INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE PETER M. HALL QC
CHIEF COMMISSIONER

PUBLIC HEARING

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This transcript has been prepared in accordance with conventions used in the Supreme Court.

THE COMMISSIONER: Yes, Dr Chen.

MR CHEN: May it please the Commission, I appear with my learned friend Ms Curtin as Counsel Assisting.

THE COMMISSIONER: Thank you. Dr Chen, before I call upon you to make opening submissions, I'll just make an opening statement. This is not the first time that the Commission has considered and examined corrupt lobbying practices and the issue of regulation or the need for regulation of such practices.

In 2010, the Commission, by way of public enquiry, undertook a detailed and extensive review of lobbying activities, processes, and issues, in a public enquiry named Operation Halifax. It released its report on the public enquiry on 10 November, 2010. It made a series of recommendations for a regulatory scheme.

However, not all of the Commission's recommendations were taken up in the Lobbying of Government Officials Act of 2011. The report provided a comprehensive analysis of the subject matters considered in the Halifax public enquiry. It has not been the subject of any negative public commentary, and indeed the report in Operation Halifax was and remains an authoritative analysis of lobbying, its processes, and its merits, and associated risks, including corruption risks.

Approximately a decade on, the Commission has determined that it is necessary to once again review lobbying in New South Wales in light of 10 years of experience, and to consider whether regulation of lobbying under the present statutory regime has worked satisfactorily or whether more needs to be done to improve or enhance it, with consequent strengthening of trust and confidence.

In the Operation Halifax report, the Commission made a number of findings, and it expressed a number of conclusions. These included, firstly, that secretive lobbying carried unacceptable risks of corrupt conduct and undue influence; secondly, that there was a need for a regulatory scheme to be established by legislation; and thirdly, that the regulatory scheme should be designed so as to give effect to the Commission's recommendations set out in its report. Accordingly, a central issue determined in the Halifax public enquiry report was that lobbying should be regulated. There has been no submissions so far received by the Commission in the present public enquiry which suggests that there is no need for any regulation.

The purpose of the present enquiry therefore, as I have indicated, is to review and as necessary to determine whether the public interest is being adequately safeguarded by the existing regulatory scheme or not.

Section 12 of the Independent Commission Against Corruption Act 1985 provides that in exercising its functions the Commission shall regard the protection of the public interest and prevention of breaches of public trust as its paramount concerns. The Commission is not, as it were, going back to square one and covering all the ground covered by Halifax. It proceeds upon the basis that this enquiry is determining whether there needs, or there remains a need, to implement recommendations by the Commission in Operation Halifax which were not taken up in the 2011 Act, and/or whether additional mechanisms are needed to ensure appropriate transparency and accountability. Existing statutory regulation is to be found in the Lobbying of Government Officials Act of 2011. The regulation made under that Act incorporates a Code of Conduct for Lobbyists.

Together the Act and regulation establishes a regulatory scheme which in particular prescribes certain statutory procedures. However, without reflecting at this point in any final way upon the adequacy of the existing legislation, it is at least open to be seen as one that provides for what may be termed a minimalist scheme for regulating lobbying in this state. Lobbying activities involves interaction between parties, the lobbyist, and/or the lobbyist's client on the one hand, and the public official or officials who is or are lobbied. Public officials, whether elected or appointed, commonly possess the power to make a wide range of governmental decisions or formulate government policy or trigger the process that may lead to the enactment of new law. The Lobbying of Government Officials Act 2011 prescribes duties upon lobbyists. Whether such provisions are sufficient or adequate will be examined in this enquiry.

The Act, it may be noted, is completely silent as to the duties of public officials who are lobbied. In relation to the exercise of public power or functions, public officials are accountable for their actions. In relation to lobbying proposals, an important question arises as to how their accountability obligations should be satisfied. In general terms, accountability is not a concept of indeterminate reference. It is informed by legal principle and importantly it requires transparency of process. It is for that reason that in the first part of this public inquiry the relevant legal framework and the legal principles that apply to the exercise of public power, in particular in relation to lobbying, will be examined. Accountability of public officials can only be properly determined in light of the legal framework that pertains to the exercise of public power generally.

Following the publication of the issues paper, the Commission received written submissions from a number of persons and entities, some calling for greater regulation of lobbying practices and others that argue strongly against further regulation. All submissions of course have been and will continue to be subject to close consideration by the Commission. Both the number and the nature of the submissions evidence the fact that the issues now before the Commission in this public inquiry attract strongly competing

views on matters of public importance, including those relating to access to and influence upon governmental officials in relation to the practice of lobbying.

The issues and program for the public inquiry will shortly be outlined by Senior Counsel assisting the Commissioner. There remains only for me to at this stage, at this point, refer to the principles of transparency and accountability as being central to both good government and trust and confidence in governmental processes. What those principles require by way of process in relation to lobbying activities will be the subject of central consideration in this inquiry.

Issues relating to access and influencing government in lobbying will be the subject of examination, including in particular the adequacy of existing checks and balances in relation to such activities. As in many areas involving relationships between public officials and others, the correct balance must be struck, for even the perception of undue influence can undermine trust in government.

In the United States many years ago it was observed by high authority, namely the United States Supreme Court, that the theory of government is that all stations are trusts and those clothed with them are to be animated in the discharge of their duties solely by consideration of right, justice and public good. They are never to descend to a lower plain. There was also a statement as to a correlative duty upon the citizen in his or her influence with those in authority, whether executive or legislative, touching the performance of their functions. He or she, the court observed, is bound to exhibit truth, frankness and integrity. Any departure from the line of rectitude in such cases, the court observed, is not only bad in morals but involved a public wrong. Similar principles have been enunciated by the High Court of Australia in this country.

Accordingly the ends which public power might be exercised legitimately are limited by law. Public trust powers conferred for public purposes are conferred, as it were, upon trust and not absolutely. There are also limits upon the circumstances in which many such powers and functions should be exercised secretively.

The statutory responsibility of this Commission is to act at all times in the public interest, in particular to instruct, advise and assist in ways in which corrupt conduct and related conduct, such as undue influence, may be eliminated and the integrity and good repute of public administration is enhanced. That is precisely what the Commission now intends to do in its examination of lobbying practices conducted in this state.

The scope and purpose of this public inquiry is as follows. The scope and purpose of the public inquiry is to consider the relationship between lobbyists and public authorises and public officials for the purpose of

whether such relationships may allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct and to identify whether any laws governing any public authority or public official need to be changed and whether any methods of work practices or procedures of any public authority or public official could allow, encourage or cause the occurrence of corrupt conduct and if so what changes should be made. Dr Chen.

MR CHEN: Thank you, Commissioner. The public inquiry that commences today is about lobbying and the regulation of it, as well as a consideration of the broader issues of access and influence. Commissioner, as part of the Commission's current investigation into lobbying, an introductory paper and a discussion paper were released by the Commission in April 2019 and submissions to them were invited. A number of submissions and responses have been received from the government and government bodies, members of the public, lobbying groups, community groups, non-government organisations, academics and researchers, to name just some. They provide valuable insight into lobbying and, as you would expect, contained a range of views about lobbying and the regulation of lobbying in New South Wales. Some of the authors of those submissions have kindly agreed to give evidence and they are programmed to be called this week or when the public inquiry reassumes in October 2019.

The Commission's investigation and report into lobbying, Operation Halifax. The inquiry does not of course start with a blank canvas. In 2010 the Commission, through Operation Halifax, investigated and reported on lobbying. That investigation and report covered much ground, in addition to making a number of recommendations in connection with the regulation of lobbying. Some have been implemented fully, some partially and some not at all. It will be necessary to return to some of the detail of the recommendations and the extent to which they were implemented from time to time in this opening, but I will start by providing a short statement of the lobbying regime envisaged by the recommendations made in the report on Operation Halifax.

In broad terms, the suite of recommendations made by the Commission recognised that there are different forms of and various elements to lobbying, such that the system of lobbying regulation contemplated six key elements. First, a statutory system where all lobbyists were required to be registered and made subject to a code of conduct. Absent registration, a public official was not entitled to deal with that lobbyist. Secondly a detailed policy would be developed by government that covered matters such as the manner in which requests for meetings were to be made by lobbyists who could attend such meetings and a creation of written records of any meetings held with a lobbyist, including the subject matter and meeting outcome. The policy was also to cover written records of telephone conversations with lobbyists and to ensure there were adequate measures in place to comply with the State Records Act 1998. Thirdly, that there be

amendment to the definition of open access information within the Government Information (Public Access) Act 2009, so that records of lobbying activities would be included subject to there being no overriding public interest against disclosure and that government agencies subject to that act would proactively release such records. Fourthly, that the lobbying register created required disclosure of the date of lobbying, the identity of the public official agency involved and, in the case of third-party lobbyists, to disclose the name of the client or any entity related to the client that would derive a benefit from a successful lobbying outcome and that the register be independently maintained and monitored. Fifthly, there be a prohibition on offering or promising gifts by a lobbyist or their client to the public official, finally that there be post-separation cooling-off periods for both ministers and parliamentary secretaries of 18 months in during and post-separation cooling-off periods for other senior public officials of two months in duration as well as a prohibition on success fees.

What then arose following the Commission's report, Commissioner, it is fair to say that the outcome has been somewhat piecemeal and appreciably less than the lobbying scheme the Commission recommended be developed and implemented for New South Wales. Registration is only required for third-party lobbyists, not in-house lobbyists, and there is next to no information specifically required to be kept and thus disclosed in connection with any particular lobbying activity that occurs between a lobbyist of any kind and a government official. Post-separation employment for ministers and parliamentary secretaries has been regulated, but not for other senior public officials, and there remains no prohibition on lobbyists offering gifts. By comparison with other regimes within Australia, the New South Wales system might be said to be strong, but the fact is that lobbying regulation in New South Wales remains well below international best practice.

The overarching question for the inquiry is whether the lobbying regime in New South Wales should conform to that best practice, or at least elements of it, in order to achieve appropriately higher levels of transparency, accountability, integrity and fairness, foundational principles to which I shall return.

The need for a further inquiry into lobbying. Commissioner, the fact that the scheme propounded by the Commission was not fully embraced is not the principal justification for the further investigation into lobbying in New South Wales, although obviously that is not unimportant, rather a number of matters have informed the Commission determining to revisit the regulation of lobbying in New South Wales, including at least the following. The first is that the three corruption risks identified in Operation Halifax, that is lack of transparency, inadequate record-keeping and access to government being more readily achieved by those with power or influence or both, largely remain.

