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NEW SOUTH WALES

FORUM ON PORK BARRELLING

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR O'BRIEN: Yep, by all means.

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

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

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

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

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

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

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

Lord Bingham in his judgment concluded that powers conferred on a local council may not lawfully be exercised for the purpose of promoting the electoral advantage of the political party. Now, the councillors then objected. They argued that they couldn't be expected to ignore party political advantage in exercising their policy powers. Lord Bingham responded that of course politicians can exercise their powers for public purposes, hoping that their policy choices would earn the gratitude and support of the electorate. But they could not exercise a power for a purpose other than that for which it had been conferred. They could not use it to promote the electoral advantage of a political party. He concluded that "the unpalatable truth was that it was a deliberate, blatant and dishonest misuse of public power, not for personal financial gain, but electoral advantage". And he saw it as corrupt and he also said that the auditor was "right to stigmatise it as disgraceful".

Now, similar arguments about politics were also made in New South Wales in the Greiner case concerning the appointment of Dr Metherell to a public service position without going through the ordinary merit procedures. Again, it was argued that this was just politics. Now, that view was rejected. Justice Mahoney said, "One has to look at the proper objects of the power." In some cases political considerations may fall within the objects of the power, such as a minister, for example, appointing their own

ministerial advisers and using political reasons for doing so. That's perfectly fine. But appointments to public offices must be exercised for a public purpose, not a private purpose. "Partiality," he said, "involves giving a preference or advantage for an improper purpose." Now, Dr Metherell's appointment was partial because it was made for an improper extraneous political purpose. Even though he might have been successful if there had been a merit selection, this was irrelevant because the issue was not about whether the outcome was objectively good or bad. The issue was about the abuse of public power. And this partial conduct satisfied the first element of corrupt conduct under the ICAC Act. Now, you might remember also that in that particular case the ICAC's finding of corrupt conduct was overturned. It was overturned on the second element of the ICAC definition of corruption, which we will probably come to later.

Now, Justice Mahoney also gave another example of potentially corrupt conduct which is relevant here. He said, "That a decision about where a public facility is to be built must be based upon what is the proper place for it, rather than where it is most likely to assist the re-election of a party member." And in later writings he also said that "If an official is given power to allocate money to encourage cultural activities and distributes it to persons or bodies apt to support a particular political party or to procure that they do so, this too would involve the misuse of public power." In short, pork barrelling may satisfy conditions of corrupt conduct under the ICAC Act where there is partial behaviour that occurs for an improper purpose and in very serious cases it might even constitute a criminal offence of misconduct in public office. But do we have to go down the route of prosecuting and imprisoning politicians to stamp out that kind of misuse of public office? One of the ICAC's really important roles, from my perspective anyway, is actually to prevent corruption from occurring to begin with by putting in place the right laws and structures so this does not happen. So we don't have to have the inquiries about whether or not the corruption has occurred. We don't have to have findings of corrupt conduct because the structures and laws are in place so that it never happens to begin with.

Now, anyone who has read the Auditor-General's report into the Stronger Communities Fund and the Regional Cultural Fund, and I do strongly recommend that people do read it, will be – in my view anyway – appalled by what occurred. It was appalling on two levels. One, it was an indictment in the integrity of the governmental behaviour. But secondly, and I say this as a former public servant, it was appalling just in terms of terrible public

administration. Now, unfortunately these examples of criticism of grant schemes et cetera don't seem to be outlier cases. They've also been allegations of other forms of improper expenditure of public money. At the Commonwealth level as we've heard and also in New South Wales in relation to sports grants, arts grants and even bushfire relief funds. So clearly, better laws and systems need to be put in place.

Now, in November 2021 the new Premier Dominic Perrottet stated that "Taxpayers expect the distribution of public funds will be fair and I share that expectation," he said. He ordered a review of how grants should be administered and this was a very good sign that something might actually be done to prevent the recurrence of such abuses in the spending of public money. Now, that report was published quite recently in April. Some of its recommendations are very good, such as the creation of a new guide on grants management to better ensure documentation and critically transparency.

So that's the first step that needs to be taken. In my view I don't think it goes far enough. First, the obligations on ministers and their staff in relation to grants need to be imposed by law, not just in a premier's memorandum and was proposed in that report. And this is because other accountability provisions in codes of conduct and statutes such as the ICAC Act turn on whether there has been breach of a law, not a premier's memorandum, a law. So for example if a minister has behaved in a partial manner and his or her behaviour would cause a reasonable person to believe that it would bring the integrity of the office or parliament itself into serious disrepute, a finding of corrupt conduct can be made by ICAC if the minister's acts also constitute breach of a law, not a premier's memorandum, a law.

Similarly, clause 5 of the Ministerial Code of Conduct requires a minister not to direct or request a public service agency to act contrary to a law. Burying grants rules in a memorandum rather than in a law avoids consequences for ministers if they breach those rules or if they instruct others to do so. Another problem is the failure to address the issue of grants being made for the advantage of a political party including when they are election promises. Now, at the Commonwealth level the use of ad hoc non-competitive grants to give effect to election promises has resulted in rules about merit and proper assessments being tossed out the window.

Any new state grant rules should explicitly provide that grants must only be allocated in the public interest and not predominantly for party political

purposes. New grants rules should also contain express provisions to prevent avoidance and to ensure that election promises must still be subject to proper scrutiny and merit assessment. A government or opposition could still promise to establish a $100 million scheme for funding sports facilities, for example. That would be a policy. But it would then have to say that the outcome of particular grants given would depend upon making a proper merit assessment. Is this the appropriate place to put it? Can this body successfully implement this grant? Will this grant lead to the most efficient use of public money? All those sorts of things.

Voters I think would appreciate the fairness involved in those kinds of allocations. Most voters I think are fed up with election bribes and the whiff of low-level corruption that they exude which corrodes public trust in the system of government. A local member could still also promise to advocate for a new swimming pool or an upgraded sporting field in their particular electorate. It wouldn't deny the ability of members of parliament to say that they would do that during a campaign but they would still need to acknowledge that although they would advocate strongly for their electorate ultimately decisions would be made on the basis of fairness and again, I think the public would accept that that's the appropriate way for it to be done. Indeed, other candidates could make no greater commitments because they too would ultimately be bound by merit requirement if it was placed in law.

So any package of reforms needs the following. Expressed legislative authorisation of every grant scheme which clearly sets out the scheme's objectives, identifies the decision-maker, the method of grant distribution and authorises the expenditure. An expressed legal obligation on ministers as exists at the Commonwealth level that before authorising the expenditure of public money they must be satisfied, based upon evidence, that spending is efficient, effective, economical and ethical. And in addition to that I would also add that this authorisation must include that ministers must act in an impartial manner and must act in the public interest. Public servants should also be under a legal obligation to comply with relevant rules concerning the management and documentation of grant schemes. If public servants are decision-makers they must also be placed under a legal obligation to act in a manner that is impartial, efficient, effective, economical, ethical and in the public interest.

Grant rules should be given legal status by being set out in a legislative instrument and there should be a body that maintains oversight of grant

programs to ensure compliance with the grant rules and to give effect to transparency by scrutinising and publicly exposing poor behaviour. This body would be a parliamentary committee, for example, it could be, which would then be able to receive and table all the relevant grant documentation.

So the aim of all these proposed reforms is to achieve proper administration, more efficient and effective use of scarce public resources, fairness and equity in how communities are treated regardless of which electorate they're in, a more level playing field for political parties in elections, removing an unfair advantage from incumbency and also improving respect for the democratic system. The NSW Government was the first to clean up political donations by imposing caps on donations and expenditure. Hopefully, it can also be the first to clean up pork barrelling by ensuring that public money is spent fairly and in the public interest. Thanks, Kerry.

MR O'BRIEN: Thank you, Anne. That's very much to the point. A nice précis of in fact a 45-page paper with lots of backup for the points that Anne has made. And these really are the key issues that we're going to chase down today. For the sake of clarity I'd like to establish some level of commonality around what we mean by pork barrelling. Joe Campbell, you've broken it down at the start of your paper. Can you very briefly just hit the key points of what you've had to say.

PROFESSOR CAMPBELL: Well, for a start, talking about pork barrelling as a term in itself can cause confusion and lack of clarity and thought. It's a metaphor. It can mean all sorts of different things to different people and so it is necessary to be more precise about what you mean by pork barrelling. The most useful definition that has been given is one that ICAC has adopted tentatively for the purpose of this investigation, which is the allocation of public funds and resources to targeted electors for partisan political purposes, and when it talks about partisan it means giving advantage to a particular political party, not just giving advantage to some particular social group or whoever else might be in favour.

That definition is one that differs from some that have been given by in particular academic students of pork barrelling that have included a geographical element to the pork barrelling, that the pork barrelling is aimed at electors of a particular geographical area. Now, the way in which the targeting of particular electors in a geographical area is something that is excluded by the definition that ICAC proposes, is that it is possible to have electors targeted by demographic criteria rather than by geographical ones.

If you've got a policy that says we are going to give particular advantage to self-funded retirees or we're going to give particular advantages to mothers of preschool children, then that is aimed at a particular demographic of the public, and that is capable of being pork barrelling under the definition that ICAC has tentatively adopted, even though it would not fall within some of the other definitions that have proposed a geographical element to the definition.

Now, I think that the ICAC definition is one that better captures what is the vice that is aimed at by saying pork barrelling is the kind of thing that is undesirable as a matter of public policy. That doesn't mean that geographical criteria are going to be irrelevant to it because usually it will be much more difficult to prove that there is advantage for a particular political party sought in giving benefit to a demographically defined group than in giving an advantage that has a much more focused geographical structure. Basically that's all I wish to say about it.

MR O'BRIEN: Okay. AJ Brown, I know that you have got a view that there is acceptable pork barrelling and unacceptable pork barrelling. I would suggest that the actual term pork barrelling carries a clear negative connotation. So in terms of your own thinking, when a former New South Wales Deputy Premier John Barilaro, who reportedly gave himself the nickname of Pork Barilaro and was under fire over the allocation of bush fire recovery funds, claimed that what others might call pork barrelling is actually an investment in the region, or regions, he said, "When you think about it, every single election that every party goes to, we make commitments. You want to call that pork barrelling," I imagine he's talking to journalists, "You want to call that pork barrelling, you want to call that buying votes, it's what elections are for." Is he blurring the lines there or does he have a point?

PROFESSOR BROWN: Well, he does have a point, Kerry, in that you're right that the term pork barrelling has possibly generally had a pejorative meaning and is now taking on a much more pejorative meaning. So really what we're talking about here is definitions of pork barrelling and we can unpack what pork barrelling is a little bit more I think, that are defining unacceptable pork barrelling, what we don't want. So the ICAC definition when we start to identify that public money is being allocated for partisan political purposes. Simon has a very good definition that is similar to that. Not a less legalistic definition but a similar definition that starts to define what is it that we don't want in pork barrelling. But the term itself to me is,

even though it has got that pejorative connotation, it's a reflection of the fact that it is part of politics and arguably will always be part of politics and should be part of politics that elected members of parliament are able to deliver for their community, and that might be a local community as Joe was saying or it might be a community of interest, and that they be able to be seen to be delivering to their community, and that's important for public trust as well as for democracy to function. And so I think we've got to remember there's a link between the term pork barrelling and the original term bringing home the bacon. Politicians have to be able to be seen to bring home the bacon. And that's actually quite legitimate that they be able to demonstrate that they have actually delivered for the community, served community purposes and they may be local and they may be sectional and that is not necessarily illegitimate.

So we've got to sort of marry up the fact that there's a whole lot of things happening here which we are starting to much more clearly identify we do not want and are unacceptable and are probably unlawful and probably always have been unlawful and we have just forgotten that, as Anne was saying, or some people have or never knew, but at the same time we've got to marry that with the political reality where we can improve all the rules, we can make it all more robust, we can make it clearer when people are breaching the principles. And we should do all of that but at the same time we will still be left with members of parliament who will legitimately say, well, we've done all of that but we failed to fulfil the purpose of serving the community here. How do we make sure that we actually can efficiently serve the community and demonstrate that we have delivered for the community?

So we have to recognise that it's a little bit like lobbying. Lobbying has a pejorative connotation now predominantly because of the problems and the risks that have manifested with the development of commercial lobbying in particular and undue access and influence, et cetera, et cetera. So it's got a pejorative meaning now but in fact lobbying in itself is not inherently bad. In fact, democracy could not function without people lobbying. So I think we have to retain that realistic political context if we're going to get the balance right on the reforms that will work, and I think it's made even more complex by the fact that there are times when it's very difficult, it's impossible to remove a partisan or an electoral, an intent to secure some electoral advantage. It's impossible or almost impossible to remove those things totally from any kind of public expenditure program.

So we can't remove it totally and now we're dealing with definitions about well, how much do you have before it taints the decision? And I'd actually go to another extreme, which might sound slightly inconsistent with what I just said, is that there is even circumstances where the presence of that does completely contaminate the decision even if it's a tiny amount of partisan political purposes involved. And we can maybe talk about some examples for that.

So it's more complex than – I think the complexity of the political reality of the fact that it's endemic to the political process, some level of pork barrelling and its legitimacy, is part of what makes this very complex and part of why the reforms actually have to deal with the total ignorance on the part of some members of parliament as to their public duties, has to deal with that total ignorance, but it also has to match with our standards for what we expect good politicians to do, and part of what we expect good politicians to do is still a level of pork barrelling.

MR O'BRIEN: Yes. Well - - -

PROFESSOR BROWN: I haven't convinced you.

MR O'BRIEN: No. No, because, you know, what you're describing could be a pensioner, an old age pensioner or an aged pensioner, since there are now many of us who are old who aren't pensioners yet, or it might be somebody on NDIS and they certainly wouldn't think of themselves as being on the receiving end of pork barrelling because the connotation that pork barrelling carries is that it is politicians either feeding at the trough or opening the trough up to some of their constituents for a favour. So, Simon.

DR LONGSTAFF: Yeah. I think we should reserve the term pork barrelling for the pernicious activity, and I'll try to define that in a moment, and find another way to describe what AJ has just been talking about which is electoral politics and things, and Anne gave a few clues as to how it's possible to seek the good opinion of the electorate without necessarily contravening some basic principles.

The other thing I'll say just briefly before going to the definition that I'd like to propose is that one of the underlying questions, which we may or may not touch on today, is whether or not we are serious about being a democracy because democracy when you properly understand it has certain implications and limitations on what you can or cannot do, including in

some of the areas AJ was talking about. You can have a liberal oligarchy if you want it, which can give a more permissive environment for what you might do in terms of seeking preferment electorally, but democracy, once you understand it, and it's right at the ground root of the system we claim, and lots of people like to wrap themselves in the legitimacy of democracy while actually corrupting it, it has very specific limitations and we may not want to live with them but we should at least understand what they are.

