSW)*** contains provisions[370] that make criminal various types of involvement in the commission or attempted commission of a criminal offence. That involvement can be by attempting to commit the crime, by being an accessory before the fact to someone else committing the crime, by being an accessory after the fact to someone else committing the crime, or by recruiting another person to carry out or assist in carrying out a crime. Any of those provisions could apply in relation to a crime that was committed in the course of pork barrelling.

Different procedures and penalties are laid out in the ***Crimes Act*** depending on whether the offence in question is a serious indictable offence, a minor indictable offence, or an offence punishable on summary conviction. One of these crimes of attempt or involvement might possibly be committed by a person who attempted to commit or was involved in the commission of any of the criminal offences mentioned earlier as ones that could possibly be committed when pork barrelling occurred, but who did not themselves commit that offence.

[370] Sections 345 – 351B

In particular, even if a particular crime can only be committed by a person who has some particular qualification, like the way the crime of misconduct in public office can only be committed by a person who is a public officer, an offence of aiding and abetting, or recruiting, can be committed by anyone at all, regardless of whether that person has that qualification[371]. Thus if, for example, a party worker did research on which electorates were marginal and contained voters whose vote could be influenced by a particular type of offer of expenditure of public funds, and that research was done for the purpose of providing it to a Minister who the worker knew would use it to offer public funds that he or she would not otherwise have offered to spend in that electorate, the party worker could be liable to conviction.

Beyond mentioning these possibilities, it is difficult to say anything more in the absence of some actual factual situation.

The ***Crimes Prevention Act 1916 (NSW)*** makes it an offence "If any person incites to, urges, aids, or encourages the commission of crimes or the carrying on of any operations for or by the commission of crimes"[372], or "If any person prints or publishes any writing which incites to, urges, aids, or encourages the commission of crimes or the carrying on of any operations for or by the commission of crimes"[373].

This Act is a catch-all one, that does not purport to displace any other provisions the prohibit the doing of more specific things. "Where an offence against this Act is also punishable under any other Act or at common law, it may be prosecuted and punished either under this Act or under the other Act or at common law, but so that no person be punished twice for the same offence."[374]

4.6. Conspiracy to commit a crime or engage in a tort

A criminal conspiracy consists not merely in the intention of two or more people, but in the agreement of two or more people to do an unlawful act, or to do a lawful act by unlawful means[375]. It is an offence under the common law[376], not by virtue of any statute, and so there is no fixed maximum sentence. "It is the fact of the agreement, or combination, to engage in a common enterprise of that kind [ie an unlawful act, or a lawful act done by unlawful means]

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[371] A practical example is in the charges in the Doyles Creek matter, where a charge of misconduct in public office was brought against Mr Macdonald, and a charge of being an accessory before the fact to that misconduct was brought against Mr Maitland, who held no public office. – his involvement was that he was the Chairman of the company that Mr Macdonald sought to benefit.

[372] ibid s 2

[373] ibid s 3.

[374] Ibid s 5

[375] ***Mulcahy v the Queen*** (1868) LR 3 HL 396 at 317; ***Quinn v Leathem*** [1901] AC 495; ***Attorney-General of the Commonwealth of Australia v Adelaide Steamship*** [1913] AC 781 at 797 per Lord Parker of Waddington; ***R v Brailsford*** [1905] 2 KB 730 at 746; ***R v Boston*** (1923) 33 CLR 386 at 396 per Isaacs and Rich JJ; ***R v Rogerson*** (1992) 174 CLR 268 at 281 per Brennan and Toohey JJ. Though this is a time-honoured statement of what conspiracy is, In ***Peters v The Queen*** (1998) 192 CLR 493; [1998] HCA 7 at [51] McHugh J (Gummow J agreeing) expressed the view that although that is a definition that finds its source in ***Mulcahy v The Queen*** (1868) LR 3 HL 306 at 317, it was not clear what the second limb of the definition adds, given that both limbs require an agreement to do an unlawful act. The logic of their Honours' view seems inescapable.

[376] Though modified slightly by s 580D ***Crimes Act,*** which abolishes any common law rule that a husband and wife cannot be guilty of conspiring together.

which is the actus reus of the offence of conspiracy"[377]. The crime is complete as soon as the agreement is made[378]. If there is no clear proof of the actual words or other communications by which the agreement was made "what is done in executing the agreement is commonly relied upon to prove both an anterior agreement to achieve the unlawful objective and the terms of that agreement"[379]

> "It [ie the crime arising from the agreement] is wholly independent of the merits of the matter in respect of which it takes place… A public ministerial officer who for private gain prefers one applicant to another is guilty of a crime, even though such preference would be otherwise fully justifiable."[380].

"Unlawful act' is an ambiguous expression. It might be an act forbidden by law, or an unauthorised act in the sense of an act that is ultra vires and void.[381] The "unlawfulness" of either the unlawful act, or the unlawful means, as those concepts are used in the law of conspiracy, can consist in being either a crime, or a tort. In ***R v Whitaker***[382] Lawrence J, delivering the judgment of himself Lush and Atkin JJ, said:

> "to make a good count of conspiracy it is not necessary that the agreement should be an agreement to commit a crime; it is enough if it be an agreement to do an act which is unlawful or wrongful in the sense of tortious. At any rate this is so where the agreement is to do an act of fraud or corruption."

This is also so concerning the tort of conspiracy[383].

"Generally speaking, it is undesirable that conspiracy should be charged when a substantive offence has been committed"[384]. However, that is not to deny that it is possible to bring a conspiracy charge in such circumstances. That is what happened in the Bylong Valley Litigation, where it would have been possible to charge Mr Macdonald alone with a substantive offence of misconduct in public office, but instead Mr Macdonald Mr Edward Obeid and Mr Moses Obeid were charged with conspiracy that Mr Macdonald commit misconduct in public office. This illustrates the way in which a charge of criminal conspiracy could be relevant to pork barrelling, if two or more people agree that a public officer would misconduct himself in his office, in a way that constituted pork barrelling. Similarly, there could be a conspiracy to commit any of the other crimes that might possibly be committed when there is pork barrelling.

There is a question of how the element of the crime of misconduct in public office, requiring that the misconduct be sufficiently serious to merit criminal punishment, is imported into the offence of conspiracy to commit misconduct in public office. In the **Bylong Valley Trial**

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[377] ***R v Macdonald; R v E Obeid; R v M Obeid (No 17)*** [2021] NSWSC 858 at [14] per Fullerton J
[378] ***R v Freeman*** (1985) 3 NSWLR 303
[379] ***R v Macdonald; R v E Obeid; R v M Obeid (No 17)*** [2021] NSWSC 858 at [14] per Fullerton J
[380] ***R v Boston*** (1923) 33 CLR 386 at 396 - 7 per Isaacs and Rich JJ
[381] ***Northern Territory v Mengel*** (1995) 185 CLR 307 at 336 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ
[382] [1914] 3 KB 1283 at 1299. The case involved an army officer who was paid money to favour one particular applicant for the exclusive right to operate the canteen for his regiment.
[383] ***Quinn v Leathem*** [1901] AC 495
[384] ***R v Hoar*** (1981) 148 CLR 32 at 38

Decision[385] Fullerton J said[386]: "If it is, it follows that the Crown would be obliged to prove that those alleged to be party to an agreement that a public officer should wilfully misconduct themselves in public office must also know and intend that the misconduct comprehended by the agreement is so serious as to merit criminal punishment, and that they knew or appreciated that fact at the time they agreed to be party to the agreement." That was a question concerning which there was no authority at the time of her Honour's judgment. Her Honour decided it by holding[387] that, to be guilty of conspiracy for Mr Macdonald to commit misconduct in public office, each of the Obeids "needed to know and intend that Mr Macdonald would:

> (i) as a public official;
>
> (ii) in the course of, or connected to, his *public office*;
>
> (iii) commit *misconduct* by:
>
> > (a) intentionally doing acts in connection with the granting of an EL at Mount Penny in New South Wales;
> >
> > (b) with the *improper purpose* of benefitting Edward Obeid and/or Moses Obeid and/or their family members and/or associates;
> >
> > and that he would
>
> (iv) commit the misconduct set out at (iii) above *wilfully*, that is *knowing* that he was acting in breach of:
>
> > (a) his duties and obligations of impartiality as a Minister in the Executive Government of the State of New South Wales; and/or
> >
> > (b) his duties and obligations of confidentiality as a Minister in the Executive Government of the State of New South Wales;
>
> (v) without reasonable excuse or justification.

Her Honour held[388] that, as to elements (iii), (iv) and (v)

> "… the Crown is obliged to prove … that each of the accused knew and intended that Mr Macdonald would wilfully (that is, knowingly and deliberately) misconduct himself in the Office he held as Minister for Mineral Resources in connection with the granting of an EL at Mount Penny, and for the improper purpose alleged, because they each knew that by Mr Macdonald agreeing to act in that way he agreed he would breach his obligations and duties as a Minister without reasonable excuse or justification."

As mentioned earlier, at the time of writing[389] there is still an unresolved appeal from her Honour's decision. However, her Honour's judgment provides the most recent authoritative account of the law in this area.

4.7. Concealing a serious indictable offence relating to pork barrelling

Section 316 ***Crimes Act 1900 (NSW)*** provides:

[385] ***R v Macdonald; R v E Obeid; R v M Obeid (No 17)*** [2021] NSWSC 858
[386] ***Ibid*** at [26]
[387] ***Ibid*** at [66]
[388] ***Ibid*** at [69]
[389] Early June 2022

(1) An adult—
(a) who knows or believes that a serious indictable offence has been committed by another person, and
(b) who knows or believes that he or she has information that might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for that offence, and
(c) who fails without reasonable excuse to bring that information to the attention of a member of the NSW Police Force or other appropriate authority,

is guilty of an offence.

Maximum penalty—Imprisonment for—
(a) 2 years—if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or
(b) 3 years—if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or
(c) 5 years—if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(1A) For the purposes of subsection (1), a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force or other appropriate authority if—
(a) the information relates to a sexual offence or a domestic violence offence against a person (the ***alleged victim***), and
(b) the alleged victim was an adult at the time the information was obtained by the person, and
(c) the person believes on reasonable grounds that the alleged victim does not wish the information to be reported to police or another appropriate authority.

(1B) Subsection (1A) does not limit the grounds on which it may be established that a person has a reasonable excuse for failing to bring information to the attention of a member of the NSW Police Force or other appropriate authority.

(2) A person who solicits, accepts or agrees to accept any benefit for the person or any other person in consideration for doing anything that would be an offence under subsection (1) is guilty of an offence.

Maximum penalty—Imprisonment for—
(a) 5 years—if the maximum penalty for the serious indictable offence is not more than 10 years imprisonment, or
(b) 6 years—if the maximum penalty for the serious indictable offence is more than 10 years imprisonment but not more than 20 years imprisonment, or
(c) 7 years—if the maximum penalty for the serious indictable offence is more than 20 years imprisonment.

(3) It is not an offence against subsection (2) merely to solicit, accept or agree to accept the making good of loss or injury caused by an offence or the making of reasonable compensation for that loss or injury.

(4) A prosecution for an offence against subsection (1) is not to be commenced against a person without the approval of the Director of Public Prosecutions if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following a profession, calling or vocation prescribed by the regulations for the purposes of this subsection.

(5) The regulations may prescribe a profession, calling or vocation as referred to in subsection (4).

(6) In this section—
domestic violence offence has the same meaning as in the *Crimes (Domestic and Personal Violence) Act 2007*.

> ***serious indictable offence*** does not include a child abuse offence (within the meaning of section 316A).
> **Note—**
> Concealing a child abuse offence is an offence under section 316A. A section 316A offence can only be committed by an adult.
> ***sexual offence*** means the following offences—
> (a) an offence under a provision of Division 10 of Part 3 where the alleged victim is an adult,
> (b) an offence under a previous enactment that is substantially similar to an offence referred to in paragraph (a).

"Serious indictable offence" is defined in section 4 ***Crimes Act***:

> ***Serious indictable offence*** means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more.

The chapeau to section 4 of the ***Crimes Act*** makes that definition subject to the usual qualification for general definitions in statutes, "unless the context or subject-matter otherwise indicates or requires". Thus section 316 (6) would operate to qualify, for the purposes of s 316, the defined meaning of "serious indictable offence" that is given in section 4. However, that qualification is most unlikely to have any practical scope for operation concerning pork-barrelling.

The ***Crimes Regulation 2020***, clause 4, prescribes the following professions, callings or vocations for the purposes of sections 316(5) and 316A(7)[390] of the Act:

(a) a legal practitioner,
(b) a medical practitioner,
(c) a psychologist,
(d) a nurse,
(e) a social worker, including—
(i) a support worker for victims of crime, and
(ii) a counsellor who treats persons for emotional or psychological conditions suffered by them,
(f) a member of the clergy of any church or religious denomination,
(g) a researcher for professional or academic purposes,
(h) if the child abuse offence referred to in section 316A(1) of the Act is an offence under section 60E of the Act, a school teacher, including a principal of a school,
(i) an arbitrator,
(j) a mediator.

The effect of this regulation is not to exempt a person who follows one of those occupations from an obligation to disclose to the police or other appropriate authority information of the type described in s 316. Rather, the effect of the regulation is to create a precondition to any prosecution of such a person for failure to make disclosure in accordance with section 316. The precondition arises if the knowledge or belief that an offence has been committed was formed or the information referred to in the subsection was obtained by the person in the course of practising or following one of the listed occupations. That precondition is that the approval of the Director of Public Prosecutions to the prosecution is obtained.

The common law offences of misbehaviour in public office, bribery and conspiracy, and the statutory offence of corruptly receiving a commission or reward, all fall within the definition

[390] Section 316A is concerned with concealing an offence relating to child abuse, and so is most unlikely to have any relevance to pork barrelling

of "serious indictable offence" as it applies in s 316[391]. Thus, failing to report an activity of pork barrelling that fell within any of those offences could itself be prosecuted under s 316. To give a specific example, party workers, politicians and public servants who know or believe that an offence of pork barrelling, that is a serious indictable offence, has been committed and who do not report that information will be themselves at risk of prosecution under s 316.

The obligation under s 316 is to report the information to the police "or other appropriate authority". The expression "appropriate authority" is not itself defined, and so would be construed as a matter of ordinary English. The particular powers and areas of concern of various different integrity agencies[392] would strongly influence whether an authority was an "appropriate" one. For an offence involving pork barrelling that amounted to corrupt conduct within the meaning of the ***ICAC Act***, it could be ICAC. If it involved an action or inaction relating to a matter of administration, it could be the Ombudsman. If the nature of the pork barrelling was that it involved a serious and substantial waste of public money by an auditable entity, it could be the Auditor-General[393] If it involved a breach of s 209 ***Electoral Act***, it could be the Electoral Commission.

4.8. Interaction of pork barrelling with the *Electoral Funding Act 2018*

The ***Electoral Funding Act 2018 (NSW)*** ("***EFA***") prohibits certain classes of person (such as an individual who is not an enrolled elector or an entity that has identified itself satisfactorily to the Electoral Commission,[394] property developers, and people connected with the tobacco, liquor or gambling industries)[395] from making donations to a political party. It also imposes limits on the amount that anyone who is not a prohibited donor can make to a political party[396], and provides a scheme under which political parties are given funding from public sources[397]. Section 3 states that the objects of the Act are:

"(a) to establish a fair and transparent electoral funding, expenditure and disclosure scheme,
(b) to facilitate public awareness of political donations,
(c) to help prevent corruption and undue influence in the government of the State or in local government,
(d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,
(e) to promote compliance by parties, elected members, candidates, groups, agents, associated entities, third-party campaigners and donors with the requirements of the electoral funding, expenditure and disclosure scheme."

The ***EFA*** requires there to be disclosure to the Electoral Commission of donations made to a political party, and of electoral expenditure incurred by a political party or member or candidate. There is a cap on the amount of donation that can be made by an individual donor. There is a cap on the amount of money a party or a member or candidate can spend on electoral expenditure at any election.

[391] The statutory offence of electoral bribery does not constitute a serious indictable offence" for the purposes of a 316, because s 209 ***Electoral Act*** fixes the maxim penalty at 3 years.
[392] Discussed in more detail in Part 6 of this aarticle
[393] See section 52D ***Government Sector Audit Act***, set out at page 104 below
[394] S 46(1)
[395] S 51
[396] S 23
[397] Parts 4 and 5, s 62 - 96

Of particular importance for present purposes are the provisions of ***EFA*** under which public funding is provided for the benefit of political parties. Under Part 4 of the ***EFA*** (s 62 ff) public funding is to be provided for election campaigns of a State election. A party is entitled to receive funding that is proportionate to the number of first preference votes it receives at an election. Because that amount cannot be known until the election is over, to enable an electoral campaign to be financed there is provision for a party to receive an advance payment of 50% of the amount it was entitled to receive at the previous general election. Under Part 5 of the ***EFA*** public funding is also provided to a political party for its administrative and operating expenses (other than electoral expenditure, expenditure for which a member can claim a parliamentary allowance as a member, or expenditure substantially incurred concerning election of members to a Parliament that is not the NSW Parliament[398]). Similar public funding is provided for the administrative expenses of elected members who are not members of a party.

The ***EFA*** shows that there has been a policy adopted, and incorporated into law, concerning the circumstances in which and the extent to which public funds should be used to support the activities of parties in participating in elections, and continuing their activities in between elections. To the extent to which pork barrelling occurs – so that, in accordance with ICAC's definition of what counts as pork barrelling, public money is expended to targeted electors for partisan political purposes – i.e. for purposes of advantaging a political party in an election – public money additional to the limit of public money available under ***EFA*** come to be spent in advantaging a party at an election. As well, when there is pork barrelling the cap on the amount of money that a party or candidate can spend in an election is got around, because it is public money that is being spent to achieve the advantage of a particular political party, not the money of the party or its candidate. In these ways, pork barrelling can subvert the policies of the ***EFA***. This is a relevant matter to take into account if for any purpose (such as the "serious" element of the crime of misfeasance in public office) it is necessary to take into account whether pork barrelling that has occurred is serious.

[398] S. 84

Part 5 - Potential civil liability concerning pork barrelling

5.1. Misconduct in public office as a tort.

Misconduct in public office is a tort as well as a crime. The legal lineage the tort of misconduct in public office has been said to go back to the thirteenth century[399]. A history to 1704 is traced in ***Shum Kwok Sher v Hong Kong Special Administrative Region*** [400]. Lord Steyn[401] thought the history was traceable back to the 17th century[402], but the "first solid basis" for this head of tort liability is to be found in ***Ashby v White***[403]**.** Edelman J has recently described ***Ashby*** as "a landmark English case from which emerged the modern tort of misfeasance in public office"[404].

By 1995 Brennan and Deane JJ could describe this tort as "well established"[405], but the majority in ***Mengel*** said that the precise limits were in important respects undefined[406]. The precise limits remained undefined in 1998[407] and as recently as 2009[408].

Even so, in the last quarter of a century there have been many reported cases that have clarified the scope of the tort[409], so that some aspects of the tort are clear enough.

The tort "bears some resemblance to the crime of misconduct in public office"[410]. The tort and the crime share a requirement that each must be committed by a person who holds a public office, and exercises a power connected to the office in an improper way. A public office, for the purpose of the tort, must be one that has a public power or a public duty attached to it[411]. However, the executive power that is exercised does not have to be *expressly* attached to the office that is held[412]. The concept of "public officer" extends at least as far as "persons who, by virtue of the particular positions they hold, are entitled to exercise executive powers in the public interest."[413].

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[399] ***G J Coles & Co Ltd v Retail Trade Industrial Tribunal*** (1986) 7 NSWLR 503 at 524 per McHugh JA
[400] [2002] HKCFA 30 per Mason NPJ
[401] In ***Three Rivers DC v Bank of England (N0 3)*** [2003] 2 AC 1 at 190
[402] ***Turner v Sterling*** (1671) 2 Vent 25
[403] Variously reported in (1703) 1 Bro Parl Cas 62; (1703) Holt KB 524; (1703) 2 Ld Raym 938; (1703) 14 State Tr 695; 92 ER 126, but described by his Lordship at 190 as "best reported in 1 Smith's LC (13th ed) 253."
[404] ***Lewis v Australian Capital Territory*** [2020] HCA 26; 381 ALR 385 at [162]
[405] ***Northern Territory v Mengel*** (1995) 185 CLR 307 at 355, 370
[406] ***Mengel*** at 345,
[407] ***Sanders v Snell*** [1998] HCA 64; 196 CLR 329 at [42], 346
[408] ***Leerdam v Noori*** [2009] NSWCA90; 255 ALR 553 at [47] (Allsop P)
[409] Without trying to be exhaustive, and naming only appellate decisions, they include ***Sanders v Snell*** [1998] HCA 64; 196 CLR 329; ***Cannon v Tahche*** [2002] VSCA 84; (2002) 5 VR 317; ***Sanders v Snell (No 2)*** [2003] FCAFC 150; 130 FCR 149;***Three Rivers District Council v Governor and Company of the Bank of England (No 3)*** [2003] 2 AC 1; ***Karagozlu v Metropolitan Police Commissioner*** [2006] EWCA Civ 1691; [2007] 1 WLR 1881; ***Leerdam v Noori*** [2009] NSWCA90; 255 ALR 553; ***Nyoni v Shire of Kellerberrin*** [2017] FCAFC 59; 248. FCR 311; ***Obeid v Lockley*** [2018] NSWCA 71; 98 NSWLR 258; ***Ea v Diaconu*** [2020] NSWCA 127; 102 NSWLR 351. The decision of the South Australian Full Court in ***State of South Australia v Lampard-Trevorrow*** [2010] SASC 56; 106 SASR 331 cannot be followed after ***Obeid v Lockley***, so far as it concerns the state of mind that a defendant must have to have committed the tort.
[410] ***R v Bowden*** [1996] 1 WLR 98; per Lord Steyn ***Three Rivers DC v Bank of England (No 3)*** [2003] 2 AC 1 at 191
[411] ***Leerdam v Noori*** at [6], [16], [48], [100]
[412] ***Obeid v Lockley*** [2018] NSWCA 71; 98 NSWLR 258 at [103], [113] – [114]
[413] Per Bathurst CJ, ***Obeid v Lockley*** at [114]

The misconduct can arise either in the way in which action is taken in purported exercise of a power or duty attached to the office, or in failing to exercise a power when the officer has a duty to do so.

Henly v Mayor and Burgesses of Lyme [414] was an action for damages brought by a landowner against a local government corporation. The corporation had received from the Crown a grant of certain land, and a pier or quay with tolls, on terms that it would repair. The plaintiff was a landowner who suffered damage when the sea came onto his land and demolished buildings, in a way that would not have happened if the repairs had been done properly. A defence taken was that because the obligation to repair was imposed by the terms of the letters patent that made the grant it was only the King who could sue for the breach. Best CJ upheld the verdict that had been given for the plaintiff, saying[415]:

> … if a public officer abuses his office, either by an act of omission or commission, and the consequence of that, is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them."

Where the tort arises from positive action by the public official rather than inaction, an essential requirement is that there is a purported exercise of his or her public duties by a public official, and that the purported exercise is invalid, "either because there is no power to be exercised or because a purported exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action."[416] The majority in ***Sanders v Snell***[417] accepted that the tort of misfeasance in public office could be committed if the act involved was an act beyond power, on administrative law tests, including an act that was void for want of procedural fairness[418].

The misuse of power is not confined to misuse of a *statutory* power that has been vested in the officer: "Any act or omission done or made by a public official in performance of the functions of the office can found an action for misfeasance in public office"[419]

However, the circumstances that give rise to the crime of misconduct in public office are not identical to the circumstances that give rise to the tort of misconduct in public office. Important differences concern the need for the plaintiff in the tort case to prove damage suffered by him or her, and the need for the damage to be something that the defendant intends to occur or to the incurring of which the defendant is recklessly indifferent.

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[414] ***Henly v Mayor and Burgesses of Lyme*** (1828) 5 Bing 91; 130 ER 995, discussed at p 13 above.

