

29 November 2019

Dr I Kirkpatrick
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Independent Commission Against Crime and Corruption

Dear Dr Kirkpatrick

(via email)

Operation Eclipse – Response to Interim Paper October 2019

Further to my submission of 22 May 2019 consisting of a chronology (attached) of the relationship between the NSW alcohol industry (a prohibited donor) and NSW governments and Oppositions and my 2019 article 'Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health',¹ please find my response to the above Interim Paper.

I firstly commend the quality and usefulness of Exhibit '7' the Discussion Paper² prepared by Dr Ng and Professor Tham and, the subsequent ICAC October 2019 Interim Paper.³

My ongoing PhD (Law) research into the regulation of the supply of alcohol in NSW suggests that vagueness and uncertainty in the definition of corruption in NSW is hampering the prevention of contemporary forms of corruption, including clientele and quid pro quo corruption.⁴ Political lobbying in NSW is central to persuasive, partial and pervasive relationships between government and commercial vested interests.

My above article and associated chronology provided specific examples where the public interest has been systematically undermined in part by extensive political lobbying. The ICAC chose not to rely upon this material.

My submission also provided the ICAC inquiry with specific examples of how the long-term relationship between the alcohol industry, public officials and senior political party officials (some of whom were and remain industry lobbyists) failed to satisfy the following safeguard principles that intersect with, or more importantly, qualify the democratic right to make representations to government. These are:

- Transparency
- Integrity

¹ Tony Brown Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health' (2019) 26 *JLM* 764.

² Ng Y, and Tham J 'Enhancing the Democratic Role of Direct Lobbying in New South Wales - A Discussion Paper Prepared for the New South Wales Independent Commission against Corruption April 2019.
<https://www.icac.nsw.gov.au/ArticleDocuments/896/EXHIBIT%2007.pdf.aspx>

³ https://www.icac.nsw.gov.au/ArticleDocuments/913/INTERIM%20PAPER%2015Oct19_FINAL.pdf.aspx

⁴ *McCloy v New South Wales* [2015] HCA 34, 13 -14, 62 and Walton W, "The ways of the world: Implications of political donations for the integrity of planning systems" (2015) Henry Halloran Trust.
<http://doi.org/10.4225/50/576B80F32B3C9>

- Fairness
- Public Interest
- Merit based decision making⁵

My research related to key 2015 amendments to NSW alcohol supply laws that shifted the balance of competing stakeholder interests clearly in favour of the alcohol industry's private commercial interests. These were arguably inconsistent with the fiduciary duties⁶ of public officials and primary 'public' interests of health, safety, harm reduction and community involvement in critical decision-making impacting upon their families' health, safety and well-being.

These critical liquor law amendments obviously **did not emerge from a vacuum** or a product of some immaculate conception.

Addressing the critical failure of transparency and accountability

None of the above statutory amendments were canvassed in industry submissions or the NSW government's response to a review of the NSW alcohol laws 12 months earlier. Any communications between industry and public officials must have been through other channels. These communications are **hidden**, often protected by 'cabinet in confidence' restrictions and largely **unknowable**.

The same excuse or current statutory exemption enabled the NSW government to withhold the NSW Police's critical submission to the review of NSW's three strike alcohol compliance laws. It is understood that some Police reservations about the industry promoted weakening of the scheme via lobbying, never received critical public ventilation. This directly contravenes some of the above five dot points.

Alcohol industry lobbying and potentially authorship⁷ must have been central to the law changes, especially given the specificity of some amendments relating to which type of liquor licenses could be reviewed by NCAT. Industry lobbying also must have played a key part in the excluding any local residents living further than just 100m from being able to seek a NSW Civil & Administrative Tribunal (NCAT) review of an unsuccessful objection to an NSW Independent Liquor & Gaming Authority (ILGA) approval of a hotel of bottle shop license. This 100m limitation does not fit at all with the available independent scientific evidence of the geographic spill-over of alcohol related harms from on and off licensed premises.

ILGA determinations of higher risk liquor license applications and range of other matters are held in-camera.

⁵ Ng and Tham, n 2.

⁶ See NSW ICAC Exhibit 15 Gageler S, 'The Equitable Duty of Loyalty in Public Office' *Finn's Law: An Australian Justice* (2016), Tim Bonyhady (ed).

<https://www.icac.nsw.gov.au/ArticleDocuments/896/EXHIBIT%2015.pdf.aspx>

⁷ Would not be the first time in NSW. Industry lobbying enable them to rewrite NSW Liquor Promotion (Statutory) Guidelines in 2013 line by line, removing all evidence-based harm reduction measures including preventing '2 for the price of 1' purchases of alcohol on shopper docketts.