In terms of the definition, with all due respect to others, I tend to be slightly idiosyncratic and want to go back to first principles. So the definition that I propose to ICAC, it's not wildly different to what you've heard, but it's just got a few subtle differences to it which reflect that understanding of democracy. So I propose that it be the commitment or expenditure of public resources. That's the first element that needs to be there, and I should say, all of the elements I'm going to propose must be present for it to account as pork barrelling in that pernicious sense. For the principal purpose of securing electoral advantage. So it's not the sole purpose. It's an issue there will be multiple purposes often in what people intend to do, but if the principal purpose is discernible as seeking electoral advantage either because there's explicit evidence, as there has been in some cases, that that was the intention or because it is evident from the actual choices made that that can only be the thing that explains the difference of treatment.

So that's the second element, by conferring a selective benefit. So one of the things which might come back to a democracy again is if there's a general benefit to the polity as a whole, then it doesn't cause a problem but if it's a selective benefit for a subsection of the polity as a whole. So all of those elements need to be there. The commitment of expenditure of public resources for the principal purpose of securing electoral advantage by conferring a selective benefit on a subsection of the polity as a whole. And that goes to, Joe was raising the question, for example, of geographic things. I think it's not so much geography, it's more the differentiation of the electorate into subsections which becomes the problematic component. I think if you think of it in those terms, then you get all of the work that I think needs to be done in relation to democratic theory and expression is captured in that definition.

MR O'BRIEN: Peter?

COMMISSIONER HALL: Kerry, I might just add a couple of comments on what Simon and AJ in particular have raised. It goes into this territory as

to ministerial discretion. Where is the boundary between legal justification for action as against political action? Where is the boundary? There is no bright line and that's what does make it difficult on occasions to say whether something is pork barrelling or not. I think in terms of the political reality that AJ spoke of, the realistic political context was another expression he used, I think that can only be understood by an analytical approach which is reflected in some of the case law.

It's been discussed in the Fitzgerald Commission of Inquiry Report and so on, but trying to pull it all together, if a politician makes a decision about giving resources, he or she sees some electoral advantage coming their way about this, is that permissible? Is this the political reality? Yes, it is. It is permissible. As one judge put it, if a politician is acting properly in office and is making a decision for the public interest but sees as what he termed as a side-wind benefit that there's some political potential expectation or benefit, that is quite permissible.

Tony Fitzgerald in his commission report, he spoke again of how do you judge whether this is on one side of the line or the other. He used the formulation, which I don't think Simon would necessarily embrace, you ask yourself the question what was the dominant purpose, the predominant or dominant purpose of this action or this decision in order to determine whether it is a proper use of the public power. That's not to say that that is the gold standard or that's the only test, but it is helpful because it starts to feed into this other area that a lot of decisions and political decisions have mixed motives, and this question of mixed motives was discussed recently by the Court of Appeal in the matters concerning Mr Maitland and Mr Macdonald.

It is a question of mixed motives so that you have to then address, well, what was the real purpose if you like, the dominant purpose, and if it did serve the public interest but there was also an expectation or a hope, as the New South Wales Ministerial Code refers to it, of some political advantage coming out of this, there's nothing wrong with that, that's quite permissible. But if you get a decision, let's take the Stronger Communities grant fund case. I mean there's no argument. There is in fact, as the Auditor-General's report discovered in that case, a document which is a briefing note in the Premier's Office, and that briefing note was to the effect "We've got the money out the door and it's hitting the political target," I mean you couldn't have it any clearer than that as to what the motive was. So that was you

would almost say the sole motive, sole purpose of that exercise was political or electoral and that's clearly on the other side of the line.

So there are gradations but I think one has to acknowledge the political reality, as AJ has been addressing, that it's not altogether quite simple because there's often more than one reason behind somebody's actions. And I think that coming back to Simon's point about selected benefit, I understand the point. I think that, however, you've got to have a tool. You've got to have an analytical tool to be able to say the particular case, looking at the facts and circumstances around that decision, what side of the line does it fall on. So that's I think the best I can do in terms of trying to find an analytical tool that does assist in deciding what part of this hypothetical line a decision falls on.

MR O'BRIEN: Okay. That's – yeah, sorry, Joe.

PROFESSOR CAMPBELL: I wonder about the ability of the third criterion that Simon has put forward to be able to actually differentiate what is understood as pork barrelling from what is not because practically all decisions of government are ones that confer a selective benefit for a subset of the polity as a whole, and if you decide to build a road between A and B then that's going to benefit the people that are near there. If you decide that you'll put a particular medication on the PBS, then it's going to benefit people who have got whatever disease is treated by that medication but not the other people.

DR LONGSTAFF: Yeah, but, Joe, that's why you've got to take the definition and all of its elements need to be satisfied. Yes, there will be times when there is a selective benefit which is done not for the principal purpose of securing electoral advantage and that would fail the test and would not be constituted as pork barrelling under what I've proposed, and there will be times when a person might be seeking some political advantage where there is no selective benefit and the whole of the general community is benefitting from the policy and that would not be counted as pork barrelling.

It's the alignment of those different elements. And I think when it comes to analytical tools, I mean there are some cases where there will be evidence clearly of the kind that you cited, but there will be other times, and I think we saw it in the end of last year, was it, with the floods in northern New South Wales, where people in objectively identical circumstances had had

their lives ruined by those floods. One group were being supported because of their political allegiance or proposed allegiance and another was ignored.

MR O'BRIEN: That was the allegation.

DR LONGSTAFF: Well, that was the claim. So I would say in those circumstances, if you see identical circumstances and differential treatment I'd be looking at some kind of rebuttable presumption that this has, you know, if the other elements that were quoted, is failing the test and those who are exercising a public office should be able to explain why that distinction was made. And a rebuttable presumption of that kind is a very useful tool in these circumstances because it puts the onus back on the public official to give good public reasons for why they acted as they did.

MR O'BRIEN: Now, I'm going to – Anne, I think we're already pretty clear on where you stand, but for clarity's sake what I'm going to do, I think we take on board that this is just a classic illustration of the complexity of the area that we are moving in, and for the purposes of this discussion I'm sure that ICAC people are taking copious notes as we go and I imagine there will be a lot further conversation around the points that have already been made. But for the purposes of where we go from here, I think we take it that we are talking specifically about, primarily about the allocation of public funds and resources to target electors for partisan political purposes, and I thought it might further assist the clarity of the discussion if I ask Ian Goodwin, as Deputy Auditor-General for New South Wales, to walk us through the Audit Office report that was released just a few months ago and analysing the integrity of the way two Berejiklian government grant programs were assessed and approved, the same state programs that Peter referred to in his opening and referred to in the same spirit. The first program, round 2 of the Stronger Communities Fund designed to provide $252 million to newly amalgamated councils and other councils that have been subject to a merger proposal. So the Audit Office report found that the process for that grant program fundamentally lacked integrity. What standards would the Audit Office have expected and where did those standards break down?

MR GOODWIN: Thank you, Kerry. I probably would just make an opening comment that, I mean, we did use the title Integrity of Grant Program Administration, so the focus there is the important word "integrity". And integrity is not just about the integrity of the actions of

individuals, it is also about the design and implementation of systems and processes that ensure integrity in decision-making.

So in the case of the Stronger Communities Fund audit, the guidelines that we looked at were deficient. They were not clear in terms of the criteria that councils would be selected. They were not clear in terms of the decision-makers or how councils would receive funds, and indeed they probably didn't align to DPC, Department of Premier and Cabinet, guidance that existed extant at that time. I mean what we would be expecting to see, and I think the work that has now been done by the Productivity Commissioner and the Secretary of the Department of Premier and Cabinet, outlines those safeguards that we would expect to see. But we would be expected to see that the process of selecting councils was, there was an objective criteria, a measurable criteria, a criteria that you can apply evidence to and that there was a clear line of who were the decision-makers and accountability and transparency around that.

Ultimately the recommendations of the Auditor-General were that we would expect to see that decisions around grants are based on ethical principles, bearing in mind that the Government Sector Finance Act and Employment Act does set out principles around impartiality, equity and transparency and accountability. We would ensure the assessments and decisions can be made against clearly directable criteria and eligibility criteria, ensure the accountability for decisions and actions involved are very clear, and indeed that is an important point, because when we looked at the Stronger Communities Fund it was not very clear as to who the decision-maker was, and include minimum administrative and documentation standards. And that's relevant. I mean there are obligations on public servants under the State Archives Act to retain records, and in this case there was a deficiency of records and has certainly been played out around some records that were destroyed in ministerial offices.

I think we do recognise that there will be times when a minister might, having established the guidance and eligibility criteria, that the minister might make a decision to override that criteria. Now, we would expect that that would normally be where there's a flaw in the decision, but at the very minimum we would expect that any override would be documented in a transparent and accountable way. And in both cases, both the Regional Cultural Fund and the Stronger Communities Fund, that documentation on how ministers made those decisions weren't [sic] evident.

I would acknowledge, as I said, that post that audit that the Auditor-General tabled on 8 February, the work on the review of grants administration by the Productivity Commissioner and by the Secretary of the Department of Premier and Cabinet if implemented in its entirety, it does pick up the safeguards that you would expect to mitigate against the risks that were identified in that audit. I guess the question is, you know, implement in its entirety is probably the word I've just used but there's also a question as to how you codify that to ensure it is robust and it has meaning.

MR O'BRIEN: We might come to reforms and actions towards the end of the discussion, but the report, this is still the first report that I'm talking about, the Stronger Communities Fund, found that 96 per cent of available funding was allocated to projects in Coalition held state government electorates. What was the significance of that, if any, in the eyes of the Audit Office? Is that a part of your, you know, does it fit your bill to look at that and analyse what that means and what is the context in which you're looking?

MR GOODWIN: Normally we would not identify grants by electoral seats but I think it was sort of compelling that there was a clear outcome that favoured a particular side of the political spectrum. The reason for calling that out by electorate was because there was an absence of clear process. The Commissioner of ICAC did point out that there was a memorandum, and the memorandum does talk about getting money out to meet political objectives but the guidelines were deficient in terms of clear criteria.

The distribution of the money from the Office of Local Government was being made on emails, effectively from emails from staff in the Premier's Office or Deputy Premier's Office. It had informal language so that everyone is comfortable and indeed I think there was probably one would argue, and we do say this in the Auditor-General's report, that there was probably an expectation of the staff in the Premier's and Deputy Premier's Office that the Office of Local Government would not contest those decisions. And that's somewhat evident by the fact that the staff in those offices were asking the Office of Local Government to prepare press releases on the same day as they were being told that this is where the council would receive that grant funding. So there was probably an absence of that contestability there.

MR O'BRIEN: Okay. So with the second of the programs the Audit Office reported on, this is the Regional Cultural Fund which was designed to

support cultural projects in regional New South Wales, you found that although the assessment process by Create NSW – the government's arts policy and funding body which advised the Arts Minister – was robust, tick, the integrity of the approvals process was compromised and I think one in five of Create NSW's recommendations were effectively ignored. They received no funding and the second round 7 of the independent panel's top 10 ranked applications were not funded. Now, I guess it's pretty clear why that was significant but you say "it creates a clear perception that factors other than the merits of the projects influence funding decisions". When you say "clear perceptions" how are you judging that? Are you judging that on process again?

MR GOODWIN: Judging that I guess on process and environment. So what I would say about the Regional Cultural Fund is that the process there as defined in the guidance, that was a good process, it was a robust process and it had an independent panel and that panel had experts and they had a criteria and so there was objectivity around it. And as you point out, of the 253 projects the Minister for Arts after consultation with the Deputy Premier overturned 56 of those and that effectively meant that there was 22 projects to the tune of about 9 million, $9.3 million that were not assessed meritorious by the panel but did get funding and in some cases didn't meet all the criteria that the panel was looking for. So it was a good process. The thing you also have to understand environmentally is that a lot of those projects were announced one month before the 2019 election.

MR O'BRIEN: Okay. So across the two grants we're talking 350 million. You found both processes, well, there was a lack of integrity as part of both of those applications to one significant degree or another. The report made a number of recommendations. What has happened with those recommendations? Has there been any action or has there been any indication of action?

MR GOODWIN: So I'll probably answer that on two levels. So I guess the follow up of the recommendations, the normal process is that the Public Accounts Committee, which is the standing committee that we report to, will follow up on the Auditor-General's recommendations but that's usually done 12 months after we table the report, so that would be February next year. But at another level I do take comfort that the Premier did institute this review.

MR O'BRIEN: Yeah.

MR GOODWIN: And as I said, that particular body of work by the Productivity Commissioner and the Secretary of the Premier and Cabinet, it does actually address. So we've gone through and it does actually address the recommendations made by the Auditor-General.

MR O'BRIEN: Okay.

MR GOODWIN: So there has been I guess good progress and comforting progress. What now needs to occur is is it implemented in its entirety and how it's codified.

MR O'BRIEN: Now, public interest is in there somewhere in the elements of what an audit office does and this is what I want to come to now. I will come back to the, or we will come back to the grants programs later for further discussion, but to focus on this concept or these concepts public trust, public interest or public benefit as they apply to the executive arm of government, that is the way premiers and ministers who make up the Cabinet exercise their power, first from the point of view of the law. Anne Twomey.

PROFESSOR TWOMEY: Sure. So we have a number of judgments of courts where they have pointed out that being elected to a position or being appointed to a public office, a senior public servant or whatever, involves a level of public trust. So you take on responsibility to the public when you are appointed or elected to those positions and the courts have said you must exercise that trust with fidelity. So you must be faithful to the public and you must act in the public interest and that doctrine flows through all levels of law. So it flows through even to the criminal law but it also, as Joe would be much more of an expert on, flows through to other aspects of, you know, tort and equity and all those sorts of things. The notion of public trust in law is a very important one, but basically it's saying to politicians that you're not there for your own interest, you are only there to fulfil the public interest, and courts recognise that when they apply the law in relation to politicians and public servants.

MR O'BRIEN: So public trust and public interest go hand in hand?

PROFESSOR TWOMEY: They do. I don't know whether, Joe, you want to add to that.

PROFESSOR CAMPBELL: Well, I think that in understanding the notion of public trust, a bit of legal history is helpful. The notion of a trust in relation to public officers is one that feeds on the notion of a trust in private law. In private law you're familiar with the notion that one person can hold property on trust for another, and when one person holds property on trust for another then that imposes huge limitations on what the person who holds the property can do in relation to the property that he is the legal owner of. In particular, he must not obtain any benefit for himself and he always has to exercise any powers that he's given for the purposes for which they were conferred. And historically the notion of this private trust developed in the late 17th century and it was by drawing on that that the notion of public trust came to be applied in the public sphere, and what is involved in public trust has got concepts that are very closely analogous to those that apply to public trust, to private trusts rather. You must not exercise powers for any purpose other than that for which they were conferred. You must not seek to benefit yourself in any way by the exercise of the powers.