[415] At 107-8 of Bing, 1001 of ER These sentences were repeated by Brennan J in ***Mengel*** at 355. ***Cannon v Tache*** [2002] VSCA 84; (2002) 5 VR 317 at [50], in a passage cited by Bathurst CJ in ***Obeid v Lockley*** at [96], also accepted that the relevant misfeasance could consist in failing to act when there was a duty to act. Similarly, in ***Leerdam v Noori*** [2009] NSWCA 90; 227 FLR 210 Spiegelman CJ said, at [6}: "The identification of a power to act which has *or has not* been exercised, is a necessary step in determining whether the conduct complained of occurred in purported performance of the functions of a public office. The relevant consideration is the link" (emphasis added)

[416] Per Brennan J, ***Mengel*** at 356. The various grounds for 'setting aside an administrative action" are considered in Part 4 above.

[417] (1998) 196 CLR 329 72 ALJR 1508

[418] [38], p 1516 of ALJR

[419] Per Brennan J, ***Mengel*** at 355, referring to ***Henly v Mayor of Lyme*** (1828) 5 Bing 91, 130 ER 995 as an example of such an action brought for misuse of a non-statutory power.

5.1.1 The required mental element for the tort

Beyond the fact that the tort is an intentional tort[420], there have been differing accounts of the precise mental element that is necessary for the tort to be committed.

Brennan J in ***Northern Territory v Mengel*** regarded the tort of misfeasance in public office as consisting of ""a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff."[421].

His Honour identified three ways in which there might be an absence of an honest attempt to perform the functions of the office, and thus three possible ways in which the mental element of the tort might be established. One was where the conduct was engaged in with the intention of inflicting injury. A second was where it was engaged in with knowledge that there was no power to engage in the conduct and that the conduct was calculated to produce injury. A third was where there was reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce.[422]

In ***Mengel*** Deane J[423] identified the elements of the tort as being:

> " (i) an invalid or unauthorised act;
> (ii) done maliciously;
> (iii) by a public officer;
> (iv) in the purported discharge of his or her public duties;
> (v) which causes loss or harm to the plaintiff."

His Honour accepted that "That summary statement of the elements of the tort inevitably fails to disclose some latent ambiguities and qualifications of which account must be taken in determining whether a particular element is present in the circumstances of a particular case."[424]. While that statement of elements remains a useful guide to whether the tort has been committed in some particular case, all that it says about the required mental state is that the invalid or unauthorised act must be "done maliciously". That is not enough to pinpoint the required mental state, from amongst the various alternatives that the cases have thrown up.

In ***Three Rivers District Council v Governor and Company of the Bank of England (No 3)***[425] two different accounts of the possible mental states involved in the tort were given. The majority took the view that there are two different forms of the tort. One requires "targeted malice" by the public officer, i.e. a specific intention to injure a person or persons. The other occurs where the officer knows he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his action is lawful[426]. An act performed with reckless

[420] ***Sanders v Snell*** [1998] HCA 64; 196 CLR 329 at [42], 346
[421] ***Mengel*** at 357
[422] ***Mengel*** at 357. Deane J at 370-1 writes to similar effect.
[423] At 370.
[424] At 370
[425] [2003] 2 AC 1.
[426] At 191 per Lord Steyn

indifference to the outcome is sufficient to ground the tort in its second form[427]. The tort can be committed by a failure to act when there is a duty to act and the defendant decides not to act, as well as by a positive action[428].

Lord Hobhouse of Woodborough regarded there as being three forms of the tort, arising from there being three possible versions of the official's state of mind as to the effect of his act upon other people. The first is "targeted malice" – action done with the intent of causing harm to the plaintiff, who is either identified or identifiable. The second is "untargeted malice", where the official does the act intentionally, being aware that it will in the ordinary course directly cause loss to the plaintiff or people in an identifiable class to which the plaintiff belongs. The act is not done with the intent or purpose of causing such a loss but is an unlawful act which is intentionally done for a different purpose notwithstanding that the official is aware that such injury will, in the ordinary course, be one of the consequences. The third category is "reckless untargeted malice". This happens where the official does the act intentionally, being aware that it risks directly causing loss to the plaintiff or an identifiable class to which the plaintiff belongs and the official wilfully disregards that risk[429].

This disparity of views is one that a trial judge would resolve as a matter of precedent. In ***Northern Territory v Mengel*** the majority said:

> "The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage"[430] "… there is no liability unless there is either an intention to cause harm or the officer concerned knowingly acts in excess of his or her power"[431] "Intentional infliction" of harm, for the purpose of this tort includes
>
> > "acts which are calculated in the ordinary course to cause harm, as in ***Wilkinson v Downton***[432], or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach."[433].

Their Honours in ***Mengel*** left open, as something unnecessary for them to decide, the possibility that the mental element of the tort might also "extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power."[434] They rejected the possibility that it is sufficient for the tort that the officer ought to know that he or she lacks power[435].

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[427] At 192
[428] At 230
[429] At 230-1
[430] ***Northern Territory v Mengel*** (1995) 185 CLR 307 at 345 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ
[431] ***Mengel*** at 345 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ
[432] [1897] 2 QB 57, a case where the defendant, as a supposed practical joke, told a woman her husband had been very seriously injured. The defendant made the statement with the intention that the woman believe it, which she did, and in consequence suffered severe nervous shock which made her ill. The defendant was liable both for the injury cause by the shock, and for the wasted expense the woman incurred in sending people to the place where her husband was supposedly lying.
[433] ***Mengel*** at 347
[434] ***Mengel*** at 347
[435] ***Mengel*** at 348

It is these majority statements of the High Court that a judge will be required to apply, unless and until the High Court decides otherwise[436]. Accordingly, in ***Obeid v Lockley*** Bathurst CJ accepted that it was necessary for the appellants to establish "either that the respondents were aware that the appellants were likely to suffer … harm or that they were recklessly indifferent to the fact that the appellants are likely to suffer … harm. It is not sufficient for the appellants to establish that it was reasonably foreseeable that they were likely to suffer… harm."[437]

5.1.2. Damage

Special or material damage suffered by the plaintiff is essential for the tort of misfeasance in public office[438]. Even though a "special interest", which could be wider than "special damage", is all that needs to be shown to have standing to challenge an administrative law decision, "special damage" must be shown to bring an action for misfeasance in public office arising from the invalid administrative decision. This is "loss or injury which is specific to him and which is not being suffered in common with the public in general."[439]

Special or material damage need not be financial damage:

> "there are three sorts of damages, any one of which is sufficient to support this action. First damage to the plaintiff's fame, if the matter he be accused of be scandalous. Secondly, to his person, whereby he is imprisoned. Thirdly to his property, whereby he is put to charges and expenses."[440]

The first of these propositions can be expressed in more contemporary language by saying that reputational harm can be damage for the purpose of this tort[441].

If special or material damage is established, the court can also in an appropriate case award exemplary damages[442]. For a tort that does not have proof of damage as one of its elements, it is possible for exemplary damages to be awarded if liability is established but no loss is proved; however, for a tort that has proof of damage as one of its elements (as the tort of

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[436] As North and Rares JJ did in ***Nyoni v Shire of Kellerberrin*** [2017] FCAFC 59; 248 FLR 311 at [109], where their Honours said: "The tort of misfeasance in public office involves a misuse of the power of the office. The officer must either intend that misuse to cause harm (whether or not the exercise of the power is within its scope) or know that he or she is acting in excess of his or her power: ***Mengel*** at 345."

[437] ***Obeid v Lockley*** at [153], in substance repeated at [172]. His Honour at [154] – [171] gave detailed reasons for that view. Beazley P at [206] agreed, and Leeming JA at [222] – [242] agreed and gave additional reasons.

[438] ***Watkins v Secretary of State for the Home Department*** [2006] 2 AC 395

[439] ***Three Rivers DC*** at 231

[440] Per Lord Holt CJ, ***Savill v Roberts*** (1698) 12 Mod Rep 208; 88 ER 1267, cited in ***Gregory v Portsmouth City Council*** [2000] 1 AC 419 at 426-7. Though Lord Holt's statement related to what was damage for the purposes of the tort of malicious prosecution, the English Court of Appeal in ***Karagozlu v Metropolitan Police Commissioner*** [2006] EWCA Civ 1691; [2007] 1 WLR 1881 at [30], [34], [42] accepted it as being also applicable to the tort of misfeasance in public office. ***Karagozlu*** held that the loss of 'residual liberty" – loss of the degree of liberty that is involved in a prisoner being transferred from an open prison to a secure prison - can be material damage for the tort of misfeasance in public office. However, it is difficult to envisage any circumstances in which that proposition would come to be applied concerning any alleged pork-barrelling.

[441] A proposition accepted as correct in ***Obeid v Lockley*** at [153] and [173]

[442] ***Kuddus v Chief Constable of Leicestershire Constabulary*** [2002] 2 AC 122

misfeasance in public office does) exemplary damages can be awarded only if compensatory damages are established[443].

It might be possible for a disappointed candidate for election to establish this tort, if a public official had misused his or her power to direct public funds, and had done so to enable the plaintiff's opponent to have an advantage in the election. If the nature of the advantage that was intended was such that the plaintiff would lose the election, the mental element of the tort could be satisfied. If the plaintiff were a sitting member, who had lost his or her seat in the election, the special damage would be the loss of salary and the net value of the loss of entitlements that the plaintiff suffered. There may well be practical difficulties in proving the causal connection between the action of the defendant and the loss of the plaintiff, but in principle such an action could be available.

Even if the plaintiff was not a sitting member, it would in principle be possible for such a candidate to receive damages for loss of a chance. Though ***Talacko v Talacko***[444] was a case concerning the tort of unlawful means conspiracy, some remarks in it are applicable more generally, to all cases where damages are claimed in tort for loss of a chance. In ***Talacko*** the joint judgment pointed out[445] that there is a difference between

> "(i) instances where a defendant's tortious act deprives a plaintiff of an opportunity or chance to which the plaintiff was not entitled but where such deprivation constitutes an immediate loss; and (ii) instances where a defendant's tortious act reduces or extinguishes the value of a plaintiff's existing right, where the value might be quantified by reference to the likelihood of future events."

To recover damages for loss of the first type:

> " … it is necessary to identify "the interest said to have been harmed by the defendant". That interest, whether described as a chance or as an opportunity, must be lost: the chance of a loss is not the same as the loss of a chance"[446]

Whether the tortious conduct has caused the loss of a chance is a matter that is decided on the balance of probabilities. As explained in ***Sellars v Adelaide Petroleum NL***[447]:

> " … the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained some loss or damage. However, in a case such as the present, the applicant shows some loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had some value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.

Thus, an assessment of whether the chance was one with more than a negligible value is a necessary prerequisite to deciding whether the tortious conduct has caused a loss at all.

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[443] ***Fatimi Pty Ltd v Bryant*** [2004] NSWCA 140; 59 NSWLR 678 at [71] – [81] per Giles JA Handley JA agreeing at [41] and McColl JA agreeing at [83]
[444] 2021] HCA 15; 389 ALR 178 (hereinafter ***Talacko***)
[445] At [40]
[446] ***Talacko*** at [42]
[447] (1994) 179 CLR 332 at 355

To recover damages for the second type of loss:

> "…the existence of a loss is sufficiently shown by proving that the tort caused a permanent impairment of the value of the plaintiff's existing right. It is enough that the right is "something of value" and that its value is diminished or lost"[448]

As well, the costs of any litigation that has been reasonably engaged in in an attempt to reduce loss caused by the wrongdoing are a recoverable head of loss. In ***Arsalan v Rixon*** a joint judgement of the High Court said[449]:

> "Where a plaintiff acts in an attempt to reduce a loss, the onus shifts to the defendant to show that the acts actually taken by the plaintiff were unreasonable acts of mitigation. Unless the plaintiff's actions are shown to be unreasonable, costs that are incurred in an attempt to mitigate loss caused by wrongdoing become, themselves, a head of damage that can be recovered. Even if the costs incurred by the plaintiff are greater than the loss that was attempted to be mitigated, those costs will be recoverable other than to the extent that they are shown to be unreasonable."

Whether such damages were worth suing for is another matter.

5.2. Tort of unlawful means conspiracy

The tort of unlawful means conspiracy is one of the economic loss torts. In ***Talacko v Talacko***[450] a unanimous joint judgment of the full bench of the High Court affirmed that the elements were:

> In *Williams v Hursey*[451], Menzies J said that "[i]f two or more persons agree to effect an unlawful purpose, whether as an end or a means to an end, and in the carrying out of that agreement damage is caused to another, then those who have agreed are parties to a tortious conspiracy". The agreement or common design between the parties is necessary for them to be jointly liable for the unlawful means[452]. However, if the conspiracy is merely aimed "at the public, the damage sustained by a member of the public is too remote to give a right of action"[453]. The agreement which is carried out must be "aimed or directed"[454] at the plaintiff.

An "unlawful purpose", within the meaning of this tort, might be a criminal act, or an act that is tortious[455]. Thus, if two or more people agree to carry out an action that involves any of the crimes discussed in Part 4 above as ones that might be committed where there is pork barrelling, or if they agree to carry out acts that amount to the tort of misconduct in public office, and they do so with the intention of causing a sitting member to lose his or her seat, and they succeed, it may be possible for the (now-former) member to recover damages for the

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[448] ***Talacko*** at [43]

[449] [2021] HCA 40; 395 ALR 390 at [32] (Citations omitted.). See also ***Gray v Sirtex Medical Ltd*** (2011) 193 FLR 1 at [24], [26] citing ***Berry v British Transport Commission*** [1962] 1 QB 306 at 321; ***Talacko v Talacko*** at [60]

[450] [2021] HCA 15; 389 ALR 178 at [25]

[451] (1959) 103 CLR 30 at 122; [1959] ALR 1383. See also Fullagar J at CLR 78: "a combination to do unlawful acts necessarily involving injury".

[452] See also ***Thompson v Australian Capital Television Pty Ltd*** (1996) 186 CLR 574 at 580–1; 141 ALR 1 at 3-.

[453] ***Vickery v Taylor*** (1910) 11 SR (NSW) 119 at 130. See also ***McKellar v Container Terminal Management Services Ltd*** [1999] FCA 1101; (1999) 165 ALR 409 at [137].

[454] ***Dresna Pty Ltd v Misu Nominees Pty Ltd*** (2004) ATPR 42-013; [2004] FCAFC 169 at [9]– [11]; ***Fatimi Pty Ltd v Bryant (***2004) 59 NSWLR 678; [2004] NSWCA 140 at [13]. See also ***Lonrho Plc v Fayed*** [1992] 1 AC 448 at 467; [1991] 3 All ER 303 at 311 and ***Lonrho Ltd v Shell Petroleum Co Ltd*** [1981] Com LR 74 at 75.

[455] ***Quinn v Leathem*** [1901] AC 495

tort of conspiracy. If their primary motive for agreeing on that unlawful course of conduct is that their own favoured candidate should win the seat, but a necessary requirement for that to happen is that the sitting member lose his or her seat, that is sufficient for the tort of unlawful means conspiracy to be established[456].

5.3. Possible statutory civil liability of person authorising a decision to make a payment that is pork barrelling

If a Minister or public servant makes a payment or parts with public assets in a way that turns out to be invalid, there could sometimes be a prima facie obligation on that person to repay the invalid payment or make good the loss resulting from the loss of the public assets. An example of a politician being required to pay a very large sum for having carried out a scheme, later found to be invalid, to gain a party-political advantage is found in ***Porter v Magill***, discussed at page 29 above. The NSW legislation that would enable a similar personal liability to arise is the ***Government Sector Finance Act 2018,*** which relevantly provides:

5.6 Gifts of government property

(1) A person handling government resources cannot make a gift of government property unless—
- (a) the property was acquired or produced to use as a gift, or
- (b) the gift has been authorised by the Treasurer in writing, or
- (c) the gift is made in accordance with the Treasurer's directions, or
- (d) the gift was authorised by or under any law.

(2) In this section—

gift includes any disposition of property of a kind prescribed by the regulations for no or inadequate consideration but does not include any disposition of property of a kind excluded by the regulations.

9.15 Debt for unauthorised gifts of government property

A person handling government resources incurs a debt to the Crown if—
- (a) the person contravenes section 5.6 (Gifts of government property), and
- (b) the person's contravention was the result of—
  - (i) dishonesty by the person, or
  - (ii) misconduct by the person, or
  - (iii) a deliberate or serious disregard by the person of reasonable standards of care.

An examination of the ***Government Sector Finance Regulation 2018*** suggests that no regulation has been made for the purpose of s 5.6 (2).

Before there was a "gift" within the meaning of this legislation there would have to be a payment concerning which there was no consideration, but that could happen concerning government grants that amounted to pork barrelling.

The debt would only arise if the person's conduct fitted one of the criteria in section 9.15 (b). The causes of contravention identified in s 9.15 (b) (i) and (iii) would be construed in accordance with their ordinary English meanings. In s 9.15(b) (iii) what counted as "reasonable standards of care" concerning payments of government money for no consideration could take into account the standard of care appropriate to a person who owed

[456] ***Fatimi Pty Ltd v Bryant*** (2004) 59 NSWLR 678; [2004] NSWCA 140 at [13] – [23]

quasi-fiduciary obligations concerning their use of power. Thus they could include whether there had been any check that making the payment was legally authorised, whether the payment was made in accordance with criteria that were based on the advancing of a public purpose (and therefore not exhibiting one of the more obvious signs of possible invalidity) , and whether the obtaining of political advantage had entered into the decision to make the payment and if so how.

"Misconduct" in s 9.15 (b) (ii) is defined to some extent, but not completely, by section 1.4 ***Government Sector Finance Act*** as "in relation to a government officer to whom the ***Government Sector Employment Act 2013*** applies, includes (but is not limited to) misconduct for the purposes of that Act.".

Under the ***Government Sector Employment Act 2013*** a partial definition of "misconduct" is given by section 69:

> **"misconduct"** extends to the following—
>
> (a) a contravention of this Act or an instrument made under this Act,
>
> (b) taking any detrimental action (within the meaning of the *Public Interest Disclosures Act 1994*) against a person that is substantially in reprisal for the person making a public interest disclosure within the meaning of that Act,
>
> (c) taking any action against another employee of a government sector agency that is substantially in reprisal for a disclosure made by that employee of the alleged misconduct of the employee taking that action,
>
> (d) a conviction or finding of guilt for a serious offence.
>
> The subject matter of any misconduct by an employee may relate to an incident or conduct that happened while the employee was not on duty or before his or her employment.

Para (b) of that partial definition is explained at page 118 ff below.

Section 69 also defines "serious offence"

> **"serious offence"** means an offence punishable by imprisonment for life or for 12 months or more (including an offence committed outside New South Wales that would be an offence so punishable if committed in New South Wales).

In the definition of "serious offence" it is the maximum possible sentence that is the defining characteristic. For a crime that is an offence under the common law rather than statute no particular penalty is imposed by the law, so the offence is one that could, in some circumstances be punishable by imprisonment for life or 12 months or more. This has particular relevance to any conduct involving pork barrelling, as the offence of misconduct in public office is a common law misdemeanour for which there is no prescribed maximum penalty[457]. Conspiracy is a serious offence, as it is a common law offence with no statutorily

[457] See page 49 above

prescribed maximum penalty[458]. The crime of electoral bribery[459] is also a serious offence, as it has a prescribed maximum penalty that includes the possibility of 3 years imprisonment.

There will be some people, such as Ministers, who were responsible for the making of a void payment, that counted as pork barrelling, but who were not government officers to whom the ***Government Sector Employment Act 2013*** applies, and thus concerning whom the definition in the ***Government Sector Employment Act*** will not apply. Concerning those people, because the definition of "misconduct" is only an inclusive one, conduct will be "misconduct" for the purposes of s 9.15 (b) (ii) if it is misconduct in accordance with the ordinary English meaning of the word. Whether any particular actions of a Minister or other person handling government resources who makes a gift of government property is "misconduct" in the ordinary English meaning would depend on the facts of the particular case. I can say, though, that if the circumstances of payment of the money amounted to the offence of misconduct in public office, that would be highly likely to also be "misconduct" within the meaning of s 9.15 (b) (ii) ***Government Sector Finance Act***. Because the definition of "misconduct" is only an inclusive one, the ordinary English meaning of "misconduct" would also apply concerning people who were government officers to whom the ***Government Sector Employment Act*** applied.

Another way in which a debt could arise concerning an invalid parting with government money or property concerning pork barrelling is under clause 9.16 ***Government Sector Finance Act:***

> **9.16 Debt for loss of resources because of misconduct by persons handling government resources**
> A person handling government resources incurs a debt to the Crown if—
> (a) a loss of government resources or related money has occurred (including by way of deficiency, destruction or damage), and
> (b) the person caused or contributed to the loss by—
> (i) misconduct, or
> (ii) a deliberate or serious disregard of reasonable standards of care.
>
> **9.17 Amount of debt**
> (1) The amount of debt that a person handling government resources is liable to pay in respect of debt incurred under this Division is so much of the loss of government resources or related money concerned as the court considers just and equitable having regard to—
> (a) the person's share of the responsibility for the loss, and
> (b) the amount or value of the loss.
> (2) The ***amount or value of the loss*** is—
> (a) for the loss of government money or related money—the amount of the loss, or
> (b) for the loss of government property—the value of the property or the costs of repairing it (whichever is less).
> (3) To avoid doubt, a gift of government property to which section 9.15 applies is to be treated as a loss of government property for the purposes of this section.

These provisions could apply even if the government received consideration for a payment or passing of property, but the consideration was inadequate, so that there was a net loss of government resources.

[458] See text at footnote 375 above
[459] Discussed at page 61 above

Even if a debt arises under these provisions, whether it is actually collected depends on the exercise of discretionary powers by government officials, in accordance with section 9.18 ***Government Sector Finance Act***:

> **9.18 Recovery and writing off of debt**
> (1) A debt incurred by a person handling government resources under this Division is recoverable by the Treasurer in a court of competent jurisdiction, but only if the proceedings are commenced with the concurrence of the Attorney General.
> (2) However, the Treasurer cannot recover amounts from the same person for debts incurred under more than one section of this Division for the same loss.
> (3) The debt remains recoverable even if the person who incurs it ceases to be a person handling government resources.
> (4) The Treasurer may waive (whether wholly or partly) a debt incurred by a person handling government resources under this Division.
> (5) A waived debt ceases to be recoverable, but only to the extent to which it is waived.
> (6) The Treasurer may delegate a function of the Treasurer under this section only to—
> (a) another Minister, or
> (b) the Secretary of a Department, or
> (c) any other accountable authority for a GSF agency.
> (7) The Attorney General may delegate the function of giving concurrence under subsection (1) only to—
> (a) the Solicitor General, or
> (b) the Secretary of the Department of Justice.
> (8) This Division does not limit any rights of recovery available to the Crown or a GSF agency apart from this Division. However, the Crown or GSF agency cannot recover from the same person handling government resources both under this Division and apart from this Division for the same loss.

5.4. Potential liability for breach of process contract

Depending on the facts concerning the way in which applications are invited for a grant or other government benefit, it is possible for there to be a contract between the entity calling for the applications, and each person who submits an application, about the process that will be followed in assessing the applications. Concerning governmental entities calling for tenders for the supply of goods or services there have been examples of the courts recognising such a "process contract" and awarding damages if the agreed process has not been followed[460]. The policy justification for such contracts arises from the considerable cost and effort that can be involved in submitting a tender, and the injustice that could arise if a tenderer had incurred that cost and effort on the basis that the tender would be evaluated in a particular way, and that way was not followed[461].

In principle it is possible that such a process contract could arise if a governmental entity called for applications for grants, to be assessed on a particular basis, and then some different basis, such as partisan favouritism, was used in the actual award of the grants. Whether any process contract concerning the distribution of governmental grants arises, and whether any such contract includes any implied terms, like that the assessment will be conducted honestly,

[460] e.g. ***Hughes Aircraft Systems International Inc v Airservices Australia*** (1997) 76 FCR 151. ***Wagdy Hanna and Associates Pty Ltd v National Library of Australia*** [2012] ACTSC 126 (which collects many of the relevant earlier authorities)

[461] In ***Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council*** [1990] 1 WLR 1195 at 1201 Bingham LJ said that if it was not recognised that in submitting the tender there was an intention to enter legal relations there would be "an unacceptable discrepancy between the law of contract and the confident expectations of commercial parties"

fairly or in good faith, will depend on the facts of the particular case[462]. It is possible for the terms on which tenders or applications are invited to stipulate that no legal obligations arise unless and until any particular tender is accepted[463].