Commissioner, these are not abstract issues. They were borne out in Operation Halifax and they have been widely repeated in submissions and responses received by the Commission to which I earlier referred. Commissioner, these issues broadly correlate to the Commission's own data and records which do record concerns and complaints about attempt to cultivate or exploit personal relationships with public officials in the pursuit of private gain. Furthermore, as was pointed out in Operation Halifax, undue and improper influence are not easily investigated or substantiated. Self-evidently, in light of the domestic and international regulation in the area of lobbying, the existence of these risks are well-recognised, thus no issue arises about the need for regulation. The real issue is how far that regulation should go to deal with those risk.

The second matter relevant to the need for this further inquiry relates to the optics or perception of lobbying activities, that is, given that much of lobbying takes place in private, critics complain that lobbying is very much clandestine. The fact that there are scant documents publicly available about lobbying activity reinforces this complaint. This is perhaps another way of saying that the public's perception of the legitimacy of lobbying depends upon there being transparency in lobbying in the sense of influencing activities. Another related criticism is that lobbying intersects with big business and other powerful interest groups and such entities covertly persuade government to the detriment of the broader public interest and is thus undemocratic. One of the questions for this inquiry is whether those particular criticisms have force or whether they are in the nature of outdated stereotypes.

Commissioner, the third matter relevant to the need for this further inquiry relates to the process of lobbying and to wider issues about the public's trust of and confidence in government. Without detailing them, a number of surveys conducted have indicated a decline in public trust and confidence in aspects of government and government institutions.

An overview of lobbying. Lobbying is a global phenomenon and worldwide has been described as a multi-billion-dollar industry. To give some necessarily broad perspective to it, it has been suggested that in 2011, the lobbying industry in Canberra was worth $1 billion per year. At its simplest, lobbying is about communications with government. More descriptively, lobbying involves individuals or groups engaging with public officials to influence decision-making by those public officials. Lobbying thus aims to influence decision-making. No doubt with this objective in mind, lobbying has been described as "the influence industry". It is important to note and emphasise a further element of lobbying, namely access. Specifically, access to the public official in order to communicate and engage with them. Lobbying and influencing can take different and less direct and immediate forms to simply meeting and communicating. It can include fostering relationships, gifts and donations and the like. It is too simplistic to conceive of lobbying as being confined to the art of direct

advocacy by the lobbyist on the part of his or her client. Rather, the conduct of lobbying extends to a range of activities relating to communications between non-government bodies or individuals and the government, which activities might more broadly fall under the umbrella of government relations.

Commissioner, I want to define some terms used in this opening, and then move to sketch an overview of what I propose cover. In the opening, I used the term "government", "public official", and "government official" interchangeably. Where context requires precision about the individual, I will be precise.

Commissioner, it should be emphasised, consistent with what the Commission held in Operation Halifax, that lobbying is an important and legitimate part of the political and democratic process, and it may pay to mention why that is so. Professional lobbyists can assist individuals and organisations to formulate and communicate their views on matters of public interest to the government, and by facilitating that access, enhance government decision-making, and thereby the strength of our democracy. Additionally, by providing an effective conduit between the public and government, lobbyists not only enhance the level of public access to government, but also facilitate government consultation and plug gaps in knowledge that may exist within government.

There is no evidence of widespread corruption involving lobbying in New South Wales. That, however, does not mean that the current system should not be held up to scrutiny, and questions asked about the extent to which it addresses relevant corruption, relevant risks of corruption, and the adequacy or otherwise or transparency and accountability mechanisms.

Lobbyists are broadly of three types. First, a third-party lobbyist, a term that is defined by section 3 of the Lobbying of Government Officials Act to mean an individual or body who carries on the business of lobbying public officials as a lobbyist on behalf of another. Secondly, an in-house lobbyist, a term that is not defined by the Lobbying of Government Officials Act, but includes an individual with a body whose job it is to communicate with and lobby public officials on behalf of that body. Examples include peak bodies, professional associations, federations, think tanks, and government relations professionals working within companies or non-government organisations. Thirdly, are self-represented lobbyists. These lobbyists seek to influence government, but would not refer to or think of themselves as lobbyists or government relations professionals. Most often they are businesspeople or citizens whose interests intersect with government. Within these groups, at least one further distinction should be made, between lobbying that is carried out for commercial gain or purpose, and lobbying that does not have those features and is carried out for non-commercial purposes.

The regulatory framework. Commissioner, before I move to some of the detail of the regulatory framework in New South Wales, I want to make several introductory points. First, lobbying activities do not operate in a vacuum, and certainly not in a legal vacuum. The simple expression of what lobbying involves – that is, communications designed to influence government – immediately raises a question about what principles and rules inform what can and, no less importantly, what cannot be done when there is this interplay between the lobbyists and the public official. Secondly, the intersection of the activity in question with public official involves larger fundamental principles of government, and conformity with those principles is paramount. These principles govern the way the lobbyists interact with the public official and they prescribe the way in which the public official is obliged – that is, duty-bound – to act. I propose to outline these principles as follows. First, some foundational democratic principles. Secondly, standards of conduct of public officials. And thirdly, the regulation of lobbyists in New South Wales.

Foundational principles. It is important to remain mindful of the fact that whilst there are a range of opinions as to whether lobbying needs to be regulated and, if so, to the extent to which there should be increased regulation, in the consideration of such questions, what guides and helps to provide the answer to them are principles, legal principles that provide the frame of reference within which all discussion of lobbying and regulation must be considered. Accordingly, I now intend to address fundamental questions such as these. What are the principles, what are the sources of them and how do they influence what is permissible and what is not, in the field of lobbying.

In the Commission's report in Operation Halifax, the Commission identified two foundational principles relevant to any regulatory scheme for lobbying, transparency and accountability. Commissioner, I'm going to suggest that in addition to these key principles there are at least two others, integrity and fairness. These four principles are not merely of peripheral legal or philosophical interest. On the contrary, they are essential to a proper understanding of our system of representative government. Each of these shapes and informs the regulation of lobbying and lobbying activities. Commissioner, these overarching principles are not confined to interesting legal and democratic theory, rather they are soundly based in legal and statutory orthodoxy. In Australian Capital Television Pty Ltd v Commonwealth, Chief Justice Mason said that members of parliament and ministers of state are not only chosen by the people but, "Exercise their legislative and executive powers and representatives of the people, and in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act." However, as was pointed out in McCloy v New South Wales, other fundamental and limiting principles emphasise there is an, "expectation fundamental to representative democracy that public power will be exercised in the public interest." The

misconduct in public offices cases make the same point. A survey of some key pieces of legislation in New South Wales also underscores the role and significance of these foundational principles to our system of representative government.

The principle of accountability, and more specifically that the government should be held accountable to the electorate, is fundamental to our system of representative democracy. In essence, the principle relates to the issues of public trust and the idea that those entrusted with public power are accountable to the public for the exercise of their trust. Thought of this way, accountability is a corollary of the public having entrusted the exercise of public power to government institutions and officials. It is a corresponding burden or obligation imposed on all who hold office or employment in our system of government. As the WA Inc Royal Commission observed in a report delivered in 1992, effective accountability to the public is the indispensable check to be imposed on those entrusted with public power. The principle therefore requires that those who exercise public power – governments, public officials and agencies – may be required to account for the manner in which they exercise that power. In turn, by ensuring accountability, those in government can be discouraged from engaging in corrupt conduct or any other form of wrongdoing.

Public accountability is achieved through a range of measures in this state. It is achieved through the process of parliamentary elections, through legislative measures that facilitate access to government information, such as the Government Information Public Access Act and the State Records Act, the right of review of administrative decisions made by government agencies through the Administrative Review Act 1997 and related legislation, judicial review of administrative action and the criminal law.

The principle of transparency in government can be perceived as facilitating the objective of holding the government accountable to its citizens. Broadly speaking, it is understood to refer to the goal of openness in government. It is through open access to how we are governed, governance that is, to the extent that it is feasible, transparent that those in government can be held accountable to the public. As with accountability, the principle of transparency can be perceived as a crucial mechanism of democratic government. That is because the extent to which people are capable of making choices about who shall govern and whether or not they support or reject the policies advocated by those that would seek to govern them will depend whether or not they have been armed with adequate information to make those choices.

Information is necessary if governments are to be kept accountable. This much was observed by the High Court in Nationwide News v Wills, a copy of which is on the screen. "The ability to cast a fully informed vote in an election of members of the parliament depends upon the ability to acquire information about the background, qualification and policies of the

candidates for election and about the countless number of other circumstances and considerations, both factual and theoretical, which are relevant to a consideration of what is in the interests of the nation as a whole or of particular localities, communities or individuals within it." Moreover, the doctrine of representative government, which the Constitution incorporates, is not concerned merely with electoral processes. The doctrine presupposes an ability and representatives to communicate information, needs, views, explanations and advice.

It is clear that through open government a level of public scrutiny can be achieved that is desirable and in the public interest because it facilitates the objectives of public accountability. In Commonwealth v John Fairfax and Sons, Chief Justice Mason made the following observation of the equitable jurisdiction and to protect information in the hands of government from public disclosure in the media, and a copy of this is on the screen: "It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism, but it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action. Accordingly the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected."

While justification for and consideration of the principle of open government is found in much of the case law concerning state and federal freedom of information legislation, it is also found in other contexts. In Stephens v Western Australian Newspapers, Justice McHugh, in commenting on the defence of qualified privilege in defamation proceedings, made the following observation, and a copy of this is on the screen: "In the last decade of the 20th century, the quality of life and the freedom of the ordinary individual in Australia are highly dependent on the exercise of functions and powers vested in public representatives and officials by a vast legal and bureaucratic apparatus funded by public moneys. How, when and why and where those functions and powers are or are not exercised are matters that are of real and legitimate interest to every member of the community. Information concerning the exercise of those functions and powers is a vital concern to the community. So is the performance of the public representatives and officials who are invested with them. It follows, in my opinion, that the general public has a legitimate interest in receiving information concerning matters relevant to the exercise of public functions and powers vested in public representatives and officials. Moreover, a narrow view should not be taken of the matters about which the general public has an interest in receiving information."

With the increasing integration of the social, economic and political life in Australia, it is difficult to contend that the exercise or failure to exercise public functions or powers at any particular level of government or administration or in any part of the country is not of relevant interest to the public of Australia generally. If this legitimate interest of the public is to be properly served, it must follow that on occasions persons with special knowledge concerning the exercise of public functions or powers, or the performance by public representatives or officials of their duties, will have a corresponding duty or interest to communicate information concerning such functions, powers and performances to members of the general public.