MR O'BRIEN: So just quickly, for both Joe and Anne, the question of public trust is one that broadly you might say is a bit amorphous, but are you both saying that in legal terms public trust is a well-defined term that, I mean is it hard to establish in a court of law?

PROFESSOR CAMPBELL: What is meant by it has got a long legal history.

MR O'BRIEN: We're not going to go there.

PROFESSOR TWOMEY: No.

PROFESSOR CAMPBELL: No. But that - - -

MR O'BRIEN: But I mean let's take the perspective – yeah.

PROFESSOR CAMPBELL: That lets you know what a person who has an obligation of public trust can and can't do.

MR O'BRIEN: Okay. So - - -

DR LONGSTAFF: Can I just ask why it's so apparently so not understood. If it's got such a long history why is it not understood by people exercising public power?

PROFESSOR CAMPBELL: I have no idea.

COMMISSIONER HALL: I think we can say this, though, it does reach back through the centuries. I'm talking now about the 17th century and beyond but it seemed to then die out. It became what Paul Finn called The Forgotten Trust and it was Paul Finn, who was a very imminent professor of law at ANU, later a judge of the Federal Court, he personally was the one to resuscitate this doctrine, which is ages old, the public trust, and he is really the pioneer again to ensure that it is front and centre of a public office. And when we're talking about obligations and fiduciary duties and so on, this is all part of the public trust obligation. His writings are extensive, beautifully written and they have influenced the development of the law since. I think everyone here probably would agree with that. And the public trust, it's not so much being able to define it but to recognise it goes with the territory, with all political public office.

PROFESSOR BROWN: Kerry, if I can chime in. I think what's really interesting about this and why it's so reassuring, every time we remind ourselves that the concept of public trust is so well embedded in our law and is so available, shock horror to some politicians, to actually rein in some of the behaviour where we're talking about here, is that in some societies more than others, but certainly in our society, this concept is actually well understood and expected by the community. And if you go to something like Transparency International's definition of corruption, which is not a legal definition, it's a holistic definition if you like, which is simply that corruption is the abuse of entrusted power for private or political gain, then that concept that, we're talking about public resources, we're talking about a community, we're talking about the fact that these people have been elected to serve the community and that with that goes a public trust and we expect to see that trust honoured and when it's breached we start to recognise it. And I think that's why we are having this conversation now is because of the extent to which not only the Auditor-General in New South Wales or federally has done a fantastic job of actually pointing out the extent to which normal systems have broken down or been sidelined, and I think Anne did a bit of a service to describing something like the Stronger Communities Fund in New South Wales, describing public administration as having been broken down. I don't think there was any public administration. I think there was just political administration involved in that.

PROFESSOR TWOMEY: Yes.

PROFESSOR BROWN: Whereas at least when you see that there's a tension between what the public administration is producing and what the politicians are doing you've got, you know, you've got direct evidence of a clash there, you can see that something is going wrong. But I think the reason why we're, I think the reason why the community, why it's so important that the Auditor-Generals have done such a good job of revealing the extent of this sort of collapse in what we typically regard as due process to support the discharge of public trust goes way beyond the type of significance that might come from what, you know, what we're describing as being the solutions here.

It's very easy for a politician to listen to this and hear, and we'll talk more about the reforms later as you said, but to hear, okay, all we've got to do is make sure we get the criteria right and we keep the records. Okay, that's what we'll do. But the reason, in fact what's been exposed is much more significant than simply that sort of interpretation of the solutions would suggest because what's been exposed is, and this goes back to what I was saying earlier, is pork barrelling, and I'm quite happy to accept the pejorative definition of that, on an industrial scale and increasingly in the last few years on an industrial scale such as we've never seen before, both at a state level and a federal level. And I think it's the extent to which these programs have transmogrified from once upon a time it was okay, a little bit of pork barrelling at the electorate level, you expect that. That's really what I was referring to before. But this system-wide, government-wide industrial scale pork barrelling is where we've clearly seen, you know, the evidence that we've gone way down a slippery slope that the public is recognising is causing them, causing enormous amounts of concern.

MR O'BRIEN: Now, I'm going to come to Ian first.

MR GOODWIN: Thanks. I just wanted to pick up on that term public trust and part of, it's so important embedded within that is public interest.

MR O'BRIEN: Yes.

MR GOODWIN: And I would just recognise that the concept of public interest over private interest is not absent in New South Wales legislation. So section 3.7 of the Government Finance Act and section 7 of the Government Sector Employment Act does lay out that a public servant in execution of their duties should place public interest over personal interest

as well as upholding, you know, the law and provide apolitical and impartial advice. The reason I draw that out is just to say that it's not absent but one of the key findings in the Auditor-General's audit was that the public service, which is the system that we audit, could have done better to provide advice to ministers on the deficiencies in the design and administration of those respective programs and provide advice on the merits of the projects they received. So there is a recognition of public interest is there but the learning, because not only do our audits call things out but there are learnings but the learnings is the public service and the public servants have responsibility to provide advice on these matters, you know, where you can have a question around whether the public interest has been served.

MR O'BRIEN: And of course, I mean this is a personal observation on my part but the public service of today generally around Australia is a very different animal to the public service of 20 or 30 or 40 or 50 years ago and the kinds of processes of integrity that were kind of a given in those times. We have a circumstance today where it is possible that a public servant is acting on signals and assumptions of what the minister wants rather than necessarily on the kinds of standards that we might be talking about here.

MR GOODWIN: And just to - - -

MR O'BRIEN: I'm not referring that to any specific case.

MR GOODWIN: Yeah. And just, I mean the job of a public servant is a difficult job and the other thing I'll just point out is what is in the Government Sector Employment Act. There's also a very clear statement that apart from doing work on a merit basis, a political basis, the public service is there to implement the decisions of the government for the day. And so there is a tension there.

MR O'BRIEN: Yeah. Now, I want to keep this moving, Simon, but just quickly, yeah.

DR LONGSTAFF: Well, I want to go just to some of the philosophical stuff around the public interest and duty as well but perhaps just by way of an anecdote first if I may, just to partly answer the question. I was sitting with a New South Wales Government minister, whom I won't name, some years ago and this person was telling me with considerable pride that they had finally achieved their goal in which every person in New South Wales was now a customer of the government, and big beaming face and thought

that I was going to be saying oh, well done. And I was absolutely appalled because I said to this person, I said, "Well, that's terrible." He said, "Why?" I said, "Because I'm not a customer, I'm a citizen." And the minister said, "Well, what's the difference?"

Now, that chilled me to the bone because if you understand political theory, political philosophy the way that we distinguish between political systems is according to where authority ultimately is located. So in a theocracy the ultimate source of authority is in God, in a plutocracy it's the wealthy, in an aristocracy it's supposed to be the virtuous, but in a democracy the ultimate source of authority lies in the persons of the governed, the people. And so this is what I was saying about the implications of democracy itself. If you actually spend any time trying to understand what it actually is as a political system, then apart from the very honourable legal traditions which were being discussed before, it is in the heart of what a democracy is that you can only act in a disinterested way for the sake of all because there's no way to distinguish between who counts or doesn't count within that because all the governed are standing equal amongst others.

And then there are issues to do with consent and other things which we might get to later and how that can be corrupted. But it's that basic idea and the failure I think maybe, Joe, when I was asking, wondering aloud why don't they get it? Maybe it's because they've forgotten that their relationship as a government to the citizens is around a duty owed to those who ultimately guarantee the authority that they then exercise and they've forgotten it.

MR O'BRIEN: Yes, Anne.

PROFESSOR TWOMEY: So, yes, I just wanted to add to that point and what Kerry raised before which is why don't the politicians understand this point. And I think that's a really important issue because there is insufficient education of members of parliament and ministers as to their roles and the limits on them. Members of parliament and ministers don't get educated in any formal way in relation to their roles. They get educated by an apprenticeship basis, and in that apprenticeship basis that's where they learn about pork barrelling and all those sorts of things and it becomes totally normalised. If you speak to members of parliament about this sort of thing, they think that people like me are completely crazy and unrealistic, et cetera, because this is just the way it is, this is normal, this is how it operates. But it's because they have been acclimatised and accustomised to

that through working in the political system and being apprenticed to it. No one has actually ever taught them things like administrative law and what the limits are on ministerial powers and how decisions are supposed to be made and all those sorts of things. They honestly don't know. And more to the point, it's the ministerial advisers in their office that don't know, again, that work through the political system but are not properly educated in what these limits are on their powers.

MR O'BRIEN: But they have a Ministerial Code of Conduct and I would have thought that it would be explicitly expected not just for the minister to understand the ministerial conduct but the senior staff around the minister to understand ministerial – so how does the - - -

PROFESSOR TWOMEY: The Ministerial Codes of Conduct are, frankly, useless. I mean, let's just be clear about this. They are deliberately written - - -

MR O'BRIEN: Don't disillusion me, completely, Anne. I want to cling to something.

PROFESSOR TWOMEY: Well, they are deliberately written to allow as much misbehaviour as you can possibly get away with. Here is something I probably should not admit publicly, but I'm going to do it anyway, when I did work in the New South Wales public service, there was a point at which we were, I was – the Legal Branch I ran was tasked with forming a code of conduct, and we formed a beautiful one on the basis of best practice, and it went to Cabinet, and I got called up to the Cabinet door and they said, "No, we're not doing any of that. Stand there and I'll read out to you what the code of conduct is going to say." And it was just dictated to me from the Cabinet room. They didn't want proper rules and restrictions on their powers in the code of conduct at all. They deliberately put in a provision in there about how wonderful parliamentary parties are and that you can't be sort of limited from doing things in that way.

MR O'BRIEN: Well, the preamble to the Ministerial Code of Conduct says that "Ministers have a responsibility to maintain the public trust by performing their duties with honesty and integrity in compliance with the rule of law and to advance the common good of the people." I would have thought, I mean maybe there's lots of caveats underneath there.

PROFESSOR TWOMEY: No, but look where it is, Kerry. Look where it is. It's in the preamble. So they deliberately put it so that it looks like it's doing something, but it's not something they have to comply with.

MR O'BRIEN: Okay.

PROFESSOR TWOMEY: They put it in the preamble so they don't need to.

MR O'BRIEN: Although I think the law does occasionally take preambles into account, doesn't it? Anyway, to what extent – I've got to keep this moving – but to what extent do a minister's powers come under administrative law? I know you sort of passed through it, but the key fundamentals.

PROFESSOR TWOMEY: Well, look, the real issue here is, and this is a particular problem in New South Wales, is it's very clear when it comes to statutory powers. So where a minister is exercising a power that has a statutory source, there are obviously purposes for the powers, there are restrictions on the powers, and administrative law will clearly apply so that you can't exercise the power for an improper purpose or take into account irrelevant considerations. You have to take into account the relevant considerations. You can't act in a biased manner. It does get more murky, however, once you move out of statutory powers and into non-statutory executive power, and there is a deal of uncertainty there as to the extent to which these administrative law rules apply, and that's one of the reasons that I would strongly suggest that with all these grant schemes in New South Wales, we should move to a statutory basis for them so we can see that there is a particular proper purpose for this power, and if it's being exercised in a way that's not consistent with that power, then we can see that it's being exercised partially and all the consequences flow through. Now, at the Commonwealth level, the High Court has sort of resolved that problem because the High Court said in a case that at the Commonwealth level you have to have statutory authorisation for all government expenditure in grants, right. So at the Commonwealth level they're forced to do that. At the state level, no one's forcing them to do that. And that would be one of the things I think that would be really helpful in cleaning up the system, because the administrative law system works more clearly when it comes to dealing with powers that have a statutory source.

MR O'BRIEN: Joe, do you have anything additional on that or are you in agreement with Anne?

PROFESSOR CAMPBELL: I didn't want to add anything to what Anne had said, but I wanted to come back on something Peter had said about where the notion of public interest comes from. While it's true that what Paul Finn has written has been very important in reminding people about the notion of there being public interest responsibilities of people who exercise public power, there are two High Court cases in the 1920s that quite clearly say this is the law in Australia, and as a matter of precedent you've just got to continue to apply those cases.

MR O'BRIEN: Okay. I'm going to keep going through, so we've got administrative law, we've got common law, we've got the statutes and we've got ICAC's, the legislation that governs ICAC in terms of propriety generally. So where does common law sit in all of this? Again, Anne, I'll just stay with you for a minute.

PROFESSOR TWOMEY: So common law is judge-made law. It's law that has existed for an awfully long time and has been developed over time by courts. So the key one here is the common law offence of misconduct in public office. Again, this was something that wasn't really well known and certainly not by politicians, and became a lot better known once we had some ICAC inquiries that led to prosecutions of people like Eddie Obeid. So misconduct in public office has now had a lot more litigation about it as a consequence of that ICAC investigation. What's interesting is because there have been few cases about it, and because it is a common law doctrine, it does, the cases all reflect how it's been developed in other common law jurisdictions. So if you look at our jurisprudence, we'll be looking at, for example, what the Hong Kong Court of Final Appeal said, and that's partly because the judge there who developed it was Sir Anthony Mason, our former Chief Justice, while sitting on the Hong Kong Court of Final Appeal. You'll see Canadian decisions. You'll see UK decisions. So there is this commonality around the common law world about what is the test that applies to misconduct in public office. And over time that has developed and it has now become a lot clearer and more certain in the very recent cases, so the ones about Eddie Obeid and Maitland and Macdonald and the rest of it. So it's the common law offence is an important one that deals with partial conduct and breach of public trust and all those sorts of things that we're talking about today.

MR O'BRIEN: Okay. So how would you apply common law to the, broadly speaking, to pork barrelling?

PROFESSOR TWOMEY: Well, it certainly can apply to it. There's a couple of aspects to it, though, that need to be taken into account. So there's one aspect is that it has to be wilful, so there has to be an intention to behave in a way that you know is unlawful and that sometimes there's a difficulty when politicians say that they don't know what's going on, and hence that quote I gave from Chief Justice Bathurst about Eddie Obeid saying that he must have known that what he was doing was wrong. And you can sometimes have good evidence that they know, like when they destroy all the documents, it's usually a fairly good sign. But the other thing is that it needs to have, it needs to be, meet a fairly high hurdle of egregious conduct because they say it needs to be something or other that actually deserves to be treated as criminal in nature. And so that's the bit where, you know, there really is a level of discretion and uncertainty about it. It actually has to be quite serious behaviour. But what's interesting is if you match that with what the ICAC Act says as well. The ICAC Act also has a provision in there that says they can't make findings of corrupt conduct unless it's a serious matter. So that notion of seriousness falls in there as well. It's not the trivial stuff, it's the serious stuff. Sort of thing that you can be convicted and sent to jail for. Has to be quite serious.

MR O'BRIEN: So before I come to you, Peter, I just want to finish this off with Anne. So come to ICAC's powers under the legislation with regard to ministerial conduct. How broad are ICAC's powers?