Damages can be given for breach of a process contract, if the process that is followed is not fair, or not what the rules said they would be. The rules of the beauty contest in ***Chaplin v Hicks***[464] are the archetype of a process contract in which damages for the loss of a chance in a contest are awarded where the rules are not followed.

In circumstances where there is a breach of a process contract in the denial of a benefit to a plaintiff in circumstances of pork barrelling, the damages recoverable would be of the second type identified in ***Talacko***[465], because the plaintiff had an existing right to have its application assessed in accordance with the agreed process, and the value of that right has been diminished by the pork barrelling.

[462] In ***Cubic Transportation Systems Inc v New South*** Wales [2002] NSWSC 656 a process contract was recognised, containing an implied term of fairness and good faith. In ***State Transport Authority (NSW) v Australian Jockey Club*** [2003] NSWSC 726; 1 BPR 21,107 such a contract was argued for but not established.
[463] ***State Transport Authority (NSW) v Australian Jockey Club*** [2003] NSWSC 726; 1 BPR 21,107 at [19] – [29]
[464] [1911] 2 KB 786
[465] See text at page 82 above

Part 6 - Role of the Integrity Bodies concerning Pork Barrelling

Spigelman CJ has proposed the recognition of a functionally distinct and institutionally separate fourth branch of government, the integrity branch, whose distinctive function is to maintain the integrity of government by ensuring that powers are exercised for the purposes and in the manner intended[466]. In so far as the courts conduct judicial review, they are part of the integrity branch. In addition, there are several other bodies established under the law in New South Wales that fall within the integrity branch as so described, and have a potential to investigate and take some sort of action concerning some sorts of pork barrelling. There are differences between the types of conduct that these various bodies can investigate, their powers of investigation, and what they can do concerning the results of their investigation.

6.1. The Role of ICAC Concerning Pork Barrelling

As an administrative agency with investigative powers, ICAC has a role to play concerning pork barrelling that is quite different to that of the courts, and has legally conferred powers different to those of the courts. Most but not all of those powers arise under the ***Independent Commission Against Corruption Act 1988 (NSW)*** ("*ICAC Act*")

As its name suggests, the focus of ICACs activities is on corruption in the public affairs of the State. The principal objects of the ***ICAC Act*** are[467]:

> (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body—
>
> (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and
>
> (ii) to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and on the community, and
>
> (b) to confer on the Commission special powers to inquire into allegations of corruption.

The meaning of many of the terms appearing in that statement of objects is explained, sometimes incompletely, in the ***ICAC Act***. Thus[468],

> ***public authority*** includes the following—
>
> (a) a Public Service agency or any other government sector agency within the meaning of the *Government Sector Employment Act 2013*,
>
> (b) a statutory body representing the Crown,
>
> (c) (Repealed)
>
> (d) an auditable entity within the meaning of the *Government Sector Audit Act 1983*,
>
> (e) a local government authority,
>
> (f) the NSW Police Force,

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[466] Hon James J Spigelman AC, "The Integrity Branch of Government" (2004) 78 Australian Law Journal 724 at 737. The concept has been adopted in some academic writing , e g David Solomon AM, "The Integrity Branch – parliament's failure or opportunity" https://www.aspg.org.au/wp-content/uploads/2017/08/Conference-Paper-David-Solomon.pdf ; Chris Field, "The Fourth branch of government" The evolution of Integrity Agencies and Enhanced Government Accountability" http://www.austlii.edu.au/au/journals/AIAdminLawF/2013/4.pdf The terminology has also come to be used in legislation. The ***Public Interest Disclosures Act 2022 (NSW)*** uses the term "integrity agency", and defines it in section 19 in a way consistent with Spigelman CJ's account, apart from excluding the courts as acting as one possible integrity agency.

[467] S 2A ***ICAC Act***

[468] S 3 (1) ***ICAC Act***

(g) a body, or the holder of an office, declared by the regulations to be a body or office within this definition.

The grammatical structure of para (a) of this definition is that "within the meaning of the ***Government Sector Employment Act 2013***" governs each of "Public Service agency" and "other government sector agency".

In exercise of the power under para (g) of the definition, each of the following has been declared to be a public authority[469]:

(a) each affiliated health organisation and statutory health corporation,
(b) each reserve trust established under the *Crown Lands Act 1989* in relation to a reserve or part of a reserve that is dedicated or reserved for the purposes of a public cemetery or crematorium or a related purpose.

Under section 3 of the ***Government Sector Employment Act 2013*** various of the terms in the definition of "public authority" are defined, and terms used in the definitions section of the ***Government Sector Employment Act*** are themselves defined. However, those definitions are of limited significance, because the definition of "public authority" is only an inclusive one. Thus, the expression "public authority' in the ***ICAC Act*** covers any person or body who would be a public authority in the ordinary English meaning of the words, even if that person or body did not fall within any of paras (a) to (g) of the definition of "public authority".

The ***ICAC Act*** also states:

public official means an individual having public official functions or acting in a public official capacity, and includes any of the following—
(a) the Governor (whether or not acting with the advice of the Executive Council),
(b) a person appointed to an office by the Governor,
(c) a Minister of the Crown, a member of the Executive Council or a Parliamentary Secretary,
(d) a member of the Legislative Council or of the Legislative Assembly,
(e) a person employed by the President of the Legislative Council or the Speaker of the Legislative Assembly or both,
(e1) a person employed under the *Members of Parliament Staff Act 2013*,
(f) a judge, a magistrate or the holder of any other judicial office (whether exercising judicial, ministerial or other functions),
(g) a person employed in a Public Service agency or any other government sector agency within the meaning of the *Government Sector Employment Act 2013*,
(h) an individual who constitutes or is a member of a public authority,
(i) a person in the service of the Crown or of a public authority,
(j) an individual entitled to be reimbursed expenses, from a fund of which an account mentioned in paragraph (d) of the definition of ***public authority*** is kept, of attending meetings or carrying out the business of any body constituted by an Act,
(k) a member of the NSW Police Force,
(k1) an accreditation authority or a registered certifier within the meaning of the *Building and Development Certifiers Act 2018*,
(l) the holder of an office declared by the regulations to be an office within this definition,
(m) an employee of or any person otherwise engaged by or acting for or on behalf of, or in the place of, or as deputy or delegate of, a public authority or any person or body described in any of the foregoing paragraphs.

[469] ***Independent Commission Against Corruption Regulation 2017*** cl 19

The structure of the definition of "public official" is different to the structure of the definition of "public authority" – it is partly one that gives criteria that if satisfied are sufficient for being a "public official" (namely, being an individual having public official functions or acting in a public official capacity), but then extends whatever might fall within those criteria to anything that falls within paras (a) to m) of the definition. Thus, it is enough to be a "public official" that the candidate in question is an individual (not a body) and has public official functions or act in a public official capacity. However, even if those criteria are not met, any candidate who falls within any of paras (a) to (m) of the definition of "public official" is also a public official. While most of the candidates who fell within para (a) to (m) of the definition would in fact be individuals, they need not be[470].

The term "corruption" appears three times in the statement of the objects of the Act, but is not specifically defined in the ***ICAC Act***. Thus, its meaning is its ordinary English meaning. That can cover both conduct that is corrupt, and also a state of affairs in which corrupt conduct occurs with some frequency, or that is conducive to corrupt conduct occurring.

The meaning of "corrupt conduct" in the ***ICAC Act*** is a special one that appears from Part 3 of the Act, and in particular sections 7 to 9.

Section 7 provides:

> (1) For the purposes of this Act, corrupt conduct is any conduct which falls within the description of corrupt conduct in section 8, but which is not excluded by section 9.
> (2) Conduct comprising a conspiracy or attempt to commit or engage in conduct that would be corrupt conduct under section 8 shall itself be regarded as corrupt conduct under section 8.
> (3) Conduct comprising such a conspiracy or attempt is not excluded by section 9 if, had the conspiracy or attempt been brought to fruition in further conduct, the further conduct could constitute or involve an offence or grounds referred to in that section.

Section 8 identifies conduct that is corrupt, unless excluded under section 9. Section 8 (1) provides:

> (1) Corrupt conduct is—
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

In para (b), the expression "partial exercise" of official functions should be construed by contrast to the expression "impartial exercise" in para (a). Thus, it means an exercise of the function in a way that favours or is prejudiced in favour of some particular person or cause or group. Pork barrelling falls within para (b) of the definition, because its very nature, as

[470] In fact an accreditation authority within the meaning of the ***Building and Development Certifiers Act 2018*** is *required*, by section 56 of that Act, to be a body corporate, and it is far from clear whether it is possible for someone who is not a natural person to be a registered certifier under that Act.

conduct that seeks to allocate funds or resources to targeted electors for partisan political purposes, is conduct by a public official that constitutes or involves a partial exercise of his or her official functions. In ***Greiner*** Gleeson CJ said that "the references to partial and impartial conduct in s 8 must be read as relating to conduct where there is a duty to behave impartially"[471]. Thus, conduct by which a public official behaves partially, but there is no duty for him or her to act impartially, is not conduct that falls within section 8. It is difficult to think of an example of a situation where a public official is not under a duty to behave impartially.

In his dissenting judgment in ***Greiner*** Mahoney JA made some remarks which were not dependent on the reason why he dissented, and that in my view remain helpful in understanding the notion of "partial exercise" in para (b). First, he considered the purpose of including "partial exercise" of official functions in the definition of 'corrupt conduct"[472]:

> "Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that "partial" and similar terms in the Act are essentially directed."

He then turned to discuss what amounted to "partial conduct"[473]:

> "First, it is used in a context in which two or more persons or interests are in contest, in the sense of having competing claims. In the present case, those claims were for appointment to a position. Secondly, it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another. Thirdly, for the term to be applicable, the advantage must be given in circumstances where there was a duty or at least an expectation that no one would be advantaged in the particular way over the others but, in the relevant sense, all would be treated equally. Fourthly, what was done in preferring one over the other was done for that purpose, that is, the purpose of giving a preference or advantage to that one. And, finally, the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed or expected that preference could be given, but for a purpose which was, in the sense to which I have referred, extraneous to that power."

The first criterion that Mahoney JA gave is quite capable of applying to conduct that involves pork barrelling, because in such situations there are competing claims to be elected.

The requirement in para (a) that the conduct be conduct that "affects or could adversely affect" the impartial exercise of functions by the public official means that conduct that falls within (a) is not *itself* failure to act impartially in exercising an official function, but rather conduct that is a causal precondition, or potential causal precondition, of the failure to act impartially. Thus, to fall within para (a) an example of pork barrelling would need to be one of the actions leading up to the eventual distribution of public funds or assets with a view to benefitting a political party.

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[471] ***Greiner v ICAC*** (1992) 28 NSWLR 125 at 145. Mahoney JA at 162 made a similar remark.
[472] At 160
[473] At 161

In construing para (c) the sense of "public trust" discussed earlier in Part 2 of this article is the appropriate one. Construing the expression in that way is consistent with the requirement in section 12:

> In exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns.

Section 8 provides other ways in which conduct can be corrupt conduct. One of them is:

> (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters—
> …

Section 8 (2) then goes on to give a long list of types of conduct that might potentially fall within the chapeau of section 8 (2). Among the items of that list, and of potential relevance concerning pork barrelling, are:

> (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition)…
>
> (i) election bribery…
>
> (l) treating…
>
> (x) matters of the same or a similar nature to any listed above,
>
> (y) any conspiracy or attempt in relation to any of the above.

In para (a) "official misconduct" would include the conduct that falls within the crime of misconduct in public office, but would extend wider than that, to anything that fell within the ordinary English meaning of "official misconduct". In the list in parentheses in para (a) of types of conduct that could be "official misconduct" the phrase "breach of trust" is, in its context in the Act, best construed as including both breach of trust in the sense in which equity courts use that expression, and also "breach of public trust". The reasons for this are that, while there is a presumption that a technical legal term used in a statute should be given its technical meaning[474], that presumption is rebuttable. The sort of "breach of trust" that is recognised as a technical term in the private law administered in a court of equity requires there to be a particular item or fund of property (the trust property) legal title to which is held by a particular person (the trustee) subject to an equitable personal obligation to use that property for the benefit of certain identified or identifiable people (the beneficiaries) or for a charitable purpose. It is not impossible that a public official or public body can hold property on a trust, in this sense recognised in the courts of equity, and breach of such a trust could in some circumstances be the type of corrupt conduct that is a principal concern of ICAC to investigate and expose. However, it is also consistent with the purposes of ICAC that the phrase be construed as covering "breach of public trust". Construing it that way is appropriate for it being (as its inclusion in the list in parentheses in para (a) requires it to be) a form of official misconduct. Construing it that way is giving the phrase "breach of trust" a degree of generality comparable to the other items in the list in parentheses in para (a) (ie fraud in

[474] ***Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council*** [2010] NSWCA 64 at [167] - [174]

office, nonfeasance, misfeasance, malfeasance, oppression, extortion and imposition). Just as fraud in office, and each of the other types of official misconduct included in the parentheses in para (a), can take several forms, so "breach of trust" can take the form of a breach of a private trust, and a breach of a public trust – see Lord Selborne in ***Kinloch***, quoted at p 18 above. There is nothing in the text to suggest that either of the possible meanings of the expression is excluded.

Yet another way in which conduct can be corrupt is provided for by section 8:

> (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters—
>
> (a) collusive tendering,
>
> (b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,
>
> (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
>
> (d) defrauding the public revenue,
>
> (e) fraudulently obtaining or retaining employment or appointment as a public official.

The type of corrupt conduct identified in s 8 (2A) could possibly arise concerning pork barrelling in some factual scenarios. Pork barrelling could readily be described as "conduct … that impairs, or could impair, public confidence in public administration", but that is not enough to fall within sub section 2A. As well it must be conduct which could involve one or more of the types of conduct listed in (a) – (e). Paras (a), (b) and (e) are far removed from the usual situation of pork barrelling, and para (d) also does not fit well the type of conduct where there is pork barrelling, so I will not consider them further.

To fall within para (c) it is necessary that "private advantage" be obtained from the use or disposition of public funds or assets. However, it is not necessary that the "private advantage" be one gained by the recipient of the public funds or assets - private advantage gained by anyone as a result of the use or disposition of the public funds or assets is enough.

It seems to me that disposing of funds or assets for the benefit of a political party is a disposition of the funds or assets "for private advantage". In construing those words, the contrast seems to be one between private advantage and public benefit or good – and disposition of funds or assets for the benefit of a particular political party is not a disposition for the public benefit or good. In relation to those Australian political parties which are unincorporated associations[475], some further assistance can be gained from the prima facie rule of construction that a gift to a voluntary unincorporated association is treated as a gift to the individual members, unless there is something in the words of the gift or the context in which it is given to lead to a different conclusion[476]. An incorporated political party has a separate legal existence, and so is capable of deriving a "private advantage".

While para (c) and (d) are infringed if the fraud or dishonesty is that of the recipient of the funds or benefit, para (c) can also be infringed if the only dishonesty established is in the person who assists in obtaining the payment or application of the public funds for private

[475] As all of the three major Australian political parties are

[476] ***Bacon v Pianta*** (1966) 114 CLR 634; ***Leahy v Attorney-General for NSW*** [1959] AC 457

advantage, or the disposition of public assets for private advantage. "Dishonestly" is not defined, so it would have its ordinary English meaning, adapted as far as is necessary to the context in which it appears in subsection (2A). Thus, its meaning is an objective one, meaning transgression of the ordinary standards of honest behaviour[477]. While it will be a question of fact in each case, it is possible that there will be some situations where a person assists in promoting or carrying through a scheme for giving advantage to a political party through the expenditure of public funds or assets, and a jury would decide that giving that assistance is not the sort of conduct an honest person would engage in.

As the opening words of subsection (2A) make clear, the person who engages in the dishonest conduct could be a public official, but need not be a public official –for example, it could be a member of a politician's staff, or a party member who promotes or organises a scheme whereby public funds are spent for the advantage of the political party.

Section 9 provides:

> (1) Despite section 8, 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.
> (2) It does not matter that proceedings or action for such an offence can no longer be brought or continued, or that action for such dismissal, dispensing or other termination can no longer be taken.
> (3) For the purposes of this section—
> ***applicable code of conduct*** means, in relation to—
> (a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or
> (b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.
> ***criminal offence*** means a criminal offence under the law of the State or under any other law relevant to the conduct in question.
> ***disciplinary offence*** includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.
> (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
> (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.
> (6) A reference to a disciplinary offence in this section and sections 74A and 74B includes a reference to a substantial breach of an applicable requirement of a code of conduct required to be complied with under section 440 (5) of the *Local Government Act 1993*, but does not include a reference to any other breach of such a requirement.

[477] Cf ***Hasler v Singtel Optus*** [2014] NSWCA 266; 87 NSWLR 609 at [123] – [124] per Leeming JA

Section 9 (1) has the textual oddity that it contemplates ICAC making a finding that there *actually has been* corrupt conduct, but the precondition to making that finding is a finding of a *possibility* – that the conduct in question *could* constitute or involve one of the types of conduct in paras (a) – (d). At the time that ***Greiner v ICAC*** was decided, section 9(1) did not include para (d). In ***Greiner v ICAC*** Gleeson CJ explained how that section operated when para (a) of section 9 (1) was involved[478]:

> " … in determining whether conduct could constitute or involve a criminal offence, the Commissioner would be required to go through the following process of reasoning. First, he would be required to make his findings of fact. Then, he would be required to ask himself whether, if there were evidence of those facts before a properly instructed jury, such a jury could reasonably conclude that a criminal offence had been committed. (It is not necessary for present purposes to examine what happens in a case where the Commissioner's findings depend in a significant degree upon evidence that would be inadmissible at a criminal trial.)

So far as the whole of section 9 was concerned, the "could", on Gleeson CJ's reading of the Act, concerned whether there were "objective standards, established and recognised by law" by reference to which the possibility is to be judged[479].

Priestley JA's construction of the "could" was that first it contemplates that the facts that have been found by the Commissioner are able to be proved before the relevant tribunal (a criminal court for para (a), the body that decides disciplinary charges for para (b) and the Governor or other body with power to dismiss the public official in question for para (c)). It then enquires whether that tribunal then *would* take the action open to it (make a finding of guilty for para (a), find the disciplinary offence made out for para (b), and dismiss the public official concerned for para (c)). Further, that action would have to be one based on known legal standards. For most public officials there are such known legal standards, breach of which justifies dismissal. For a Minister, at the time ***Greiner v ICAC*** was decided, the only such legal standard that could be applicable is commission of a criminal offence.

Priestley JA's reasons for s 9 (1) having extremely limited application to Ministers were equally applicable so far as Members of Parliament were concerned. It was following the decision in ***Greiner v ICAC*** that section 9 (1) (d) was introduced into the ***ICAC Act***, to provide a "known legal standard" additional to the criminal law, by reference to which the "could" in s 9 (1) is to be measured, so far as Ministers and Members of Parliament are concerned.

6.1.1. Criminal offence

The route that s 9(1)(a) provides to conduct being corrupt because it is criminal is discussed in Part 4 above.

6.1.2. Code of Conduct Governing Ministers

Content is given to section 9 (1) (d), so far as Ministers and those Members of Parliament who are Parliamentary Secretaries are concerned, by the ***Independent Commission Against Corruption Regulation 2017***. Clause 5 prescribes the ***NSW Ministerial Code of Conduct*** set

[478] At 136. His Honour was stating what had been common ground in the proceedings, but without expressing any disapproval of it.
[479] At 124 per Gleeson CJ

out in the appendix to the Regulation as an applicable code for the purposes of section 9 of the Act.

Notwithstanding its name, the Code applies to more people than just current Ministers. Clause 11 of the Code says in the code

> ***Minister*** includes—
> (a) any Member of the Executive Council of New South Wales, and
> (b) if used in or in relation to this Code (other than Parts 1 and 5 of the Schedule to the Code)—a Parliamentary Secretary, and
> (c) if used in or in relation to Part 5 of the Schedule to the Code—a former Minister.

A Parliamentary Secretary (of whom there are at present 18 in the NSW Parliament[480]) is a Member of Parliament who is not a Minister, but who assists a particular Minister with the responsibilities of his or her portfolio.

The preamble to the Ministerial Code says:

> 1 It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest…
>
> 3 Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales.

As discussed earlier[481], these parts of the preamble state obligations to which a Minister is already subject, independently of the Code. However, it is only if, on the proper construction of the Code these provisions of the preamble can themselves impose obligations that a breach of them would fall within s 9(1)(d).

Clause 6 of the Code requires:

> A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.

Clause 11 of the Code defines "person" as including "a natural person, body corporate, unincorporated association, partnership or other entity." An unincorporated political party would thus fall within the scope of "any other person" in clause 6 of the Code[482]. An incorporated political party would also fall within the scope of "any other person" in Clause 6, by virtue of being a "body corporate … or other entity".

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[480] https://www.parliament.nsw.gov.au/members/Pages/parliamentary-secretaries.aspx

[481] At page 6 above

[482] A longer route to the same conclusion is that an unincorporated association is in law nothing but its individual members, and pursuant to section 8 (b) ***Interpretation Act 1997 (NSW)*** "a reference to a word or expression in the singular form includes the plural. AS well there is an interpretation rule in Clause 12 of the code that "the singular includes the plural". Thus the unincorporated party, as a collection of natural persons, would fall within the "natural person" element of the definition of "person".

Clause 6 could be breached, in ways potentially relevant to pork barrelling, by any of three types of behaviour by a Minister– acting dishonestly, acting other than only in what they consider to be the public interest, and acting improperly for the private benefit of a political party.

In deciding when it is "acting improperly" for the private benefit of a political party, the notion of "private benefit" would be understood by contrast with the public benefit that is achieved by acting in what the Minister considers to be the public interest. In deciding what was acting "improperly" it would be legitimate to take into account the portions of the preamble to the Code that are quoted above. Acting by spending money or disposing of public assets to advance the interests of a particular political party tends against maintaining public confidence in the integrity of government, it is not pursuing the interest of the people of New South Wales to the exclusion of any other interest, it tends against maintaining the public trust that has been placed in Ministers, and is not performing their duties to advance the common good of the people of New South Wales.

This construction of clause 6 is consistent with clause 9 of the Code, which provides:

> A Minister must not improperly use public property, services or facilities for the private benefit of themselves or any other person.

Other ways in which the Ministerial code could potentially be breached when a Minister was involved in pork barrelling could be through breach of clause 3, which requires a Minister not to knowingly breach the law. As well clause 5 requires a Minister not to knowingly issue any direction or make any request that would require a public service agency to act contrary to the law. Issuing directions to distribute money in a way that constituted illegal pork barrelling could breach this requirement. Clause 19 requires a Minister not to improperly use any information acquired in the course of their official positions for the private benefit of themselves or any other person. A political party could be "any other person" within the meaning of this requirement. Disclosure to a political party or candidate or party worker of confidential information acquired in the course of official duties, if done for the purpose of advancing the prospects of a party or candidate, could breach that requirement.

In these ways, a Minister who was involved in pork barrelling in a way that amounted to a substantial breach of the Code could be involved in corrupt conduct, within the meaning of the ***ICAC Act***.

6.1.3. Code of Conduct governing Members

Content is given to section 9 so far as Members of Parliament are concerned by Codes of Conduct adopted by each House. It is not a matter of choice whether a House will consider whether to adopt a code of conduct at all – provisions in s 72A – 72E ***ICAC Act*** set out a procedure for drafting codes of conduct, and seeking public input concerning them. Each House is required at the commencement of the first session of each parliament to form a committee one of whose functions is "to prepare for consideration by the [House in question] draft codes of conduct for members of [that House] and draft amendments to codes of conduct already adopted"[483]. The Legislative Assembly adopted such a Code of Conduct on

[483] Section 72B (1) ***ICAC Act*** concerning the Legislative Council, section 72 DA (1) ***ICAC Act*** concerning the Legislative Assembly.