However freedom of information legislation is undoubtedly one of the primary means of achieving transparency and accountability in government. In the "agreed to in principle" speech given by the Honourable Nathan Rees in relation to the Government Information (Public Access) Bill, he stated that the legislation would improve transparency and integrity in government. Similarly in the 1979 report published by the Senate Standing Committee on Constitution and Legal Affairs, that was a precursor to the Freedom of Information Act 1982 Commonwealth, accountability of a government to its citizen, achieved in part through the principle of transparency, was one of the three specific justifications given for increasing access to government information. The Government Information (Public Access) Act 2009 is the principle legislative vehicle for transparency in government in New South Wales.

The GIPA Act came into effect on 1 July, 2010, replacing the Freedom of Information Act 1989. It is apparently from the objects of the GIPA Act that the concepts of transparency and accountability are its guiding principles. Section 3(1) of the GIPA Act provides that the object of the Act is to open government information to the public in order to maintain and advance a system of responsible and representative government that is open, accountable, fair and effective. This is said to be achieved through the GIPA Act by authorising and encouraging the proactive public release of government information by agencies, providing an enforceable right to access to government information, and providing that access to government information is restricted only when there is an overriding public interest against disclosure.

The object of enhancing transparency and accountability in government that is facilitated through the GIPA Act is bolstered by the effective management and protection of the official records of government. In New South Wales this is facilitated through the State Records Act which imposes an obligation on each public office to make and keep full and accurate records of the activities of the office, preserve and protect the state records over which it has control and prescribe standards for the management of state records. The State Records Act also provides for a right of public access to New South Wales government records that are more than 30 years old. As observed by the WA Inc Royal Commission in its report, proper

recordkeeping is a prerequisite to effective accountability as a state's official records bear silent testimony to the administration of a government.

The principle of integrity in government is then linked to the principles of transparency and accountability. Each principle is mutually supportive of the other. Integrity in government can be seen to be advanced and promoted through the management and protection of state records prescribed by the State Records Act and through the public's right to access state records provided by that Act and the GIPA Act. However, when we speak of integrity in government, we refer not just to the need for integrity in the processes of government but also to the need for integrity in the practices of government – that is, the conduct that we expect of public officials. I will address the standards of conduct we expect of public officials shortly, but suffice to say that integrity of conduct refers to the core values that the public expects will be met and practised consistently by those whom we have entrusted to govern us. It is the measures calculated to promote integrity in both the practices of government and the conduct of public officials that best protect us against the risk of corruption.

I anticipate the Commission will hear evidence during this inquiry about the principle of integrity and its importance to the regulation of lobbying.

Finally it is clear that the principle of fairness is also integral to our system of representative government. In part, fairness is about equality and equal access to rights. In McCloy v New South Wales, the High Court observed that equality of opportunity to participate in the exercise of political sovereignty is an aspect of the representative democracy guaranteed by our constitution. Appropriately fairness, along with transparency, are the guiding principles of the Electoral Act 2017 which provide for the election of members of parliament of New South Wales. The principle of fairness also refers to an obligation imposed upon government officials to act fairly, that is to a standard of conduct in relation to the treatment of members of the public. In the context of litigation a government agency owes an obligation of fairness in the manner in which it conducts itself which is usually referred to as a duty to act as a model litigant. However, this obligation is of course not confined to legal proceedings, but instead is fundamental to the relationship between those in government and those whom they govern. This much can be discerned from the observations of Chief Justice Griffith in the Melbourne Steamship v Moorehead, where His Honour referred to the old-fashioned, traditional, and almost instinctive standard of fair play to be observed by the Crown in dealing with subjects. It is anticipated that over the course of this enquiry an issue for investigation will be about how fairness in terms of equality of access, opportunity, and fairness as a yardstick of government conduct is met, and whether and how it can be enhanced.

Standards of conduct of public officials. The standards of conduct imposed upon public officials in New South Wales can be identified as springing

from three distinct sources. The first is the common law, which imposes standards of conduct upon public official through criminal offences as well as other civil remedies. The second source is the various codes of conduct that have been implemented by government bodies to regulate the conduct of public officials. The third is the pool of ethical obligations that are imposed upon public officials and in accordance with which they are expected to behave, although no method of enforcement or ensuring compliance exists.

With respect to the common law, perhaps the most well-known standard of conduct imposed on public officials is the offence of misconduct in public office, an offence founded upon what has been identified as a member of parliament's duty to serve. In the King v Boston, Justices Isaacs and Rich said the following, and a copy of this is on the screen: "The fundamental obligation of a member in relation to the parliament of which he is a constituent unit still subsists as essentially as at any period of our history. That fundamental obligation which is the key to this case is the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community." The source of this duty to serve has been related to the matter of public trust. In this sense, the duty owed by public officials has been recognised as being analogous to that of a fiduciary, the idea that, although public officials are not fiduciaries in the strict private law sense, they're expected to adhere to fiduciary standards of behaviour.

This concept of public trust as informing the standard of conduct imposed on public officials by the common law was recognised by Chief Justice McLachlin in the Canadian Supreme Court case of the Crown v Boulanger, a copy of which is on the screen: "The purpose of the offence of misfeasance in public office can be traced back to the early authorities that recognise that public officers are entrusted with powers and duties for the public benefit. The public is entitled to expect that public officials entrusted with these powers and responsibilities exercise them for the public benefit. Public officials are therefore made answerable to the public in a way that private actors may not be." The common law offence of misfeasance in public office can be seen to provide the minimum standard of conduct applicable to public officials, the breach of which amounts to a criminal offence.

Sitting above this baseline standard of conduct are the codes of conduct that prescribe how public officials must behave, the breach of which in some cases will amount to disciplinary offences. These codes include the codes of conduct for New South Wales ministers and parliamentarians, each of which bear upon the issue of lobbying. The Parliamentary Code of Conduct applies to all members of parliament. In the preamble to the code of conduct, reference is made to the responsibility owed by members of parliament to maintain the public trust placed in them, and further, recognises the duty to serve as their principal responsibility. The code provides, among other things, for the disclosure of conflict of interest, and

the disclosure of gifts and benefits received in connection with their official duties, and prohibits the acceptance of gifts that may pose a conflict of interest or give the appearance of an attempt to improperly influence the member in the exercise of his or her duties. By clause 7, "Members are required to disclose secondary employment or engagement," the Parliamentary Code of Conduct is an applicable code of conduct for the purposes of section 9 of the Independent Commission Against Corruption Act, and accordingly, ICAC has jurisdiction to investigate a substantial breach by a member of the code.

As with the Parliamentary Code of Conduct, the Ministerial Code of Conduct is an applicable code of conduct for the purposes of section 9 of the ICAC Act such that ICAC is empowered to investigate substantial breaches of the code by ministers as constituting corrupt conduct. The preamble refers to the need to maintain public confidence in the integrity of government and the core responsibility of ministers to maintain the public trust that has been placed in them by performing their duties with honesty and integrity and in compliance with the rule of law, and to advance the common good of the people of New South Wales.

By clause 3, a minister is prohibited from knowingly breaching the law, the NSW Lobbyists Code of Conduct or any other applicable code of conduct under the ICAC Act. Relevantly, ministers are prohibited from soliciting, accepting or agreeing to solicit or accept any private benefit by way of an inducement or reward for doing or not doing something in the exercise of his or her official functions. The schedule to the Ministerial Code of Conduct imposes a series of additional obligations on ministers relevant to the issue of lobbying.

Part 4 of the schedule to the Ministerial Code of Conduct regulates gifts and hospitality. Clause 17 prohibits a minister from soliciting or accepting any benefit if it could reasonably be perceived as an inducement or reward for doing or not doing something in the exercise of his or her official functions. As to the ethical obligations owed by public officials, these are being said to stem from the public trust confided in them and also from the ever present need for public confidence in government. The ethical obligations owed by public officials must surely include standards of honesty, impartiality and disinterest. It is expected that some of the witnesses to give evidence before the Commission in this inquiry will be able to further provide content to the nature and source of these ethical obligations.

The regulation of lobbying in New South Wales. Certain of the principles that have been referred to are reflected in varying degrees in the regulatory regime in place in New South Wales, not only in terms of those instruments but also within the objects stated within them. The Lobbying of Government Officials Act provides that its objects are "To promote transparency, integrity and honesty through the implementation of a number of measures," which I will shortly discuss. Similarly, the Lobbyists Code of

Conduct, described by section 5 of the Act, provides that its purpose is "To set out the ethical standards of conduct and other requirements to be observed by lobbyists in order to promote transparency, integrity and honesty."

By way of overview, the key elements of the regime are as follows. The Lobbying of Government Officials Act 2011 came into force on 1 July, 2011. Together with the Lobbying of Government Officials, Lobbyists Code of Conduct Regulation 2014, the Act to an extent effects a level of transparency and accountability with respect to lobbying in New South Wales and also imposes ethical and other standards on lobbyists. Oversight of the Act and regulations is given to the NSW Electoral Commission, which is charged with enforcing compliance with the Act and regulations and is empowered to impose sanctions for contravention of the Act and regulations. I will address the question of enforcement of compliance by the NSW Electoral Commission in more detail after providing a sketch of the Act and regulations.

The Act defines lobbyists and lobbying in sections 3 and 4 respectively. Section 3 of the Act defines lobbyists to mean "A third-party lobbyist or any other individual or body that lobbies government officials, including an individual engaged to undertake lobbying for a third-party lobbyist." Section 4 defines lobbying as, "Communicating with a government official for the purpose or representing the interests of others in relation to legislation or policy (both in force and proposed), planning applications, and the exercise by the official of his or her official functions."

Subsection 4.1 excludes from that definition members of parliament and government officials acting in the ordinary course of their duties. Government official is broadly defined to include "A minister or parliamentary secretary and their staff, public servants, individuals engaged under contract to provide services to or on behalf of the New South Wales public service, and members of statutory bodies," but excludes local government officials.

The Lobbyist Code of Conduct applies to third-party lobbyists and to all other individuals and bodies that lobby NSW Government officials. It is set out in schedule 1 to the regulations. Section 7 imposes a duty upon lobbyists to comply with the Lobbyists Code of Conduct in connection with the lobbying of government officials. The NSW Electoral Commission is given the function of enforcing compliance with the Lobbyists Code of Conduct.

The Act also creates certain offences with respect to lobbying. Pursuant to section 15 of the Act, success fees for the lobbying of a government official are banned such that it is a criminal offence, punishable by a fine, to give or a receive a success fee and a criminal offence, punishable by a fine, to agree to give or to receive a success fee for the lobbying of a government official.