PROFESSOR TWOMEY: Well, we have seen that there are many technicalities about them. So we saw that both in the Greiner case and the Cunneen case as well, so you can trip over the technicalities. But on the whole they're pretty wide. So, for example, it refers to behaving in a dishonest or partial manner in the exercise of official functions. That's one aspect of it. Breaches of public trust is another. And also committing the offence of misconduct in public office also triggers it. But the technicality with ICAC is there's two elements you have to deal with, so the first is doing those things, the breach of public trust or the behaving impartially and – so behaving in a partial manner in exercising of functions, et cetera, and then you get to the second level, which is really dealing with the seriousness aspect of it, and there you either have to have committed a criminal offence or had a serious breach of a code of conduct if you're a politician, or if you're a public servant you can also be caught there if it's a matter that's

disciplinary, would lead, give rise to disciplinary conduct against you, or indeed if it was effectively a sackable offence. There's also the provision that I mentioned to you before that even if you don't satisfy any of those but your conduct would lead a reasonable person to believe that you had brought your office or the parliament itself into serious disrepute, you can again be found to be having committed corrupt conduct, but only if you can identify a law that has been breached. That doesn't have to be a criminal law, it could be any type of law, but you do need a law.

MR O'BRIEN: Okay, and the final piece of this thread before I come to Peter, and I'm asking you rather than Peter because he may not want to go to this one himself, and this is not relating to any of the matters that we've talked about, but this is more general. If a minister goes outside the guidelines for establishing who gets grants under a particular scheme, arguably hijacks the process to favour some electorates for party political gain, and in the process of course protect their own jobs and seeks to hide or cover up that process and breaks their code of conduct, how serious a breach of the law would that be?

PROFESSOR TWOMEY: Well, as always, depends on the circumstances and it also depends on the evidence that you would have to be able to establish any of that. But that kind of behaviour could amount to corrupt conduct under the ICAC code, particularly if there was a serious breach of the Ministerial Code of Conduct. And could even possibly amount to an offence of misconduct in public office if it was prosecuted at the criminal level, but you'd have to reach that, that hurdle that I mentioned to you before of being the type of conduct that would justify criminal convictions. So it would depend on the nature of the conduct involved. But those two things are possibilities. Now, look, it doesn't happen very often in Australia that these sorts of things are prosecuted, but we have seen in more recent times with ICAC prosecutions have occurred in relation to a number of politicians who have ended up actually in jail from this Parliament. And so I think we've seen an increasing appetite in integrity agencies and, indeed, in prosecution agencies to take this sort of conduct more seriously than they have before, so politicians should be a bit more worried than they used to be.

DR LONGSTAFF: Can I just ask a question for clarification?

MR O'BRIEN: Just quickly.

DR LONGSTAFF: Just very briefly. Ministerial advisers, are they covered? Is the action of a ministerial adviser deemed to be the action of the minister? Or if they're doing things between, say, the public service and the minister, does it completely fall outside those legal requirements?

PROFESSOR TWOMEY: It gets quite complicated. They have their own legislation that governs their activities. They also have their own separate code of conduct, so there is a separate code of conduct that deals with ministerial advisers, and there's an obligation under that code of conduct, by the way, interestingly, to obey things like premier's memoranda, which actually curiously doesn't appear in any of the other codes of conduct, so why the ministerial advisers get that one and the others don't is beyond my comprehension. But anyway, it is quite interesting. There are sort of separate rules in relation to them.

MR O'BRIEN: Now, Peter?

COMMISSIONER HALL: Kerry, just a few things. You spoke about public trust and common law so far as the ICAC is concerned. The term or expression "public trust" is in fact, of course, found embedded in our Act, in the ICAC Act, in different places. So by doing that it doesn't import the common law but it reflects the common law. So again referring to the doyen Paul Finn in this area, he went back into the old cases and said, well, what is a breach of public trust or public office? And he examined the historical case law in which it's – he said it's dishonesty, obviously, it involves dishonesty. It can involve partisan conduct. And it can involve conduct such as oppression. Now, all of that still lives today. If a public official is dishonest, if he's wilfully partial in, in certain matters, or if they act in an oppressive way, all of that common law is in fact embedded into the notion of corrupt conduct through the definition of the Act. I'll just pick out one strand of that, and that is oppression. What happens if a minister, in fact, directs the public sector staff or employees to get that money out the door? The employees are usually well trained in grant administration, and this happens, circumstances like this happened recently. So the minister directs, in effect, "Get the money out the door." They know it should have gone through a proper process, that is the public sector staff, it has to go through a selection process and so on and so forth. But they know in a particular case that hasn't happened, and they are bound, as has been mentioned here, under the – Ian's referred to two pieces of legislation – whereby they are bound to ensure efficiency, ethical and sound administration. That is the statutory value which binds them in their daily

work. But what do they do? Do they say, go to the minister and say, "No, I'm not going to do that. I'm not going to do that"? Well, they've got a choice. They're between a rock and a hard place. Either they succeed in their opposition to this ministerial directive, or they'll be walking out the door and that's goodbye to their job. I would regard that as oppression. It's putting the public sector employee into an impossible position, virtually.

Now, that of itself could constitute, in my view, improper conduct, constituting oppression, constituting corrupt conduct by a minister. Leave to one side for the moment all about the decision-making around the grant. That too could create the notion of improper conduct. I think some of the reforms that are now proposed by the Productivity Commissioner will help in addressing that issue, that ministers can't do that, should not do that, must not do that. And then there's the question that Anne's picked up on, well, how are we to state that reform. Is it to be an administrative instrument or should it be written into law? In my view, no doubt, no argument. It must be written into law to stop that sort of thing happening. It has happened. It shouldn't have happened. But whether that would be regarded as improper conduct by the staff member who buckles under pressure is an issue I won't bother addressing now. So that, yes, we do have a very broad jurisdiction, we have very extensive powers. Some of them, of course, we have to apply for warrants to exercise. These are the sort of powers and jurisdiction that is absolutely necessary if we are to be an effective agency for enforcement of the public trust and obligations that go with it.

Don't want to get dragged into the federal debate and argument, but these powers that the Commission holds, they are, can be extremely intrusive. For example, telephone interception powers and so on under a warrant. But I can assure members of the public that the protocols, the procedures, the processes within the Independent Commission Against Corruption that regulate the use of those powers is extremely robust and extremely accountable, so that - - -

MR O'BRIEN: And, sorry, who are you accountable to, Peter? You're accountable back to the parliament?

COMMISSIONER HALL: We are accountable at three levels, firstly to the inspector, Bruce McClintock, who was here a moment ago. Secondly, to the Parliamentary Oversight Committee. And, thirdly, to the parliament ultimately. They do write reports. I get complaints from people. They've got to write up, was this complaint justified, was this a proper use of power.

I can say, fortunately, we haven't had many challenges since I've been Chief Commissioner, and I don't think historically there has been many, if any. But it's just a testament to the fact that a well-run organisation has to be accountable, must have oversight, must have to give account if somebody does challenge. So perhaps straying off the point a bit, but I think that, yes, the jurisdiction is adequate, the powers are not only adequate but also necessary. Anything less than that is very difficult to find the truth in a corrupt conduct case which has to go back over the past trying to recreate what happened because people don't leave records. It is a secretive activity and so on. So these powers are necessary. If we want the public trust to stand for what it is, you do need to have an enforcement process. Now, just going back very quickly, Anne, has referred to the Commonwealth legislation which is I think something of a model for us in this reform process, which does have a lot of good statutory provisions in place. But what they don't have is an ICAC or an ICAC-like body to act as enforcement. In New South Wales we have the ICAC enforcement scenario but we don't have written into law as in federal legislation what needs to be put in place. And that's, I think, Anne's point, it must be at least of the standard federal legislative prescription of safeguards and nothing less will satisfy.

MR O'BRIEN: Now, in the interests of keeping going and getting through all of the key points that I wanted today. I'm going to, AJ Brown, hear what you want to say and also Joe and then we'll move onto our next stage. Yep.

PROFESSOR BROWN: I was just going to say very quickly that, there's part of the answer to the situation of those public servants who are put in that oppressive situation is reinforces the importance of strong and effective whistleblower protection laws and public interest disclosure regime, which Joe's paper refers to. So that at least those people, even if they just go, they go ahead and they do it. They can actually trigger the response from the system. But going back - - -

MR O'BRIEN: AJ, here's the other side of that coin. Until proper protection, is absolutely enshrined and guaranteed of whistleblowers, if somebody came to me and said that they had something serious that they wanted to blow the whistle on, I would feel absolutely obliged to point out to that person the lives that have been destroyed by whistleblowers in the past in many instances.

PROFESSOR BROWN: Yeah.

MR O'BRIEN: And it's a disgrace to our system.

PROFESSOR BROWN: Yeah, and I couldn't agree with you more, which just increases the obligation both on government but on the integrity agencies to actually pursue and get in place regimes of real protection and that's relevant across the states and the federal level. But getting back to your main point about what are the fundamental legal weapons that we've got to fight here, fight pork barrelling with here. There's another one which Joe explains well in his paper, which is the offence of electoral bribery. And Joe explains in his paper that the way that that offence is written is, you know, is currently written in a way which doesn't allow us necessarily to be able to clearly identify where effectively what is happening is vote buying, it's bribery. And it's excluded from the offence or is easily defended from the way that the offences are written. And that's something else that needs to be rectified. But, I guess, the reason why I think it's really important to recognise that's how serious this is. It's not just a matter of bad record keeping. It's not just a matter of a lack of transparency or trying to do things too fast or whatever. And I think we have to recognise that this is part of why this is such a serious issue. And how, and again, putting it from an international perspective how close we're now coming in this industrial scale type of pork barrelling to the type of electoral bribery that in other countries is rife and completely undermines and destroys their democracy. We would presume that that could never ever happen in Australia. And yet, in fact, many of these schemes are a hair's breadth away from it and in fact the public perceive it.

When we did some research in 2018 before these, all these schemes started to come to light and achieve the prominence that they did, we had half of Australian citizens saying that they actually believe that electoral bribery, actual vote buying, people basically getting money in order to vote in a particular way. It happens at least occasionally and 25 per cent of people saying they think it happens frequently. What are they referring to? They're referring to pork barrelling. And there are examples of schemes, and this may be what was effectively happening behind some of the schemes we're talking about here where the documentation doesn't exist. We know of the scheme in Tasmania in the 2018 state election where the government shocked itself. And I think, out of fairness to politicians, we've generalised a lot about politicians. The fact is there are some politicians who really don't get this. But there are other politicians who simply lack the support of the system in order to be able to navigate it. In Tasmania, the

government decided they would create a fund, an election re-election fund, a grant program, a pork barrelling scheme. Said to their members, go out and find people to give money to. Go out and ring people and say, "Do you want a grant here?" So government members were going out ringing community groups in their electorates saying, "We've got some money here like we want to give it to people to help make sure they vote for us. Can I give you some money?" That is literally what was happening.

MR O'BRIEN: Cathy McGowan who was former member for Indi told me when she was in the parliament and she was rung up by a local sport's club and asked if she was coming to the minister's announcement of a grant that they were getting in the next week or so. And she said, "What grant? I know nothing about it." And the reply was, "Well, neither did we."

PROFESSOR BROWN: Yep, exactly.

MR O'BRIEN: In fact, they were rung up and told they were getting it.

PROFESSOR BROWN: Yeah. So exactly. So that's why we've really moved into the realms of electoral bribery and that's how serious and dangerous it is. And I think in Tasmania unfortunately the Tasmanian Integrity Commission commenced an investigation into this and for various reasons, including the legal blowback from people suddenly realising that this was potentially electoral bribery. Unfortunately that investigation effectively had to be shutdown. But the key - - -

DR LONGSTAFF: But the other half of this is you won't get it if you don't vote for us.

PROFESSOR BROWN: Exactly. And, again, I don't want to say that there aren't problems in our political culture because, I mean, even the then Prime Minister Scott Morrison in Brisbane, just in this election campaign, when the latest evidence of the extent of pork barrelling was revealed in terms of grant distribution says, "Yes, that's why you vote for us. Good local members get money for people, you know, we give money to people in our community, so that's why you vote for Coalition members because we will get you money." And so I mean, I safely interpreted from that that former Prime Minister Scott Morrison was one individual who didn't get it but there's - - -

MR O'BRIEN: If he was here, in fairness to him, perhaps he would argue that it would be money that was going to be spent in such a way that it was beneficial to - - -

PROFESSOR BROWN: Absolutely. Of course.

MR O'BRIEN: Yeah.

PROFESSOR BROWN: And I guess that goes back - - -

MR O'BRIEN: Not just the individual.

PROFESSOR BROWN: - - - to my original point about this needing to be realistic in terms of the political landscape but I also want to reinforce, I guess, that especially local members who are legitimately trying to get access to government resources to serve their community need the support of better codes of conduct that are then enforced, need the support of better rules that are then better enforced and probably need a bit of better leadership. And then they would be blessed to say, thank God, we've got a mechanism, you know, we've got a framework within which we can work here where we're not being compromised and we don't suddenly feel incredibly uncomfortable because what we just realised we just did was ring up and offer people money to vote for us, which is what happens, I think is a bit of what's been happening and certainly appears to be what happened in Tasmania.

MR O'BRIEN: Now, Joe.

PROFESSOR CAMPBELL: There's an additional wrinkle to what Peter was saying about the near impossible situation that a public servant can be put into when he or she is instructed to take part in a pork barrelling scheme and that arises under section 316 of the Crimes Act. What that section does is to create a positive obligation on anyone who knows or believes that a serious, indictable offence has taken place to report it to a member of the police or another appropriate authority. And so there, the public servant would be at risk of being prosecuted for this offence of concealing the pork barrelling that was going on. It's an impossible collection of laws.

MR O'BRIEN: Ian.

MR GOODWIN: Absolute agreement with all of what my colleague is saying. And what I'm about to say might be a bit odd for an auditor to say or Deputy Auditor-General but - - -

MR O'BRIEN: Feel free.

MR GOODWIN: - - - I do have to sort of give an optimistic view, as well. And the optimistic view is, you know, as the Audit Office, obviously we're auditing the entirety of the NSW Government. And we're having a very focused discussion on a particular grant or two particular grant programs where the public service could have done a better job, there was a deterioration perhaps of standards. But that's not the entirety of the public service. And it's an interesting question as to why we did do that audit. And, you know, we have a very thorough, risk-based approach in the selection of audits but this one did come to our attention through a range of means. And without going into the detail of those range of means, it does speak to the fact that the system does have the ability to identify red flags. It doesn't excuse what happened but I guess the comfort I take is that the system actually identified and there was an integrity agency in the Auditor-General to be able to respond. There was another integrity agency in terms of the ICAC to respond in its own lane. And the report is published to the parliament. And now we do have a piece of work that advances, well, perhaps public administration and we're having this conversation. And this conversation should serve not only read in build general support but this conversation should serve as, I hope, a very good reminder to public servants around their roles and responsibilities. But I do have to sort of say I remain an optimist because this audit did come to us, not by luck but by elements of the system working to, you know, identify areas where you do need to look.