5 March 2020[484]. The Legislative Council adopted such a Code on 24 March 2020[485]. Both codes are in identical terms. There are examples of a breach of the Code being found to be corrupt conduct, within the meaning of the ***ICAC Act***[486] However, the obligations the Codes impose on members, in their capacity as members, seem unlikely to have relevance to any instance of pork barrelling. I have already mentioned the way in which the Code of Conduct concerning Ministers can affect those Members who are Parliamentary Secretaries.

6.1.4. Section 9(4) and (5) as a separate route to finding corrupt conduct

If conduct fell within section 8 ***ICAC Act***, but not within section 9(1), it could still be "corrupt conduct" for the purposes of the ***ICAC Act*** if it satisfied the requirements of sections 9 (4) and (5). This has great potential relevance to pork barrelling. Many examples of pork barrelling would be ones that would cause a reasonable person to believe that it would bring into serious disrepute the integrity of the office held by the person who had engaged in the pork barrelling. After all, most examples of pork barrelling are ones where there would be a breach of the public trust that attaches to the office in question, and for a public officer to breach a public trust could easily be something that caused a reasonable person to believe that the office of the person who had engaged in it was brought into serious disrepute.

It would be rarer to find a situation where there was pork barrelling and the integrity of Parliament was brought into disrepute, but it is far from impossible. There are many provisions of the law, identified in Part 6 of this article, that empower an integrity agency to make a report to Parliament concerning illegal pork barrelling that it has uncovered. If such a report had been made to Parliament, and the Parliament did nothing, or if the Public Accounts Committee of the Legislative Assembly or the Public Accountability Committee of the Legislative Council [487]did nothing, or if any of those bodies made only a token or half-hearted effort to deal with the pork barrelling, that is a situation that could cause the integrity of Parliament to be brought into disrepute. It could be a situation where the public could reasonably suspect that no real enquiry was made for fear of what it would find, or to avoid publicity being given to actions that could embarrass or shame the government. The same can be said for any other means by which pork barrelling comes to the attention of Parliament, like a question asked in question time.

Subsection 5 requires that the Commission identify a breach of the law (apart from the ***ICAC Act*** itself) before making a finding of corrupt conduct on the basis of s 9 (4). However, a "breach of the law" can be a breach of any part of the law. It might be a breach of the criminal law, but that is unlikely to be the type of breach of the law that the draftsperson of s 9(4) was intending. That is because if there were to be a breach of the criminal law the Commission need not rely on s 9(4) at all – a shorter route to making a finding of corrupt conduct exists under s9 (1) (a). Alternatively, the type of breach of the law that triggered s 9 (5) might be a breach of the civil law, like the commission of a tort or a breach of some obligation that arises in equity's exclusive jurisdiction. Of particular importance concerning pork barrelling, it might also be a breach of the administrative law – so that any of the types

[484] Accessible at https://www.parliament.nsw.gov.au/members/Documents/Code%20of%20Conduct%20(adopted%205%20March%202020).pdf

[485] Accessible at https://www.parliament.nsw.gov.au/members/Documents/Members%27%20Code%20of%20Conduct.pdf

[486] E.g. ***D'Amore v Independent Commission Against Corruption*** [2013] NSWCA 187; 303 ALR 242

[487] Discussed at page 113 - 114 below

of breaches identified in Part 3 of this paper could suffice. This widens considerably, beyond those arising under s 9(1), the circumstances in which there might be a finding of corrupt conduct.

6.1.5. Other functions of ICAC concerning pork barrelling

Even though the definition of "corrupt conduct" is central to the powers of ICAC, ICAC has a significant role in combatting and preventing corruption, in the wider sense. Section 13(1) ***ICAC Act*** states that the principal function of ICAC are:

> (a) to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that—
> (i) corrupt conduct, or
> (ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or
> (iii) conduct connected with corrupt conduct,
> may have occurred, may be occurring or may be about to occur,
> (b) to investigate any matter referred to the Commission by both Houses of Parliament,
> (c) to communicate to appropriate authorities the results of its investigations,
> (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,
> (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated and the integrity and good repute of public administration promoted,
> (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration,
> (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct and to promoting the integrity and good repute of public administration,
> (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct and to promote the integrity and good repute of public administration,
> (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity and good repute of public administration,
> (j) to enlist and foster public support in combating corrupt conduct and in promoting the integrity and good repute of public administration,
> (k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

Many of the provisions of the ***ICAC Act*** give the detail of how those various functions are to be carried out. The powers that ICAC is given to receive complaints from any person[488], investigate, report, make recommendations, collect evidence, co-operate with other authorities and educate are all legal authorities or powers. The obligation of various public authorities to notify ICAC about possible corrupt conduct that it has encountered[489] is a legal obligation. The Act creates numerous offences connected, broadly, with disobeying or failing to co-operate with the exercise by ICAC of its legal powers[490]. Thus, it is part of the

[488] S 10 ***ICAC Act***
[489] S 11 ***ICAC Act***
[490] Including s 50(6), and sections 80 – 96, 15 and 116

legal implications of pork barrelling, when that pork barrelling falls within the definition of "corrupt conduct" in the ***ICAC Act***, that it is liable to be investigated, reported on, the subject of co-operation between public authorities and the subject of public education, in accordance with the provisions of the ***ICAC Act***. It is not necessary, for the purposes of this article, to spell out the detail of how those functions of ICAC are carried out.

6.2. The Role of the Auditor-General concerning Pork Barrelling

The WA Inc Royal Commission final report said:

> " The Auditor General is no mere scrutineer of the financial affairs of the departments and agencies of government, notwithstanding the importance of this responsibility. The Auditor General's role must now be accepted as multi-purposed. The *Financial Administration and Audit Act 1985* itself acknowledges as much. In auditing the accounts of an agency, the Auditor General is expected to address not merely the financial integrity of the agency's activities but also such matters as the agency's compliance with the law and the legislation and directions under which it acts and the controls it has to secure that compliance; the probity of official conduct in its financial affairs; the appropriateness of performance indicators; and, of no little importance, given our inquiries, the adequacy of the records on which its management is based and carried into effect. As well, the Auditor General has an expanding and more far-reaching responsibility, one which relates directly to protecting the public purse.
>
> It is not the role of the Auditor General to question government policy. But it is the role of that office to examine the efficiency and effectiveness with which policy and, for that matter, legislative and other programmes, are put into effect. It equally is that office's role to examine the efficiency and effectiveness of governmental agencies themselves. Put colloquially, the Auditor General has the proper and developing function of conducting "value for money" audits of government programmes and agencies. These responsibilities are of great importance. Their discharge must be facilitated in every way. They constitute a vital check on waste, mismanagement and the subversion of government's policies and programmes.
>
> The above description is not intended to be a comprehensive statement of the Auditor General's function. It serves merely to illustrate why the Commission attributes to it the importance it does and why it considers the office itself to be one that must be safeguarded and enhanced. Although in the end only a reporting agency to Parliament, it can properly be described as the public's first check and best window on the conduct of government."[491]

The same comments could be made about the role of the Auditor-General in NSW. The duties and powers of the Auditor-General arise under a complex web of interdependent statutory provisions[492] that cannot be summarised in a way that is complete and accurate. Thus, the following section of this article relating to the Auditor-General, should be taken to be one that gives a general idea of the functions and powers of the Auditor-General that can have a relation to pork barrelling, but cannot capture every nuance of the relevant law.

[491] WA Inc Final Report para 3.10.3 – 3.10.5

[492] The principal parts of this jigsaw are the NSW statutes the ***Government Sector Audit Act 1983,*** the ***Government Sector Finance Act 2018***, the ***Government Sector Employment Act 2013***, the ***State Owned Corporations Act 1989,*** with some role also being played by the ***Constitution Act 1902***, the ***Treasury Corporation Act 1983***, the ***Workers Compensation Act 1987*** the ***Public Interest Disclosures Act 1994*** and each annual ***Appropriation Act***, together with the ***Corporations Act 2001 (Cth***)

A "GSF agency" can be taken, for the purposes of this summary, to be any entity that is part of or connected with the NSW government, outside the Parliament itself and any Minister[493]. The acronym "GSF" means "government sector finance", and the definition seems to be intended to capture almost any governmental entity that holds or handles money or other assets.

An "auditable entity" can be taken, for the purposes of this summary, also to be any entity that is part of or connected with the NSW government, outside the Parliament itself and any Minister[494].

The "accountable authority" of an auditable entity can be taken, for the purposes of this summary, to be the person in charge of the activities of that entity[495].

The ***Government Sector Audit Act 1983 (NSW)*** provides for there to be an Auditor-General. Under s 27B of that Act:

> (5) The Auditor-General may, in the exercise of his or her functions, have regard to whether there has been—
> (a) any wastage of public resources, or
> (b) any lack of probity or financial prudence in the management or application of public resources.
>
> (6) Nothing in this Act entitles the Auditor-General to question the merits of policy objectives of the Government, including—
> (a) any policy objective of the Government contained in a record of a policy decision of Cabinet, and
> (b) a policy direction of a Minister, and
> (c) a policy statement in any Budget Paper or other document evidencing a policy direction of the Cabinet or a Minister.

Under s 34 the Auditor-General carries out what might be called conventional auditing functions concerning the accounts of the State itself and its various agencies, and reports on the results of those audits:

> (1) This section applies to any of the following statements and reports given to the Auditor-General under the *Government Sector Finance Act 2018* for auditing or audit-related services—
> (a) any annual GSF financial statements for a reporting GSF agency under section 7.6 of that Act,
> (b) any final annual GSF financial statements for a former reporting GSF agency under section 7.7 of that Act,
> (c) an SDA account financial report for an account in the Special Deposits Account under section 7.8 of that Act,
> (d) a special purpose financial report for a GSF agency under section 7.9 of that Act,
> (e) Consolidated State Financial Statements under section 7.17 of that Act.
>
> (2) The Auditor-General (or, if authorised by the Auditor-General, the Deputy Auditor-General or an auditor) must prepare within the relevant auditing period after the statements or reports are given to the Auditor-General—
> (a) for statements or reports provided for auditing—an audit report, or

[493] The definition in s 4 (1) ***Government Sector Audit Act 1983*** refers one on to the ***Government Sector Finance Act 2018***, where it is defined in section 2.4
[494] There is a longer and mor precise definition in s 4 (1) ***Government Sector Audit Act 1983***
[495] There is a longer and more precise definition in s 4 (1) ***Government Sector Audit Act 1983***

(b) for statements or reports provided for audit-related services—a report on the results from performing those services.

(3) The ***relevant auditing period*** is—
(a) in the case of Consolidated State Financial Statements—as soon as practicable after the Auditor-General is given the statements, or
(b) in any other case—the period specified by the *Government Sector Finance Act 2018* or the Treasurer's directions for the statement or report concerned.

(4) An audit report must state—
(a) for annual GSF financial statements or final annual GSF financial statements—whether in the Auditor-General's opinion they comply with section 7.6 (3) of the *Government Sector Finance Act 2018*, or
(b) for Consolidated State Financial Statements—whether in the Auditor-General's opinion they comply with section 7.17 (3) of the *Government Sector Finance Act 2018*.

(5) An audit report may include such information as is required or permitted by the Australian Auditing Standards.

(6) The Auditor-General (or, if authorised by the Auditor-General, the Deputy Auditor-General or an auditor) must report to the accountable authority for the GSF agency concerned, the responsible Minister for the agency and the Treasurer as to the result of any audit or audit-related service for the purposes of this section and as to any irregularities or other matters that, in the judgment of the Auditor-General or authorised person, call for special notice.

If there were to be expenditure that was not authorised by legislation, as would be the case concerning pork barrelling in relation to which any of the administrative law requirements for valid expenditure had not been complied with, that might well constitute an irregularity or other matter that in the judgment of the Auditor-General, should be included in a report as something calling for special notice.

Under s 36 an authorised person is "entitled at reasonable times to full and fee access of or relating to any entity, fund or account or government resources or related money" for the purpose of any audit or other function that the Auditor-General is authorised or required to perform, or for exercising any other function conferred on the Auditor-General under any Act. The authorised person can also require" the relevant person" in relation to an entity to provide the Auditor-General with such information as is in the relevant person's possession, and that the Auditor-General requires for any of those purposes. The "relevant person" is, in effect, the person who has the practical ability to provide the information[496]. The Auditor-General can require a person to appear and produce books records or other documents. The power to obtain access to documents and information is a particularly wide one, because s 36(6) says:

(6) An authorised person is entitled to exercise functions under this section despite—
(a) any rule of law which, in proceedings in a court of law, might justify an objection to access to books, records, documents or information on grounds of public interest, or
(b) any privilege of an entity that the entity might claim in a court of law, other than a claim based on legal professional privilege, or
(c) any duty of secrecy or other restriction on disclosure applying to an auditable entity or an officer or employee of an auditable entity (including a government officer).

[496] Section 36(9) says: "In this section, ***relevant person***, in relation to an entity, fund or account or government resources or related money, means an officer, employee or other person exercising functions in relation to that entity, fund, account, resources or money."

The Auditor-General also has power to require the provider of a banking service to an auditable entity to produce records about the banking activities of the entity[497]. This would assist the Auditor-General in following when, how, to whom and from whom money has flowed concerning governmental expenditure, which can sometimes be a useful tool in investigating the propriety of expenditure.

As well as audits of the accounts of an auditable entity, the Auditor-General has the power, when the Auditor-General considers it appropriate to do so, to conduct a "performance audit" of any auditable entity. That audit is one "of all or any particular activities of an auditable entity to determine whether the auditable entity is carrying out those activities effectively and doing so economically and efficiently and in compliance with all relevant laws."[498]

That power of the Auditor-General is particularly relevant to pork barrelling, because the power to enquire whether activity was "in compliance with all relevant laws" would enable the Auditor-General to decide whether any of the administrative law requirements for valid action had been breached. It would also give the Auditor-General the legal power to investigate whether the activities were being carried out economically and effectively, and so to evaluate pork barrelling against those standards, even if that pork barrelling was being carried out in a way that did not breach any law. All the powers of the Auditor-General under sections 36 and 37 ***Government Sector Audit Act 1983*** would be available concerning any such performance audit. These powers are extraordinarily broad.

Once a performance audit is complete the Auditor-General is required to report on it. The report is to "the accountable authority for the auditable entity, the responsible Minister and the Treasurer."[499]. The report cannot be made until the Auditor-General has given the accountable authority for the auditable entity, the responsible Minister and the Treasurer, at least 28 days before, a summary of the findings and. proposed recommendations in relation to the audit[500]. The Auditor-General is required to include in any report the submissions or comments that the auditable entity makes, or an agreed summary of them[501]. In the report the Auditor-General:

(a) may include such information as he or she thinks desirable in relation to the activities that are the subject of the audit, and
(b) is to set out the reasons for opinions expressed in the report, and
(c) may include such recommendations arising out of the audit as the Auditor-General thinks fit to make[502].

[497] Section 37 ***Government Sector Audit Act 1983***
[498] Section 38B (1) ***Government Sector Audit Act 1983***
[499] Section 38C(1) ***Government Sector Audit Act 1983***
[500] Section 38C (2) ***Government Sector Audit Act 1983***. This requirement is, fairly clearly, one aimed at according natural justice to the accountable authority of the auditable entity. The reason for requiring the Minister and the Treasurer to be provided with the summary are not so obvious, and though it is possible to speculate on several possible reasons for including this requirement I will not do so. The 28 day period is automatically shortened to whenever the accountable entity has given the Auditor-General any submissions or comments he or she wishes to make, if that happens in less than 28 days. .
[501] S 38C (3) ***Government Sector Audit Act 1983***
[502] S 38C (4) ***Government Sector Audit Act 1983***

That report is to be provided to each House of Parliament if that House is then sitting[503]. If the House is not sitting, the report is to be presented to the Clerk of the House, whereupon it is taken to have been laid before the House (and so would have become subject to Parliamentary privilege concerning defamation), it is to be printed and is then taken to be a document published by order or under the authority of that House[504]. It is also required to be included in the official record of proceedings of the appropriate House on the first day on which that House sits after the report is received by the Clerk[505].

The effect of these provisions is that the Auditor-General's findings and recommendations about any pork barrelling can be reported on to the Parliament and are required to given the publicity and legal protections that arise from being presented to a House of Parliament.

The conduct that is the subject of the report can then become the subject of public discussion. If there is anything that has been revealed by the investigation that the integrity agency has made that is discreditable to any member of the government or other public official, or that shows some deficiency in the way governmental power is exercised, it can be the subject of public comment, and perhaps of further comment, investigation or action within the Parliament. These effects also arise concerning reports to Parliament made by other integrity agencies, like the Electoral Commission, the Auditor-General, and the Ombudsman. Having a statutory mechanism for the making of such reports, by an office-holder who is independent of the government and the Parliament, following an investigation that has compulsive powers, is an important part of the structure through which a measure of open government is achieved in the State.

Other functions of the Auditor-General with a potential relevance to pork barrelling arise under Division 7:

52C Definitions

In this Division—
public official means a public official within the meaning of the *Public Interest Disclosures Act 1994*.

52D Complaints about waste of government money

(1) A public official may complain to the Auditor-General that there has been a serious and substantial waste of government money by an auditable entity or an officer or employee of an auditable entity (including a government officer).

(2) A complaint to the Auditor-General may be made orally or in writing.

(3) The Auditor-General may deal with the complaint—
(a) by conducting an inspection, examination or audit under this Act into the matter, or
(b) in such other manner as the Auditor-General considers appropriate.

(4) To avoid doubt, for the purposes of this section waste of government money in relation to an auditable entity that is not a GSF agency includes waste of money of that entity even if it is not government money.

[503] S 38E (1) ***Government Sector Audit Act 1983***
[504] S 38E(2), 63 ***Government Sector Audit Act 1983***
[505] S 63 ***Government Sector Audit Act 1983***

52E Reports by Auditor-General

(1) The Auditor-General may, if of the opinion that it is appropriate to do so, make a report on a complaint—
(a) to the accountable authority for the auditable entity, except as provided by paragraphs (b) and (c), or
(b) if the complaint relates to the conduct of the accountable authority for the auditable entity—to the responsible Minister, or
(c) if the complaint relates to the conduct of a Minister—to the Premier.
The Auditor-General is to give the responsible Minister and the Treasurer a copy of a report made to the accountable authority for the auditable entity.

(2) The Auditor-General must not make a report under this section unless, at least 28 days before making the report, the Auditor-General has given the person to whom the report is to be made a summary of the proposed report. The Auditor-General may make any such report before the expiration of that 28-day period if that person has provided to the Auditor-General any submissions or comments he or she wishes to make.

(3) The Auditor-General is to include in a report under this section any submissions or comments made by the person or a summary, in an agreed form, of any such submissions or comments.

(4) The Auditor-General, in a report under this section—
(a) may include such information as he or she thinks desirable in relation to the activity the subject of the complaint, and
(b) is to set out the reasons for opinions expressed in the report, and
(c) may include such recommendations arising out of the complaint as the Auditor-General thinks fit to make.

(5) The Auditor-General may include a report under this section in any other report of the Auditor-General.

52F Presentation of reports to Parliament

(1) The Auditor-General may, if of the opinion that a report on a complaint under this Division should be brought to the attention of Parliament, present the report to each House of Parliament, if that House is then sitting. The Auditor-General may include the report in any other report of the Auditor-General to the House of Parliament concerned.

(2) If a House of Parliament is not sitting when the Auditor-General seeks to present a report to it under this section, the Auditor-General is to present the report to the Clerk of the House concerned to be dealt with in accordance with section 63C.

It is only a "public official" who is entitled to make a complaint to the Auditor-General about waste. However, a public official, within the meaning of the ***Public Interest Disclosures Act 1994***, and thus for the purposes of Division 7 ***Government Sector Audit Act*** 1983, includes any individual who is employed by or is an independent contractor to a public authority, every employee of a corporation that is engaged by a public authority to provide services to the public authority, and various other people who act in a public official capacity or perform public services[506]. It is a much wider term than "public official" as used concerning the crime of misbehaviour in public office.

[506] A more precise definition is given in section 4A of that Act.

These provisions entitle the public official to report the waste arising from pork barrelling to the Auditor-General.

If a public official were to know or believe there was a serious and substantial waste of public money that was occurring through pork barrelling, or to know or believe that he or she had information that might assist in the prosecution or apprehension of a person who had committed a serious indictable offence concerning pork barrelling that involved a serious and substantial waste of public money, that public official could be guilty of a criminal offence under s 316 ***Crimes Act*** if he or she did not report that matter to the Auditor-General[507].

6.3. The Role of the Electoral Commission concerning Pork Barrelling

The Electoral Commission has a role to play concerning those examples of pork barrelling that infringe the ***Electoral Act 2017.*** It has a general power to institute prosecutions for offences against the ***Electoral Act 2017***[508]. The present relevance of that power is that it would apply if there were to be the type of pork barrelling which breached s 209 ***Electoral Act***.[509]

In connection with any such offence, the Commission can exercise any investigative or other functions that arise under the ***Electoral Funding Act 2018***[510]. Those powers include appointing a person as an inspector[511]. An inspector has power to do the following[512]:

(a) enter at any reasonable time any place at which the inspector has reasonable grounds to believe that relevant documents are kept, and
(b) request, by notice in writing, the owner or occupier of the place to produce for inspection any relevant documents at the place, and
(c) request, by notice in writing, any person employed or engaged at the place to produce for inspection any relevant documents that are in the custody or under the control of that person, and
(d) examine any person at a place entered with respect to matters under this Act, and
(e) examine and inspect any relevant documents at the place, and
(f) copy, or take extracts from, any relevant documents at the place, and
(g) make such examinations and inquiries as the inspector considers necessary.

In that section[513]:

relevant document means a document (whether in writing, in electronic form or otherwise) held by or on behalf of, or a financial document that relates to, any of the following—
(a) a party, elected member, group, candidate, third-party campaigner, associated entity, party agent or official agent,
(b) a former party, elected member, group, candidate, third-party campaigner, associated entity, party agent or official agent.

The powers of an inspector are bolstered by some criminal sanctions[514]:

[507] See the discussion of s 316 ***Crimes Act*** at page 73 above
[508] ***Electoral Act 2017*** s 10 (2) (b)
[509] See page 63 above
[510] S 258 ***Electoral Act 2017***
[511] S 139 ***Electoral Funding Act 2018***
[512] S 137(1) ***Electoral Funding Act 2018***
[513] S 137 (4) ***Electoral Funding Act 2018***
[514] S 137 (3) ***Electoral Funding Act 2018***

A person must not—
(a) refuse or intentionally delay the admission to any place of an inspector in the exercise of the inspector's functions under this section, or
(b) intentionally obstruct an inspector in the exercise of the inspector's functions under this section, or
(c) fail to comply with a request of an inspector made under this section.
Maximum penalty—200 penalty units.

6.4. The Role of the Ombudsman concerning Pork barrelling

The ***Ombudsman Act 1974 (NSW)*** provides one avenue through which some allegations of maladministration can be investigated and reported upon. Section 12 ***Ombudsman Act*** confers upon any person (including a public authority) the opportunity to "complain to the Ombudsman about the conduct of a public authority", provided it is not a complaint concerning a type of conduct that is excluded. Being a type of conduct that could possibly be the subject of a complaint under section 12 is a necessary condition for the Ombudsman having power to deal with the complaint.

The words "any person" in section 12 should be read in their ordinary English sense, as well as in the extended legal sense under which a corporation is a person. Thus, any natural person, any corporation, and any public authority, has the capacity to make a complaint to the Ombudsman. In other words, unlike the situation concerning seeking relief from the courts, there is no restrictive requirement of standing to make a complaint. It is left to the Ombudsman to weed out complaints that are trivial or in any other way not worth the trouble of investigating, in exercise of his or her power to decide what, if anything, to do concerning any complaint.

All the other significant terms in this precondition under section 12 to the Ombudsman's exercise of power are defined in Section 5 ***Ombudsman Act***. It defines "conduct" as meaning:

(a) any action or inaction relating to a matter of administration, and
(b) any alleged action or inaction relating to a matter of administration.

It defines "administration" as including:

> administration of an estate or a trust whether involving the exercise of executive functions of government or the exercise of other functions.