Section 18 of the Act creates an 18 month cooling-off period for former ministers and former parliamentary secretaries, whereby ministers and parliamentary secretaries who cease to hold office must not, for the duration of that cooling-off period, engage in the lobbying of a government official in relation to an official matter that was dealt with by them in the course of carrying out portfolio responsibilities in the 18 month period immediately before ceasing to hold office. A contravention of that section is an offence.

D. Registration. The creation of a system of registration has a number of regulatory purposes, including to require disclosure of certain identifying information relating to third-party lobbyists and to bring third-party lobbyists within the oversight of the NSW Electoral Commission.

Commissioner, in Operation Halifax, the Commission made a number of recommendations on relation to the registration of lobbyists. By recommendation 1, the Commission recommended that legislation be enacted that required the registration of lobbyists on a newly created lobbyist register. By recommendation 7, the Commission recommended that legislation enacted in accordance with recommendation 1 include a provision that precluded government representatives from engaging in lobbying unless the lobbyist was registered. By recommendation 8, the Commission recommended that he lobbyists disclosure on the registers details about the lobby activity, including the date, the identity of the government representative lobby and, in the case of third-party lobbyists, the name of their client for whom the lobbying occurred.

Commissioner, as we have seen, the Lobbying of Government Officials Act and the regulatory scheme that sits beneath or alongside it, goes only some way towards implementing these recommendations. A register of sorts has been created and is maintained by the NSW Electoral Commission but its application is confided to third-party lobbyists, thus in-house lobbyists, charitable organisations and peak bodies who engage in lobbying activities on their own behalf are not required to register, nor are members of a profession whose lobbying activities are incidental to the other professional services they provide.

Commissioner, let me add that no one is suggesting that a statutory scheme should capture ordinary citizens who want to talk to their local MP, sign a petition or write a letter to a government agency. However, this inquiry will investigate who ought to be on a lobbyist register. A question for this inquiry will be whether the bounds of the register, in terms of who it covers, are sufficiently broad or whether, in line with the earlier recommendations made, it should extend to all lobbyists or to a more limited section, such repeat players or certain industries.

A further issue relates to how much is disclosed on any register and whether more information should be required of registrants. These are challenging issues which this inquiry will address and strive to answer. Commissioner,

the fact that that registration is important, not only because it identifies a lobbyist or where the lobbyist is an organisation the individual retained to undertake the lobbying, but because oversight of the registered lobbyist in relation to the Lobbyists Code of Conduct is conferred upon the NSW Electoral Commission by section 9(7) of the Lobbying and Government Officials Act.

Commissioner, the usual response to any suggestion that lobbying should extend more widely beyond third-party lobbyists and one that informs why the Lobbying of Government Officials Act was drafted in the way it was is that for all other lobbyists it is plain who they are and represent, be they industry groups, NGOs, community groups. Put simply, transparency is achieved without registration. Although there is some force in that point, the absence of oversight is a matter that cannot be ignored, furthermore there is, within certain lobbying groups, a call for the registration requirements to be extended so as to encompass first all third parties who make representations, including lawyers, management consultants and financial advisors, all of whom may daily lobby government on behalf of their clients, but whom are currently exempt from registration; and, secondly, those who are former elected officials or senior public servants and advisors who have become in-house lobbyists employed by a business, industry association or charitable group. That position is adopted as well, Commissioner, by some other community and public interest groups.

Commissioner, the recommendation made by the Commission in Operation Halifax that registration extend to broader categories of lobbyists I should emphasise is by no means unique. A regulatory requirement in these terms exists in other jurisdictions such as Canada, Ireland and Scotland. The course of evidence, Commissioner, will involve a comparative aspect to examine the reasons for that approach and whether their implementation in New South Wales should be followed.

The information required to be disclosed by third-party lobbyists and included on the register includes the name and business contact details of the lobbyist, the names of the individuals engaged to undertake the lobbying for the lobbyist and the names of the third parties who have retained the lobbyist to provide or for whom the lobbyist has provided lobbying services. Further information required to be included in a register is prescribed in the regulations. A further question for this inquiry will be whether the information required to be disclosed on the register is sufficiently detailed and achieves an appropriate level of transparency.

Commissioner, returning to the requirement for registration, it is important to note that there is no requirement for there to be any form of record or disclosure by the lobbyist that lobbying has occurred, nor is there, generally speaking, a statutory requirement for there to be any form of record or disclosure by the public official that lobbying has occurred. The only caveat

is the publication of ministerial diaries, and I propose to return to this issue when I address the issues of access and disclosure.

By virtue of clause 9 of the Lobbyist Code of Conduct, a third-party lobbyist is not permitted to meet or communicate with government officials for the purpose of lobbying absent compliance with the requirements of the register. Further, the powers of oversight given to the NSW Electoral Commission include the capacity to cancel or suspend a third-party lobbyist's registration for certain reasons which include contraventions of the Lobbyist Code of Conduct and a failure to update the register when required. Third-party lobbyists or other lobbyists who have contravened the Lobbyists Code of Conduct or the Act may be placed on a lobbyist watch list maintained by the NSW Electoral Commission and published on its website.

It is convenient now, Commissioner, to see what this register looks like and the information that is disclosed within it. Displayed on the screen now is a screenshot of the Register of Third-party Lobbyists accessed from the NSW Electoral Commission website where it is published. Commissioner, we will also now play a short video which walks through how the register is accessed, its basic elements and some aspects of its functionality.

VIDEO RECORDING PLAYED **[11.09am]**

MR CHEN: Access, issues relating to access and the revolving door. Commissioner, earlier I mentioned that a central element to lobbying was access. I want to now deal with this in a little more detail, and there are three particular access issues that I will cover. The first is access itself, the second is the regulation of access, the third is the issue commonly described as the revolving door.

Gaining access. Commissioner, one of the recurring complaints made in the submissions relates to access. Those complaints are both general and specific. A general overarching complaint about access is that effective lobbyists are those with greater levels of access, but they are also the most expensive – the point being that only the rich and powerful can afford these lobbyists and that this is so tends to undermine democratic processes rather than enhance them. A more specific one is that there is, "Inequity of access to government representatives," as it has been described in a submission received by the Commission, and that this occurs particularly with small non-government organisations when compared to the clients of third-party lobbyists. These concerns have been raised in research and analysis of the admittedly limited data available, namely 62 per cent of meetings with senior ministers were with private business or industry peak bodies. Again this data and the allied complaints raise broad questions about fairness and democratic processes.

Commissioner, although the Commission in Operation Halifax was satisfied at that time that there was reasonable access to government, the submissions and responses received point towards a different dynamic in 2019. Access may well not be as open as it was in 2010. Bearing in mind the lobbying activities in question largely hinge on access, the reason for this will necessarily be investigated further.

The regulation of access. To the extent that there is any form of regulation in relation to the gaining of access to a public official, this is governed by part 2 of the Lobbyists Code of Conduct. Put shortly, the code requires disclosure before any meeting with the public official commences of up to three matters. First, by clause 5 of the code, a lobbyist must disclose the nature of the matter to be discussed. Secondly, by clause 6 of the code, a lobbyist must disclose any financial or other interests they have in the matter to be discussed. And, thirdly, in relation to a third-party lobbyist – in contrast to, say, an in-house lobbyist – by clause 10 of the code, the third-party lobbyist must disclose to the government officials that they are third-party lobbyists, the names of any individuals they have engaged to undertake the lobbying, and the name of the person interests they are representing. Other than that it would seem access is at the discretion of the public official. It is worth pointing out that neither the Lobbyists Code of Conduct nor any other regulatory instrument prescribes how that disclosure is to be made, nor is there any requirement to keep any record of the disclosure made to the public official in the ways described.

Commissioner, it will be recalled that recommendation 2A made by the Commission in Operation Halifax recommended that such requests for access to lobby a public official should be required to be in writing. As is apparent, the current regime adopted a different approach and some issues about this to be investigated include how that disclosure is ordinarily made by the lobbyists to the public official, how – if at all – that disclosure is recorded and whether there is justification for restating a recommendation in terms of or similar to recommendation 2A made previously by the Commission.

The revolving door. There has been considerable discussion both in the relevant literature and in the community of cases where particularly senior government officials have moved from those positions into government relations or consultancy roles with businesses who themselves do business with government. The issue presented is often described as the revolving door – those within government moving into positions that facilitate access and thus enable communication and influence with the public officials. It is illustrative to see how, if such an issue presented itself in New South Wales, this might be regulated and policed.

Section 18 of the Lobbying of Government Officials Act seeks to cover this position in relation to post-separation employment by creating an 18-month

cooling-off period. It provides former ministers and parliamentary secretaries who cease to hold office must not, for the duration of that cooling-off period, engage in the lobbying of a government official in relation to an official matter that was dealt with by them in the course of carrying out portfolio responsibilities in the 18-month period immediately before ceasing to hold office. Contravention of that section is an offence. Some questions about the reach of these provisions immediately arise. One is, when one reverts to the definition of lobbying in section 4 of the Lobbying of Government Officials Act, it seems clear enough that the former minister or parliamentary secretary can do anything in connection with the lobbying of a public official except communicate with them. Put another way, it would only be in contravention of the Lobbying of Government Officials Act if there was actual communication with the government official. Hence so-called strategic advice to those who undertook the lobbying of the official would not be the subject of statutory prohibition. The scope for circumventing or navigating around it seems clear.

A further question relates to its possible reach. It only prohibits lobbying in relation to an official matter that was dealt with by the former minister or parliamentary secretary in the course of carrying our portfolio responsibilities in the period of 18 months immediately before ceasing to hold office. Put another way, there is at least potentially ambiguity in what is not considered to be an official matter.

There are self-evident ethical issues and potential corruption risks raised when a public official, particularly a senior one, becomes a lobbyist or a government relations consultant for an organisation that does business with government. Those include gaining improper advantage from the relations developed when the lobbyist was a public official and, further, the use of confidential information. To pick up and emphasise this last point, I will refer to an illustration of the ethical dilemma raised when a senior public official moves into an organisation with commercial dealings with government. In this situation how does that former public official separate the information gained in the service of the public, knowledge of competitors, their bids and key government matters involved in the decisions making from fully discharging their new commercial role, how is this or can this be policed? Further, how can the public be confident that a public official, in the course of exercising his or her public official functions, has not been influenced in some way by the offer of future employment in the private sector.