PROFESSOR BROWN: Ian can neither confirm nor deny but I interpret that as saying that there were whistleblowers involved and I would say again that's a reason to be, as there usually is in these situations. And, I mean, like Ian, I would say that irrespective of the challenges of that, that's one of the reasons to be optimistic is the fact that we do still have public servants who are professional, who will actually draw attention to these things that are going wrong and provide the trigger or provide one of the triggers for making sure that these things won't go uncorrected.

COMMISSIONER HALL: Kerry, could I just make one – sorry, AJ – point? It is absolutely important to have those public sector employees that

Ian's referred to to act in a competent and ethical way. They are, after all, in a sense the gatekeepers. And I'm confident that by far the majority of them actually do their work extremely well but we can't - - -

MR GOODWIN: I would agree.

COMMISSIONER HALL: Thanks, Ian. We can't get away from the fact because it is a fact that most of the big problems with some of the more significant pork barrelling exercises that we've been discussing hasn't come from the public sector level, that is it's not some breach of duty or some negligence at the bureaucratic level, public sector level. The problem in all the cases we've been discussing has come from the ministerial level. And that is why I think what Anne has been alluding and will address in the next and final segment that there's got to be a statutory regime by which not only the public sector employees but the ministers of the Crown are obliged to act in accordance with law, not in accordance with some administrative process. Until we get to that stage, we will not solve the problem of pork barrelling. And having said that, we recognise immediately that this does not mean that we place fetters and unrealistic restrictions on politicians. They have their important role to play. There is some leeway as I - - -

MR O'BRIEN: And, sorry, Peter. And they are the elected members of parliament. They are elected.

COMMISSIONER HALL: Indeed. They've got to represent their constituents and I would think most of them do a very good job. But it is important to realise that the balance that has to be struck is at centre, front of mind all the time. We are not here to avoid real politic. The real politic, of course, is part of the democratic process. But it's a question of, as has been said here, for the law to be formulated in a way which everybody can read for themselves and understand, they don't have to go back into the law books to work out public trust obligations and how courts have applied it, the statute will speak, will make it clear and I'm confident that the standards both at the ministerial level and otherwise will be significantly lifted and safeguarded.

MR O'BRIEN: Okay. Now, that's where we're going to leave the conversation for the moment because we're going to have a short break of half an hour and return at 12.30 where we're going to look at part 2 of your paper, Anne, and particularly, we're going to chase the rabbit further down the burrow about the exercise of power for party political advantage as

opposed to the advantage of an individual. We're also going to take a closer look at that Productivity Commission and Premier's Department review of the grants processes, to look at those areas where at least some of you, I think, still regard as deficient and then we're going to look at ways we could reform the system, further ways we can reform the system. So thanks for the conversation so far and we'll be back in half an hour.

SHORT ADJOURNMENT

MR O'BRIEN: Okay. We're just going to pick up where we left off, basically. We've covered a lot of ground this morning and it was a nice, free-flowing conversation mostly that I think delivered a lot of food for thought for a lot of people out there. So I want to touch briefly on one aspect that relates back to what we have been talking about so far in terms of the exercise of power and that is differentiating between the exercise of power for party political advantage, in other words, for a political party as opposed to an individual. Anne, I will start with you but to what extent is that an issue legally? How clearly can you link the two in this case?

PROFESSOR TWOMEY: Most of the cases, as I said, are directed at private interests, so particular personal ones. There are a few cases that went beyond that. So the one in the UK, for example. And I think the main reason why it hasn't actually been something that's been prosecuted is that it's actually very difficult to prove that things have been done for party political interests and maybe also there's been a lack of will to prosecute these sorts of things because the borderline between politics and political parties is a very unclear one, so when people do go out to prosecute politicians for these sorts of things, they want to do it only when there's a very clear case because otherwise it's seen to be some kind of partisan attack. So there isn't a lot of authority on it but there's enough authority from judges to say that if you are doing something for a purpose other than the proper purpose that the power was conferred for, and that includes doing it for a party political purpose, then it can amount to misconduct in public office, it can amount to corruption. It might be difficult to prove but nonetheless, it's no excuse to say that you were just doing it for a political party purpose and therefore that's okay. That's not the right answer.

MR O'BRIEN: There's also, I mean, you know, complexity on complexity, but any individual politician who is on the one hand hopefully there to serve

the public, on the other hand, it's also their career and it's their livelihood, and if you are a junior minister on your way to becoming a senior minister or you are a minister with pretensions to becoming a premier or a prime minister, then in practically everything you do, there's a personal motive. Now, how do you differentiate there?

PROFESSOR TWOMEY: That's right. And so this comes down to mixed purposes and this is something that's addressed in the litigation. So one way of dealing with it is the "but for" test and so sometimes courts have said, well, if you wouldn't have done X, but for the benefit it was giving to your parliamentary party, then that's an example of circumstances where you've crossed the line. There will be many cases where you're doing things that are certainly in the public interest and are perfectly acceptable because they're in the public interest and you're hoping to get a benefit because the community will think you're good for doing it and vote for you. That's all fine. That's not a problem. But if you're doing it solely for political or even perhaps predominantly for political benefit and you wouldn't have done it but for the political benefit and it's being done for a purpose which is not the purpose for which the power was given, then that's the point at which you tip into the wrong side.

DR LONGSTAFF: I think there's another layer to this, too, and it's to do with the fact that everyone who enters into politics or enters the executive as a minister, each person does so on a voluntary basis. No one is conscripted into political life in this country. And when you do that, when you make that choice, you enter one branch of the professions. And there's two worlds that sit beside each other in Australia. There's the world of the market which licenses the pursuit of self-interest and the satisfactions of wants. So someone in a corner store, you walk in, buy a block of chocolate, all they want to know is can you pay for it. But there's another group of occupations which are in the professions which are exactly the opposite to that because they begin primarily with the subordination of self-interest because of duties you owe to others and which is about satisfying needs or interests rather than merely wants. So to go back to the person coming into the corner store, if they were to walk into their doctor's surgery and say, "I want a block of chocolate," and the doctor knows them to be a diabetic, he'd say, "No, I'm not going to do that. You can yell as much as you want but it's not in your interests that I do this."

Politicians, and why politics has always been considered the most noble calling of a citizen, at least traditionally, is because you make that choice to subordinate your self-interest and that of the party ahead of these other

obligations. So lawyers on this panel know they all have overriding obligations as officers to the court which comes before a duty to the client, to the profession and only at the bottom is their own self-interest. And maybe we need to recall through some of the educational programs that Anne was talking about the people coming in to understand that because I think that's another layer of what might, if you understood it properly, prevent you or help to guard against you taking decisions which are self-interested in the way that the professions have to formally deny.

PROFESSOR BROWN: There's another element which is really captured in the first part of Simon's definition, getting back to pork barrelling, which is that when we get back to pork barrelling, we're talking here about public resources versus political party or campaign resources. And we can actually separate those. And I guess that's where we can see, maybe in the past, we've allowed it to be quite murky, the use of ministerial staff or electorate office staff for party political purposes, the use of public money, postal allowances or whatever which are meant to be there for electorate information for campaign purposes. And we've been tightening up on that too slowly probably but things like the red shirts scandal in Victoria, you know, the use of electorate office staff for campaign purposes, some of these, you know, there should be a bit of a better debate in the media, I think, about, you know, the tactic of moving your electoral campaign launch as close as possible to the election as you can because up until that point, you can use public money as a government to support your campaign and the party money only has to kick in after that for travel, et cetera.

Those sorts of things I think, you know, it's starting to become clearer, there's a clearer debate about those things. And so I think that for individual parliamentarians and ministers, et cetera, we should be able to make it easier to say, right, you know, we draw a line here, these are public resources, not political party resources. And with that focus on resources, when it comes to pork barrelling I think you can start to say, well, this is why this not actually – and in an election campaign context, and I hope we might come back to that a little bit because that's the context in which a lot of this has got really odious and pernicious. You know, we tend to forget. We tend to treat the government as if it's the government spending this money in an election campaign. It's not. It's actually a political party that is actually promising this money but they're doing it with government money. So there's a real conflation there, which if we make it a very clear distinction between the party and the government, then actually it should become much easier to say, no, no, that's not on.

COMMISSIONER HALL: If I could just add something, if I may, to what Anne's spoken about, the mixed purposes and what AJ has just been referring to where you've got the political and the self-interest or political interest. It comes back I think to understanding where that line I referred to earlier is to be drawn. I've referred to, as he then was, Professor Paul Finn before and he is not only a great academic and/or a great judge, but he's a pragmatist. And in an article written by now present judge of the Supreme Court Stephen Gageler entitled The Equitable Duty of Loyalty in Public Office, Stephen Gageler quotes from one of Paul Finn's many works but it does show the practical side of politics is not lost on the doyen of this public trust concept, Paul Finn. I just briefly mention it because he puts it so well. He's talking about the public officers and what we expect of them and the standards that apply to them. And in doing so, he talks about the conflicts between duty and interest that can arise for a politician. So he says, well, the neutral public servant he's addressing in this example is a person one would imagine has all sorts of personal beliefs, he has biases, he has interests, he has preferences, he has associations. And how does he then subordinate some of these to the important public interest?

Well, as he puts it in exercising his "conscientious appreciation" of his duty to the public interest, as he said, talking about, in particular, appointed public servants, "the neutral public servant is not expected to be the neutered public servant". He says despite the law, then you expect that those influences in that person, biases and all the rest of it, are always going to affect his or her decision-making and you can't disembowel them of, you can't act on the basis that they are to be machine-like in terms of giving effect to the public interest. But what he really does, and this is I think another alternative to the dominant purpose test, which he says is that it's permissible or acceptable for a public officer to have some regard to perhaps political considerations provided, and this is the proviso that he emphasises, provided that the power that's to be exercised is being exercised in the public interest. If it has, in effect, as I said before, as a side wind, he can see this is going to be of some political benefit, that's okay. We are talking about human beings. Politicians are made up, like all of us, with all sorts of, as Paul Finn says, all sorts of things going through our mind and we get influenced by them in any, even our professional life, to some extent.

So I think I just wanted to say that in terms of making these judgment calls on what's acceptable and what's not, I think either the dominant purpose or the Paul Finn approach. You can have some regard to these things

provided, so long as that proviso is satisfied that it's definitely in the public interest, satisfies the public interest, then you can have some regard to other factors, yeah, this might be of some political benefit to the party. Well, that's all right. So I think, you know, we've got to temper all the principles in the way Paul Finn is suggesting here. That's just my point.

DR LONGSTAFF: As long as it's a contingent benefit (not transcribable)

COMMISSIONER HALL: Yes.

DR LONGSTAFF: Like, I mean, and I'm probably a bit more strict than you might, than might be – I mean, when you were on the bench you would have had lots of personal beliefs and proclivities but I bet you that they didn't come to bear in the judgment you exercised from there, because we are capable as human beings of suppressing those things to the point that our duty requires us to do, and I think that's the kind of standard we should expect from politicians too when they're exercising public power.

COMMISSIONER HALL: Well, the function of a judge is a bit different from politicians, of course, and so I guess you've got to – yeah.

DR LONGSTAFF: Well, both functions are exercised in the public interest.

COMMISSIONER HALL: That's for sure.

MR O'BRIEN: I want to, before we get on to looking a little closer at the Productivity Commissioner's review, I want to just touch on transparency for a few minutes, and its manipulation. AJ Brown, there was, there's one other case that was controversial that goes back to the Howard years, 2007, and their distribution of grants under what they called their Building Better Regions Fund, where a ministerial panel was established to determine funding approvals, and it was then claimed that Cabinet confidentiality applied to its deliberations. In other words, not Cabinet itself but a "panel" of Cabinet ministers were set up to look at this. This was a fund where in round 3 of the proposals 112 of the 330 projects approved were chosen by this ministerial panel against the department's recommendations, which had been merit-based. The minister's reasons for overturning the department's recommendations were redacted. So the transparency of that process was severely limited by claiming Cabinet confidentiality. To what extent do you think that the principle, is the principle of Cabinet confidentiality misused or abused by governments? We talk about commercial-in-confidence as

another way that governments will use to prevent access to information. To what extent is the principle misused or abused by governments in Australia to avoid transparency and public accountability?

PROFESSOR BROWN: Oh, to a significant degree, no question about it. And that, I mean that was an example, you know, an egregious example of basically, you know, where you can clearly identify Cabinet confidentiality as being totally inappropriate because it wasn't really deliberations of Cabinet, it was basically administrative, ministerial executive decision-making, which has to be transparent. And there are other examples. I can read Anne's mind, I mean - - -

PROFESSOR TWOMEY: National Cabinet, yes.

PROFESSOR BROWN: The outgoing government tried to claim that National Cabinet for the former COAGs meeting of states and Premiers was somehow a subcommittee of the Federal Cabinet, which is impossible constitutionally.

MR O'BRIEN: As they then proved over the course of the next two years.

PROFESSOR BROWN: Yeah, exactly, but tried to use Cabinet confidentiality to keep those proceedings secret. So there's no doubt that there's, that there is abuse there. And commercial-in-confidence in grants programs as well is used as a cloak, not just in commercial dealings but in grants programs. So there's no doubt those are always really perennial problems and Cabinet-in-confidence is obviously used that way. It comes and goes, the extent to which it's badly used. But I guess, I mean, on your theme of - - -

MR O'BRIEN: Well, at the same time acknowledging that there is an argument for having confidentiality around sensitive policy that's being determined, where people can feel that they can speak without fear or favour, et cetera, et cetera. We all know the arguments. But there is some merit to the basic argument, if applied properly, isn't there?

PROFESSOR BROWN: Absolutely, yeah. I mean, there's no question about that. But on your theme of transparency, I think the key, and getting back to pork barrelling, I think one of the reasons why we, and when we really clearly know that pork barrelling is inappropriate is when transparency is being satisfied but not satisfied at the same time, because the

– and there's a conflict between what the public is being told and what the community is being told is the process and what actually happens. And the reason why that's so critical is that we have situations such as some of the cases that Ian's office has investigated, where there were no criteria, therefore there was no process, no proper process, so whatever they did was cowboy land anyway. But the key thing about something like the federal sports rorts grant which was different, because there was a public process, there was criteria. The problem – and the community was entitled to expect that that was followed. And if you applied for a grant, you were entitled to expect that it was followed. Where there was these, the breach of trust in that case was not how the money was allocated, it was in the fact that that was not the process that was actually used to make the decision. So there was actually – so getting back to whether or not that was actually political corruption, for example, I and we have been quite clear about saying, yep, that was political corruption. The reason why it was political corruption, if you apply our definition, abuse of entrusted power for private or political gain, was that the abuse of entrusted power was actually the fact that they made decisions on a different set of rules from the ones that they'd actually put out publicly as being the set of rules. That's the breach of trust and that's what corrodes public trust because that's what makes people think, yep, well, I'm never going to apply for a grant again because this is all rubbish. They're just going to give it to their mates, this is what's going to happen. So if I was in any doubt about it before, I'm no longer in any doubt about it now.

