Some Legal Implications of Pork Barrelling

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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.

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[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.
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> 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.
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> 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.
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> 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

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[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

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[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

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[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."

[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.

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[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.

[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:
>
>> "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:

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[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:
>
> > "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

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[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

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[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

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[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, Westminister*** 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."

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[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

[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

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[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

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[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,

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[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.

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[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.

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[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]

[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:

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[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

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[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.

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[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

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[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.

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[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,

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[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,

[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

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[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

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[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.

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[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

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[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

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[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.

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[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

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[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].

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[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.

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[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]:

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[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.

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[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

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

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[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

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[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

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[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).

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[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.

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[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

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[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.

[578] WA Inc Royal commission report para 4.3.2

[579] ***Allen v Tobias*** (1958) 98 CLR 367 at 375 per Dixon CJ, McTiernan and Williams JJ

[580] Everything is presumed against a person who destroys something

[581] [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