Because this definition is only an inclusive one, the word "administration" in the ***Ombudsman Act*** would extend also to cover matters which count as "administration" in the ordinary sense of the term, and thus would include the types of exercise of governmental or public power which form the subject matter of administrative law.

The definition of "public authority" Is

"(a) any person appointed to an office by the Governor,
(b) any statutory body representing the Crown,
(c) any Public Service agency or any person employed in a Public Service agency,
(d) any person in the service of the Crown or of any statutory body representing the Crown,
(d1) any person employed by a political office holder under Part 2 of the *Members of Parliament Staff Act 2013*,

(e) an auditable entity within the meaning of the *Government Sector Audit Act 1983*,
(f) any person entitled to be reimbursed his or her expenses, from a fund of which an account mentioned in paragraph (e) is kept, of attending meetings or carrying out the business of any body constituted by an Act,
(f1) any accreditation authority or registered certifier within the meaning of the *Building and Development Certifiers Act 2018*,
(f2) any body declared by the regulations to be a public authority for the purposes of this Act,
(g) any holder of an office declared by the regulations to be an office of a public authority for the purposes of this Act,
(g1) any local government authority or any member or employee of a local government authority, and
(h) any person acting for or on behalf of, or in the place of, or as deputy or delegate of, any person described in any of the foregoing paragraphs."

Full exposition of the scope of "public authority" within the meaning of the ***Ombudsman Act*** would be quite lengthy. It is sufficient for present purposes to say that the definition is an extremely broad one. For most practical purposes it can be taken that any person or entity that is part of the State government counts as a "public authority".

It is not every type of conduct of a public authority that can be the subject of a complaint under section 12. The section contains some exclusions from the types of conduct that can be complained about.[515] One such limitation relates to conduct of a class described in Schedule 1 of the Act. Schedule 1 needs to be read in its entirety to understand the scope of this exclusion, and the list of types of conduct that it excludes are quite varied and resist easy summarization. It includes conduct of the Governor (whether acting with or without the advice of the Executive Council) and conduct of Parliament or a member or officer of a House of Parliament when acting as such. There are also certain other exclusions, not likely to be relevant to any allegation of pork barrelling, such as conduct concerning the activities of the Children's Guardian, courts or sheriffs, conduct by legal advisors or legal representatives, and conduct of bodies chaired by a judge.

Section 12 also contains some exclusions concerning the time at which the conduct complained about occurred[516]. However, the times that are excluded are now likely to have passed long ago, so those exclusions based on the time the conduct occurred are not likely to be of ongoing practical relevance.

Allegations of pork barrelling in the past have related to conduct of public servants, or of Ministers acting outside parliament. Such conduct could potentially be the subject of a complaint under section 12.

However, just because a complaint is made to the Ombudsman under section 12 does not necessarily mean that anything will be done concerning that complaint. The Ombudsman has a broad discretion about what steps, if any, should be taken concerning it, including whether a complaint should be investigated at all. The Ombudsman might decide to deal with the complaint by conciliation, under section 13A – though it is hard to envisage a situation in which a complaint of pork barrelling could appropriately be dealt with by conciliation.

[515] When section 12 confers a general right to complain about the conduct of a public authority concerning a matter of administration, and then creates exceptions to that general right, the onus of proof of coming within an exception would lie on the person who claimed that the exception applied: ***Dowling v Bowie*** (1952) 86 CLR 137 at 139-140. However, each of the exceptions listed in section 12 is of a type concerning which it is unlikely there would be room for argument or uncertainty about whether not it applied.
[516] Section 12 (1) (b) – (d)

Alternatively or in addition, and whether or not a person has made a complaint to the Ombudsman, the Ombudsman has a power to make conduct of a public authority the subject of an investigation under the Act. That power arises if

> "it appears to the Ombudsman that any conduct of a public authority about which a complaint may be made under section 12 may be conduct referred to in section 26."[517]

Section 26(1) ***Ombudsman Act*** is a provision which operates where the Ombudsman has conducted an investigation, and has found:

> "that the conduct the subject of the investigation, or any part of the conduct, is of any one or more of the following kinds—
> (a) contrary to law,
> (b) unreasonable, unjust, oppressive or improperly discriminatory,
> (c) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory,
> (d) based wholly or partly on improper motives, irrelevant grounds or irrelevant consideration,
> (e) based wholly or partly on a mistake of law or fact,
> (f) conduct for which reasons should be given but are not given,
> (g) otherwise wrong,"

Section 26(1) requires that if the Ombudsman finds that the conduct the subject of the investigation is of any of the kinds identified in section 26(1) the Ombudsman is "to make a report accordingly, giving his or her reasons". Conduct which amounts to pork barrelling could readily fall within one of the paragraphs in section 26(1), in the sort of circumstances considered earlier concerning the application of administrative law standards to pork barrelling. Pork barrelling that involved criminal conduct, or conduct that gives rise to a civil cause of action could fall within para (a).

I will return later to the nature of the report under s 26 (1) and what happens concerning it. The point, at this stage of the explanation, is that both when the Ombudsman receives a complaint under section 12, and when conduct of a public authority is of a type that could be the subject of a complaint under section 12 comes to the attention of the Ombudsman other than through someone complaining about it, the Ombudsman must make a preliminary decision about whether it is *possible* that the conduct complained about *might* be of a type identified in s 26. Only if there is that possibility that the conduct might be of a type identified in section 26 can the Ombudsman begin an investigation. The Ombudsman has power, under section 13AA, to conduct preliminary inquiries for the purpose of deciding whether to make conduct the subject of an investigation under the Act.

Even if an investigation has been commenced, the Ombudsman has power at any time to discontinue it[518]. In deciding whether to commence an investigation at all, or to discontinue an investigation, the Ombudsman can have regard to such matters as he or she thinks fit[519].

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[517] S 13(1) ***Ombudsman Act***

[518] Section 13 (3)

[519] Section 13 (4) (a). Section 13 (4) goes on to list a wide variety of types of matter to which the Ombudsman can have regard, but which do not limit the breadth of "such matters as he or she thinks fit" in section 13 (4) (a). There is a specific limitation under s 13 (5) on the Ombudsman's power to investigate conduct of a local government authority concerning which a right of appeal or review exists under any Act, unless the Ombudsman is of the view that special circumstances make it unreasonable to have exercised that right of

The legal threshold that "conduct may be conduct referred to in section 26" – and thus the legal threshold for the Ombudsman having the power to commence an investigation – is a low one. If the possibility that the conduct might infringe section 26 is a low one, that could be a ground for the Ombudsman to decide, in the exercise of his or her discretion, not to conduct an investigation. The point, for present purposes, is that it is a matter for the Ombudsman to decide.

This is not the place to give a complete account of the powers of the Ombudsman in an investigation. However, some indication should be given of the nature of such an investigation. If an investigation is commenced, it is held in the absence of the public[520]. The Ombudsman has power to require a public authority to give to him or her a statement of information, or produce any document or thing, or provide a copy of any document[521], except that the Ombudsman's powers of investigation do not extend to matters concerning the Cabinet[522]. In the course of an investigation the Ombudsman can hold an inquiry in which the Ombudsman can exercise the powers of a Commissioner under Div 1 of Part 2 of the ***Royal Commissions Act 1923***[523].

If the Ombudsman finds that conduct is of a type identified in s 26, he or she is required to make a report, giving reasons[524]. The report can (but is not obliged to) make recommendations, of various types identified in s 26 (2), concerning the conduct. Those types are:

(a) that the conduct be considered or reconsidered by the public authority whose conduct it is, or by any person in a position to supervise or direct the public authority in relation to the conduct, or to review, rectify, mitigate or change the conduct or its consequences,
(b) that action be taken to rectify, mitigate or change the conduct or its consequences,
(c) that reasons be given for the conduct,
(d) that any law or practice relating to the conduct be changed,
(d1) that compensation be paid to any person, or
(e) that any other step be taken.

The report must be given to the responsible Minister, to the head of the public authority whose conduct is the subject of the report and, where the public authority is a Public Service employee, to the Department of Premier and Cabinet[525].

If a report recommends that compensation be paid, the relevant Minister, or the relevant local government authority, has power to make the payment[526], but there is no obligation to give effect to the recommendation.

If the Ombudsman is not satisfied that sufficient steps have been taken in consequence of a report under s 26, he or she may make a report to the presiding Officer of each House of

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appeal or review. This limitation could conceivably inhibit the Ombudsman's power to investigate conduct by a local government authority of a type like that exhibited in ***Porter v Magill***.

[520] S 17 ***Ombudsman Act***.

[521] S 18 ***Ombudsman Act***

[522] The precise scope of this limitation concerning the Cabinet is stated in s 22 ***Ombudsman Act***.

[523] S 19 ***Ombudsman Act***. Broadly, those powers include summonsing a witness to attend, administering an oath or affirmation, requiring production of documents, and giving directions restricting the publication of evidence or information

[524] S 26 (1) ***Ombudsman Act***

[525] S 26 (3) ***Ombudsman Act***

[526] S 26A ***Ombudsman Act***

Parliament, and must provide the responsible Minister with a copy of the report. The responsible Minister is obliged to make a statement to the House of Parliament in which the responsible Minister sits not more than 12 sitting days after the report is made to the Presiding Officer[527]. The Ombudsman can also make a special report to the Presiding Officer of each House of Parliament on any matter that arises concerning the discharge of the Ombudsman's functions[528]. The Ombudsman can include in either of these types of report a recommendation that the report be made public forthwith[529]. The Ombudsman is also to make an annual report to Parliament[530]. Each report that the Ombudsman provides to the Presiding Officer of ta House of Parliament must be laid before that House on the next sitting day after which it is received by the Presiding Officer[531]. There is also provision for a report to be made public, in certain circumstances, if parliament is not sitting when the report is received[532].

The practical effect of a report to Parliament is that the conduct that the Ombudsman has found to infringe one or more of the heads in s 26 becomes known to the public, together with the Ombudsman's view that the conduct infringes, and the Ombudsman's recommendation about what, if anything, should be done concerning the conduct. In this way, any finding that the Ombudsman has made about conduct that amounts to pork barrelling can become known to the public, to the authorities who have responsibility for taking criminal proceedings, and to people who might have a civil cause of action arising from the pork barrelling. As well, the report to Parliament is subject to parliamentary privilege so far as defamation is concerned.

6.5. The Role of the Parliament concerning Pork Barrelling

6.5.1. Role of the Individual Houses of Parliament

It is a fundamental principle of our system of government that the executive government of the day is responsible to Parliament. "Each House performs the parliamentary function of review of executive conduct, in accordance with the principles of responsible government"[533]. Institutionalised practices such as the existence of a formal opposition, the practice of a daily question time, and the practice of having parliamentary committees that, at least sometimes, inquire into how the executive has acted all provide some legal scope for the investigation and exposure of pork barrelling.

A Minister is "liable to the scrutiny of [the House of which that Minister is a member] in respect of the conduct of the executive government"[534]. As well,

> "the long practice since 1856 with respect to the production to the [Legislative] Council of State papers, together with the provision in Standing Order 29 for the putting to Ministers of questions relating to public affairs and the convention and parliamentary practice with respect to the representation in the Legislative Council by a Minister in respect of portfolios held by members in

[527] S 27 ***Ombudsman Act***
[528] S 31 (1) ***Ombudsman Act***
[529] S 31(2) ***Ombudsman Act***
[530] S30 ***Ombudsman Act***
[531] S 31AA(1) ***Ombudsman Act***
[532] S 31AA(2) ***Ombudsman Act***
[533] Per Spigelman CJ, ***Egan v Chadwick*** [1999] NSWCA 176, 46 NSWLR 563 at {2} (ii)
[534] ***Egan v Willis*** (1998) 195 CLR 424 at [45]

> the Legislative Assembly, are significant. What is "reasonably necessary" at any time for the "proper exercise" of the "functions" of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.[535]"

These powers of a House of Parliament to question a Minister about conduct that is alleged pork barrelling, and the power to require the production of documents relating to it[536], are part of the means the law provides to investigate and deal with pork barrelling. How those powers are exercised, if at all, and what if anything is done by a House of Parliament concerning any alleged pork barrelling, is a matter for that House.

6.5.2 The Public Accounts Committee of the Legislative Assembly

Several particular aspects of the role of Parliament in this respect are worth mentioning. One is that there is a legislative requirement for the Legislative Assembly to appoint, as soon as practicable after the start of the first session of each parliament, a Public Accounts Committee[537]. It is to consist of six Members who are neither Ministers nor Parliamentary Secretaries[538]. The functions of the Committee include, broadly, receiving and examining various accounts of state entities, receiving and examining any reports that the Auditor-General makes, and making reports to the Legislative Assembly on any matters that arise from those accounts or reports[539]. It has a power to inquire into and report to the Legislative Assembly on any question in connection with the reports it receives, provided that the question is one that is referred to it by either the Assembly, a Minister, or the Auditor-General[540].

It also has a power, exercisable without the need for any question to be referred to it, to inquire into any expenditure by a Minister that is made without parliamentary sanction or approval "or otherwise than in accordance with the provisions of this Act or any other Act"[541], and to report to the Assembly about any matter connected with that expenditure that it considers should be brought to the notice of the Assembly[542]. This power to inquire into expenditure that is not made in accordance with the provisions of any Act whatsoever is an extremely wide one, because if expenditure was made in circumstances where it breached any of the administrative law standards it could, as a matter of law, be expenditure that was not authorised by the Act that it purported to be made under. That is the sort of situation that could arise concerning pork barrelling.

There is a limitation on the power of the Committee to inquire into and report on "a matter of government policy" – that type of matter can be inquired into if and only if the matter has been specifically referred to the committee by the Assembly or a Minister[543]. A great deal of the governmental action and expenditure of money that occurred is likely to be as a result of

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[535] ***Egan v Willis*** (1998) 195 CLR 424 at [50]
[536] As to which see also ***Egan v Chadwick*** at [2] (iv) and [12] per Spigelman CJ
[537] S 54 (1) ***Government Sector Audit Act 1983***
[538] S 54(2), (4) ***Government Sector Audit Act 1983.***
[539] S 57 (1)(a) – (e) ***Government Sector Audit Act 1983***
[540] S 57 (1) (f) ***Government Sector Audit Act 1983***
[541] S 57 (1)(g) ***Government Sector Audit Act 1983***
[542] S 57 (1)(g) ***Government Sector Audit Act 1983***
[543] S 57 (2) ***Government Sector Audit Act 1983***

an ad hoc decision, rather than the product of any policy, so this restriction will not prevent many of the potential inquiries that could be made into pork barrelling.

There is also a potential for there to be a preliminary question that will need to be decided, concerning an allegation that there has been pork barrelling, whether the action that has been taken is really as a "matter of government policy"[544]. If the action in question is fundamentally an attempt to assist a political party, should it be characterised as an exercise of government policy at all, or rather as an exercise of political party self-protection or self-assistance?

The role of the committee concerning pork barrelling is potentially great, particularly when combined with the power of the Auditor-General to include in a report he or she makes to Parliament recommendations concerning pork barrelling. An Auditor-General's report that found that pork barrelling had occurred could be the trigger for further enquiry by the Public Accounts Committee. Whether its potential is realised will depend to a large extent on whether the committee is dominated by the government, as well as the energy and inclination to inquire of the committee members. The current committee was established by a resolution of the Assembly on 18 June 2019[545].

6.5.3. The Public Accountability Committee of the Legislative Council

The Legislative Council has established a Public Accountability Committee. It is a standing committee of the Council established by a resolution of the Legislative Council on 5 June 2019[546]. Its functions are expressed in the same words as are the functions of the Public Accounts committee under s 57(1) ***Government Sector Audit Act 1983***, apart from substituting "Council" for "Assembly". The resolution establishing it requires that it have 3 government members, 2 opposition members, and 2 crossbench members[547], with the Chair to be a non-government member[548]. The committee can inquire into not only any matter relevant to its functions that is referred to it by the House, but it can also (subject to some procedural requirements) self-refer any matter[549].

This committee, like its counterpart in the Legislative Assembly, has a potentially great role concerning the investigation and public exposure of particular examples of pork barrelling, and the making of recommendations for ways to stop or limit it. Its composition, and its powers of self-referral, go some way to ensuring it is not dominated by the government. It has used its potential to enquire into pork-barrelling in making reports into the administration of certain NSW government grant schemes, finding what it described as "clear examples of

[544] See also the discussion of "policy" at pages 37 and 67 above
[545] The text of the resolution can be found at https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=183#tab-resolutionestablishingthecommittee
[546] The text of the resolution can be found at https://www.parliament.nsw.gov.au/lcdocs/committees/255/Minutes%20-%201%20-%2057th%20Parliament%20-%205%20June%202019%2
[547] Resolution cl 10
[548] Resolution cl 11
[549] Resolution clauses 5 - 9

pork-barrelling" concerning two schemes in particular, and making recommendations for how to control or lessen the phenomenon[550].

6.5.4. Production of Papers under Standing Order 52 of the Legislative Council

Another important tool of the Parliament in examining the conduct of the executive government is the power of the Legislative Council to call for "papers". It arises under Standing Order 52 of the Legislative Council. It enables the House itself to obtain documents that relate to decisions and actions of the executive government, or of statutory bodies or State-owned corporations.[551]

6.5.5 Relationship of the courts to Parliament

The extent to which the courts can investigate or make findings about events in Parliament is severely limited. However, a court can make findings about whether a House of Parliament has a particular power, privilege, or immunity, though not about whether the occasion for the exercise of any power privilege or immunity has arisen or whether it has been exercised correctly[552].

6.6. Role of other Bodies concerning Pork Barrelling

For completeness' sake I should mention the possibility that office-holders or institutions other than the Ombudsman, the Auditor-General, ICAC and the Parliament might have a role or legal powers concerning some examples of pork barrelling. I will not try to give a full account of the role that such office-holders or institutions might play concerning any alleged pork barrelling, but simply alert the reader to the possibility of there being such a role.

6.6.1. Role of the Civil and Administrative Tribunal concerning pork barrelling

One such institution is the Civil and Administrative Tribunal. That Tribunal derives its jurisdiction under the ***Administrative Decisions Review Act 1997 (NSW)*** ("***ADR Act***"). It has jurisdiction only concerning a decision of an administrator:

> "if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this act of any such decision (or class of decisions) made by the administrator:
>
> > (a) in the exercise of functions conferred or imposed by or under the legislation, or
> > (b) in the exercise of any other functions of the administrator identified by the legislation"[553]

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[550] Legislative Council Public Accountability Committee, "Integrity Efficiency and value for money of NSW government grant programs – Final report" February 2022, accessible at https://www.parliament.nsw.gov.au/lcdocs/inquiries/2606/Report%20No%2010%20-%20Public%20Accountability%20Committee%20-%20NSW%20Government%20grant%20programs%20-%20Final%20report.pdf

[551] The operation of Standing Order 52 in recent decades is discussed in detail in Stephen Frappell and David Blunt (eds), ***New South Wales Legislative Council Practice*** (2nd ed 2021, Federation Press Sydney) at p 663 - 719

[552] ***R v Richards; ex parte Fitzpatrick and Browne*** (1955) 92 CLR 157 at 162; ***Egan v Willis*** (1998) 195 CLR 424 at [27]

[553] Section 9 ***ADR Act***

Further, an application for administrative review of such a decision can only be made by an "interested person"[554]. An "interested person" is defined in section 4 ***ADR Act*** as "a person who is entitled under enabling legislation to make an application to the Tribunal for an administrative review under this act of an administratively viewable decision."

Thus, whether the Tribunal has jurisdiction concerning any particular example of pork barrelling, and if so who can invoke that jurisdiction, will depend completely on the terms of the legislation, if any, under which the decision that is alleged to amount to pork barrelling was made. If the decision in question is one concerning which a particular person has a right to seek review, that person also has the right, within stringent time limits, to seek reasons for the decision[555]. It is not possible to be any more precise than this about the possibility of the ***ADR Act*** providing a legal avenue of relief concerning some particular example of alleged pork barrelling.

6.6.2. Other Integrity branch institutions

There are other institutions that form part of the integrity branch of government. They include the Governor in so far as she performs the functions that Bagehot identified as those of a monarch, namely, to be consulted, to encourage and to warn[556], the Law Enforcement Conduct Commission (LECC), the Privacy Commissioner, the Information Commissioner, and the respective Inspectors of ICAC and LECC. However, their functions are such that they seem unlikely to come across situations of pork barrelling.

[554] S 55 (1) ***ADR Act***
[555] S 49 ***ADR Act***
[556] Walter Bagehot, ***The English Constitution***, 4h ed Fontana London 1965 p 111

Part 7 - Legal Aids to Disclosure, Discovery or Proof of Pork Barrelling

There are several provisions of the law that facilitate the disclosure, discovery or proof of instances of pork barrelling. They come from widely scattered parts of the legal landscape. I have no confidence that this part of the article will have mentioned all the ones that exist.

7.1. Compulsory disclosure provisions

The provisions of s 316 ***Crimes Act***, discussed at page 73 above, can sometimes require that a person who knows about pork barrelling disclose that knowledge to an appropriate official. That official will then be able to take the action open to him or her, as discussed in Part 6 above.

7.2. Whistleblower legislation

An important aid to the detection and taking of action concerning pork barrelling is in legislation, colloquially referred to as whistleblower legislation. It removes some of the obstacles that there otherwise might be to a public official who knows about pork barrelling letting appropriate authorities know about it, or as a last resort letting a journalist or Member of Parliament know about it. While the legislation applies only to disclosures made by a public official, that is quite important so far as pork barrelling is concerned, as any expenditure of public funds or other assets for the benefit of a political party would almost inevitably need to be done with the co-operation or knowledge of one or more public officials, who might well be less than enthusiastic participants. The legislation might apply to pork barrelling in three quite separate ways - through the conduct being corrupt conduct, as defined in the Act, through it being maladministration, as defined in the Act, or through it being or causing serious and substantial waste.

The ***Public Interest Disclosures Act 1994 (NSW)*** (***"PIDA 1994")*** is the current legislation governing disclosures of various types of misbehaviour by a public official. The Parliament has also passed a ***Public interest Disclosures Act 2022.*** The 2022 Act states that ***PIDA 1994*** and the Regulation made under it are repealed[557], but the 2022 Act (and therefore the repeals it effects) commences only 18 months after the date of assent, or any earlier day that is appointed by proclamation[558]. The date of assent was 13 April 2022, and no proclamation of an earlier starting date has been made so far, so it is ***PIDA 1994*** that is the currently operative one.

PIDA 1994 states its objects in s 3(1):

> The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention in the public sector by—
> (a) enhancing and augmenting established procedures for making disclosures concerning such matters, and

[557] S 90 ***Public Interest Disclosures Act 2022***
[558] S 2 ***Public Interest Disclosures Act 2022***

(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and
(c) providing for those disclosures to be properly investigated and dealt with.

7.2.1. Who can make a disclosure to whom

In broad terms, ***PIDA 1994*** facilitates the making of a disclosure of wrongful conduct by a "public official" to a "public authority" or an "investigating authority". It contains in s 4 and 4A a set of definitions, the effect of which is that each of those terms has a very wide scope. A "public official" would be likely to cover anyone who had the capacity to be involved in pork barrelling (other than as the recipient of the benefit), though the terms cover many other people as well:

investigating authority means—
(a) the Auditor-General, or
(b) the Commission, or
(c) the Ombudsman, or
(c1) the Children's Guardian, or
(d) the LECC, or
(e) the LECC Inspector, or
(f) the local government investigating authority, or
(g) the ICAC Inspector, or
(h) the Information Commissioner, or
(i) the CC Inspector.

investigation Act means—
(a) the *Independent Commission Against Corruption Act 1988*, or
(b) the *Ombudsman Act 1974*, or
(c) the *Government Sector Audit Act 1983*, or
(d) the *Law Enforcement Conduct Commission Act 2016*, or
(e) the *Local Government Act 1993*, or
(f) the *Government Information (Information Commissioner) Act 2009*, or
(g) the *Crime Commission Act 2012*.

public authority means any public authority whose conduct or activities may be investigated by an investigating authority, and includes (without limitation) each of the following—
(a) a Public Service agency,
(b) a State owned corporation and any subsidiary of a State owned corporation,
(c) a local government authority,
(d) the NSW Police Force, PIC and PIC Inspector,
(e) the Department of Parliamentary Services, the Department of the Legislative Assembly and the Department of the Legislative Council.