So the corrosive effect, I think as Anika Wells, the new Sports Minister, said this week, the problem with sports rorts was not only that it was potentially a waste of money, et cetera, et cetera, and all the things that Ian would be primarily concerned about, but I think her language was it was fractious for the community. It actually polarises the community. It's fundamentally corrupting of the way that democracy should work. So in that situation, in fact, that's an example where I'd go even stricter than Simon again because I'd say it didn't have to be a predominant purpose that that was done, that breach of trust was done for the purposes of some political gain. The fact that it was any purpose means that it was a breach of trust for an extraneous purpose, no matter how small that political purpose was. And that's the difference between what the Audit Office said, and then when the Secretary of Department of Prime Minister and Cabinet, as he was then, Phil Gaetjens, said, "Well, I've looked at this too and it doesn't matter that there was that political, that it had that political purpose in it because it had all these other good purposes." And the fact is that once that breach of

trust has actually occurred, which was in the dishonesty, once that breach of trust actually occurs, then if there's any extraneous purpose in there, it's corruption. So I think there are some circumstances where you would go even stricter and say a predominant, if it's, you know, it's not a matter of whether it was predominantly or principally for the purpose of political gain. If there was any extraneous purpose in there, it's contaminated in terms of its impact on public trust and the way our democracy should function.

MR O'BRIEN: Now, I'm going to come to Ian in a second but I just want to get a reaction from either Anne or Joe to what AJ has just said in terms of - - -

PROFESSOR CAMPBELL: One reaction is that it might be possible for there to be a civil law remedy in relation to this because there's a body of law that's grown up in relation to tendering that says that when either a government or any private organisation calls tenders and says they will be evaluated in accordance with criteria A, B, C and D and then goes ahead and does something completely different, a disappointed tenderer can sometimes successfully sue for breach of what is called a process contract. And that is a remedy that will be available in relation to applications for grants unless the government is then careful enough in its formulation of the criteria to say that there are no legal obligations going to arise out of these criteria that we are now announcing.

PROFESSOR TWOMEY: Yep, and just to add to that, I'm being told, although I don't know the details, but there is some kind of litigation to that effect going on at the moment.

PROFESSOR BROWN: The Wangaratta Tennis Club, I think.

PROFESSOR TWOMEY: I think there was a Beechworth one, but I think there's another proceeding as well, so - - -

MR O'BRIEN: So many to choose from.

PROFESSOR TWOMEY: There may well be litigation on that issue directly, yes.

COMMISSIONER HALL: There was one, just shortly, particular case I recall. It was in a regional area and the grant was a grant, it wasn't a huge

amount but it was one which was assessed on the basis of a proper assessment system, and there was a panel which the department of government established, independent panel. They came up with their short list, and there's, I think there was about 10 from recollection. The organisation that ranked number one on all the, they have a ranking criteria and so on, had something to do with the arts in this regional town. It was only a small town somewhere and I think it was linked to their library so it was a bit of a cultural centre. They came out hands-down winner on the panel's assessment. The relevant minister called to have a look at the outcome of the process, and fiddled with it a bit. The winner ended up getting knocked off, and some others, I've forgotten how many, ended up getting on the short list and they had not made the cut. The winner or the would-be winner, talking about disappointed tenderers, was absolutely devastated and ropeable. They knew they had won. And yet they had, they were off the list. And the disillusionment that that one little case feeds into what AJ was saying, that that destroys, just one little case like, it wasn't, as I say, a huge amount of money, I've forgotten how much it was, but it just absolutely destroys human faith in - - -

MR O'BRIEN: So if you're talking about a widespread application of pork barrelling, you are talking about a significant, potentially a significant contribution to the incremental corrosion or erosion of democracy.

COMMISSIONER HALL: Yes, yes.

DR LONGSTAFF: Corruption of democracy.

COMMISSIONER HALL: But just adding to that, I remember now, when I think about it, it did have a, I suppose you could say, a positive outcome because the person who replaced the winner had won it on the basis that they were now going to add a gym to the existing swimming pool. So there was a winner, I suppose, but it's certainly nothing to do with culture.

DR LONGSTAFF: There's a really important point about that, though, and this is again, sometimes the debate is skewed with this, those who defend these decisions will say, "Oh, but look at the positive outcomes," you know. Look, the truth of the matter is the positive outcome doesn't remedy the underlying wrong. If I - - -

MR O'BRIEN: The consequences.

DR LONGSTAFF: Yeah, if I come and steal your car and go and deliver a lot of packages of food to homeless people and things like that, the world might be better off but it doesn't undo the fact that I've taken your car without permission. And the same thing here is that, yes, there may be some good but the fundamental wrong which has just been alluded to here, and the corrupting effect that it has isn't offset by whatever good might be achieved, even an additional gym.

MR O'BRIEN: So coming back to transparency with you, Ian. How often is the work of the Audit Office hindered by lack of transparency?

PROFESSOR TWOMEY: Quite often.

MR O'BRIEN: Hang on, sorry. Ian I said.

PROFESSOR TWOMEY: Sorry. That's all right.

MR O'BRIEN: I'll come to you.

MR GOODWIN: It's a very good question. And I've got a couple of starting points. Margaret Crawford, as the Auditor-General, tabled a report on the 10th of February this year on the report to State Finances, where she made the point that the audit was frustrated around the timely provision of information to, in this case, the financial audit of the total state accounts. And there are various reasons that are called out in that report around that frustration of information. One of it, it does, I will touch on around Cabinet information. But the other point, before I get to that, is I'll just make a point around the legislative safeguards for Auditor-Generals, and those legislative safeguards are sort of grounded in what they call the inter-site principle, so this is the supreme organisation of auditor-generals at an international body, but they set out a series of principles, and one of those principles is unrestricted access to information. And every now and then, the Australian Council of Auditor-Generals do a survey and have a look at where their jurisdiction sits relative to the other jurisdictional peers in Australia and around those legislative safeguards, and this is done by Dr Robertson, and it was updated in 2020. So over a period of about 10 years, New South Wales in 2009 was ranked fifth in terms of legislative safeguards for the Auditor-General. The 2020 survey has New South Wales ranked eighth. And obviously there's been a slide in terms of the legislative safeguards, and one of those is around our ability to access information.

So turning to that report and State Finances, one of the frustrations was getting information that had been classified as Cabinet-in-confidence. So just in terms of how we audit, I mean, I always describe it in the most simplest terms. We audit advice to government, and then we audit the implementation of the decisions of government. We do have a respect around the Cabinet process, so the Cabinet process, which is where Cabinet ministers should be able to speak freely, but when they make their decision they speak as one. And that's sort of the principle around the Cabinet. I guess there's an observation I would make, is that over time there's been a bleaching of what is considered to be Cabinet, and in New South Wales it's somewhat complicated by the fact that the GIPA Act has a very wide description of what's Cabinet. And so we end up in debates – we, sorry, we have a process that we work constructively with the Department of Premier and Cabinet, where we can access information through, that is classified as Cabinet through eCabinet. There are restrictions around how we do that, but we do work that through. But I guess more recently there's a debate around emails, public service emails that are around the preparation of advice to government that have now been labelled as Cabinet, and we are now going through sometimes a fairly frustrating process to access that information. Now, going back to that survey - - -

MR O'BRIEN: Well, I was going to ask you whether you, whether that has the appearance of being a valid action that was taken to widen it out. Maybe I'm putting you on the spot.

MR GOODWIN: So I can't speak for why someone might do it, might interpret it as that. I mean, there are – going to Simon's sliding point, a point I accept, that public servants come to do their job with the best of intentions, and sometimes they do, through an email system. An email system requires them to classify is it official or is it Cabinet. So they do, because they're working on something for Cabinet, they might classify it as Cabinet. It becomes then difficult to then unravel that, but I would probably argue that a lot of that, if I go back to the starting principle, if Cabinet is a discussion within Cabinet and we are entitled, should be entitled to audit the advice to government and the decisions, implementation of the decisions of government. And so in that respect, that definition, those sort of public service emails probably wouldn't meet that more classical definition.

COMMISSIONER HALL: Wouldn't?

MR GOODWIN: Would not.

MR O'BRIEN: Okay. Anne?

PROFESSOR TWOMEY: I was just going to add to that. There are two real problems here. One is the lack of documentation at all in relation to many things, so it's very hard to establish something if no one's ever documented it at all. So we need obligations to actually do documentation.

MR O'BRIEN: Gives a whole new meaning to the paperless office.

PROFESSOR TWOMEY: Yes. And the second one is often the documentation is completely useless. So the example at the Commonwealth level is that they do have good rules that say if you are the minister and you make a decision that's contrary to the advice that's been given to you, so if the public servants say this particular grant proposal, you know, should be rejected because it's a waste of money, right, and if you're the minister and then you say, no, I'm going to override that, then you have to, at the Commonwealth level, write an explanation as to why you did that and send it to the Minister for Finance on an annual basis. But if you actually look through those letters to the Minister for Finance, most of them are completely useless. They do not explain, you know, why I thought that the public servant's decision was wrong. I mean, let me just make clear here it could be perfectly right that the politician, the minister says, well, actually I do know better and the public servant was wrong, 'cause public servants aren't always right. So let's accept in many cases the public service recommendation in where this happens might have been wrong. But your explanation needs to say, well, I overrode it because of these particular reasons, and this is why this grant actually is value for money, and I do it by reference to those criteria.

Now, if you look at those, I looked at a year's worth of those, actually two years' worth of those letters, half of them were completely useless. All they said was "This is a good project," okay. That gives you no explanation at all, really. One of them, spectacularly said, you know, "I did it for the reasons on the following table," the table obviously filled out by a public servant who had said, "No reasons given." So the minister hadn't even bothered reading that. Interestingly, though, occasionally a minister would actually come up with a proper explanation as to why they rejected the advice of the public service, which was compelling. And I just want to give a little shout out here to Bridget McKenzie, Senator McKenzie, who is often criticised in relation to the sports rorts affair. But of all these letters that I

read, she wrote one of the best ones explaining why, in a particular circumstance in another aspect of her portfolio she did reject the public servant's decision and explains why. And it explains why it would be a better thing to do something. So ministers can do this well, but nearly always they don't. That means the documentation and the transparency isn't there and nobody is checking. I mean, as far as I know, I may well be the only person who actually sat and read through two years' worth of these letters. But if no-one is checking and scrutinising, then you end up with rubbish documentation and the transparency is not there.

MR O'BRIEN: Now, with the half hour or so that we've got left, I want to move to what do we do about the problems? How do we fix rather than fixate totally on finding people guilty of things? So to start off that reform discussion, Anne, I want to take – you've ticked off a number of the things that were in the Premier's Department and Productivity Commissioner's review as being good and others on the panel have given the big tick, but you've also indicated a number of things that you've got criticisms. So with regard to the legal status and enforceability of the ground rules for handing out grant money, you've pointed out differences between the Commonwealth and New South Wales where you think New South Wales is deficient. Now, is that going to be addressed by – what are they and is that going to be addressed by the review recommendations?

PROFESSOR TWOMEY: Sure. So, the key one that I was particularly concerned about was the legal status of these rules.

MR O'BRIEN: Yeah.

PROFESSOR TWOMEY: So at the Commonwealth level it's a legislative instrument, so it's part of the law and it's divided into things that are mandatory, so legally required to do, and things are guidelines. At the state level at the moment they have no legal standing at all. The recommendation was made, under this new report, that they should be put in a premier's memorandum on the basis that there are general obligations that ministers and public servants ought to comply with premier's memorandums. As I said earlier, I was critical of that because I think that it needs to be based in law because that then triggers a whole lot of other applications. Now, earlier this morning when I did say that I got a little message sent to me pointing out, correctly, that there is a recommendation, a further recommendation in that review which suggests that there could be a separate legislative requirement that there be compliance with the guides. So you

still put your guide in a premier's memorandum and you have some other separate thing saying that you need then to comply with it. Now, the suggestion is that might be in the Government Sector Finance Act or the Government Sector Employment Act.

Okay, two concerns I have with that. One is that those particular Acts focus on – particularly the Government Sector Employment Act – public servants, so it's about making public servants comply with it, whereas the real problems that we're identifying are ministers and ministers' officers. So if it's just stuck in one of those Acts and it only applies to public servants, it's not going to be good enough. So that was concern number one with it. Concern number two is that leads to a very, very weird legal issue where you actually have obligations under something that's not a law and then you have elsewhere a legal obligation to comply with the thing that's not a law. So you've got a, sort of a law by second degree. And I have to say I did try and sit down and think about how that would work when trying to connect that through to like ICAC obligations, and obligations in the ministerial code to comply with the law, and whether or not that would work it out and satisfy it or not. I'm still not convinced as to what the answer is but I think the whole point of it then is if it's not clear to me whether or not you would still be breaching those kind of provisions, then the uncertainty and lack of clarity surrounding it is in itself a problem.

Because in the end, and I come at this as a former public servant, what your public servant needs is something very clear, words on a page, so that they can come back to the minister and say, "Well, look, here the law says X." If it's just something, oh look, there's a value in the Government Sector Act that I am supposed to comply with this value, that's very unclear and uncertain and it's really hard to pin down a minister and say, "Well, actually there is a legal obligation here and I have to comply with it" because all I'm told is I have to meet a value, right? If I have an express legal obligation in law, I can then front up to the person and say, "Well, this is a legal obligation that I actually have to comply with," and it's there in black and white on the page. Let me give you a very small example of that. I once had a run-in with a ministerial adviser in the Premier's Office where there was a Freedom of Information application to the department. I was going to release documents under it and he said, "You can't release that because it's politically embarrassing," and I just went up to him and said to him very loudly in his face "Are you instructing me to breach the law? This is the law and I have to comply." And he backed off at a rate of knots. So you can do that if it's absolutely clear on the page.

MR O'BRIEN: He obviously forgot that he was supposed to be a little more devious than that. Anne, I want to sort of cut to when you're talking about the premier's memorandum. So let's say a minister is in breach of the premier's memorandum. Who resolves that?

PROFESSOR TWOMEY: Well, quite.

MR O'BRIEN: The premier?

PROFESSOR TWOMEY: The premier.

MR O'BRIEN: Okay.

PROFESSOR TWOMEY: So the only pushback there is from the premier, and if you're doing it at the premier's behest, well, who is going to stop you then, and the answer is no-one.

MR O'BRIEN: So where the premier's got the skin in the game is if the reputation of the government is going to take a hit if action is taken against that minister because of a breach of the premier's memorandum, the premier is a part of that backlash, unless the premier wants to take credit for, you know, being the one who applied it. And what if the premier himself or herself has been involved in the pork barrel?