<https://www.smh.com.au/national/nsw/government-bows-to-liquor-industry-on-discounts-20130713-2px3h.html>

There was no opportunity at all afforded the NSW public and other interested stakeholders to provide any input based on the best independent scientific evidence of alcohol harm reduction, effective community engagement in government decision making processes etc.

The public only became aware of the extent of the proposed legislative changes when the Bill was introduced to Parliament for the Second Reading process.

The orchestrated complete exorcism of transparency, openness, fairness and merit of these life impacting laws was justified by senior public servants on the basis the amendments did not represent 'policy changes'. Nothing could have been further from the truth, with the ILGA Chairperson (a former Human Rights Commissioner) at the time of the amendments reportedly resigning because of alleged loss of independence.⁸

These so called 'Fit for Purpose' alcohol law reforms also ushered in a new liquor licensing approval process. Public officials advised community members on more than one occasion that the government agency had a 100% application approval objective and that any negative (public harm/welfare) related aspects of an application would be dealt via conditions on a liquor licence.

My above journal article illustrated how the primacy of 'public interest' was subordinated (corporatized) to that of 'customer (drinker) convenience' (read industry profits) and became a non-statutory justification or narrative for the approval authorities to achieve their 100% approval rate for valid applications, including high risk alcohol outlets opposed by Police, Public Health officials and local residents.⁹

The failure of openness and transparency integrity protections also exists at the individual agency level

"Cabinet in Confidence" and "Commercial in Confidence" exemptions from disclosure are being significantly abused by some government and local government agencies. The attached a letter of refusal by the Police on 9 May 2019 to provide a vulnerable western Sydney community with safety data of high-risk local pub owned by the large ALH liquor groups (Woolworths), appears to be a prima facie contradiction of the core objectives of the *Government Information (Public Access) Act 2009*.

In rejecting part of the GIPA application pertaining to one of the two pubs from which police assault statistics were sought, the Police's review officer noted

I took into account that this agency cannot control how information released under the GIPA Act is used or disseminated (page 1)

⁸ See <https://www.smh.com.au/national/nsw/liquor-and-gaming-in-chaos-before-lockout-laws-review-20160405-gnyhho.html> and <https://www.abc.net.au/news/2016-05-24/casino-at-risk-from-organised-crime-after-inspector-exodus/7441102>.

⁹ The failure of the NSW regulatory bodies to adopt an evidence – based merit approach following the implement of Fit for Purpose amendments to determining higher risk liquor license applications was considered in Ziller A, and Brown T, 'Rational Social Impact Assessment of Alcohol Outlets: Slip Sliding Away' (2019) 26 *JLM* 786.

He also relied upon and paraphrased the ALH submission

The ALH Group have concerns about this information being released into the public domain and affecting the reputation of not just the Pritchard Hotel but the ALH Group as a whole. Consequently, affecting the commercial and financial viability of the Hotel and other ALH Group establishments (page 2)

The Police refusal was made notwithstanding the following provisions of the GIPA Act

15. Principles that apply to public interest determination

A determination as to whether there is an overriding public interest against disclosure of government information is to be made in accordance with the following principles:

(a) Agencies must exercise their functions so as to promote the object of this Act.

(b) Agencies must have regard to any relevant guidelines issued by the Information Commissioner.

(c) The fact that disclosure of information might cause embarrassment to, or a loss of confidence in, the Government is irrelevant and must not be taken into account.

(d) The fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account (emphasis added).

This has become 'standard fare' when seeking important information from the NSW Police where this is opposed by a third-party respondent from the alcohol industry. Police's unwillingness to accept advice from the NSW Information and Privacy Commissioner relating to the approval of GIPA applications and is undermining the freedom of information system, a key corruption detection/prevention mechanism.

What has the potential to cloud the above issue is the Police Minister before entering Parliament in March 2011 was at one stage, a senior official with the Australian Hotels Association (AHA) amongst other distinguished positions. There is no suggestion that his former employment may influence Police or that industry lobbyists would achieve greater access to the Minister than say community representatives concerned with Police actions and position on alcohol harms and transparency.