One solution that has found favour in Canada is to extend the cooling-off period to five years. Other jurisdictions have less extensive cooling-off periods. There are undoubtedly differing views and a range of matters that would require consideration as to the appropriate time, if a cooling-off, sorry, if a longer cooling-off period than the existing 18 months were to be considered. Another solution might be to amend the legislation and, in aid

of any amendments, to create a new more robust scheme to enable investigation and enforcement of any obligations cast upon public officials in post-separation employment. Commissioner, as I have said, these are large issues but they will be addressed in the course of this inquiry.

There is also a particular criticism of the public official becoming a lobbyist, namely it denotes special or privileged access. Commissioner, recommendation 11 contained within the Commission's Operation Halifax reports, recommended that former ministers and parliamentary secretaries have a cooling-off period largely in line with section 18 of the Lobbying of Government Officials Act, but the recommendation also extended to other senior public officials, albeit for a 12 rather than 18-month period.

Commissioner, the recommendation made by the Commission in the Operation Halifax report was in the terms that was partly informed by considerations of uniformity. There was a provision in the Australian Government Lobbying Code of Conduct, then in force, that stipulated a cooling-off period for defined senior public officials. The current version of the Australian Government Lobbying Code of Conduct was published in 2019 and it has maintained by clause 7.2 that cooling-off period for those senior public officials.

The Commission, in its report in Operation Halifax, made no recommendations in relation to the risk posed by potential favoured access, finding that the evidence supported a conclusion that there was surprisingly unrestricted access to government representatives by members of the public. Nevertheless, in light of the importance that government processes are accessible to members of the public, this issue remains to be considered further.

Commissioner, I will briefly make reference to some of the ethical standards in relation to access. One is that by clause 12 of the Lobbyists Code of Conduct, a lobbyist must not make exaggerated or misleading claims to their clients about the nature of access to the government or government agencies or to persons associated with them. Further, these issues are also dealt with in the schedule to the New South Wales Ministerial Code of Conduct to cover situations relating to offers of post-separation employment whilst in office and after ceasing office for a period of 18 months after the minister has ceased to hold office if he or she wished to consider an offer of employment that related to any of the portfolio responsibilities held during the last two years of office, the minister must first obtain the advice of the parliamentary ethics adviser and most not accept such an offer if the parliamentary ethics adviser has advised against it.

Commissioner, there are competing considerations in play, including the entitlement of a former public official to seek out post-separation employment, particularly in an area where the public official may have acquired skills and experience. Those that give service to the public should

not unreasonably, and only when necessary, be constrained in what they do once they cease service of the public.

Other issues to be canvassed over the course of this inquiry include whether the reach of the prohibition on post-separation employment should be extended beyond ministers and parliamentary secretaries, whether the statutory definition, specifically within section 4 of the Lobbying of Government Officials Act should be amended and if so in what way.

THE COMMISSIONER: Dr Chen, just before we come to the next area – which is, as I understand, dealing with disclosure of access – we might take a morning tea break at this point. Is that convenient to you?

MR CHEN: It is, Commissioner, yes.

THE COMMISSIONER: And then we'll resume perhaps in about 15 minutes or so. Very well. Yes, I'll adjourn.

SHORT ADJOURNMENT **[11.25am]**

THE COMMISSIONER: Yes, Dr Chen.

MR CHEN: Thank you, Commissioner. Disclosure of access, ministerial diaries and other issues. Commissioner, I earlier identified the six key elements of the Commission's recommendations in Operation Halifax. Relevantly here, it extended to the creation of records relating to the lobbying activity and generally speaking, their disclosure except in instance where disclosure was contrary to the public interest.

What, then, is the position when lobbying occurs in New South Wales? The disclosure of lobbying activities, meetings between senior public servants and in-house lobbyists can be largely invisible. So much is clear from the earlier overview of the lobbying regime in New South Wales. Next to no information about lobbying activity is the subject of publically-available records. Even on what is publically available, transparency is minimal. There will be evidence as to records that lack substantive and meaningful detail. Commissioner, the only form of positive disclosure that occurs following on from a lobbying activity with a public official is the publication of ministerial diaries. Beyond that, lobbying remains behind closed doors.

I will move to explain the system for disclosure of ministerial diaries, show what that looks like, and then show what disclosure looks like in other jurisdictions.

There are two core issues raised. The first issue, in line with what the Commission had previously recommended, is whether there should be a requirement for more substantial and meaningful disclosure, and further, whether any such regime should extend beyond ministers. Of course, whether this creates an acceptable burden and where any burden of disclosure should sit will necessarily be carefully examined by evidence, but also by reference to the principles of public trust that I have previously mentioned. The second issue is whether the information should be made more readily available to the public.

Commissioner, if there is a meeting that takes place not with a minister but, say, ministerial advisors, then the relevant minister has no requirement to disclose the occurrence of that meeting. It is not readily apparent why, if the lobbying occurs through a senior staff member, a corresponding obligation to disclose that meeting does not still arise. But the fact is, under current guidelines, no such requirement arises.

Commissioner, again, these are not abstract concerns. I expect there will be some evidence to the effect that it sometimes happens that a third-party lobbyist arranges a meeting between his or her client and a minster, but the third-party lobbyist is directed by the minister or ministerial staff not to attend the meeting. In these circumstances, the third-party lobbyist is not recorded in the ministerial diary as a participant in the meeting, despite their involvement in arranging and preparing their client for the meeting. If so, this raises issues about lack of disclosure.

The disclosure of ministerial diaries. Commissioner, there exists Premier's Memoranda relating to the publication of ministerial diaries. The Premier's Memorandum on the Publication of Ministerial Diaries, which was issued on 30 September, 2015, and which replaced the memorandum that took effect on 1 July, 2014, requires all government ministers to publish on a quarterly basis summaries of their diaries, detailing scheduled meetings held with stakeholders, external organisations, third-party lobbyists, and individuals.

The summaries are required to disclose the identity of the organisations or individuals with whom the meeting occurred, the names of all individuals engaged by the third-party lobbyist to undertake the lobbying who attend the meeting, the name of their client, and the purpose of the meeting. Reporting periods are quarterly, and the information must be disclosed by ministers at the end of the month following the end of each quarter.

The summaries of ministerial diaries are published on the website of the Department of Premier and Cabinet, and they are publically accessible. Exceptions apply, including that social or public functions or events are not required to be disclosed unless substantive discussion of issues are raised with a minister at those functions that concern his or her role as a portfolio minister or a member of Cabinet. Ministerial - - -

THE COMMISSIONER: Dr Chen, could I just, could I interrupt you, and sorry for that. In relation to the quarterly reporting you refer to, how does that measure up with other state jurisdictions, do you know?

MR CHEN: Commissioner, the example that I'll take you to shortly which will involve Queensland, which has ministerial diaries being disclosed monthly. So - - -

THE COMMISSIONER: Monthly?

MR CHEN: Monthly, yes, Commissioner.

THE COMMISSIONER: Yes, thank you.

MR CHEN: Ministerial diaries, some examples. It is useful to show what this disclosure actually looks like. Commissioner, on the screen now is a screenshot accessed from the website of the NSW Department of Premier and Cabinet of the Ministers' Diary Disclosures for the months of April to June, 2019. Next, the screen will display the Disclosure Summary for the Premier for the period of 1 April, 2019, to 30 June, 2019, which is accessed from the Ministers' Diary Disclosures page.

It is useful to consider how this level of disclosure compares to other systems. To that end, we will now play a short further video that considers the disclosure required by the publication of ministerial diaries in New South Wales, and how that compares with equivalent systems elsewhere in Australia and internationally.

VIDEO RECORDING PLAYED [11.53am]

MR CHEN: Commissioner, there are a number of complaints about the system in place within New South Wales relating to the lack of transparency of it, including, first and most obviously, that there is a lack of detail in what is disclosed. There is no requirement to disclose what was discussed or what policy was addressed. Secondly, the timing of the disclosure is only required to be made quarterly, and even then, only within a month following the end of each quarter, rather than in other instances, such as in Queensland, where monthly disclosure is required as a result of Queensland Government initiative introduced in January, 2013. And thirdly, that the way in which the data is recorded and the lack of uniformity in detail makes analysis of trends and close scrutiny both difficult and time-consuming.

Commissioner, the lack of transparency is not assisted by the terms of the register of third-party lobbyists in the first place, because it only applies to

third-party lobbyists, and even then, it reveals nothing about when the activity occurred or what it involved.

Disclosure in other jurisdictions, some examples. Commissioner, it is useful to give further consideration to what is undertaken in other jurisdictions. In Scotland, there is what is known as the Lobbying Register, which is managed and maintained by the Scottish Parliament pursuant to the Lobbying Scotland Act 2016. Pursuant to section 4 of that Act, the Lobbying Register must contain a good deal of information pertaining to first, the registrants identity, information about the registrants regulated lobbying activity, that is detailed information pertaining to instances of the registrant engaging in regulating lobbying, as well as additional information relating to their compliance with any codes of conduct.

The level of detail required by the Act as to the lobbying activity is shown on the screenshot of the Scottish Lobbying Register accessed from the Scottish Parliament Website that appears now on screen. Some elements of the Scottish Lobbying Register and its functionality, as well as the information required by the Irish Register of Lobbying, are demonstrated in the short video that we will play on the screen now.

VIDEO RECORDING PLAYED [12.01pm]

MR CHEN: Commissioner, a fundamental issue to be considered by the Commission in this inquiry is whether the current disclosure requirements for lobbyists and lobbyist activities fulfils the public expectation of transparency and accountability and this will involve examination of whether the level of detail and content of the disclosure required in ministerial diaries is sufficient should meetings between lobbyist and ministerial adviser or between lobbyists and senior public servants also be the subject of disclosure should interactions or communications occur in outside scheduled meetings also be disclosed. These and other questions relating to the current effectiveness of the register and disclosure regime such as it is, will be the subject of evidence before this inquiry.

THE COMMISSIONER: Dr Chen, I assume there's going to be evidence about the level of detail in diaries kept in New South Wales to give us an idea as to what level of disclosure or lack of disclosure that there is?

MR CHEN: There will be, Commissioner. There will be, Commissioner, yes.

Concluding remarks. Commissioner, as previously announced by the Commission, the current inquiry is scheduled to be heard in two tranches, this week, and in October 2019. One of the purposes in having a split hearing is to enable, in the intervening period, the further consultation and

participation by those interested in developing more detailed policy submissions across the issues covered in the scope. The second tranche will then investigate the regulatory scheme in some detail, including the mechanics of possible regulatory reform.