PROFESSOR TWOMEY: Well, quite. I mean, that's the problem. So we saw this, you know, back with the Commonwealth sports rorts affair as well. You know, in the end you can end up maybe with a minister being thrown out into the sin bin for a couple of months and then, look, they're back in power and they're a minister again shortly afterwards. You know, you take one for the team and then you pop back. But did that ministerial code, was it ever taken seriously? Absolutely not. And the problem is that it's only administered to the extent that the prime minister or the premier concerned thinks that they need to in the circumstances. It's utterly flexible. Flexibility can be good sometimes but flexibility can also facilitate corruption as well and we've just got to be more careful about that.

MR O'BRIEN: Ian.

MR GOODWIN: Sorry, and I absolutely agree with everything that Anne has said and I think the point you're making is that, you know, the

guidelines would be strengthened if they were concretised in legislation. I probably just want to offer – and I'm not sort of suggesting that this is the way the government should go, because the Audit Office doesn't comment on policy, but I just offer an alternative perspective. And that alternate perspective is, so there are some good safeguards in that document and if it was, I guess there's an ease to put it in as a premier's memorandum, so it can be done quickly, and it can done in a way that doesn't get, sort of, get altered. And from an auditor's perspective then, yeah, we've got something that we can hold the government to account because we would then audit against that guideline. The trade-off is if you try and concretise in legislation, you lose, I guess, that speed. You put at risk that the guidelines can then become subject to negotiation as it tries to go through as a bill in the parliament and it can come out looking like something that could be a little bit different. And so I think the challenge here is the trade-offs around, you know, getting something in law, which is obviously a better solution, versus a memorandum that is a solution that can be done quickly and not necessarily be watered down through other processes. But even if it was a memorandum, and I would agree that there are all the weaknesses that Anne points out, I guess I just might get to the point that as a system, and we talk about integrity of systems, it is then something that the Auditor-General can actually audit against and then hold the system to account too.

PROFESSOR TWOMEY: Can I just add to that, by the way? I wasn't really suggesting that you should make it an actual Act itself but do it as a legislative instrument.

MR GOODWIN: Right.

PROFESSOR TWOMEY: So you could do it as some kind of a subordinate instrument, which the government can - - -

MR GOODWIN: A regulation.

PROFESSOR TWOMEY: - - - control, the government can make as a regulation.

MR GOODWIN: Yeah.

PROFESSOR TWOMEY: But the key thing is making it disallowable.

MR GOODWIN: Yep.

PROFESSOR TWOMEY: So if you do change it in a way that does then allow for corruption, it can be disallowed in the parliament. So - - -

DR LONGSTAFF: The key point there is the one you made this morning, isn't it, that certain triggers are only pushed or pulled if it has the force of law.

PROFESSOR TWOMEY: Correct.

DR LONGSTAFF: Otherwise people just sail through the ICAC Act and all the rest because of that deficiency.

MR GOODWIN: And that's something that is a good middle ground and (not transcribable) regulations are often used, particularly in support of the GSF Act.

PROFESSOR CAMPBELL: And any problems about speed in being able to get legislation through are solved by having a regulation. You can do that really quickly.

MR O'BRIEN: It's just struck me here that you've got this interesting contrast between the state and the Commonwealth. In the state, the situation we're talking about today is one where you've got the integrity commission, which has oversight of ministerial codes of conduct and so on, but where there clearly have been flaws and a looseness in the systems around grants. In the Commonwealth, Anne talks about the Commonwealth being ahead of the game because it's got legal status but it doesn't have an integrity commission to - - -

PROFESSOR TWOMEY: Correct.

MR O'BRIEN: - - - actually keep them honest. So, one last question to you, Anne, relating to your review of their review before we then get onto more reforms when I come to the rest of the panel. Journalists always, their ears prick up when they see words like "the elephant in the room". We like that. And here you say, in your paper, that the New South Wales review into grants administration failed to address the elephant in the room, "that it studiously avoids the issue of grants being made to advance a political party". You say that "Political party interest is left festering unaddressed between public and personal interests." Can you elaborate?

PROFESSOR TWOMEY: Yeah. I think that's right. I went back looking through it and there's a couple of odd little bits where they mention political issues and election promises but it's really not the focus of it, which is bizarre given that that was the entire point, the reason that the review was taken. There's so much more focus, and this pops up all through the legislation and the values and everything that we've got, it's all comparing public interest to private interest, but there is just this horrible area in between public interest and private interest which is the interests of the political party. So what do we do about election promises? Let's just actually be clear and upfront about it because if we just let it drop between, so on the one hand politicians say, "Well, that's not private interest, that's something else so therefore it's okay," or on the other side people are saying, "Well, hang on a minute, that's not in the public interest," it just drops in between. And it is quite astonishing that this particular report doesn't really grapple with how you deal with questions about grants administration that favour the interests of political parties, particularly during election campaigns with election promises. It needs to be addressed head-on.

COMMISSIONER HALL: I wonder if I could just add to that, Anne. I did look at the terms of reference for the Productivity Commissioner's inquiry. I'm trying to find it now, I can't put my finger on it, but it may, the explanation in part, at least - - -

PROFESSOR TWOMEY: Yes. They were quite limited in terms of reference.

COMMISSIONER HALL: Yes. Sort of value for money and other things like that.

PROFESSOR TWOMEY: That's right.

COMMISSIONER HALL: So, and as you point out, in fairness to the Productivity Commissioner, he does advert to the misconduct in public office more than once in the report but he hasn't proceeded to analyse it. That's not a criticism, because I think his line of enquiry was not really going into the legal implications and needs for legal reform on certain things. But the important thing I think I should emphasise is that as valuable, this is a valuable piece of work, the final report, April 2022, for the reasons you've said, but if it covered everything, then we wouldn't be

here today. The point of being here today is to take further into consideration matters that are essentially legally based in terms of the obligations on public officers and so on and so forth. I am hopeful that the fruits of this subject-matter investigation by the Commission, with the aid of this forum, will cover areas not yet covered or addressed in this report and I think that's why there's a need for both, the Productivity Commission report, and I would hope our report will be seen as supplementing other issues which also must be on the agenda and actioned. I'm perhaps always overoptimistic as to when our reports can be produced but in this case we're aiming for late-June/early-July.

MR O'BRIEN: Okay.

PROFESSOR CAMPBELL: I wonder whether the relevant contrast is between personal interest and public interest. I think it is probably rather between public interest and not public interest. And that if you've got an attempt being made to advantage a political party, then that is not in the public interest and therefore is the sort of thing that is just as likely to be illegal.

MR O'BRIEN: Now, has anyone else got anything to contribute on the review before – yes, AJ.

PROFESSOR BROWN: Yeah. I mean, for the purposes of the transcript and assisting Peter's report. I mean, I agree with everything that Anne has said and that we've just been discussing, but I would say there's five areas in which we really need to make sure that these reforms work and the first is actually the one that you said, and this is speaking to the Commonwealth level, is what you said about the lack of machinery at the Commonwealth level to actually enforce better rules if they're there. It reinforces why the current debate now about the implementation of a national anti-corruption commission has to be driven by a scope of corruption that is broader than just criminal offences, because we're talking here about the absolute necessity of being able to go into the political grey areas to sort out what is right and what is wrong. So it's really important now that the Commonwealth actually do the job properly so that there is that, that same capacity.

The second thing is that I think that we've got to recognise that at a Commonwealth level those statutory or the rules that have the force of law, you know, are crucial. I think we should remember that in the sports rorts

affair, the main recommendation of the Australian National Audit Office there in relation to that was to bring those grants within those guidelines, and ministerial decision-making about grants within those guidelines. It was recommendation 4 and the government accepted it on the spot. So it's a bit like saying, yep, actually we're a bit scared now but we're going to accept that recommendation. So actually to say that nothing was done is not accurate because, in fact, the system was pushed in the right direction. But I think the key problem is those mechanisms for transparency around when ministers decide to deviate from their official advice, making those mechanisms real so that there's a real deterrent to poor or partisan decision-making. Because we have the problem of corruption in plain sight. There's plenty of people, I suspect that John Barilaro might have been one of them, who would say, "Yeah, we'll just do it openly. We'll just say, yeah, these are the reasons," and, you know, and dare anybody to tell us that this is not in the public interest. So we've actually got, that's got to work in a way that actually can be a realistic disincentive to make poor decisions while not stopping the ability to make good decisions. That's quite a complex thing to get right at the end of the day in politics, I think.

The third thing is that the – and I would absolutely agree with what Joe just said, I think that goes to the problems maybe in the report and the problems with the codes of conduct at the moment, is this focus on public versus private. They have to more actively and explicitly deal with what we're talking about here, that it's not a contest between public duty and private personal gain, that it's something more complicated than that and that the guidance on that in codes of conduct that are then properly enforced is as crucial as anything else, because it's one of the few ways that we've got to actually support good decision-making culture amongst politicians and actually influence their understanding of what they're doing. Otherwise it just turns into Whac-A-Mole, you know, what they're currently getting away with over here they will just try and get away with over there because they believe that they're doing the right thing. We've got to create a framework where it's more clearly understood why this is not the right thing. So that's number three.

Number four is, I would go back to the electoral bribery offence and actually recast the electoral bribery offences to make it clear that pork barrelling can be electoral bribery, which is currently not, it's currently written in the other direction so that it's actually a clear warning in criminal law where it needs to be. You don't need to be an expert in public trust and misconduct in public office to say giving people money to influence how

they vote, or how that immediate community votes, is actually problematic in criminal law directly.

And then finally, my fifth point would be, getting back to election campaigns, a lot of this is being driven by using this money in election campaigns and making the announcements in election campaigns and so we need a much stronger process for basically saying, no, that's not, for separating what is campaign activity and expenditure and promises, and part of that is actually creating much more robust systems after the election for having official processes to assess the value for money for election promises so that actually this current culture of saying, "I've issued a media release." I, the prime minister or the premier, "I have issued a media release saying we're giving these people this money. That's legal authority for the fact we have to give them this money."

PROFESSOR CAMPBELL: It's not.

PROFESSOR BROWN: No way, no way is it legal authority for, but that's actually the way that it's being interpreted and used within the public sector. So we've actually got to create a system where actually politicians know that when they make these promises, they've actually got to already be backed up by the right principles to say this will be a public purpose program that will benefit these particular communities and those particular communities can go, right, well, we'll vote accordingly. But actually the program itself is designed from the get-go to be of a proper public purpose and that will actually be a gateway after the election that means it just can't get into the budget, it can't become an appropriation unless it actually meets those tests, no matter what was in the prime minister's media release or what was in the election commitment. Those are my five.

MR O'BRIEN: There's your five. Anyone want to speak to AJ's five?

COMMISSIONER HALL: Well, I'd like to respond, certainly in relation to the last point. But before I get to that, I think there seems to be almost unanimous, there is a unanimous agreement amongst the panel that the matters Anne has raised in terms of the approach to reform involving these matters be the subject of a statutory or statutory instrument, a statutory reform being perhaps a statutory instrument is clear. It must be done for all of the reasons that Anne has articulated but I do also have in mind, and Ian might be able to clarify this, that the Auditor-General's report did contain a number of proposals for reform. One of them, as I recall it, touched on a

comparative analysis of other jurisdictions. I may be mistaken but I think in New Zealand they have a different approach. The minister doesn't make the decision, somebody else does. There's a panel of experts. But then, of course, the panel's decision goes to the minister who formally signs off. It would be hard to reverse the whole process. Ian, can you recall some more detail around that?

MR GOODWIN: So two points there. So I will just sort of reaffirm, you know, the Auditor-General made five recommendations that should go into the guidelines, and a read of the document prepared by the Productivity Commission and the head of Premier and Cabinet, it addresses those, I would say. And I just, you know, one can always chase ground looking for more but it does address those. To the point that the Commissioner just made, so in the Auditor-General's report, we did do some comparative analysis, so looking, you know, what happens in the model in New Zealand and the model in the UK. And the model there gives a clear separation between the role of the government to set policy and then for the public service to implement the decisions of government. And, in that case, a public servant, what's important is that the government is quite clear in what its policy and program designs are for a particular grant distribution, but there is a public servant that then makes that final decision. And so it ensures the risks that we saw in the audit of Stronger Communities Fund doesn't arise. But it is a model and government would need to form a view as to where it lands on that.

COMMISSIONER HALL: Thanks, Ian. And if I could just come back to the second point that AJ raised and that is the election promises. I think it's well accepted that election promises, if elected, then usually the new government feels compelled to implement them - - -

PROFESSOR CAMPBELL: Sometimes.

COMMISSIONER HALL: - - - but because for the reasons that AJ has said when no groundwork really has been done, no business case has been done before the election about whether this proposal is viable and worthwhile or not, ministers can often be compelled because they've made this promise not to back off and do nothing about it. They feel they have to implement it. They might get advice saying, look, there's all sorts of problems about this pre-election promise that might be financial or it might be other issues but then the temptation is to try and retrofit the grant program into mirroring in some degree the promises that were made. And trying to retrofit something

after the sort of gate has opened and the horse has bolted is always notoriously difficult. So I endorse everything AJ has said about that. Something's got to be done in that space, too, I think, that election promises can be the source of a problem, that governments then go ahead and waste money on things that they shouldn't or they get hooked up on a program they never had any idea of before they made the promise. And I think that's a very important point.

MR O'BRIEN: Okay. There's two things I want to raise. One is let's say that you've got a particularly effective integrity commission and/or you've got a particularly effective auditor-general's office and you've got a government that doesn't like the extent to which they've been embarrassed and they're tempted to consider how they might nobble the process. And one obvious way to be to cut funding. And that might be an efficiency exercise or it might come up as, you know, and it might be excused in some other way, competing priorities. But let me test this. Peter, you told a budget estimates hearing in NSW Parliament that ICAC had been forced to abandon some of its investigations and scale back others because of a lack of resources, and that key performance indicators for the Commission had been revised down. I'm going to ask a similar question to Ian, with a slightly different twist. But are you comfortable that it's not open to a government in New South Wales to use the threat of a funding cut, even an unspoken threat of a funding cut, to reduce the effectiveness of ICAC?

COMMISSIONER HALL: There's no protection against a decision by government to reduce funding.

MR O'BRIEN: And is it possible to have a protection?

COMMISSIONER HALL: Yes, it is. So for about the end of 2018, I commenced what I regard as something of a campaign to, and the Commission decided to really put an end to the funding system that had been in place for some 30 years whereby the obvious anomaly of those who we oversight, including ministers of the Crown, can decide our funding. I mean, the conflict is obvious. And many of those ministers who sit on the ERC, of course, could be the subject of an investigation by us at any time and if we do commence an investigation, then the opportunity, theoretically at least, is there to hold us back. In 2016, there was a marked reduction in Commission's [sic] funding. This was before I joined the commission as Chief Commissioner. That had very, very significant effects, not only on morale but on capacity of the Commission. Now, as I understand it at that

time, there was nothing provided by way of explanation or justification for cutting our budget at that time.