The reality is that many disadvantaged NSW communities materially and adversely impacted by largely preventable alcohol related harms¹⁰ including domestic and family violence¹¹ and,

¹⁰ Reducing and preventing alcohol related harms in NSW is a critical public interest issue. It's estimated that on average there are 4 deaths, 40 Emergency Department admissions and 137 hospitalisations from alcohol each day in NSW. Alcohol is the single largest contributor to preventable death and disablement of Australian men between the ages of 15 – 44. Centre for Epidemiology and Evidence. Health Statistics New South Wales. Sydney: NSW Ministry of Health. (2018). Retrieved from: www.healthstats.nsw.gov.au. In 2013, the NSW Auditor General found the total cost to the community of the supply and consumption of alcohol was around \$3 billion per annum with the cost to each NSW household being \$1535 per annum.

¹¹ Alcohol was involved in about 1 in 3 reported incidents of violence from an intimate partner (34%) and 3 in 10 incidents of other family violence (29%). Alcohol was involved in around 30% of intimate partner homicides. Australian Institute of Health and Welfare 2019. Family, domestic and sexual violence in Australia: continuing

Fetal Alcohol Spectrum Disorder (FASD), do not have ready access to champions, financial resources and specialised independent professional advice to successfully challenge GIPA refusals and initiate other appeals against adverse alcohol and gambling regulatory decisions.

The calculated deprivation of ready public access to government information can only benefit the private industry and their lobbyists' commercial interests. The retinue of lobbyists including direct lobbying by alcohol - based corporations that all gain advantage from the exercise of illegitimate power with no effective safeguards and timely sanctions, is a demonstrable failure of openness and transparency. This must be rectified as a matter of urgency.

The key point here is that while the proposed increased regulation of the requirements of political lobbyists and the receptive public officials may be important to reduce the levels of potential corruption broadly defined, the immediate challenge is addressing entrenched failures in the **existing** safeguards and principles identified above. Otherwise, any prospective reforms will be doomed to failure. Of course, this may be an impossible task given the Executive government determines the level of funding to our integrity protection agencies.¹²

The entrenched and systematic nature of powerful alcohol and other industries' undue influence (and legislative capture)¹³ over the NSW political and regulatory process for many years through various medium including lobbying, leaves little confidence that any micro-level changes to lobbyist requirements and other well-meaning but potentially tokenistic approaches to transparency and accountability including access to ministerial diaries,¹⁴ would have any lasting positive transformative impact on preventing the further degradation of integrity, transparency, the democratic process and the rule of law.

Where there is a loophole (or political vested interest) there is a way

This view of critical deficiencies in the **existing** NSW corruption detection and effective deterrence regulatory regime is further exemplified by the 7 October 2019 report in the *Guardian* 'Political donations hidden from NSW planning authorities by big corporations'.¹⁵

This included Woolworths reportedly failing to declare \$100,000 to the NSW Liberal and National parties whilst at the same time lobbying for minor modifications to stores in northern NSW.

Following is an extract of a graph of apparent illegal donations by corporations in NSW from the above Guardian article of 7 October 2019

the national story 2019. Cat. no. FDV 3. Canberra: AIHW. <https://www.aihw.gov.au/getmedia/b0037b2d-a651-4abf-9f7b-00a85e3de528/aihw-fdv3-FDSV-in-Australia-2019.pdf.aspx?inline=true>