Commissioner, necessarily I have only mentioned some of the issues that will arise in the current investigation, albeit that they are the most important ones. A good number present competing arguments and differing bodies of evidence and their possible resolution by way of recommendations will inevitably be challenging. Nevertheless, consistent with the Commission's statutory role under section 13 of the ICAC Act, the Commission will revisit the regulation of lobbying in New South Wales and the related topics of access and influence to ensure that in any recommendations made the framework will be provided to enable New South Wales to have a robust evidence-based system of lobbying regulation that faithfully addresses the democratic principles identified.

Thank you, Commissioner.

THE COMMISSIONER: Thank you, Dr Chen. Yes, very good. Are we ready to proceed?

MR CHEN: We are, Commissioner. And the first witness is Professor Brown who's in the hearing room now.

THE COMMISSIONER: Yes, thank you. Thank you, Professor. Professor, I'll get you to take an oath or an affirmation as you choose.

MR BROWN: I'm happy to take an affirmation.

THE COMMISSIONER: Thank you. If you wouldn't mind standing for that purpose and we'll - - -

<ALEXANDER JONATHON BROWN, affirmed [12.07pm]

THE COMMISSIONER: Thank you, Professor. Yes.

MR CHEN: Would you state your full name, please.---Alexander Jonathon Brown.

And, Professor, you are currently the Professor of Public Policy and Law at Griffith University?---That's correct.

And included within your remit, you're the program leader of Griffith University Centre for Governance and Public Policy's public integrity and anti-corruption research program?---That's correct.

You're also the program director of Griffith University's Graduate Certificate in Integrity and Corruption.---Yes.

Professor, since 2005 I think you've led six Australian Research Council projects into public integrity and governance reform. Is that right?---That's correct.

And you currently lead to Australian Research Council projects in the areas of national integrity systems and public interests whistleblowing. Is that right?---Yeah.

The first is on strengthening organisational responses to public interest whistleblowing?---Yes.

You need to audibly respond, Professor.---Yes. There will be a lot of yeses here through your transcript.

All right.

THE COMMISSIONER: Your credentials are well-known but they're lengthy and it's just good to get them on the record, Professor.

MR CHEN: The second being Australia's second national integrity system assessment. Is that right?---That's right.

Could you briefly say – Commissioner, just to break up the monotony of yes and no – could you explain briefly what that assessment involved?---Certainly. It's, it's the implementation of an international methodology for looking at the strengths and weaknesses of the entirety of a country's integrity systems, so not limited to issues like lobbying, but certainly including issues like lobbying.

THE COMMISSIONER: How long has that been running for?---That's been a two-years project, I think effectively a three-year project now, coming to conclusion.

Is there a final report, 2019?---Not yet, not yet.

It's still in process.---Yep.

It's still in draft form. All right. Thank you.

MR CHEN: And, Professor, that assessment involves project partners such as Transparency International Australia, does it not?---It does, yes.

State agencies and other expert collaborators. Is that so?---Yes.

And, Professor, just picking up what the Commissioner has asked you about, a draft report though was released, was it not, in April of 2019 entitled Governing for Integrity, a Blueprint for Reform?---Yes.

Commissioner, I tender, if I can, the draft report or perhaps I can call it literature co-authored by Professor A.J. Brown and it has an index within it. Commissioner, would you - - -

THE COMMISSIONER: Yes, thank you. If you would - - -

MR CHEN: Would you like me to read that on the record, the index?

THE COMMISSIONER: No, that's okay. Yes, the draft report, Governing For Integrity, A Blueprint For Reform, April 2019, with be admitted and become our first exhibit, Exhibit 1.

#EXH-01 – LITERATURE CO-AUTHORED BY PROFESSOR AJ BROWN

MR CHEN: Professor, your academic and research expertise is around the issues of public integrity, integrity, anti-corruption and the development of public institutions, is that right?---That's correct.

And you've been recognised, I think, internationally for your contributions to research across those areas, as well as integrity systems, anti-corruption agencies and whistleblowing?---So I'm told.

And you've also led, as part of your work, some significant international projects on public integrity systems and whistleblowing in public and private sectors, have you not?---I have, yes.

You've also advised Australian governments and parliaments on issues of policy, legal and institutional performance and reform, have you not, including in 2014 work which contributed to the G20 leaders' anti-corruption plan on whistleblowing?---That's correct, yes.

You've also be a consultant to the Victorian Parliament on the performance of the Independent Broad-Based Anti-Corruption Commission?---I have.

And also, between 2017 and 19, you were as member if the Commonwealth Government's Ministerial Expert Advisory Panel on Whistleblowing leading to the recent first-stage reform to Australia's private sector whistleblowing laws?---That's correct, yes.

Since 2010, you've been on the Australian Board of Transparency International?---Yes.

That's a global coalition against corruption, is that right?---That's right.

And that engages with government, the public and other groups to build coalitions against corruption, is that the broad statement of its aims and objectives?---Indeed, it's the world's largest non-government organisation focussed on finding corruption.

THE COMMISSIONER: Sorry, you were involved, weren't you giving advice down on Tasmania, it was to the parliament or somebody in the establishment of the Integrity Commission as I recall?---I think that parliamentary committee in Tasmania was one of many that I've probably given evidence to over the years.

MR CHEN: But staying with Transparency International for the moment, Professor, in 2017 you were elected to the Global Board of Transparency International and you currently chair its Trends and Vision Committee and lead its current Vision 2030 process on a worldwide outlook with respect to corruption?---That's correct, yes.

Do you also sit on the Global Board of the World Anti-Corruption Organisation?---Yes. That's Transparency International. That's the World Anti-Corruption organisation.

And on some other matters, briefly, Professor. In 2017-18, were you the President of the Australian Political Studies Association?---Yes.

Are you currently a fellow of the Australian Academy of Law?---Yes.

And in a past life you've been a former state ministerial policy adviser? ---Yes, that's right.

And you're a former senior investigator for the Commonwealth Ombudsman between 1993 and 1997?---Yes.

And you graduated in 1983 with an Art and Law Degree from the University of NSW?---Yes.

And you were awarded your PhD from Griffith University in 2004? ---That's correct.

Now, Professor, can I move away from your background and more into some of the issues which the Commission is investigating and the particular topic of institutional integrity and public trust is the board topic I would like to introduce, Professor. In the draft report, Governing for Integrity, the principal objective was to evaluate the institutions and processes for upholding public integrity in controlling corruption within Australia. Is that a fair description of it?---That's a, that's a fair description.

And part of that principal objective identified two terms or concepts which I perhaps require definition. The first is integrity systems and the second is corruption. Dealing perhaps with corruption first, Professor, that obviously includes an orthodox definition, that is what we would commonly understand to be corrupt conduct but it also has extended meanings. Would you be able just to amplify what corruption means in the particular context and also some of the extended meanings picked up in your report? ---Certainly. I mean the primary definition that we imply in the report is actually the Transparency International definition, which is that corruption is the abuse of entrusted power for private gain, but I think significantly when focussing on corruption and particularly on political corruption, that's quite interchangeably varied to be a definition to the effect of the abuse of entrusted power for political gain, as opposed to private gain. And I think one of the key issues about the definition of corruption is both that core concept, so the Transparency International one and the one that we use, the core concept that we're talking about, entrusted power within institutions, governments, but not limited to governments, within institutions generally, and that there is some moveability, some malleability in the types of gain or the types of influences that impact on that entrusted power that then can equate to abuse. And I think some of those fundamentals relate very much to issues of influence which are probably very relevant to your lobbying inquiry.

THE COMMISSIONER: You've distinguished in the literature you've written, as I understand it, or been party to, co-author to, between, I think you've referred to as black corruption and grey corruption. Does that description still apply to what you're talking about now?---It certainly does. And one of the things that we examine and talk about is the concept of grey corruption, but I mean there are other major concepts that we deal with, which is political corruption, grand corruption, petty corruption, the relationship between all those forms, and I think grey corruption is

particularly pertinent because it's a reference to corruption which is not clearly unlawful or which is only illegal or sanctionable as a minor infraction, but which in fact has the potential to lead to much more serious forms of corruption and which certainly has the potential to erode public trust in institutions very significantly. So I think the, I mean one of our concerns as result of the assessment is that the significance of grey corruption in our political landscape and in our institutional landscape is poorly understood, that it's much more influential both in terms of our corruption risks and in terms of public perceptions of corruption than we've appreciated in the past, and that it's actually very central to our major corruption problems and corruption risks going forward, perhaps more so in many ways that some of the clearly unlawful forms of corruption which are serious and which we clearly need to combat but which are actually quite sort of low incidence if you like in the scheme of things.

MR CHEN: I want to come back to a couple of those concepts as you could imagine just a little bit later.---Sure.

But I just want to finish off if I can the definitions or definitions used within the report about corruption. It also was used in the report to discover or to cover situations that related to systems, that is the absence of an integrity system, the failure of the systems or the integrity system not adapting to new challenges. Could you speak a little bit about that, Professor Brown? ---Well, that's the, I mean really the purpose of an integrity system assessment is to establish whether all of the major functions on which integrity relies are being fulfilled by institutions or by other processes. So, I think it, I think the main point probably to make is that integrity is much more than an absence of corruption, and, and the purpose of an integrity system is that it will, it will control corruption, and deal, deal with corruption, hopefully prevent corruption, but that the aim of the integrity system is actually to ensure, indeed, some of the values that, that you referred to at the outset of the enquiry, Dr Chen, fairness, transparency, accountability, and, and, and I don't, I don't know when you want to come to those concepts of integrity, but, but, but clearly that's the broader purpose of an integrity system.

It's as well to start with it now. Professor, could you perhaps answer a large question is, why do we have public integrity systems?---Well, I mean, we, we have integrity, we have integrity systems to ensure that power that is entrusted to institutions and to holders of power is discharged for the purposes for which it was entrusted, and that that should be done so in, in accordance with those values that I mentioned, fairness, honesty, transparency, diligence are, are sort of my shorthand, the list of the key values that, that compose integrity. So when we know that integrity systems are, are fundamental to sort of every functioning society, they take different forms, but they basically are what maintain the cohesion of our institutions and prevent them from being corrupt, or more corrupt than they are.

Well, upon what legal footing or basis, or what are the legal fundamentals that integrity rests on? Is one of the ideas public trust?---Absolutely, and the, and, and that also is why, it's, the concept of trust is so central to the concept of corruption that we use, that power is entrusted and it's, it's the terms of that trust that really dictate then whether we judge whether there is corruption or where integrity is being fulfilled.

Public trust can be used in varying senses, I gather, Professor. It can be used to express a legal principle, but as, it can also express other ideas, can it not?---It, it certainly can. It, it's a, fundamentally, it can be a political concept as well as a legal concept.