In this Act, ***public official*** means—
(a) an individual who is an employee of or otherwise in the service of a public authority, and includes (without limitation) each of the following—
  (i) a Public Service employee,
  (ii) a member of Parliament, but not for the purposes of a disclosure made by the member,
  (iii) a person employed by either or both of the President of the Legislative Council or the Speaker of the Legislative Assembly,
  (iv) any other individual having public official functions or acting in a public official capacity whose conduct and activities may be investigated by an investigating authority,
  (v) an individual in the service of the Crown, or
(a1) a person employed under the *Members of Parliament Staff Act 2013*, or

(b) an individual who is engaged by a public authority under a contract to provide services to or on behalf of the public authority, or
(c) if a corporation is engaged by a public authority under a contract to provide services to or on behalf of the public authority, an employee or officer of the corporation who provides or is to provide the contracted services or any part of those services.

7.2.2. Whether types of conduct that could be the subject of a protected disclosure could involve pork barrelling

Section 4 contains definitions of all except one of the types of conduct concerning which disclosures could be made under the Act:

> ***corrupt conduct*** has the meaning given to it by the *Independent Commission Against Corruption Act 1988*.

Pork barrelling could involve corrupt conduct, in the way discussed in connection with the role of ICAC

> ***government information contravention*** means conduct of a kind that constitutes a failure to exercise functions in accordance with any provision of the *Government Information (Public Access) Act 2009*.

It is hard to see how this type of conduct – essentially, frustrating the right of a person to have access to government information in accordance with the ***Government Information (Public Access) Act 2009*** – could have any role concerning pork barrelling.

> ***maladministration*** is defined in section 11 (2).

Section 11(2) gives content to that definition:

> For the purposes of this Act, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is—
> (a) contrary to law, or
> (b) unreasonable, unjust, oppressive or improperly discriminatory, or
> (c) based wholly or partly on improper motives.

Pork barrelling could involve maladministration, as defined, in the way discussed in connection with the role of the Ombudsman.

Another type of conduct that can be the subject of a public interest disclosure is a local government pecuniary interest contravention. Section 4 defines it as

> ***local government pecuniary interest contravention*** means the breach of an obligation imposed by the *Local Government Act 1993* in connection with a pecuniary interest.

Those obligations, essentially of disclosure of pecuniary interests of a local government decision-maker or of members of his family or connected companies or business entities, seem unlikely to have any relation to pork barrelling.

There is no definition of the other type of conduct concerning which there can be a protected interest disclosure, namely serious and substantial waste. That term therefore has its ordinary

English meaning. However, when it is waste of a type that the Auditor-General has a role to report on, it has a potential relevance to pork barrelling.

7.2.3. Public interest disclosures relating to pork barrelling

A central concept in the Act is that of a "public interest disclosure". It is defined in s 4:

> ***public interest disclosure*** means a disclosure satisfying the applicable requirements of Part 2.

Part 2 of the Act runs from s 7 to s 19. Its provisions allow a person who has knowledge of conduct concerning pork barrelling to report it to the appropriate authority for investigating the particular type of conduct that has occurred, or as a last resort to a member of Parliament or a journalist. There is no express obligation in ***PIDA 1994*** for any of the entities to which a disclosure is made to investigate it or do anything else concerning it – but the functions and powers of each of those entities, discussed in Part 6 of this article, would come into play once a disclosure had been made to such an entity.

Those provisions within it that seem to be ones that are more likely to have any potential relevance to pork barrelling are:

> **7 Effect of Part**
> A disclosure is protected by this Act if it satisfies the applicable requirements of this Part.
>
> **8 Disclosures must be made by public officials**
> (1) To be protected by this Act, a disclosure must be made by a public official—
> (a) to an investigating authority, or
> (b) to the principal officer of a public authority or investigating authority or officer who constitutes a public authority, or
> (c) to—
> (i) another officer of the public authority or investigating authority to which the public official belongs, or
> (ii) an officer of the public authority or investigating authority to which the disclosure relates,
> in accordance with any procedure established by the authority concerned for the reporting of allegations of corrupt conduct, maladministration, serious and substantial waste of public money or government information contravention by that authority or any of its officers, or
> (c1) to the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council about the conduct of a member of Parliament, or
> (d) to a member of Parliament or to a journalist.
> (2) A disclosure is protected by this Act even if it is made about conduct or activities engaged in, or about matters arising, before the commencement of this section.
> (3) A disclosure made while a person was a public official is protected by this Act even if the person who made it is no longer a public official.
> (4) A disclosure made about the conduct of a person while the person was a public official is protected by this Act even if the person is no longer a public official.
>
> **9A Presumptions about beliefs on which disclosures are based**
> (1) For the purposes of determining whether a disclosure by a public official is protected by this Act, an assertion by the public official as to what the public official believes in connection with the disclosure is, in the absence of evidence to the contrary, evidence of the belief asserted and that the belief is an honest belief.
> (2) Such an assertion need not be express and can be inferred from the nature or content of the disclosure.

10 Disclosure to Commission concerning corrupt conduct

To be protected by this Act, a disclosure by a public official to the Commission[559] must—

(a) be made in accordance with the *Independent Commission Against Corruption Act 1988*, and

(b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct.

11 Disclosure to Ombudsman concerning maladministration

(1) To be protected by this Act, a disclosure by a public official to the Ombudsman must—

(a) be made in accordance with the *Ombudsman Act 1974*, and

(b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that, in the exercise of a function relating to a matter of administration conferred or imposed on a public authority or another public official, the public authority or public official has engaged, is engaged or proposes to engage in conduct of a kind that amounts to maladministration.

(2) For the purposes of this Act, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is—

(a) contrary to law, or

(b) unreasonable, unjust, oppressive or improperly discriminatory, or

(c) based wholly or partly on improper motives.

12 Disclosure to Auditor-General concerning serious and substantial waste

(1) To be protected by this Act, a disclosure by a public official to the Auditor-General must—

(a) be made in accordance with the *Government Sector Audit Act 1983*, and

(b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show that an auditable entity or officer or employee of an auditable entity (including a government officer) has seriously and substantially wasted government money.

(2) To avoid doubt, for the purposes of this section waste of government money in relation to an auditable entity that is not a GSF agency includes waste of money of that entity even if it is not government money.

(3) In this section—

auditable entity has the same meaning as in the *Government Sector Audit Act 1983*.

government money, ***government officer*** and ***GSF agency*** have the same meanings as in the *Government Sector Finance Act 2018*.

14 Disclosures to public officials

(1) To be protected by this Act, a disclosure by a public official to the principal officer of, or officer who constitutes, a public authority must be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration, serious and substantial waste of public money or government information contravention by the authority or any of its officers or by another public authority or any of its officers.

(2) To be protected by this Act, a disclosure by a public official to—

(a) another officer of the public authority to which the public official belongs, or

(b) an officer of the public authority to which the disclosure relates,

in accordance with any procedure established by the authority concerned for the reporting of allegations of corrupt conduct, maladministration, serious and substantial waste of public money or government information contravention by that authority or any of its officers must be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show such corrupt conduct, maladministration, serious and substantial waste of public money or government information contravention (whether by that authority or any of its officers or by another public authority or any of its officers).

[559] "Commission" is defined in section 4 as meaning ICAC

(2A) To be protected by this Act, a disclosure by a public official to the principal officer of the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council about the conduct of a member of Parliament must—
(a) be made in accordance with any official procedure established for the reporting of allegations of corrupt conduct, maladministration or serious and substantial waste of public money by a member of Parliament, and
(b) be a disclosure of information that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show corrupt conduct, maladministration or serious and substantial waste of public money by a member of Parliament.
(3) In this section—
public authority includes an investigating authority.

15 Protection of misdirected disclosures
(1) A misdirected disclosure by a public official to an investigating authority that the public official honestly believed (at the time the disclosure was made) was the appropriate investigating authority to deal with the matter is a public interest disclosure if—
(a) the investigating authority (whether because it is not authorised to investigate the matter under the relevant investigation Act or otherwise) refers the disclosure under Part 4 to another investigating authority or to a public official or public authority, or
(b) the investigating authority could have referred the disclosure under Part 4 but did not do so because it has power to investigate the matter concerned under the relevant investigation Act.
(2) A ***misdirected disclosure*** is a disclosure that is not a public interest disclosure because it was not made to the appropriate investigating authority or public authority (but that would have been a public interest disclosure had it been made to the appropriate investigating authority or public authority).

The "last resort" possibility of making a protected disclosure to a journalist or a Member of Parliament arises only if other ways of making the protected disclosure have been attempted but proved fruitless:

19 Disclosure to a member of Parliament or journalist
(1) A disclosure by a public official to a member of Parliament, or to a journalist, is protected by this Act if the following subsections apply.
(2) The public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of this Part.
(3) The investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred—
(a) must have decided not to investigate the matter, or
(b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or
(c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or
(d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.
(4) The public official must have reasonable grounds for believing that the disclosure is substantially true.
(5) The disclosure must be substantially true.

7.2.4. Administrative arrangements to facilitate the making of public interest disclosures

PIDA 1994 requires that there be procedures available within the public administration entities of the State by which public interest disclosures can be made can be made.

6D Public interest disclosures policies and guidelines

(1) Each public authority must have a policy that provides for its procedures for receiving, assessing and dealing with public interest disclosures.

(1A) Such a policy must provide that a copy of the policy and an acknowledgment, in writing, of the receipt of the disclosure is to be provided to a person who makes a public interest disclosure, within 45 days after the person makes the disclosure.

(2) The Ombudsman may adopt guidelines for the procedures of public authorities for receiving, assessing and dealing with public interest disclosures. The guidelines may include a model policy that provides for those procedures.

(3) A public authority must have regard to (but is not bound by) the Ombudsman's guidelines in formulating a policy for the purposes of this section.

(4) Subsection (1A) does not apply in relation to a public interest disclosure—

(a) made by a public official in performing his or her day to day functions as that public official, or

(b) otherwise made by a public official, under a statutory or other legal obligation.

6E Responsibility of head of public authority

(1) The head of a public authority is responsible for ensuring that—

(a) the public authority has the policy required by section 6D, and

(b) the staff of the public authority are aware of the contents of the policy and the protections under this Act for a person who makes a public interest disclosure, and

(c) the public authority complies with the policy and the authority's obligations under this Act, and

(d) the policy designates at least one officer of the public authority (who may be the principal officer) as being responsible for receiving public interest disclosures on behalf of the authority.

The operation of the public interest disclosure procedures within the public authorities is kept under the review of the Ombudsman, who has responsibilities for publicising and educating the public about the procedures and protections that the Act offers, and informing the Parliament periodically about the operation of the Act:

6B Oversight of Act by Ombudsman

(1) The Ombudsman has the following functions in connection with the operation of this Act—

(a) to promote public awareness and understanding of this Act and to promote the object of this Act,

(b) to provide information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to this Act,

(c) to issue guidelines and other publications for the assistance of public authorities and investigating authorities in connection with their functions under this Act,

(d) to issue guidelines and other publications for the assistance of public officials in connection with the protections afforded to them under this Act,

(e) to monitor and provide reports (***monitoring reports***) to Parliament on the exercise of functions under this Act and compliance with this Act by public authorities (other than investigating authorities in respect of their functions as investigating authorities),

(f) to audit and provide reports (***audit reports***) to Parliament on the exercise of functions under this Act and compliance with this Act by public authorities (other than investigating authorities in respect of their functions as investigating authorities),

(g) to provide reports and recommendations to the Minister about proposals for legislative and administrative changes to further the object of this Act.

(2) A monitoring report is to be provided once every 12 months. An audit report is to be provided whenever the Ombudsman considers it desirable to do so and at least once every 12 months.

(3) The Ombudsman must, as soon as practicable after 30 June in each year, prepare and provide a report to Parliament on the Ombudsman's activities under this section for the preceding 12 months.

(4) A report to Parliament under this section can be provided by being included in the Ombudsman's annual report under section 30 of the *Ombudsman Act 1974* or can be provided as a separate report and provided to the Presiding Officer of each House of Parliament.
(5) Section 31AA of the *Ombudsman Act 1974* applies to a report to Parliament under this section as if the report were a report made or furnished under Part 4 of that Act.

Each public authority has an obligation to make periodical reports to the Ombudsman about how its public interest disclosure procedures are operating:

6CA Reports to Ombudsman by public authorities
(1) Each public authority must provide a report under this section to the Ombudsman for each 6 month period.
(2) The report is to provide statistical information on the public authority's compliance with its obligations under this Act during the 6 month period to which the report relates.
(3) The report is to be provided to the Ombudsman within 30 days after the end of the 6 month period to which the report relates, or by such later time as the Ombudsman may approve.
(4) The regulations may make provision for or with respect to—
(a) the statistical information that is to be provided in a report under this section, and
(b) the form in which such a report is to be provided.
(4A) The regulations may exempt any specified public authority (or any specified class of public authorities) from the requirements of this section.
(5) In this section, ***6 month period*** means the period of 6 months ending on 30 June and 31 December in any year.

The ***Public Interest Disclosure Regulation 2011*** has been made, setting out the required contents of a report from the public authority to the Ombudsman. It does not contain any exemption of the kind envisaged by s 6CA(4A) of the Act:

(2) A report to which this clause applies is to include the following information concerning the period to which the report relates:
(a) the number of public officials who have made a public interest disclosure to the public authority,
(b) the number of public interest disclosures received by the public authority in total and the number of public interest disclosures received by the public authority relating to each of the following:
(i) corrupt conduct,
(ii) maladministration,
(iii) serious and substantial waste of public money or local government money (as appropriate),
(iv) government information contraventions,
(v) local government pecuniary interest contraventions,
(c) the number of public interest disclosures finalised by the public authority,
(d) whether the public authority has a public interest disclosures policy in place,
(e) what actions the head of the public authority has taken to ensure that his or her staff awareness responsibilities under section 6E (1) (b) of the Act have been met.
(2A) A report must provide the information required by subclause (2) (a) and (b) in relation to each of the following, separately:
(a) public interest disclosures made by public officials in performing their day to day functions as such public officials,
(b) public interest disclosures not within paragraph (a) that are made under a statutory or other legal obligation,
(c) all other public interest disclosures.

7.2.5. Legal Protections Given to a Protected Disclosure

PIDA 1994 does more than provide procedures through which a public official who has knowledge of pork barrelling can report it to an appropriate authority. As well it confers some significant protections for a person who makes a public interest disclosure, by making it a criminal offence to take reprisals against a person for having made a protected disclosure:

20 Protection against reprisals

(1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence.
Maximum penalty—100 penalty units or imprisonment for 2 years, or both.

(1A) In any proceedings for an offence against this section, it lies on the defendant to prove that detrimental action shown to be taken against a person was not substantially in reprisal for the person making a public interest disclosure.

(1B) A public official who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of engaging in conduct that constitutes misconduct in the performance of his or her duties as a public official and that justifies the taking of disciplinary action against the public official, including disciplinary action provided for—
(a) by or under an Act that regulates the employment or service of the public official, or
(b) by or under a contract of employment or contract for services that governs the employment or engagement of the public official.

(1C) This section extends to a case where the person who takes the detrimental action does so because the person believes or suspects that the other person made or may have made a public interest disclosure even if the other person did not in fact make a public interest disclosure.

(2) In this Act, ***detrimental action*** means action causing, comprising or involving any of the following—
(a) injury, damage or loss,
(b) intimidation or harassment,
(c) discrimination, disadvantage or adverse treatment in relation to employment,
(d) dismissal from, or prejudice in, employment,
(e) disciplinary proceeding.

(3) Proceedings for an offence against this section may be instituted at any time within 3 years after the offence is alleged to have been committed.

(4) A public authority (other than an investigating authority and the NSW Police Force) must refer any evidence of an offence under this section to the Commissioner of Police or the Commission. Evidence of an offence that relates to the NSW Police Force must instead be referred to the LECC.

(5) An investigating authority (other than the Commission, the ICAC Inspector, the LECC and the LECC Inspector) must, after completing or discontinuing an investigation into an alleged offence under this section, refer any evidence of the offence to the Commissioner of Police. Evidence of an offence that relates to the NSW Police Force must instead be referred to the LECC.

(6) The NSW Police Force, the Commission, the ICAC Inspector, the LECC or the LECC Inspector must, after completing an investigation into an alleged offence under this section and forming the opinion that an offence has been committed, refer the alleged offence—
(a) to the Director of Public Prosecutions, by providing the Director of Public Prosecutions with a brief of evidence relating to the offence, or
(b) if the alleged offence relates to the Director of Public Prosecutions, to the Attorney General, by providing the Attorney General with a brief of evidence relating to the offence.

PIDA 1994 also gives a right to a person against whom any such reprisals are taken to recover damages for any loss that the reprisals cause:

20A Compensation for reprisals

(1) A person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is liable in damages for any loss that the other person suffers as a result of that detrimental action.

(2) This section extends to a case where the person who takes the detrimental action does so because the person believes or suspects that the other person made or may have made a public interest disclosure even if the other person did not in fact make a public interest disclosure.
(3) Damages recoverable under this section do not include exemplary or punitive damages or damages in the nature of aggravated damages.
(4) An entitlement to damages arising under this section does not constitute redress in relation to detrimental action comprising dismissal from employment, for the purposes of section 90 (Effect of availability of other remedies) of the *Industrial Relations Act 1996* or any other law.

There is also jurisdiction for the Supreme Court to grant an injunction against there being a contravention of s 20[560], and some less than complete protections concerning disclosure of the identity of the person who has made a protected disclosure[561]. There is power for an investigating authority to whom a disclosure is made to refer it to another authority, if the first authority is not authorised to investigate the disclosure, or it is of the opinion that another authority would be more appropriate to conduct an investigation[562].

7.3. Inapplicability of contractual or equitable confidentiality obligations to pork barrelling

It could happen that a person has knowledge of the commission of pork barrelling of a type that constitutes a crime or tort, but has learnt it in circumstances to which a contractual obligation of confidentiality, or an equitable obligation of confidence, appears to apply. Sometimes, the law refuses to enforce such an obligation of confidence.

If the person with knowledge of the pork barrelling is someone who is a public official, within the meaning of the ***PIDA 1994***, any contractual or equitable confidentiality obligation would be overridden by the statutory right to make a protected disclosure in accordance with that Act. The confidentiality obligation might continue to apply to disclosures that were not of the type permitted by ***PIDA 1994.***

As well, even if the person involved is not a public official, the maxim "there is no confidence in an iniquity"[563] has the effect that any contractual obligation of confidence is unenforceable, in so far as it is sought to be used to restrain disclosure of the crime or tort. An equitable obligation of confidentiality does not arise concerning that information, at least in a way that prevents the information from being disclosed to a person or authority who is in a position to take remedial action concerning it.

A contractual obligation of confidence is unenforceable if it is contrary to public policy. One way in which it could be contrary to public policy if it requires the doing of some act that is forbidden by statute, as some instances of failing to disclose pork barrelling are. The "public policy" that the courts

> "apply as a test of validity to a contract, is in relation to some definite and governing principle which the community as a whole has already adopted, either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognise and

[560] S 20B ***PIDA 1994***
[561] S 22 ***PIDA 1994***
[562] S 25 ***Public Interest Disclosures Act 1994***
[563] ***Gartside v Outram*** (1856) 26 LJ Ch (NS) 113, at 114

> enforce. The Court is not a legislator, it cannot initiate the principle; it can only state or formulate it if it already exists."[564]

> "Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that 'public policy is a variable thing. It must fluctuate with the circumstances of the time' ... New heads of public policy come into being, and old heads undergo modification. ... As a general rule, it may be said that any type of contract is treated as opposed to public policy if the practical result of enforcing a contract of that type would generally be regarded as injurious to the public interest"[565]

Contracts that interfere with the administration of the criminal law are another category of contracts contrary to public policy. Mason J explained how this principle operates concerning a confidentiality clause expressed in general terms in ***A v Hayden***[566]*:*

> "… some contracts are void whereas others are valid, though the court will decline to enforce the particular provision in a valid contract in particular circumstances when enforcement of that provision would have an adverse effect on the administration of justice. Thus, a simple agreement not to disclose the existence of a serious criminal offence, which has been, or is about to be, committed in consideration of the payment of a sum of money may well be void because it is illegal. However, it will be otherwise with a contract which is in all respects lawful but nevertheless contains a provision which, if enforced according to its terms, will result in an interference with the administration of justice. Take a contract which contains a minor or subsidiary provision which, though not directed to non-disclosure of criminal offences, imposes an obligation of confidentiality in sweeping terms. If those terms are not susceptible of being read down, the court will refuse to lend its aid to the enforcement of the provision if enforcement would result in the non-disclosure of a criminal offence adversely affecting the administration of justice."

A contract requiring a person to keep quiet about some aspect of pork barrelling that he or she knows about is one that could be unenforceable in accordance with this principle, if the pork barrelling itself was criminal.

Contracts promoting corruption in public life are another recognised head of contracts that are contrary to public policy. This could provide another basis or invalidating some contractual confidence obligations in so far as they covered certain types of pork barrelling.

An equitable obligation of confidence does not arise concerning information about an actual or proposed crime or tort because the information lacks the necessary quality of confidence – information about conduct like that is not the sort of information concerning which a person can have an obligation of conscience to restrict the dissemination or use of the information. As Gummow J has said[567]:

> "information will lack the necessary quality of confidence if the subject-matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed."

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[564] ***Wilkinson v Osborne*** (1915) 21 CLR 89 at 97 per Isaacs J. To similar effect is Jordan CJ in ***Re Morris (deceased)*** (1943) 43 SR (NSW) 352 at 355-6

[565] ***Fender v St John-Mildmay*** [1938] AC 1, 13–14, 18

[566] (1984) 156 CLR 532 at 556-7

[567] ***Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)*** (1987) 14 FCR 434 at 456

For equity to refuse to recognise an obligation of confidence in these circumstances is consistent with it following the law and applying a public policy that refuses to grant legal protection to iniquities.

7.4. The role of record keeping

Both statutes, and administrative practices about record keeping are important aids to remedying pork-barrelling, particularly because they can expose the reasons for which an administrative decision was made. Historically, one of the difficulties in using the prerogative writs to control improper expenditure of public money was that "certiorari would be risky if the reasoning which led to the impugned decision was not known."[568]. Modern procedures that enable the reasoning to be discovered and exposed remove or lessen that risk.

Having a traceable path of the information available to a decision-maker, and the evaluative options presented to the decision-maker, are important to proving what was the purpose with which the decision was made. When one of the defining characteristics of pork barrelling is that it is expenditure made for partisan political purposes, ascertaining the purpose of a particular item of expenditure is of critical importance. The difficulties that arise from decisions made on the basis of an oral discussion that is never recorded in writing, or on the basis of things written on a whiteboard that is then wiped[569], or in a paper document that is then shredded or lost, are avoided if there is proper creation and retention of documents. The powers of various of the integrity agencies to investigate allegations of pork barrelling include power to require production of documents, detailed in Part 6 above, which can be critical to establishing the purpose for which expenditure was made.