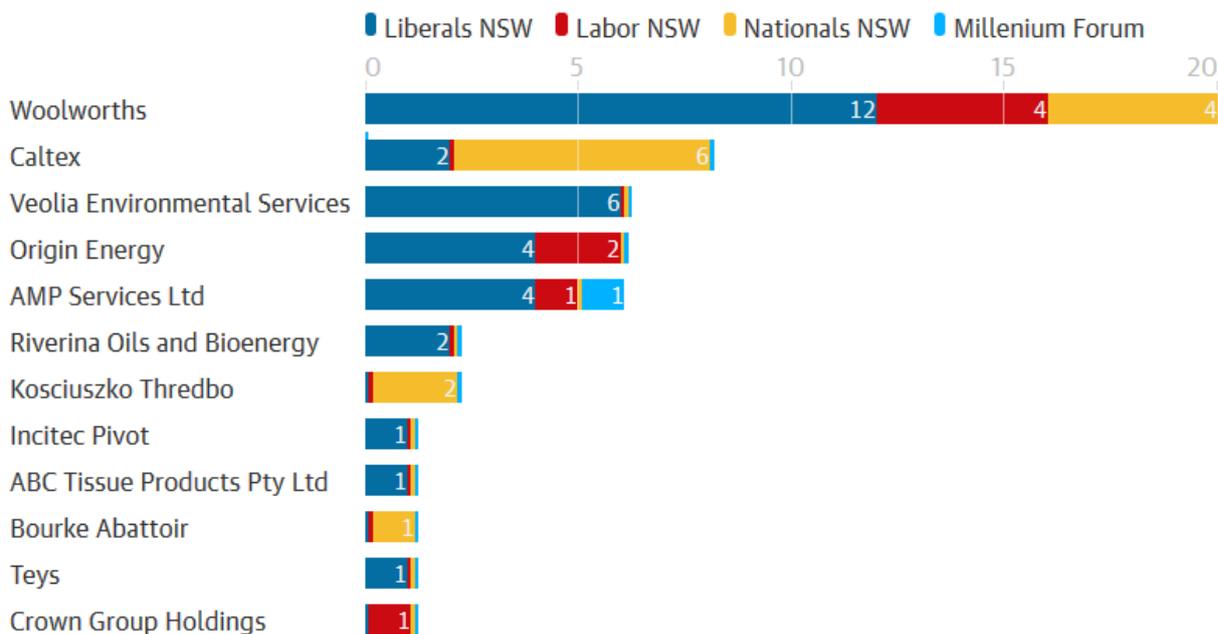
¹² See <https://www.theguardian.com/australia-news/2019/oct/21/icac-head-says-funding-cuts-will-have-immediate-and-serious-effect> .

¹³ Tony Brown Legislative Capture: A Critical Consideration in the Commercial Determinants of Public Health' (2019) 26 *JLM* 764.

¹⁴ See <https://www.theguardian.com/australia-news/2019/mar/22/mining-sector-met-nsw-ministers-almost-every-week-over-four-years> .

¹⁵ https://www.theguardian.com/australia-news/2019/oct/07/political-donations-hidden-from-nsw-planning-authorities-by-big-corporations?CMP=Share_iOSApp_Other .

Number of undeclared donations by company



Guardian graphic | Source: Guardian Australia

The ongoing porousness of political donations between Federal and NSW political parties undermines the effectiveness of proposed lobbying reforms. The understandable unwillingness by elected public officials to address the relatively underexplored mechanisms¹⁶ by which the NSW alcohol and other industries including gambling, developers and the mining sector reciprocate favours from elected NSW public officials and/or their political parties for a regulatory environment conducive to commercial gain and growth but deaf to legitimate public interest concerns, provides further grounds of pessimism for the usefulness of tighter lobbying controls per se.

Another impediment is the lack of a consistent national approach to address the corrupting influence of powerful commercial vested interests on the political law-making process including compliance and enforcement practices. For instance, it is irrational that ClubsNSW, one of the wealthiest industry organisations in NSW is exempted from the NSW Prohibited Political donor laws.

¹⁶ See for example <http://www.phrp.com.au/issues/september-2019-volume-29-issue-3/the-revolving-door-between-government-and-the-alcohol-food-and-gambling-industries-in-australia/>; 'If someone donates \$1000, they support you. If they donate \$100 000, they have bought you'. Mixed methods study of tobacco, alcohol and gambling industry donations to Australian political parties.' See also <https://www.ncbi.nlm.nih.gov/pubmed/30474155>; <https://theconversation.com/politicians-who-become-lobbyists-can-be-bad-for-australians-health-124078>. See also <https://grattan.edu.au/report/whos-in-the-room/>

Finally, Novak¹⁷ recognised the inherent (human) nature of political collusion to subvert the public interest for personal gain stemming back as far as antiquity. As Galbraith¹⁸ and Ayres and Braithwaite¹⁹ also observed, this inherent predilection to abuse power requires a system of countervailing checks and balances and, eternal vigilance.

Public health/Public interest considerations

The World Health Organisation (WHO) Framework Convention on Tobacco Controls (FCTC)²⁰ excludes the tobacco industry from any involvement in government determinative processes relating to the regulation of tobacco. This arose in part from the recognised deadly public health consequences from the promotion, supply and use of tobacco products and the clear evidence of the tobacco industry's deceptions in resisting democratic controls that would prevent death and disease from smoking. Its exclusion was the accumulated international independent evidence of the various strategies and tactics deployed by the industry to adversely interfere with the research and governmental decision-making process.²¹

The nature and extent of the NSW alcohol and gambling industries demonstrable yet unimpeded interference in the impartial evidence-based public regulation of their industries is the antithesis of the reason and purpose of the FCTC. It may partly explain why NSW experiences the highest rate of poker machine gambling harms in the world.²²

This second reason why this may be of interest to the ICAC is that it provides an interesting intersection between public health/public interest and the governance of Unhealthy Commodity Industries (UCI)²³ including the closely aligned NSW alcohol and gambling industries. The WHO are receiving submissions for the establishment of a similar Framework Convention on alcohol given the similar burdens of harm and levels of interference by both industries.²⁴

It is respectfully recommended that **public health and safety considerations** be a **priority factor** in considering the effectiveness and purpose of interventions and education to prevent and address corruption and the undue influence of lobbyists and internal corporate lobbyists.