And how would you then express it as an enforceable legal principle, public trust, Professor?---Well, I think that's, I think that's crucial to, to the effectiveness of any integrity system and, and indeed, as a legal principle central to the question of to what extent integrity is, is ever enforceable at law. I think that the important thing for a broad understanding of, of public trust and its role in integrity and anti-corruption, I think it's actually useful to distinguish between the three different areas of law that actually contain significant content for the purposes of understanding public trust and its importance for integrity and corruption, because it actually operates as a constitutional principle as a, as a traditional principle in the law of equity, as a fiduciary principle if you like is the second one, and the third is the way in which it plays out in criminal law enforcement through things like the common law offence in our traditional of breach of trust or misconduct in public office, to which you've already referred. And I think it's actually, it's actually significant to understand all three of those in order to understand the enforceability of, of concepts of public trust, because one of, I think one of the key questions for what, yeah, what values we're actually able to articulate and then enforce in relation to integrity and, and the control of corruption varies between those three different bodies of law. But I'd suggest that there is a fair amount of convergence between those different, those different bodies of law in terms of what it actually means. But it may be useful to step through some of that.

Sure. You perhaps can lead the way, Professor, if you like, now.---So, yeah, I mean, I, I think what, what's very interesting is that in effect, the clearest articulations that we have in our legal tradition are of, of the concept of public trust as a fiduciary principle, that it is effectively a, a duty of loyalty to those who have entrusted power to those who are holding public office. But the, what I might, I might refer the Commission to a particularly useful exposition I think of the status of the public trust principles at the moment, which is a chapter of a book by, a chapter by Stephen Gageler, Justice Stephen Gageler, in the book Finn's Law and Australian Justice, 2016, edited by Tim Bonyhady, and the chapter is called the Equitable Duty of Loyalty in Public Office. And I think it's particularly useful for actually explaining that there is a tension and there is a difference between public trust as a constitutional principle and public trust as an equitable principle or

a fiduciary principle, and, and the extent to which I think we underestimate the extent to which it's enforceable as a fiduciary principle, including through, if you like, filtered through the criminal law in the form of, of the common law offences of breach of trust or misconduct in public office. I think we overestimate the extent to which it's a constitutional principle, but I think there is some convergence between, between the constitutional principles and the other principles. And if I could give you a, I think it's well explained in, in Justice Gageler's chapter, which is a description of Justice Paul Finn – or formerly Professor Paul Finn's – extensive work, which has influenced our, our concept of how these work in Australia and within our legal traditions. But I think it's really, it's very interesting to reflect, for example, on the reference you made a little earlier I think, Dr Chen, to what the High Court has said in, in cases like Australian Capital Television in 1992, where, where the, the court very clearly articulates the constitutional principle that office holders, executive office holders, are accountable to parliamentarians, who are accountable to the people, and that that carries with it a constitutional principle of, of, of in effect public trust. But that is actually quite different and somewhat less enforceable in our legal tradition than the concept of public trust as a fiduciary duty, and it's, I, I just draw the Commission's attention to what Justice Gageler says, which is that it was, the, the, the principle that, that the higher trust of government should be recognised as a constitutional principle in those terms has only so far reached something of a high water mark in, in 2008 in the case Federal Commissioner of Taxation v Day. I'm not sure if anything has happened since then to change that, but Justice Gageler's assessment was that at that point four members of the High Court were endorsing the view expressed judicially by Justice Finn that the higher trust of government should be recognised as a constitutional principle, but that that is as far as, as the constitutional principle of public trust has really ascended. And it's interesting to reflect on that, I think, because it's a reflection of our traditions that really emphasise that our democratic system still relies on concepts of parliamentary sovereignty somewhat more strongly, or, or quite strongly, as opposed to concepts of popular sovereignty, and so our constitutional principles are on a path I think of, of evolution from the traditional concepts of parliamentary sovereignty – which would very much say that parliamentarians are not trustees for the electors, they are in fact the holders of sovereignty, the holders of power in their own right – to a more I think what is an evolving, a continually evolving, stronger concept in the Australian tradition towards recognising that our constitutional system rests on popular sovereignty in which the concept of a genuine public trust of parliamentarians being the trustees of power as opposed to the holders of power is actually gaining strength all the time. I think that's quite significant for any kind of legal articulation of what the public trust means because I think it's, it's easy to overestimate the enforceability of the public trust in those constitutional terms when we're still on that path. But what is very significant is that, what, what Justice Gageler describes as the narrow path of the public trust which is the path that Justine Finn pursued in more detail and which really has informed our law, including the laws with

respect to corruption and with respect to the regulation of integrity much more strongly is what he calls the narrow path based on the rule of equity. So the fiduciary principle, the idea that powerholders are trustees to others for the use of that power, have in fact gained much more sway but not yet as a constitutional principle in the way we might sometimes assume. And I think that's an important distinction for thinking about what other forms that enforceable measures should take to, to try and regulate integrity and to regulate the conduct of parliamentarians in particular and other government officer holders, but parliamentarians in particular. But I think what's interesting if, if one looks at the third branch of law, which is really how expressions of the responsibility of public officer holders has evolved when the court have been, Australian courts have been considering the meaning for the purposes of assessing breaches of public trust which ascend to the, to the common-law criminal threshold. So, this is the offence of misconduct in public office or often that's synonymous with breach of trust, is to discuss those breaches of trust very much as if members of parliament or any public office holders are, are trustees. But it's interesting to see that that, that that formulation of the relationship between the, those who hold power and those in whom interests it's being held is, doesn't have a constitutional reference point, it has a reference point that is in some way perhaps thanks to the criminal law tied to, more to the question of the impacts on society if the trust is breached. So I think, I, I think it's, it's, it's easy to, to, to talk through, you know, specific cases and specific examples of the, the different ways in which trust is conceived and presented and I think they are all very important for thinking about what are the fundamental values and what's the enforceability and how do we, how do we calculate what the relationships are or should be in which we can build that enforceability. But I think what, what's quite clear overall, is that there is enforceability but it's involving, and I think that it's, that it's strengthening and that it's, in some ways, it's, I think if you were to look at it jurisprudentially, I think you would say that it's unifying but perhaps in a way that, that we're not always clear about because of the fact that it's being expressed in these three different, through these three different legal traditions.

THE COMMISSIONER: Is this right, that whether you're dealing with public trust as a constitutionally based principle or otherwise, it has inherent in it the notion that public power is held and exercised by public officials who don't own the power but who hold it on trust, therefore they don't – and hold it on trust for public purposes essentially, so that it's a fiduciary-like trust at least, or a fiduciary, I should say fiduciary-like responsibility or obligation and if you look at the essential duties of a true fiduciary in private law, there's positive and a negative. One being the trustee must act in the interests of the beneficiary and the other negative obligation, the trustee shall not act in his or her own interest. So that if you translate those concepts to the public law space the power is held not absolutely but on trust and it's for public purposes and limited in that way, and secondly officials or government must not use the power in some way to achieve a benefit which is extraneous to the public purpose. Is that in line with your

analysis?---I think, I think that's an accurate summary of sort of the net effect of the position. I think the key issue is to still bear in mind the different extent to which principles of responsibility and the level of enforceability of those principles.

Yes, yes.---A good example, if you look at Paul Finn's work in 1993 where he could most readily identify a convergence between constitutional principles and the equitable principles of public trust, it was actually in recognising that public officials who are not elected are entrusted their power by public officials who are elected, it's from the public officials who are elected that that power is devolved.

Yes, yes.---And that creates a potential problem because if that's the case, then public officials who aren't elected are upholding that power on trust from - - -

Derivative faction.---Yes, exactly.

Yes, yes.---As opposed to holding it in trust directly for the members of the public and for the public interest, whereas the constitutional principle would say that all office holders, including elected ones, are trustees for that power. And I think it's important to, I think that's why it's useful to differentiate because I think that is the path of constitutional evolution that the Australian political system is on, and I think that is actually reflected in some of the ways in which the criminal law principles for misconduct in public office are expressed for example, if you look at the way in which Chief Justice Bathurst expressed it on the Obeid appeal in 2017, what he said, I'm happy to give you the citations if you require them.

I think we've got those.---But what Chief Justice Bathurst said was that members of parliament are appointed to serve the people of the state, including their constituents, and it would seem that a serious breach of trust imposed on them by using their power and authority to advance their own position or family interest rather than the interests of the constituents who they are elected to serve could constitute and offence of the nature alleged, i.e. misconduct in public office, i.e. a breach of trust. So there is something about a convergence between a constitutional principle that is evolving and emerging but it's being expressed through the criminal law principle, the common law principle, the common law offence of breach of public trust. And I think those two things have different, in the same way that you mentioned the responsibilities of a fiduciary, I think those two other things, the constitutional principle and the common law criminal offence principle also have their own parameters in terms of what's been identified and expressed as being the responsibilities that are enforceable. So I think it becomes very relevant when thinking about what are the values that we expect to be honoured in the discharge of public trust and, and how can they be expressed and how can they be made enforceable in ways that are best consistent with our legal and political traditions.

If we take, eventually we will be taking steps towards applying these principles in the lobbying context. The interest in that context is of course the intersection if you like between the dealings that take place, on the one side the public official, on the other side, the lobbyist or the lobbyist's client who is a citizen of – so it's an intersection between the official and the citizen if you like and how one distinguishes the obligation on both or each, one being informed by the principles you've been referring to and the other, it being suggested and with some jurisprudence I referred to the US Supreme Court this morning as to the citizen's obligation dealing with public officials, the exercise of public power. So we'll come to that, but it's an area of course I'm particularly interested in. And the other is the issue again affecting lobbying activities. What's wrong with the exercise of public power, if you like, either in private or clandestinely, secretively, and how does that contravene the principles that we've been talking about. But I'll let Dr Chen take you through the various other matters that he wants you to address.