That just goes to show, and it's driven my campaign to try and get a truly independent funding model, it goes to show that the vulnerability that the Commission had in 2016 continues to this very day. There's nothing in law to stop it from happening. As I said at the very outset of my introductory remarks, we are here to serve the public interest, to prevent breaches of public trust and so on. To serve the public interest, we need obviously to have the resources but if we don't have the staff and can't afford to have the required number of investigators, for example, legal officers and so on, then we've got to cut our cloth and say we just simply cannot pursue that investigation, either put it to one side and park it or terminate it and concentrate on the others. That's not a good decision but it does result from the funding variables.

And the final point is that we did put up, well, firstly, we took Senior Counsel's advice on the legal question of our independence and the ability through funding to impair it from Bret Walker of Senior Counsel. He gave two opinions which we annexed to our special report to parliament. We got no feedback at all from those special reports and those special reports are meant to be the chain of communication between the Commission and the parliament. The Auditor-General's Office was requested then by government to do a performance audit on us and the other integrity agencies. I think there might have been a belief harboured somewhere that we don't manage our funding properly. Well, the Auditor-General put that to bed and gave us a clean bill of health and, in fact, we're audited every year, anyway, and we've never been criticised, so there's nothing in any suspected mismanagement issue. So more recently, as you'd be aware, the Premier has announced a much more improved position on funding in terms of we will get what we have sought in the budget case for the next financial year. That's never happened before. There's always been chiselling away at whatever we put up and we end up with something less than our business case. I hasten to add, we have never put up a business case as an ambit claim in order to try and put a little bit of padding in there. I also, in order to reinforce the validity of our business cases, got an independent consultant, KPMG, in to validate everything we sought, every dollar we sought. We still ended up with a business case that had been chipped away and was something less. No explanation that we had overreached or suggestion that we'd overreached in our estimates.

So these are the problems with funding, they do go right to the heart of the capacity of what I regard as a Commission here to serve the people. Our budget is not high compared to, you know, the major departments of government. It really is, it is really a very small budget, so it is not the financial impact on the state that is at stake as far as I see it, because it's relatively miniscule in budgetary terms.

MR O'BRIEN: So it's a big question mark there in your mind? Ian, the Commonwealth Auditor-General has made warnings about a lack of funding affecting their statutory duties. To look at how that might or might not apply here, I want to refer to the New South Wales Upper House Public Accountability Committee inquiry into WestConnex project urged NSW Government to ensure that the Audit Office had the resources required to undertake a detailed and comprehensive performance audit of the WestConnex project in 2019/20. Now, were you able to conduct that comprehensive performance audit? Did the government pick up on that committee recommendation that you should conduct this comprehensive performance audit? In other words, was the office capable? Because I would imagine with the amount of money that you would set aside for those kind of big audits, there'd be a serious limit on how many you could do.

MR GOODWIN: Yeah, thank you. So, probably the right point to start is just how much resources we have to conduct performance audits. So we get a government contribution of about $8.5 million to conduct performance audits. 1.3 million is for the local government sector, so that leaves about 7.2 million for the state government sector. To translate that, I often translate it as that's 7 cents for every $1,000 of government spend that's invested in performance audit. So it's a fairly modest, modest investment and relative to our peers, fairly modest. That's important because, you know, we're auditing an entire system and we have to be able to make sure that we're judicious and where we put our resources, and certainly auditing WestConnex in its entirety would be a very large audit. We did do an audit of WestConnex that was tabled in mid-2021, but it looked at the, how the changes from the original business case in 2014 have been justified, and highlighted that $4.26 billion of projects were funded outside the original budget by excluding them from the scope of the work, but still completed. So, in essence, they were part of WestConnex. But to do it in its entirety it has a complication of two-folds. One is just scale and how much resources we have, but since that point the government's divested of its controlling interest in WestConnex, and by doing that it's no longer a controlled entity of the NSW Government. The NSW Government has a significant

remaining interest at a point in time, but what that means is once it's no longer a controlled entity, we no longer have the mandate to do a performance audit.

MR O'BRIEN: Well, just very quickly, was the committee's recommendation a well thought through recommendation? Was it a justifiable recommendation? And, I suppose, was it important that that comprehensive performance audit be done?

MR GOODWIN: Look, I think we would respect any recommendation made from the parliament and that recognises the fact that the Auditor-General reports to the parliament, and we would recognise that WestConnex is both large in scale and in risk complex. And anything of scale and complexity does warrant, often, a look at. But as it stands, we wouldn't have the mandate to do that audit now.

MR O'BRIEN: Yes, okay. So one last question to you, and this relates to another recommendation from that same committee, which was that the NSW Government should establish "follow the dollar" powers for the Audit Office of New South Wales. What, very briefly, what in a nutshell are the "follow the dollar" powers and what would you potentially achieve if you had them, because you still don't have them, do you?

MR GOODWIN: No, no we don't, and we're the only jurisdiction in Australia that doesn't have "follow the dollar" powers. So that's a big reason why, in terms of how we're measured relative to our peers in terms of independent safeguards, we're slid back. The "follow the dollar" powers recognises that government has evolved how they deliver services to citizens, so going from every service delivered to citizens from government departments to contracting with third parties to deliver for our citizens, whether they are private institutions or non-government institutions. So the Auditor-General's performance audit mandate is limited to entities that are controlled entities that we would do a financial statement audit of, and so therefore if it doesn't meet that test, but the government is still delivering services such as aged care, schools, private prisons, private hospitals, we don't have that mandate to follow the dollar to see how well those resources are being used. We sort of stop at the government department who then grants that money across. So it is a limitation, and in a sense because government has evolved how it's delivered its services to citizens, by the Auditor-General's mandate not evolving with it, it's, I guess, we're sort of seeing a degrade in terms of that mandate.

COMMISSIONER HALL: Could I just add a brief comment on that? Outsourcing of public services, contracting services, sometimes it's a chain of connections, is all public money. It's the same public money flowing down through that system. The corruption profile changes over time, and the corruption risk has certainly increased with outsourcing. At any one point there are risks of money being fraudulently misused or abused. I wrote, some years ago now, supporting the "follow the dollar" legislation. I heard nothing further since about it, but I would certainly support it.

MR O'BRIEN: Do you mean you didn't get an answer.

COMMISSIONER HALL: No. But I do support it, and I think it's essential, it makes sense. Why not have a "follow the dollar" powers to follow the money, New South Wales money through the system to ensure that it's being properly used? I don't see any disadvantage, there's no downside, it's only upside.

MR GOODWIN: If I may, and I know you're probably pushing time now, Kerry, but the Auditor-General has made, and I have to apologise, I misspoke, I said (not transcribable) out of home care. But the Auditor-General has issued a number of reports where she has said, for example, in 2018 that there's $1.2 billion to grants to non-government schools that she is not able to give assurance to the parliament on how it's used. Recognise that in a 2019 audit, contracting in non-government organisations, about 500 NGOs valued to 784 million, we're not able to assess how that money's being used. So we are talking some fairly sizable money that, sort of, sits outside the mandate of the Auditor-General. It is a recommendation - - -

MR O'BRIEN: And you are the only audit office in Australia that doesn't have those powers?

MR GOODWIN: Correct. It's a recommendation that's gone to the parliaments in 2013 and 2017. And if I could just correct one other thing, one thing I should have probably answered your question on when you talked about Cabinet-in-confidence, what I should have made clear is the legislative impediment there is that the Auditor-General, while she is entitled to request any information of the public service and get that within 14 days, she is not entitled to Cabinet information or information that's legal privileged. Now that was an amendment, that sort of sits at odds with some of the other jurisdictions, but there was an amendment put through back in

the ’90s, so there was that authority and, you know, it would be a most welcome reform if that was, sort of, reversed.

MR O’BRIEN: We’re going to finish now, but I had a sense over the course of the conversation that nobody was in a rush to go down a road that sees a number of ministers going to jail, but at the same time, a warning note that we are talking, potentially, about criminal abuse of power.

PROFESSOR CAMPBELL: It never hurts to have the threat there, because it’s the sort of thing that public servants can advise their ministers about.

MR O’BRIEN: Oh that would be interesting. “Minister, Minister, should I point out to you that what you’ve just done might incur a sentence of up to 20 years.” But I noticed in Anne’s, I think it was in your paper, Anne, the consequential loss, the idea of consequential loss which has been applied in Britain?

PROFESSOR TWOMEY: So in the UK, so that, the case about the Westminster Council and the selling off the council properties and kicking out the tenants, it also involved losing quite a significant amount of money, so they sold the properties off cheap. And in the UK they had a provision that said that if you, through your wilful act, cause loss to the council, then you have to repay it. The amount that they had to repay went into the millions of pounds. However, one of the two leaders of the council who was subject to this was the heiress of the Tesco supermarket chain, and actually did have millions of pounds. In the end they settled it, I think she paid something like, it’s in the paper, but I think it was something like 12 million pounds, but that was a discount on the 30 or 40 million pounds that was owed. The other one that wasn’t an heiress of a supermarket chain, I think, paid something like 40,000 pounds. But it does raise the issue of, well, maybe concentrations of minds might be greater if the consequential loss to the public of the misuse of public money, you know, if that did become a liability - - -

MR O’BRIEN: Could be recovered.

PROFESSOR TWOMEY: - - - if you had to pay it back, that might make people a little more careful.

MR O’BRIEN: Now, we’re going to end but does anyone have a last word that’s going to add significantly to the sum of what we’ve talked about today before I come to Peter? No?

PROFESSOR BROWN: I'd just add, again, just sort of leading with a bit of an international perspective, and I mean I've already been emphasising how close we've been getting to the type of electoral corruption in other countries that we would never imagine we could. I think we've got to recognise that even if pork barrelling isn't corrupt, it drives corruption. It drives people to think that this is all about getting favours from government. It drives people in government to want to misappropriate money in order to create the slush funds, or to steal money, indeed. A lot of the kleptocracy around the world is driven by powerholders who steal money from the public purse, not just to buy their own shoes and their luxury yachts, but actually to create the funds that they then use to pay other people to vote for them in order to entrench themselves in power. So I think we have to recognise just what the implications are of pork barrelling if we let it go unchecked, and it actually includes driving corruption risks up even when pork barrelling itself is not technically corrupt. Just to really emphasise the significance of what we're talking about here.

DR LONGSTAFF: And I would say technically it is corrupt.

PROFESSOR BROWN: It can be corrupt, absolutely, it can be corrupt.

MR O'BRIEN: Ian Goodwin?

MR GOODWIN: If I can just say one final comment just on your question around the "follow the dollar" I just wanted just to clarify because I wouldn't want, particularly colleagues, to think that this is an extensive power that the Auditor-General would have. So, there's two myths, there's one that that would involve the Auditor-General doing financial audits of private entities and it would not, it's simply a performance audit mandate. And the other is that would it put a burden on the private sector, and the answer to that, that are transactive of the government, and the answer to that would be not, it would be an authority to look at something in very judicious circumstances, and often in rare circumstances, but only when there's an obvious governance failure or potential fraud. So it would be in the public interest to look at, but it wouldn't be a widely used mandate.

MR O'BRIEN: Okay. So that's where we're going to end the discussion, and terrific discussion it's been. But I want to ask Peter, again, as the host, just to round it out with any final comments he might want to make.

COMMISSIONER HALL: Thanks, Kerry. Well, to close this forum I'd like to thank a number of people, firstly our moderator, Kerry O'Brien. Kerry would be well known to all of us having been the anchor man for many years on The 7.30 Report as I recall, and Kerry's experience in that area over many years in the political domain. But not only was his experience so valuable for ICAC's use, calling upon him to do the role of moderator for this forum, but he has consumed an enormous amount of data and material we have sent to him, because he wanted to read into it to master what we were talking about and he's certainly done that. I want to thank you, Kerry, very much indeed for the conscientiousness, the hard work you've put into identifying the issues and the problems and some solutions, and directing our attention in this forum to those issues. So I thank you very much indeed for your very helpful, constructive input which has elevated this forum, I hope, to be seen by everyone as being a very worthwhile exercise. To our expert panellists, Anne, Joe, Simon, Ian and AJ, every one of you as soon as I asked whether you would assist and be involved in this, without any hesitation, accepted and were quite enthused about making a contribution to the public interest in this way. We could not have had more suitable and expert panellists than you.

This is a slightly new venture by the Commission. We normally do most of our work behind closed doors except for public inquiries. This issue of pork barrelling is an important community issue as I said at the outset. A lot of questions being raised, a lot of confusion, a lot of misinformation being put out there as to whether it's okay, normal or not. These are important issues because they do go right to the heart of trust and confidence in government and public administration, and without that, cynicism takes off like a bushfire and our institutions suffer consequently. So, thank you each one of you for your contributions and thank you, Ian, for having worked with the Commission in relation to this matter and indeed in our professional relationship over time, which I have thoroughly enjoyed and we've had enormous support from the Auditor-General Margret Crawford and her staff and Ian, in relation to a number of matters. It's been a very good relationship to date between the ICAC and the New South Wales Auditor-General's office, and her staff. And that's as it should be, of course. And those of you who have viewed this forum via livestreaming, I trust and hope that the forum has been informative.

If I could just briefly address some next steps, it's important for politicians and the public to be aware, of course, of the legal and ethical issues associated with pork barrelling as has become evident. Consequently, this forum will issue a report setting out its views on pork barrelling, in particular whether

the conduct associated with the practice of pork barrelling could constitute corrupt conduct under the provisions of the ICAC Act. As I've earlier indicated in the course of our discussions, we are hopeful of having that report finalised and published by sometime early July next. We are endeavouring to expedite that process because it is an important issue, because there are reform agendas now, fortunately, out there. We wish to work with the NSW Government, with the Productivity Commissioner, so that we can get the best outcome for the public of New South Wales. We should not be working separately, we are in touch with the Secretary of the Department of Premier and Cabinet, Mr Coutts-Trotter, and he has indicated that he wants to work with us. We are happy at that situation, that's as it should be also. So I am optimistic that we will have a constructive dialogue with the Premier, the Government of New South Wales and those others who have contributed from the government point of view.

Anyone who might wish to express a view or make some form of submission are encouraged to contact the Commission at the address ICAC@ICAC.nsw.gov.au, all of that's on our website. These comments should be sent within the next week if you'd like them to be considered by the Commission in the compilation and consideration of the issues and compilation of this report. In addition, in the course of the recording of today's forum, the livestreaming will be available on the Commission's YouTube site, that is to say it will be recording available on the YouTube and a transcript will also be prepared. The papers prepared by the Commission, by Anne, Jo and Simon, will also be made available on our website later this afternoon. It remains to thank you all, and I wish you a good afternoon.

FORUM CONCLUDED