¹⁷ William Novak, 'A Revisionist History of Regulatory Capture' in Daniel Carpenter and David Moss (eds) *Preventing Regulatory Capture: Special Interest Influence and how to Limit It* (Cambridge University Press, 2013).

¹⁸ John Kenneth Galbraith *American Capitalism* (Houghton Mifflin, 1952).

¹⁹ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

²⁰ https://www.who.int/fctc/text_download/en/

²¹ Ulucanlar S. et al 'The Policy Dystopia Model: An Interpretive Analysis of Tobacco Industry Political Activity' (2016) *PLoS Med* 13 (9) <https://doi.org/10.1371/journal.pmed.1002125>

²² See <https://aifs.gov.au/agrc/publications/gambling-activity-australia/export> and

<https://www.themonthly.com.au/issue/2019/june/1559397600/james-boyce/lie-responsible-gambling>

²³ Petticrew M. et al 'Nothing can be done until everything is done': the use of complexity arguments by food, beverage, alcohol and gambling industries' (2017) *Journal of Epidemiology & Community Health*, 71(11), 1078-1083. <http://dx.doi.org/10.1136/jech-2017-209710>

<https://jech.bmj.com/content/jech/71/11/1078.full.pdf>

²⁴ Casswell S. 'Current developments in the Global Governance arena: where is alcohol headed?' (2019) 9 *J Glob Health* (2) <https://www.ncbi.nlm.nih.gov/pubmed/31360444>

UCIs warrant special constraints and qualifications on their capacity to directly or indirectly lobby public officials.

Recommendations

My respectful suggestion is the greatest utility for the ICAC to prevent the worst form of systematic entrenched corruption in NSW – regulatory capture – may be derived by ensuring the above five safeguard principles (transparency, integrity, fairness, public Interest and merit-based decision-making) and associated independent public agencies are strengthened with appropriate levels of funding, robust laws and practices. New laws in the first instance, may not be required. Existing laws simply need to be allowed to operate.

Complaints of failure of NSW governments including local governments to comply with a robust positive duty to reasonably ensure the genuine and transparent compliance with all the above points - factors in defining and determining important decisions should be quickly heard by an independent court with the power to invalidate and/or direct timely compliance with the same. The onus must be on the government/council to establish its compliance.

The High Court of Australia has ruled on the validity of NSW's prohibited donor laws.²⁵ The risk of contemporary corruptive practices (clientele and quod pro quo corruption) in a number of industries and related occupations, and the dangers on the democratic institutions and processes, was sufficient grounds to impose these statutory safeguards.

In a similar vein, consideration should be given to drastically reducing the ability of agencies and Ministers to rely upon 'Cabinet' and 'Commercial' 'in Confidence' exemptions to stall and refuse to timely release all information pertaining to the decision-making process, especially for all the industries mentioned above. Genuine and fully informed independent community inclusiveness from the very start of the conceptual process (a form of tripartism)²⁶ may also contribute to greater transparency and a countervailing power to the undue influence of some elements within the professional lobbyist class.

Timely, transparent and genuine broad stakeholder inclusiveness (including those with alternative viewpoints) before critical decisions are made may better enable NSW governments to be held accountable. This is a core requirement.²⁷ The above example relating to the NSW government's abject failure to ensure any transparency of key public health related alcohol supply law amendments may have been remedied by relatively simple and effective transparency/accountability laws. Such failure also undermines the level of trust in government.²⁸

²⁵ n 4.

²⁶ As advocated by Ayres and Braithwaite n 19.

²⁷ Regulatory literature includes recent work in the US regarding greater public engagement in the rule making process. See <https://www.theregreview.org/2019/06/03/santambrogio-staszewski-public-engagement-rulemaking/>

²⁸ See <https://www.democracy2025.gov.au/> . Stronger transparency governance laws may be under consideration in the European Parliament. See <https://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190124STO24226/transparency-key-meps-to-declare-meetings-with-lobbyists> .

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