The WA Royal Commission said concerning record keeping by government instrumentalities:

> "Proper record keeping serves two purposes. First, it is a prerequisite to effective accountability. Without it, the end purpose of FOI legislation can be thwarted. Without it, critical scrutiny by the Parliament, the Auditor General and the Ombudsman can be blunted. Secondly, records themselves form an integral part of the historical memory of the State itself. A record keeping regime which does not address both of these requirements is inadequate."[570]

7.4.1. Record keeping requirements under NSW law

The ***State Records Act 1998 (NSW)*** contains, in section 3, some definitions that are fundamental to the obligations that the Act creates. It has an extremely wide definition of "public office";

> ***public office*** means each of the following—
> (a) a department, office, commission, board, corporation, agency, service or instrumentality, exercising any function of any branch of the Government of the State,
> (b) a body (whether or not incorporated) established for a public purpose,
> (c) a council, county council or joint organisation under the *Local Government Act 1993*,

[568] John Barratt, Public Trusts, (2006) Modern Law Review 514 at 515
[569] as happened in a "sports rort" allocation of Federal funds in 1994 that led to the resignation in 1995 of Ros Kelly from Parliament, and the Labor Party losing the normally-safe seat of Canberra in the resulting by-election
[570] WA Inc Royal Commission Report para 4.3.2

(d) the Cabinet and the Executive Council,
(e) the office and official establishment of the Governor,
(f) a House of Parliament,
(g) a court or tribunal,
(h) a State collecting institution,
(i) a Royal Commission or Commission of Inquiry,
(j) a State owned corporation,
(k) the holder of any office under the Crown,
(k1) a political office holder (other than the Leader of the Opposition in the Legislative Assembly) within the meaning of the *Members of Parliament Staff Act 2013*,
(l) any body, office or institution that exercises any public functions and that is declared by the regulations to be a public office for the purposes of this Act (whether or not the body, office or institution is a public office under some other paragraph of this definition),
but does not include the Workers Compensation Nominal Insurer established under the *Workers Compensation Act 1987* or a justice of the peace within the meaning of the *Justices of the Peace Act 2002*.

Content is given to para (k1) of the definition of "public office" by the definition of "political office holder" by Section 3 ***Members of Parliament Staff Act 2013:***

political office holder means—
(a) a Minister, or
(b) the Leader of the Opposition in the Legislative Assembly, or
(c) the holder of a Parliamentary office in respect of which a determination under section 4 is in force.

Of particular relevance for any allegation of pork barrelling is concerned, a Minister counts as a "political office holder".

Section 4 of that Act states:

(1) The Premier may, having regard to the duties associated with a Parliamentary office held by a member of Parliament, determine that the holder of that office is entitled to employ staff under Part 2 in the member's capacity as a political office holder.
(2) A determination under this section—
(a) cannot be made in respect of a special office holder, and
(b) may be varied or revoked by the Premier.
(3) Any such determination, including any variation or revocation, is required to be published in the Gazette.

A "special office holder" is defined as a member of Parliament who holds an office listed in Schedule 1. Schedule 1 is:

Government Whip
Opposition Whip
Whip of a recognised party with 10 or more members in the Legislative Assembly (other than the Government or Opposition Whip)
Speaker of the Legislative Assembly
Deputy Speaker of the Legislative Assembly
President of the Legislative Council
Deputy President of the Legislative Council
Leader of the Opposition in the Legislative Council
Deputy Leader of the Opposition in the Legislative Council
Deputy Leader of the Opposition in the Legislative Assembly

It is difficult to find information on the extent to which determinations under section 4 have actually been made, and therefore the full scope of the term "political office holder". However, the ***Members of Parliament Staff Act 2013*** has a mechanism, in Part 2 (s 5 – 13), for staff to be employed by a political office holder for a term that ends if the political office holder ceases to hold that office. The ***Government Sector Employment Regulation 2014,*** clause 35 enables staff to be seconded to a political office holder. Thus, there is a realistic possibility that a pollical office holder will create or hold records.

Section 3 ***State Records Act 1998*** also contains, in section 3, a very wide definition of "record";

> ***record*** means any document or other source of information compiled, recorded or stored in written form or on film, or by electronic process, or in any other manner or by any other means.

That in turn is a contributor to the breadth of the definition in section 3 of "State record":

> ***State record*** means any record made and kept, or received and kept, by any person in the course of the exercise of official functions in a public office, or for any purpose of a public office, or for the use of a public office, whether before or after the commencement of this section.

Part 2 of the ***State Records Act*** imposes obligations on each public office[571] concerning the creation and keeping of records. The more significant ones are:

> S 11(1) - Each public office must ensure the safe custody and proper preservation of the State records that it has control of.
> S 12(1) - Each public office must make and keep full and accurate records of the activities of the office.
> S 14(1) - If a record is in such a form that information can only be produced or made available from it by means of the use of particular equipment or information technology (such as computer software), the public office responsible for the record must take such action as may be necessary to ensure that the information remains able to be produced or made available.

The State Records Authority is a body corporate created by s 63 ***State Records Act***. Its functions are conferred by s 66 of that Act:

(a) to develop and promote efficient and effective methods, procedures and systems for the creation, management, storage, disposal, preservation and use of State records,
(b) to provide for the storage, preservation, management and provision of access to any records in the Authority's possession under this Act,
(c) to advise on and foster the preservation of the archival resources of the State, whether public or private,
(d) to document and describe State archives in their functional and administrative context,
(e) such other functions as are conferred or imposed on the Authority by or under this Act or any other law.

One of the powers of the Authority is to approve standards and codes of best practice for records management by public offices[572]. Pursuant to that power, it has published a Standard

[571] Save that section 9 exempts from these requirements the Governor acting in the Governor's vice-regal capacity, the Houses of Parliament, and a court or tribunal, in respect of the court's or tribunal's judicial functions. These exemptions are unlikely to be of importance so far as pork barrelling is concerned, because holders of those exempted offices are most unlikely to have the capacity to cause public money to be used for partisan purposes.
[572] S 13(1) ***State Records Act 1998***

No 12 – Standard on Records Management[573]. Oddly, it does not make any specific requirements for how a public office is to go about complying with sections 11, 12 and 14. An earlier standard that the Authority had issued, but which is no longer current, Standard No 7 issued April 2004, appears to have said:[574]

> "Full and accurate records are sources of detailed information and evidence that can be relied on and used to support current activities. They are records that have been created and managed in ways to ensure that they can be reused and understood in the future. This use can be for everyday business purposes, as evidence in legal proceedings, for accountability to internal or external stakeholders, or for future historical research. To be full and accurate, records must:
> • be made
> • be accurate
> • be authentic
> • have integrity
> • be useable."

That seems to me to be helpful in explaining what is required for records to be full and accurate, and thus to be helpful in explaining what are the obligations of a public office under s 12 ***State Records Act.*** Its relevance to pork barrelling is that if a decision was being made by a public office about expenditure of money, a record should be created. The decision should not be made through a conversation that leaves no trace and could be forgotten or misremembered. The record created should be one that would enable a reader later to understand what was the procedure through which the public office came to consider who were the potential candidates to whom the money might be expended, and why the decision was made to expend it to the person or entity to whom it was actually expended. If there were any guidelines by reference to which the potential candidates were chosen, or the ultimately successful candidate was chosen, those guidelines should be part of the record. The date of adoption of such guidelines should be part of the record – then if there were to be an allegation that guidelines had been adopted so that, by apparent compliance with the guidelines, a particular already-favoured candidate would succeed, it would be possible to tell whether there was any truth in the allegation. The record of the decision-making process would then be available to any of the integrity bodies that had power to require production of documents to investigate an allegation.

There are some criminal sanctions to support the obligation of the public office to maintain the record. Section 21 provides[575]:

> (1) A person must not—
>
> (a) abandon or dispose of a State record, or
> (b) transfer or offer to transfer, or be a party to arrangements for the transfer of, the possession or ownership of a State record, or
> (c) take or send a State record out of New South Wales, or
> (d) damage or alter a State record, or
> (e) neglect a State record in a way that causes or is likely to cause damage to the State record.
>
> Maximum penalty—50 penalty units.

[573] Accessible at https://www.records.nsw.gov.au/recordkeeping/rules/standards/records-management
[574] This quotation is obtained from a publication of the South Australian government "Glossary of Terms" p 17, accessible at https://archives.sa.gov.au/sites/default/files/documentstore/policies-guidelines/Advice%20Sheet/20150731_glossary_of_terms_final_v3.pdf which cites the former NSW standard.
[575] There is a miscellaneous list of exceptions in s 21(2)

(4) Anything done by a person (***the employee***) at the direction of some other person given in the course of the employee's employment is taken for the purposes of this section not to have been done by the employee and instead to have been done by that other person.

That obligation, if performed, will enable any investigator of whether there has been illegal pork barrelling to have access to the documentation that is relevant to establishing the reason why an expenditure of public money was made. Proceedings for an offence under s 21 are to be taken before the Local Court, and are to be commenced not more than two years after the offence was alleged to have been committed[576]. If a document that was relevant to pork barrelling were to be destroyed, contrary to s 21, it is fairly readily predictable that the time taken for an investigation to be begun into the pork barrelling, and to reach the stage where it had become sufficiently clear to justify the bringing of criminal proceedings that a relevant document had been destroyed, might be such that the two year time period was exceeded[577].

7.4.2. Rules of the law of Evidence

The importance of record keeping is underlined by a principle in the law of evidence that "A spoliator must expect that every possible inference will be drawn against him."[578]
The justifiability of drawing such an inference has been affirmed by the High Court in a case where there was an issue about whether certain documents had been executed, and the defendant had destroyed copies of the documents which were in his possession[579]:

> " …there are two grounds why the Court should proceed upon the assumption that the document was so executed. In the first place to presume the fact against the defendant seems but a proper application to the circumstances of the principle *omnia praesumuntur contra spoliatorem*[580]. It is a far cry from the municipal warfare of the present case to a case in Prize but no statement of the principle could be more apposite than that of Sir *Arthur Channell* delivering the opinion of the Privy Council in ***The Ophelia***[581]: "If any one by a deliberate act destroys a document which, according to what its contents may have been, would have told strongly either for him or against him, the strongest possible presumption arises that if it had been produced it would have told against him; and even if the document is destroyed by his own act, but under circumstances in which the intention to destroy evidence may fairly be considered rebutted, still he has to suffer. He

[576] S 78 ***State Records Act 1998***
[577] An example is that some working notes and emails relating to a particular distribution of government funds were destroyed at some time between September 2018 and March 2019. A complaint about their destruction was made to the State Records Authority in October 2020, after the destruction had come to light in the course of an inquiry before the Public Accountability Committee of the Legislative Council. The State Records Authority issued a report concerning it in January 2021: https://www.parliament.nsw.gov.au/lcdocs/other/14049/Report%20-%20State%20Records%20Authority%20-%20Disposal%20of%20records%20re%20Stronger%20Communities%20Fund.pdf While the Report recommended against the taking of any criminal proceedings, there is a real risk that by then it would have been too late to bring any criminal proceedings.
[578] ***Stanton v Percival*** (1855) 5 HL Ca 257; 10 ER 898 at 280, 908 per Lord St Leonards. To the same effect is Lord Hardwicke in ***Pearce v Waring*** (1737) West t Hard 148 at 153; 25 ER 866 at 869. See too ***Lewis v. Lewis*** (1680) Cas. t. Finch 471; 23 E.R. 254 at 255, per Lord Nottingham L.C., ***Wardour v. Berisford*** (1681) 1 Vern. 452; 23 E.R. 579, per Lord Jeffreys L.C., ***Armory v. Delamirie*** (1722) 1 Str. 505; 93 E.R. 664, per Pratt C.J. and ***Cookes v. Hellier*** (1749) 1 Ves. Sen. 234 at 235; 27 E.R. 1003 at 1004, per Lord Hardwicke L.C.
[579] WA Inc Royal commission report para 4.3.2
[580] ***Allen v Tobias*** (1958) 98 CLR 367 at 375 per Dixon CJ, McTiernan and Williams JJ
[581] Everything is presumed against a person who destroys something
[582] [1916] 2 AC 206

is in the position that he is without the corroboration which might have been expected in his case[582]"

7 June 2022

[582] [1916] 2 AC at 229, 230

Some Legal Implications of Pork Barrelling

J C Campbell

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Part 5 - Potential civil liability concerning pork barrelling

Part 6 - Role of the Integrity Bodies concerning Pork Barrelling

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Appendix 4: *On the ethics of "pork-barrelling"* by Dr Simon Longstaff

THE ETHICS CENTRE

ON THE ETHICS OF 'PORK-BARRELLING'

The purpose of this paper is to provide an evaluation of the ethical status of the practice known as 'pork-barrelling'. I have taken the institutional context to be that of a democracy – of which liberal (or 'representative') democracy is one kind. Thus, the 'standard of judgement' applied to the practice of 'pork-barrelling' is derived from a philosophically robust understanding of the concept of 'democracy' and what this entails for the practice under question. I note this, because an evaluation of 'pork-barrelling' under the conditions of an absolute monarchy, theocracy, plutocracy, etc. might yield different conclusions

It is the conclusion of this paper that the practice of pork-barrelling, as defined below, contravenes the core requirements of democracy and as such should be deemed an illicit form of conduct that corrupts the democratic process.

ETHICAL PERSPECTIVES

From the outset, it should be noted that this paper draws extensively on traditions of thinking about ethics and politics in the 'Western' tradition. There are alternative traditions that could be drawn on for additional insight. However, given that the political system in New South Wales is very much a 'western construct', I have focussed, here, on the tradition out of which it has grown.

Yet even a 'Western' perspective is not just one thing. Rather, there are multiple threads that are woven together – to form a whole that is neither uniform nor even coherent.

Attributed by Plato to Socrates, the core question of ethics is: *what ought one to do?*

This is a practical question that seeks to identify the basis for how a person should act or, in the broadest sense, how we are to live. In the Ancient Greek tradition, 'ethics' and 'politics' were intimately connected. For example, Aristotle saw 'ethics' as touching on questions to do with the 'good life' for individuals while 'politics' concerned questions to do with the 'good life' of the community. In that sense, 'ethics' and 'politics' were understood to be 'two sides of the same coin'.

Ethics might be concerned with a single question: what ought one to do? However, this deceptively simple question has prompted multiple responses – with arguments about their respective qualities continuing to this day. I offer, below, a brief account of some of the major traditions – not in all of their subtle complexity but, instead, in terms of their core insights. Later, we will see how the application of these insights might shape our evaluation of the practice of 'pork-barrelling' (as defined below).

Consequences

If you ask people gathered in a room what they think should be done in a particular situation, it's likely that a large number will want to know the most likely outcomes of the options before them. In asking about the likely consequences of a potential course of action, these people hope to be able to do a kind of cost–benefit analysis to pick the option that achieves the greatest good or at least causes the least harm. For each option, you add up all the good that might be done and then subtract all the bad. Whatever option ends up with the highest positive score is the one you should choose.

Throughout history, philosophers have differed in their ideas about what counts as 'good' or 'harm'. The most famous form of consequentialism, Utilitarianism, as developed by Jeremy Bentham and his philosophical successors, originally proposed that 'good' equals pleasure and 'bad' equals pain. Modern Utilitarians link the concept of 'good' to the realisation of preferences and that of 'bad' to aversions. Both 'old' and 'new' forms of Utilitarianism share a commitment to the strict equality of all persons. That is, they think that no individual's pleasure (or preferences) should count for more than another's.

Duty

Opposing the view that consequences matter most is the argument that we should act always and only according to our duty. This ethical theory thinks the issue of consequences to be irrelevant to any judgement about what one ought to do. Those preferring this approach – about a third of the population in a country such as Australia – feel bound to honour promises, to give effect to commandments (as from God) or, in the most sophisticated philosophical account (as advanced by Immanuel Kant), to act in compliance with universally applicable maxims we prescribe for ourselves.

Kant's argument is based on the belief that the intrinsic dignity of human beings is intimately linked to our capacity to reason. He says that all humans belong to the 'Kingdom of Ends' and that no person may ever be used merely as a 'means to an end'. Persons are not commodities, they cannot be regarded as nothing more than 'tools' to be used by others. Some philosophers have used Kant's criterion for personhood to argue that humans with defective reason (including babies) do not belong to the 'kingdom of ends'; that they are not 'persons'. As noted above, I argue that all humans as 'persons' simply as a result of their participating in a certain 'class' of being – human being – and that their membership applies irrespective of their individual capacities.

Having placed our capacity for rationality at the core of human dignity, Kant then presses reason into the service of ethics. He argues that reason must be the standard for judgements of right and wrong. As members of the 'Kingdom of Ends' each human has the right (indeed the duty) to generate and obey a set of maxims (rules) produced by reason and commanded by ourselves for ourselves. Kant says that we are bound to apply these maxims regardless of the consequences and wholly as a matter of duty. This is what Kant calls the 'categorical imperative'.

For example, Kant argues that it is always wrong to lie or to break a promise. The 'wrongness' of lying has nothing to do with the outcome. Lying to someone is treating them as a means (rather than an end) to gain something from the lie. Kant argues that maxims or rules are only good or worthwhile if they can apply to all people, in all places, at all times. Such rules must be logically consistent, since any contradiction would contravene the demands of reason. Therefore, for Kant the evil in lying does not arise from its consequences. It is in the logical impossibility of willing a *universal* maxim that depends on the concept of truth while at the same time destroying the basis for truth. Such a maxim cannot be 'universalised'. To put it crudely, the maxim is destroyed by a 'logic bomb' – it implodes under the weight of its internal contradiction: truth cannot be a universal maxim if lying is ever allowed.

Virtue

The third broad tradition is based on the idea that the characters of both individuals and organisations are shaped by the choices we make. Adherents of this view do not want (or need) to know what the general consequences of a potential course of action will be. Nor are they concerned about duty for duty's sake. Faced with an ethical question, those inclined to virtue will want to know how their choices will affect their emerging character. Such people see their character as being like wax, able to absorb the imprint of whatever touches it. Looking to Aristotle for inspiration, they believe that who you become is shaped by what you do. According to this approach, if you tell a lie then this leaves behind an indelible mark. Tell enough lies and you end up taking on the shape of a liar. The reasons for lying do not matter so much as the practice itself.

It is in this tradition that we find Aristotle's concept of the 'golden mean' – the point of 'balance' on which virtue rests. Take the case of courage. At one extreme is recklessness, at the other is cowardice. A person of courage recognises and understands the danger they face – and remains steadfast despite that. They do not hide behind others. Nor do they rush recklessly towards the jaws of death. Those who rush towards death or hide behind others are in the grip of vice.

Virtue ethics treats vice as a distortion that prevents us from seeing how we should act or the world as it is. For example, a glutton will also overestimate how much they should eat or drink. The vice of gluttony is a type of 'blind spot' that exposes the affected person to risk.

Relativism
The fourth approach is sceptical about any ethical theory claiming to provide an absolute answer to the question, 'What ought one do?'. In its strongest form, relativism states that there are no absolutes – in knowledge, ethics, and so on. Thus, a relativist will claim that it is wrong to judge the ethics of others since only they are qualified to form a view of their conduct from 'within their own skin'. It is this idea that is often associated with the expression, 'When in Rome do as the Romans do.'

Relativists criticise ethical systems and focus on the way those systems evolve throughout history. At their best, relativists draw attention to the way in which powerful people and institutions are able to 'construct' ethical systems in their own image. This then allows us to look behind such systems in order to see whose interests they are serving. For example, so-called 'Victorian' morality established ideals of conduct that suited the interests of an imperial power that felt justified in colonising people across the world. Dispossession, the suppression of language and culture were all deemed to be 'noble' when couched in the language of the 'white man's burden' to bring 'civilisation' to the world. Relativists challenge the assumption that 'Victorian' morality was in any way superior to the moral codes that it displaced – often by violent means. We are invited to see the ascendant morality as self-serving.

Unfortunately, some forms of relativism go to a point of self-negation. In their strongest form, the claims are self-contradictory. For example, 'it is true that there is no such thing as "truth"' or, 'it is absolutely wrong to claim that anything is absolutely wrong'.

Care
The 'ethics of care' rejects the disinterested application of reason (whether in calculating utility, or universalising a maxim, etc.) in favour of an ethics grounded in the quality and character of relationships. As the name suggests, it prioritises the value of 'care' (benevolence) for others – including other persons, and other entities with which/whom we relate (e.g. aspects of the natural world). As such, an ethics of care directs us to notice the particular in a relationship. This is contrasted to other approaches that depend on the application of a general standard that might make us blind to the needs and interests of those who are before us.

Purpose
There is nothing new in the idea of *teleology*. The central idea is that things should be 'fit for purpose'. For example, the purpose of a knife is to cut. It follows that a 'good' knife is one that cuts well. It's important to note here that a 'good' knife is not one that has produced a set of outcomes. Its qualities will be obvious even if it is never used. So, the 'goodness' of the knife is not assessed in terms of outcomes (consequences). Instead, the 'goodness' is to be found in the knife itself – and how fit it is for its particular purpose.

The same thing can be said of a wonderful friendship. Its goodness is not to be judged by the outcomes it produces. The quality of a friend is not to be found outside of the friendship itself. The goodness is in the relationship, the shared confidences, the trust, etc.

Now, there is something more that might be considered here. It's not enough that what we make is merely 'fit for purpose'. The purpose itself should be constructive (rather than destructive).

Additionally, I think that we are obliged to go about the task of making it the right way. The *ends* and the *means* both matter. Finally, I think that our intentions have ethical significance. In summary: we should make good things by the right means for the right reasons.

Which to choose (if any)?
Each of these traditions has its strengths and weaknesses – often revealed in crude forms that the traditions' more sophisticated adherents would not support. Consequentialists can be led to advocate terrible injustices to a few innocent people if this will result in the realisation of enough 'good'. Those

focusing on duty can also appear indifferent to great harms caused by complying with logically consistent (or divinely received) commandments. Those concerned with virtue can seem to value the shape of their character more than the welfare of others. And the significance of relativists' analysis of the role of power is often overlooked because it is so easy to poke holes in the strong forms of their arguments.

It is easy to set up as 'straw persons', mere caricatures of each tradition. Yet the broad-brush strokes of each position are worth noting as you will frequently find their central claims being appealed to in public debate. You can see this in the debate about the use of embryonic stem cells for medical research. Human embryos are sometimes destroyed in the course of this work – and this is a source of disagreement between those who support the research and those who believe human life to be sacred and therefore to be protected from harm. Those supporting the use (or destruction) of embryos in medical research often justify the research on the basis of its likely consequences (curing diseases, etc.). Those opposed will often invoke the commandments of their god. Both sides 'talk past' each other and ignore the values underpinning the other side's position. There is little chance of either side really hearing the other – and little chance of real interaction. They are not even on the same ethical page.

Advocates for each tradition often present their approach as being all-encompassing, to be chosen to the exclusion of all others. In practice, I do not think matters are so clear. For example, some actions will be consistent with duty, will build a good character, exhibit care, are aligned to purpose and also generate the best outcomes.

So, how does the practice of 'pork-barrelling' fare?

A DEFINITION OF 'PORK-BARRELLING'

I will leave it to others to outline the etymology of the term 'pork-barrelling'. For the purpose of this paper, I define the term to mean:

> The commitment or expenditure of public resources for the principal purpose of securing electoral advantage by conferring a selective benefit on a sub-section of the polity as a whole.

The key features of this definition should be noted:

The commitment or expenditure of public resources

The focus, here, should be on the word 'public' – denoting resources that have been provided by 'the governed', via taxation or any other means, that are levied for the purpose of providing a range of public goods.

… for the principal purpose of securing electoral advantage

It is important that any definition of 'pork-barrelling' distinguish between the commitment or expenditure of public resources on the basis of *intention* rather than *outcome*. There will be many examples of 'pork-barrelling' that confer tangible benefits to at least some members of the polity. However, such outcomes should be understood as 'secondary' (or 'double') effects associated with the intended 'primary' effect – being that of securing electoral advantage.

One immediate question arising from this definitional element will concern how any disinterested observer will be able to discern what is, or is not, the 'principal purpose' behind the commitment or expenditure of public resources. In some cases, the evidence of such a purpose may be both direct and obvious. For example, there may be records that explicitly demonstrate purpose (e.g. colour coding the allocation of public resources according to sources of potential electoral advantage, memoranda seeking approval for patently political purposes, etc.). However, even in the absence of

such compelling evidence, a reasonable and disinterested person might conclude that the 'principal purpose' is the attainment of electoral advantage rather than some public good.

As a matter of principle, one would expect that sound public administration would see public resources applied according to objective need – with those citizens with the greatest need receiving the greatest allocation of public resources. Likewise, where needs are equally distributed amongst citizens who differ in no material respect except for the electorate within which they reside, one would expect an equal distribution of public resources. Yet, as has been seen in recent months following devastating flooding in Northern NSW, people with identical needs were treated in distinctly different ways – based on the political allegiance of their elected representative. This deficiency was only corrected after a public outcry.