MR CHEN: Thank you, Commissioner. Professor Brown, I want to take you back to a couple of the other ways in which you thought public trust had a political and social dimension to it. Could you just briefly explain the differing ways in which it could be used in those settings, please?
---Certainly. And I think here we move from the concept of public trust as a legal principle – or three different legal principles in some ways – to the concept of public trust as a political and social phenomenon, and I think the, I think what's most important to understand for the purposes of, of, of thinking about issues of lobbying and influence upon policy and on decision making is that concepts of public trust are often regarded as being threefold. Whether or not the public actually trusts their institutions, trusts governments and trusts politicians is, is obviously crucial to the effective functioning of society, to social stability, to political stability, to social stability, and when it, when it erodes, it clearly has huge impacts. But, but it's a different concept because, in political science terms, it's, it's often divided into three or regarded as involving three different factors, three Ps, performance, process and probity. And when we talk about – the concept of public trust we've been talking about until now as a legal principle focuses primarily on concepts of probity, although not exclusively, but public calculations of public trust in institutions rely as well on, do rely on that but also rely – so political scientists believe – on public beliefs in relation to the performance of the institutions and government, and also public confidence and perceptions of the process, including their own, own participation and ability to control government. So, so I think it's important to, and, and I think these things are directly relevant to the way in which public, public officers discharge their duties and those who influence public policy discharge their duties, because if performance trumps probity in calculations of public trust, then the scope for corruption is very high or for undue influence is very high. If those things are in balance and there's no fixed balance, then clearly it's a different equation. And one of the things we

know is that overall trust in institutions comprising of all three of those things is very volatile but it generally has been declining and it's certainly been declining in Australia, and I think a big question is – and one that we've been examining both through Transparency International and in my academic capacity – is to what extent issues of probity factor in that declining trust and might factor in the revival of trust. And, so, I mean, I'm happy to, to talk you through some of that evidence if it would assist the Commission.

Well, I was going to maybe come into a different topic, which is the decline in public trust as you identified it, and are you able to just briefly say what any conclusions, any tentative ones that you have been able to draw from your own research or other research across this area of decline in public trust?---Well, I think what's important to understand is that declining public trust is not just driven by probity issues and by integrity issues, or issues of honesty, et cetera. The single – and I think that's, I think that's important to bear in context and also understand the political dynamic in which integrity policy including lobbying and its regulation sits, the single greatest impact on public trust in Australian politics in the last few decades was an issue of, effectively, an issue of process, trust in political process. It was the removal of sitting prime ministers by means other than elections. And, and that's been, you know, verified in terms of what's, what's happened with public opinion and public trust in government. So I think it's important to recognise that public trust doesn't hinge simply around issues of probity. But it certainly involves issues of probity, and we're only just starting to get a handle on the extent to which those issues of probative actually factor into the overall sort of pattern of decline in public trust. And what we do know is that it's very significant. It, it's just simply the fact that we know that it's not all of it. And we probably will come to some issues which explain why that is actually very important for, for issues of lobbying and undue influence.

Could I ask you, Professor, what's the link if any between public trust and the legitimacy of our political and democratic institutions?---Well, it's fundamental, especially in the democratic system. Unless people are trusting the institutions enough to continue to participate in them, and trusting that they're, those institutions are making decisions for the common good, for the social benefit, for the collective benefit, then we're on a, we're on a slippery slope. Well, many countries already are in a situation from which it's hard to recover, where power isn't held by people for the purposes of favouring sectional interests or particular interests, as opposed to discharging your responsibility to the general public. So it, the, the, the problem with collapse of public trust in a political sense is that it does create the environment in which those who gain power and hold power then discharge that power without regard for those who have ceased to trust, and simply discharge that power with regard to particular interests that are still participating and supporting the, the political process. So it, it, I, I think especially in an Australian context, I think it's fundamental to, to recognise

the serious consequences if public trust, in a political sense, in a, and a social sense, is eroded too far, with probity issues being one of the important factors in that equation.

Professor, can I move now to put this discussion about lobbying into its context, domestically and internationally? Can you place this discussion of principles in the broader discussion of, taking place internationally about political integrity and how our systems need to evolve around public integrity?---Yeah, certainly. I, I think it's useful to put all of these questions in the context of, of perhaps two of the greatest challenges that, that we're seeing internationally. When I say "we", I'm, I'm, I'm speaking about Transparency International as a, as an anti-corruption movement. But I think this, this is consistent with pressures that we have in Australia and in New South Wales. One is the problem that corruption is increasingly something that happens in plain sight, that the abuse of power for, the abuse of entrusted power for particular gain, private gain, political gain, is something which doesn't necessarily happen dishonestly. It happens quite transparently. And that has implications for any regulation of any influences over government that assume that you can make, that, that you can regulate influences over government simply by making them transparent or honest, because conflicts of interest between business and government interests are rife, globally, in many, many countries. You only need to look at the world's largest economy or about two thirds of Europe and you start to see the extent of which that is that case. The second is long-term socioeconomic trends which are pointing to concentrations of wealth and inequality in the world and so, for example, in the global, you know, in an increasingly global and globally competitive economic world, we've seen, we continue to see over time the concentration of wealth. So on some projects what we're looking at for the future, whereas in 2017, the top, the wealthiest one per cent of citizens in the world held about 50 per cent of the world's wealth, which itself is a huge concentration obviously, the projections are that if past trends continue then by 2030 the top one per cent of citizens of the world will hold approximately two thirds of the world's wealth. And the significance of that growing inequality is that it makes it increasingly difficult to establish and maintain what you might call a probity culture in societies, the concept that, that you should conduct life as institutions or as people entrusted with power in a way that isn't calculated towards maximising personal gain and maximising wealth in that personal sense is increasingly hard to combat in a world that is continually going in that direction. And so the risk, those two risks mean that the pressures that resulted in public office being gained and held by people who, where the overwhelming expectation is that they will gain and hold that office, not for the purposes of discharging of public trust but for the purposes of perhaps discharging of public trust but at the same time holding that office for the purposes of personal gain and for the gain of sectional interests, their friends, their business colleagues is something that is a global problem for probity and for the regulation of interests and for integrity and corruption globally. And it helps explain why corruption has not been falling in the

world, why corruption problems in many ways, especially grand corruption problems around the world, are assessed to have been growing faster than they have been, been, been, been defeated in many, many countries. So we face a, we face a very challenging global outlook for the fight against corruption and some of those fundamentals, which fortunately are weaker in Australia than in many other countries, are still fundamentals that will, that are affecting Australia and affecting Australian society and our political systems and will continue to do so increasingly and with increasing intensity. So it actually starts to change the landscape of how we define integrity and probity and how we try and enforce it.

How important, Professor, are lobbying and associated reforms for the outlook of corruption control generally?---Well, they're vitally important because lobbying can, the understanding and the control of lobbying goes to the heart of relationships between office holders and those who would influence them and in particular will define the nature of the relationship between many of the private interests, business interests or sectional interests that, that would gain or be part of the networks of influence that would gain from this sort of erosion of standards that is the product of both of those two global forces. So partly the concern, the public concern about those trends explains why concern about lobbying and other forms of influence has become so important but also at the same time, unless the, unless we understand how influence and undue influence work in relation to policy making and political life and then how to regulate it, then we can't expect to combat those trends and so lobbying and it's regulation is right at the heart of whether those trends will be allowed to take hold or whether we'll find mechanisms for actually offsetting those trends or being able to contain them.

As concepts you define unaccountable influence differently from undue influence, is that right?---That's right, yes.

And could you just explain what the distinction is between the two and the importance of the distinction?---Certainly. I mean, I think, I think the, the main assumption up until now has been that if different interests are influencing policy makers, then there's not necessarily an assumption that there's something wrong about that, but that by making it transparent and accountable, one will be able to deal with the problem because people will not engage in dishonest or inappropriate activity if it's exposed, that sunshine will be the disinfectant. The problem is that if people are happy to influence inappropriately in a transparent and open and accountable way, then transparency in and of itself, accountability in and of itself will not solve the problem. The, and, and I think it actually, if, if I may say, goes very much to the heart of what you said at the opening of this inquiry, Dr Chen, which is that if we're going to articulate principles that are important for understanding and regulating lobbying activity or influencing of government, then the principles of transparency and accountability, which previously have been the focus or until now have been the core focus and

previously were the focus for Operation Halifax, for example, go with that question of creating the accountability and the transparency, but they can't necessarily solve the problem about whether the influence itself is appropriate or inappropriate. For that you need the other types of values that you suggested perhaps need to be part of the answer, and I think, Dr Chen, you identified fairness and integrity as being two of those values, and I think when we're talking about what, what differentiates an act of influence or an act of lobbying between whether it's due or undue, then it will be not only whether it's accountable and transparent but it will be whether it is actually consistent with or alternatively, or promoting or alternatively eroding those fundamental values. And, and I think that is where, I think that distinction is actually central to establishing whether we can have any regulation for controlling influences on policy makers or decision makers that will actually be effective in an era where transparency and accountability in and of itself will not necessarily solve the problem.

Can I just draw that together if I can, that the shortcomings in the current systems – and I'm not asking you to be specific about any particular system but domestically – is that whereas the focus has been traditionally upon transparency and accountability to fundamental principles, the way and manner in which lobbying needs to be controlled and regulated moving forward by the super-added elements of fairness and integrity, is that a fair summation?---It is, but I think, I think what that leads to is some larger questions about what are the values in public decision-making and the exercise of public power or the discharge of public trust, in effect, getting back to that concept. What are the values which will, which, which we can rely on or have some consensus about as being the values which define what the appropriate discharge of, of power is when making decisions. And I think, I think this is where the debate really starts because I would see fairness as being one subset of integrity, rather than, rather than integrity being, you know, a value in and of itself that is easy to pinpoint, and I think we need to think about – in particular in the lobbying context – what is it about, about particular forms of influence that we think are undue, and when does that, when, when can we identify that as occurring, so that it's not the question of whether lobbying is occurring or even whether it's transparent or not, but what its actual nature and effect is can be assessed when necessary. And I think that's a, that actually is a very substantial challenge, I think it's very appropriate if the Commission is already thinking that that is a challenge that needs to be confronted, but I think it is a very complex challenge, and the reason why it's a complex challenge is that it necessarily revolves around concepts of what is the public interest in any particular decision, how that's defined, and it also comes directly back to those other issues that define what a community sees as being important when it comes to public trust in which parliamentarians and political elected decision-makers certainly do, which is the performance dimension of public trust. If a decision can be made in a way that will lead to a better outcome, i.e. better performance of government, that will satisfy the public, then who cares what the process is by which that decisions' been made. And so if your

calculation of the public interest is based on performance, on outcome, then the question of what influences are appropriate in that process are quite different to if you have a different definition of what the public interest is, that is to find more about other values and process, fairness being a critical one. So I think it's very useful to probe that a bit further, to discuss and try and articulate and to ask other people to articulate what the values are of a decision, of any public decision-making process that defines whether in fact it's been discharged in a way that upholds the public trust effectively in order to then determine whether people who are influencing that process are doing so in a way that is corruptive, if you like, of that process.

THE COMMISSIONER: Well, we might return to those large questions after the luncheon adjournment.

MR CHEN: Okay.

THE COMMISSIONER: Thank you. I'll adjourn to 2 o'clock.

LUNCHEON ADJOURNMENT **[1.02pm]**