This suggests a general principle by which 'primary purpose' can be discerned – even in the absence of direct evidence. That is, when identical cases of need attract materially different levels of public resources, this fact, alone, should be taken as *prima facie* evidence in support of a rebuttable presumption that public resources are being committed or expended for the primary purpose of securing electoral advantage. It will then be incumbent upon a decision maker to rebut that presumption (if able to do so) to the satisfaction of a reasonable and disinterested person.

… by conferring a selective benefit on a sub-set of the polity as a whole.
Here attention is drawn to the fact that the application of resources is not directed to benefiting the polity as a whole. Rather, there is a conscious targeting of resources so as to benefit (or promise to benefit) a subset of the polity; being that deemed capable of conferring particular electoral advantage (e.g. of a kind that might determine the outcome of an electoral contest in a marginal seat). Thus, a promise made to the electorate as a whole (e.g. all citizens of NSW in a State Election) would not be deemed 'pork-barrelling' under this definition.

ON DEMOCRACY
The most fundamental basis for distinguishing between political systems is to locate the 'ultimate source of authority' – that which 'grounds' the legitimacy of the system as a whole. For example, in a theocracy, the ultimate source of authority is deemed to be God (or gods). In an aristocracy, authority is ultimately vested in the 'virtuous'. In a plutocracy, it is the 'wealthy' … and so on.

In a democracy, the ultimate source of authority is located in 'the governed' (sometimes called 'the people', 'citizens', etc.). Thus, the relationship between a nominally democratic government (one that claims democratic legitimacy) and its citizens can never be reduced to a set of transactions. Citizens are never merely 'customers'. That is because those who govern in a democracy derive all of their power from citizens – each and every one of them – irrespective of whether or not they *ever* transact with government as a service provider.

One important advantage of distinguishing between political systems according to the 'ultimate source of authority' is that is leaves room for each type of political system to adopt different forms of decision making without necessarily falling outside the definitional scope for their type of polity. For example, one can be a 'democracy' with or without compulsory voting, or bi-cameral houses of parliament or elections held every three, four or five years. The distinguishing feature of democracy is that those who are governed get to determine the mechanism(s) by which power will be exercised. The Australian Constitution is a solid example of this principle at work. It is open to citizens (and only citizens) to amend the Constitution as they think fit. This includes the capacity, if minded so to do, to change the mechanism by which the Constitution is amended. Thus, if the people of Australia amended the Constitution so as to abolish the Senate, hold election only once in a decade, etc., strip the Commonwealth of its foreign affairs power, etc. etc. – Australia would remain a democracy … just so long as the governed retained the ultimate authority to amend the Constitution again.

The point here is that one cannot declare a political system to be (or not to be) democratic simply by observing its form of government. It goes deeper than that.

There is also advantage in democracies locating ultimate authority 'in the persons of the governed'; rather than in more general terms such as 'the people'. In some respects, this recognises the underlying compact between citizens and the State – most notably in the *prima facie* obligation of citizens to obey the laws made in their name and on their behalf. We gain some sense of this relationship from the medieval concept of an 'outlaw' – a person whose conduct places them beyond the 'pale'; who steps outside the boundaries of the law. By doing so, it was held that the 'outlaw' renounced their status as one of 'the governed' and as such, lost the broad rights of citizenship by becoming, in essence, a hostile 'alien'. We see something of this view reflected in current debates about whether or not felons serving time in prison should have voting rights – a contentious issue that the core concept of democracy informs.

Whether one refers to 'the governed', 'the people' or use some other term, the core idea is that democratic legitimacy is conferred by the consent of the governed/people; often expressed through the process of elections, referenda, etc.

There is much debate about whether or not 'consent' is genuinely possible in a 'liberal' or 'representative' democracy in which those elected to parliament do not serve as *delegates* of their electorate (bound to express and give effect to the electorate's will) but, instead, as *representatives* authorised to exercise their best judgement in the interests of the electorate. Whether one prefers direct or deliberative democracy or think 'consent' to be explicit or tacit, for the purpose of this paper (and in line with the definition of democracy as a political system in which 'ultimate authority is located in the persons of the governed'), I will stipulate that legitimacy is conferred on representatives by the consent of the governed; as expressed during elections.

Of course, this still leaves open issues to do with the quality of consent that might be obtained. The 'gold standard' for consent is that it be 'free' (unconstrained and conferred on genuinely voluntary basis), 'informed' (at a minimum not based on false beliefs induced by a reckless indifference to the truth – including lying, misleading and deceiving (by act or omission) and 'prior' to any act being performed that is reliant on consent for its approval of legitimacy.

One can see why there is such an abhorrence of nominally 'democratic' politicians who either lie or mislead. Their doing so degrades the quality of consent offered by citizens and thus the inherent legitimacy of the democratic settlement that it gives rise to.

A final point about democracy – at least as practiced in Australia – is that all citizens are taken to be equal in the measure of authority they may confer on any democratically elected government. This simple fact is captured in the simple aphorism: "One person, one vote". This is a form of radical equality in which the sole criterion for exercising authority is to be an eligible voter. Beyond that, nothing else is relevant – not education, wealth, postcode, occupation, gender, religion … nothing else matters. Every elector stands equal to every other. The fact the votes of one or more particular voters (e.g. in marginal seats) might prove to be decisive is irrelevant when it comes to the relative status of different individual or classes of electors. All stand equal.

ON THE STANDARD OF JUDGEMENT

Given the above, the fundamental nature of democracy would seem to entail that the following conditions be met:

- Public power and resources be used exclusively in the public interest. Any unequal distribution of public benefit be prohibited unless explicitly justified by an explicit appeal to the public good (e.g. progressive taxation is justified on the basis that it increases the public good by helping to

minimise poverty, exploitation, etc. – goods which benefit society as a whole and not only those receiving preferential treatment).
- All electors be accorded equal respect by those who seek their votes
- To the greatest extent possible, the consent of the electorate must be free, informed and prior to any exercise of power flowing from the 'authority of the governed'.

APPLYING THE STANDARD OF JUDGEMENT

As defined in this paper, 'pork-barrelling' would seem to violate each and every one of the three conditions for democratic legitimacy as outlined above.

Exclusively in the public interest

By definition, 'pork-barrelling' is motivated by a dominant purpose that is essentially private. Political parties are private entities – seeking to advance private interests (namely, the attainment of power). Political parties and independent candidates may contest for power due to a since belief that their election will be in the public interest. However, neither such a belief, nor formal recognition, nor the receipt of public funding alters the fact that parties and candidates are private beings. Given this, it cannot be consistent with democracy that public resources be deployed for the dominant purpose of securing a private advantage. It is this consideration that has led Transparency International (TI) to define political corruption as the:

> Manipulation of policies, institutions and rules of procedure in the allocation of resources and financing by political decision makers, who abuse their position to sustain their power, status and wealth.

As noted earlier in this paper, it is possible (perhaps most likely) that 'pork-barrelling' will confer benefits on at least some of the people in whose name the resources are putatively expended or committed. As outlined below, there are some philosophical approaches that might be open to the conclusion that, on the narrow count of public interest, 'pork-barrelling' can be ethical. For example, a consequentialist (e.g. an 'act' utilitarian) might be led to approve such a practice if, in fact, it leads to a net gain in some good (such as happiness or contentment or health …). Such a calculation would take into account only the consequences and be indifferent to the motivation behind the act.

Unlike 'act-utilitarians', who judge solely by the direct consequences of an isolated action, 'rule-utilitarians' are concerned about the outcome of certain practices should they become the norm. In essence they ask, 'will adoption of a rule or practice (such as 'pork-barreling') add or subtract from outcomes in the foreseeable future. That is, rule-utilitarians evaluate a practice like 'pork-barrelling' from a more systemic perspective. For reasons outlined below, it is unlikely (but not impossible) that 'rule-utilitarians' would approve the practice.

It should be noted here that in both cases of Utilitarianism (Act and Rule), neither motive nor intention matter, in and of themselves, so long as the outcome is an increase in utility.

Equal respect for citizens

However, it could be argued that the application of a consequentialist form of reasoning betrays a misunderstanding of what is important about democracy as a system of government. That is, the justification for democracy is not grounded in the claim that democratic polities achieve better outcomes. It may be that this is the case (recent history would suggest so). However, this is merely a contingent fact. Indeed, one can image a future in which autocratic systems outperform democracies on a number of fronts. For example, some people think that autocracies are better equipped, than democracies, to make the kind of change needed to address challenges such as those posed by climate change. Yet, the traditional case for democracy will disregard factors such as relative outcomes in favour of evaluating rival political systems by reference to values such as: equality, autonomy, justice, etc. all linked to the principle of 'respect for persons'. That is, the source of

democracy's legitimacy lies not in the outcomes that it produces but rather, in the status it accords the citizens who constitute the polity.

Understood in these terms, it cannot be in the public interest of a democracy that some citizens be elevated (and others relegated) according to their instrumental value to those who contend for and exercise power.

Free, prior and informed consent to be governed

As noted above, politicians who lie to, mislead or deceive the electorate deny those whom they would govern the opportunity to confer consent, informed consent, of a quality required for a government to claim the legitimacy of being 'democratically elected'.

However, the same 'dilution of legitimacy' can be produced by the practice of 'pork-barrelling'. For the most part (but not always), the commitment or expenditure of public resources, that lies at the heart of the practice, is directed towards meeting the genuine needs of a sub-section of the community. That is, the offer of improved infrastructure or services will typically remedy a prevailing absence of goods such as healthcare, education, roads, etc. Indeed, it is this fact that seems to make many politicians blind to the iniquity of 'pork-barrelling'. They see a genuine need; they promise to provide a solution and wonder why anyone would criticise such apparent benevolence.

As stressed earlier, the mere fact that some genuine good is realised is not enough to 'justify' pork-barrelling (where the dominant motivation is to secure political advantage). However, this does not exhaust the range of ethical concerns. Some forms of 'pork-barrelling' take the form of a 'conditional offer' along the lines of, "Vote for us and you will be rewarded. Fail to support us and pay the price in lost opportunity". The conditional offer is rarely expressed in such crude terms (it occasionally is as blatant as that), but the underlying logic of incentive/reward is just below the surface. Otherwise, why would the offer of public resources so often be reserved for the election period?

If we assume a 'best case' where there is a genuine need within an electorate, then 'pork-barrelling' takes on the character of something worse than a 'bribe' for votes. The deeper the need, the closer such a conditional offer resembles throwing a line to a drowning man so long as he pledges his loyalty. To say that the man's choice to make the pledge and be hauled to safety is a 'free' choice – invites derision.

Consent – obtained at the point of a gun – is not consent at all. The democratic consent derived from citizens induced to vote for one candidate or another, as the 'price' to be paid in order to secure a public good is no better.

Public goods should flow to citizens on the basis of need and according to principles of justice … not as a reward for compliant conduct that advances the private interests of politicians.

A FUNDAMENTAL OBLIGATION

As might be expected, politicians are quick to claim the legitimacy of a democratic mandate whenever it suits their interests to do so. Furthermore, they tend to be passionate defenders of the democratic ideal – not merely because it underpins the legitimacy of their exercise of power but also because they have a genuine regard for the many public goods that democracy confers on a polity. These public goods include: the ability to effect a peaceful transfer of power, the ability to undertake complex reform, etc. What is less understood is that public goods, such as those, depend not just on the effective operation of the formal procedures of democracy (such as fair elections).

While the mechanisms of democratic government might be in perfect working order, it is still possible for the machine to grind to a halt if sand enters the gears. In democracies, the equivalent of 'sand' is distrust – especially when it extends to the system as a whole.

It is self-evident that there has been a precipitous decline in public trust of institutions of many kinds; not least of which is government. This has serious adverse consequences not least of which is a reduction in the 'freedom of movement' of government – even if motivated to act solely in the public interest. Paradoxically, the community will even limit the scope of governments to initiate reforms that will confer obvious public benefits – not because the benefits are uncertain but simply because of a lack of trust that the relative burdens and benefits will be distributed equitably. That is, a point can be reached where low levels of trust are, in themselves, a source of risk to the polity.

The 'political class' claims to be aware of this risk. They often express a hope that the 'trust-deficit' might be reversed. However, as Kant observed, "to will the end is to will the means". In this case, it would seem to require those who promote the ideal of democracy to back up their rhetoric with aligned actions. Furthermore, in this case, the obligation to adopt the means necessary to achieve the espoused end requires politicians to enhance and preserve the integrity of the system-as-a-whole.

Seen in this light, 'pork-barrelling' is revealed to be an illicit and ultimately self-defeating practice. As defined, it is a practice that destroys trust – not only amongst those who 'miss out' because they are in the 'wrong' electorate – but more generally. Even those who seem to benefit from this form of politically corrupt largesse are left wondering about how they would have fared if living outside the 'boundaries' of whatever group is being targeted with a view to advancing the private, political interests of one party or another. The effect of this is that the arena of democratic contest becomes de-legitimised to those cost of the whole democratic polity – not least those who contend for a mandate to exercise power.

Some politicians claim that all such considerations should be set aside as electors will ultimately 'signal' their approval or disapproval of 'pork-barrelling' at the ballot box. Those making this claim acknowledge that the exercise of political discretion in the disbursement of public funds must be lawful. However, they deny that there is any objective ethical standard beyond what the electorate will tolerate. Such an approach could be said to be the root cause of the loss of trust in the institutions of politics – as it effectively denies that politicians have any ethical responsibility at all – with all judgement 'outsourced' to citizens. In essence, it denies the fundamental tenets of 'representative democracy'. Worse still it ignores the basic fact that the practice of 'pork-barrelling' is, at face value, a force for corrupting democracy – compromising the judgement of the electorate. Whether presented in the form of a 'bribe' or a 'threat', the practice of 'pork-barrelling' undermines the fundamental grounds for consent to which advocates for 'pork-barrelling' ultimately appeal.

It should be clear from this that politicians, political parties, the media – indeed all who engage actively in the processes of democracy are bound by an obligation that transcends that owed to any individual, part, corporation, institution, etc. That is, there is a supervening obligation to enhance and preserve the integrity of the system-as-a-whole.

CONCLUDING REMARKS

At the outset of this paper, I outlined a number of traditions, drawn from Western philosophy, that can be drawn on when evaluating the ethics of 'pork-barrelling'. Some of these traditions have been evoked, in explicit terms, as the analysis has developed. For example, we have seen how an act-utilitarian might, in theory, deem a particular case of 'pork-barrelling' to be ethical. We have also noted that it is possible that a rule-utilitarian might reach the same conclusion when evaluating the practice as a whole. However, it should be noted here that whether or not such conclusions would be reached depends on the ability to foresee outcomes and estimate net utility. Most importantly, utilitarians require each and every person's utility to be weighed in equal measure – enforcing a type of 'strict equality' that ignores differences of race, gender, etc. That is, utilitarians would disregard factors, like 'electorate', 'postcode', 'political orientation', etc. when calculating utility. As such, consequentialism does not offer any clear basis for evaluating 'pork-barrelling' *per se*. In the end, the most than can be said is that 'it depends …'. And that, I think, is an inadequate basis for answering the question before us.

We have also examined questions of duty and purpose – notably when considering the democratic context within which the practice of 'pork-barrelling' is being evaluated. It seems to me that this provides a much more stable basis for evaluation. As we have seen, 'pork-barrelling' (at least as defined in this paper) is unethical – not on the basis of consequences (which could be dire) but because it undermines the ethos of democracy – an ethos that politicians have a general duty to protect and enhance.

I have not said anything about relativism – largely because I think that despite it growing out of important insights about how power shapes narratives, etc. it is, at least in its strongest forms, incoherent.

I have not offered any comments about how an 'ethics of care' would ultimately evaluate the practice of 'pork-barrelling'. My hunch is that such an evaluation would condemn the practice on the basis that it is indifferent to the quality and character of relationships because driven by what is, in essence a selfish (one sided) concern to secure political advantage at the expense of others.

Finally, there is the perspective associated with 'virtue' – which leads us to ask about how the character of our society would be shaped should 'pork-barrelling' be accepted as the norm. Here we need to consider whether or not we aspire to a character in which inducements (or threats) condition our choices. It might be observed that, as Adam Smith has argued, there is nothing base or inappropriate about appealing to or proceeding from self-interest (at least in terms of the operation of a free market). However, even with his faith in the benevolent operation of the 'invisible hand', Smith still reserved certain public goods as being exempt from the operation of the market. Indeed, he believed that a well-functioning society would only be created and sustained should its members possess the virtues of 'sympathy' and 'reciprocity'.

'Pork-barrelling' undermines such virtues by fracturing the democratic polity into 'haves' and 'have nots' where the distinction has nothing to do with either merit or need. The only index for preferment is the usefulness of an elector to those who seek power. This sees citizens as mere 'means' rather than 'ends' in themselves. It flips democracy on its head. It corrupts the character of our democratic polity.

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17th May, 2022

Sensitive

Appendix 5: *Review of grants administration in NSW* – recommendations – NSW Department of Premier and Cabinet and NSW Productivity Commissioner

Recommendations

A new *Grants Administration Guide*

Principles-based guidance with mandatory requirements

Recommendation 1	Issue the draft *Grants Administration Guide* at **Appendix A**, which: • provides guidance based on the principles set out in the *Commonwealth Grants Rules and Guidelines* (2017) and reflects the government sector core values of integrity, trust, service, and accountability • includes mandatory requirements for officials, Ministers, and ministerial staff.

Compliance through legislative amendment and capability building

Recommendation 2	Issue the draft *Grants Administration Guide* at **Appendix A** under a Premier's Memorandum, which is binding on officials, Ministers, and ministerial staff and can be readily updated in line with evolving best practice.
Recommendation 3	Make compliance with the draft *Grants Administration Guide* at **Appendix A** a legislative requirement.
Recommendation 4	Develop grants administration skills and expertise among officials by establishing a cross-agency "community of practice", convened by the Department of Premier and Cabinet and responsible for: • developing resources to support compliance with the draft *Grants Administration Guide*, including templates and training materials for officials administering grants • exploring opportunities for collaboration across government to improve the timing and coordination of grant opportunities, particularly where multiple grants target the same stakeholders.

Accountability and transparency

Responsibilities identified and documented in the planning and design phase

Recommendation 5	When establishing a new grant, officials must identify and document roles and responsibilities, including who is responsible for assessing applications and making recommendations and who is the designated decision maker.

Open and transparent application and assessment processes

Recommendation 6	Officials must ensure all new grants have published guidelines that: include the purpose of the grant, clear selection criteria, and details of the application and assessment process; and are approved by the responsible Minister(s) or delegate.
Recommendation 7	Where a method other than a competitive, merit-based selection process is planned to be used, officials must document the reasons why a different approach has been chosen and outline the risk mitigation strategies. This must be approved by the responsible Minister or delegate.
Recommendation 8	Officials must assess all grant applications against the published selection criteria. Where significant changes are made to the grant opportunity, the guidelines must be amended and re-published as soon as possible. In limited circumstances eligibility criteria may be waived. The reasons for any departure from the published eligibility criteria must be documented and approved by the decision maker.
Recommendation 9	Ministers and Members of Parliament can make suggestions for grant funding in their electorates. Officials should, however, document: • the input from Ministers and Members of Parliament at all stages of the process • how any input from Ministers and Members of Parliament during the assessment phase was considered in formulating funding recommendations.
Recommendation 10	Where the decision maker is a Minister, officials must provide written advice that includes, at a minimum: • grantees recommended for funding based on selection criteria • the merits of the proposed grant(s), having regard to the grant guidelines and the key principle of achieving value for money • proposed funding amounts for each recommended grantee • details of the application and assessment process applied • any relevant input from key stakeholders, including ministerial staff, the responsible Minister, and other Ministers or Members of Parliament.

Robust decision-making and record keeping frameworks

Recommendation 11	Grants administration processes must involve robust decision-making frameworks for Ministers and officials, including that: • where there is an assessment team making recommendations to a decision-maker, those recommendations should be made in writing • a Minister must not approve or decline a grant without first receiving written advice from the assessment team on the merits of the grant • a Minister, or delegated official, who approves a grant must record the decision in writing, including the basis for the approval with regard to the grant guidelines and achieving value for money • where a Minister, or delegated official, makes a decision that departs from the recommendations of the assessment team, they must record the reasons for the departure.
Recommendation 12	As reflected in the draft *Grants Administration Guide* at **Appendix A**, guidance on grants administration should emphasise all parties' obligations under the *State Records Act 1998* (NSW), especially those of Ministers and ministerial staff to ensure decisions and actions of Ministers are properly recorded and stored.

Comprehensive grants information on a central, publicly accessible website

Recommendation 13	Develop a whole-of-government database that includes up-to-date information on: • upcoming grant opportunities • all open grant opportunities and their guidelines • all grants awarded • a record of ministerial grant award decisions that vary from the recommendations of officials, and the reasons for the decisions • grant program evaluations. This grants information must be made publicly available on a central website, subject to legal and policy exceptions outlined in the draft *Grants Administration Guide*. Until a central website can display this information, it should be published on agency websites.

Grantees are accountable for how they spend public funds

Recommendation 14	All grants must have a funding agreement or, where not practicable, formalised terms and conditions. Where grants have an acquittal process, officials should assess grantee compliance with the terms of the funding as part of this process.

Value for money and outcomes orientation

Efficient and customer-focused grants processes

Recommendation 15	As reflected in the draft *Grants Administration Guide* at **Appendix A**, guidance on grants administration should make clear that application, reporting and acquittal requirements must be proportionate to the value and risk of the grant, and the applicant's capability.

Reinforce existing NSW expenditure appraisal and evaluation policies

Recommendation 16	Grants should be designed with clear and specific objectives, including connection to identified needs, agency outcomes and government priorities. Officials should identify the outcomes and program measures to be used to evaluate the program against these objectives, consistent with existing policy requirements.
Recommendation 17	Officials must demonstrate at the planning and design stage how a grant program will deliver value for money by identifying benefits and costs (economic, social, environmental, and cultural). Value for money assessment should be proportional to the value and risk of the grant.

Probity and governance

Leverage agencies' existing risk management requirements and practices

Recommendation 18	Ensure best-practice grants processes, in line with agencies' risk management frameworks and requirements under the *Government Sector Finance Act 2018* (NSW), by requiring: • officials to establish processes to identify and manage risks throughout the grant lifecycle, including preparation of a risk appetite statement for all medium-to high-risk grants for approval along with the grant guidelines • agencies to identify and task their appropriate risk management officials with providing advice and support to officials who are planning, designing, and implementing grants • officials to seek probity advice (whether external or internal) for all grant programs that are complex, high risk or high value, to support the design, application, assessment, and decision-making phases • Chief Audit Executives to ensure their agency's internal audit program includes regular audits of grant programs to monitor and assess compliance with the Guide. The frequency of audits should be proportionate to the value and risk of grants activity undertaken by the agency.

Implement fraud risk controls

Recommendation 19	When administering grants, officials must develop and implement fraud controls that are proportionate to the value and risk of the grant and consistent with NSW public sector risk management requirements.

Appendix 6: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific offences which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.

Subsection 9(1) provides that, despite s 8, 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.

Section 13(3A) of the ICAC Act provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

Subsection 9(4) of the ICAC Act provides that, subject to subsection 9(5), the conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in s 8 is not excluded by s 9 from being corrupt if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides that the Commission is not authorised to include in a report a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection 9(4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from the ICAC Act) and the Commission identifies that law in the report.

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified

person is corrupt conduct unless the conduct is serious corrupt conduct.

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities. The Commission then determines whether those facts come within the terms of subsections 8(1), 8(2) or 8(2A) of the ICAC Act. If they do, the Commission then considers s 9 and the jurisdictional requirement of s 13(3A) and, in the case of a Minister of the Crown or a member of a House of Parliament, the jurisdictional requirements of subsection 9(5). In the case of subsection 9(1)(a) and subsection 9(5) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has committed a particular criminal offence. In the case of subsections 9(1)(b), 9(1)(c) and 9(1)(d) the Commission considers whether, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, they would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

The Commission then considers whether, for the purpose of s 74BA of the ICAC Act, the conduct is sufficiently serious to warrant a finding of corrupt conduct.

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently in the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. 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 to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

> *…as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejfek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution, Queensland, 1977* (McGregor J) and *the Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings of fact and corrupt conduct set out in this report have been made applying the principles detailed in this Appendix.

I·C·A·C

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