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INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE PETER M. HALL QC
CHIEF COMMISSIONER

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AT SYDNEY

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THE COMMISSIONER: Yes.

MR CHEN: Professor Brown, I want to return to a couple of concepts that we were dealing with just prior to the luncheon adjournment, and that is that of unaccountable influence or undue influence. And, Professor, I was going to ask you if you would be good enough to explain the distinction in
10 practice between those two concepts.--Certainly. And I think, I mean, I, I think the, the key thing is that we know what will make any influence or, or decision-making process more transparent and more accountable, and many of those things are things that the current lobbying regime for example, would, you know, would attempt to provide, registration of actors, transparency of records, and, and I think those things are fairly self-evident. I think what's much more difficult is to then say, okay, once we've, once we're actually examining this decision-making or this process, what's going on here that's appropriate or inappropriate? So it comes back to that
20 question about what's undue in, in substance about it. And I think this is where we, if we go back to the concepts of public trust and when we know that public trust has been breached, then we can identify some of the things that we know will, will let us define what's occurred as being undue influence, where there is self-enrichment, where there are conflicts of interest, where there is dishonesty, where there is partiality and favouritism. But, but what is more difficult is where there is, you know, what is traditionally sometimes been identified as a confluence of interests, where, where it can reasonably be argued or just is argued plausibly that, that nothing undue has occurred, because the outcome is both serving, delivering the best outcome for the public, and also happens to be serving the interests
30 of particular people who have been seeking to influence the decision. And, and I think that's where it comes back to the question of, okay, what are the, what are the values or principles that we're, we define what is, what is due influence. And I guess the, just still talking in the abstract, you know, without thinking about the specifics, where a specific scenario is the difference between favouritism and doing a favour. The, we know that if there was a process that resulted in favouritism, then by definition we can define that as having been an exercise of either undue influence or, or reciprocation of some kind of undue influence. But the, but in, but in many of the same situations, simply doing a favour for somebody would be
40 something that we regard as being sort of a positive. And, and that's, that's, I think, a distinction which goes to the heart of some of the relationships which occur in lobbying environments, where you were talking about basically people who are, who are able to obtain access in return for, for some kind of benefit, which isn't necessarily a personal benefit, but which is a political benefit, or – but they, but to get back to your question, I think the, the key is to identify, well, what are the key elements of what is any good decision-making process that we can then identify as being, you know, due process.

THE COMMISSIONER: And what are they?---And I guess that's where I think we have to be thinking about concepts that go right back to sort of basic concepts of what is good decision-making, what is good, what are good public service values, for example. And way before integrity or ethics were identified as being worthwhile values in their own right, there was a widespread consensus that efficiency, effectiveness, and equity were, were the key values that should drive - - -

10 Sorry, what were they? Efficiency?---Efficiency, effectiveness, and equity were, were three values that would, would drive – I'm thinking of the, the types of values that performance auditors would use to identify whether in, in the, in a holistic picture, I think you could add other values to that. They would be sort of core values. But other than, I think if you were to, to try and differentiate between what the decision-making process that is, that one can say was genuinely designed to serve the public interest, then I would, I would extend upon that a little bit to say, to add, to add on a five, perhaps four things. One is – and this would apply to, I think, sort of any decision or, or any policy decision or practical decision that a policymaker or an
20 official's got to make. One is value for money, two is the, and this would go to fairness, the non-exclusiveness of the process, so including diversity and the reality of inputs and influences into a process, recognising many interests, and I think that would align with the value of fairness that you mentioned earlier. The third would be appropriate use of expertise and knowledge that's available for making any decision, and the fourth would be that it's a rational decision, meaning that it involves some genuine consideration of options and evaluation of those options. And so I think, I'm not suggesting that that's, you know, that's an exclusive list, or a definitive list, it's more or less sort of would be my sort of off the top of my
30 head list if I was to judge whether a process had actually, a decision-making process had actually been conducted in a way which was genuinely intended to respect the public interest, as opposed to be one that was catering to section or particular interests.

Can I just take you back to what you were talking about before lunch. You mentioned that transparency and accountability are essential, but not enough in themselves, as I understood what you said, to bring about a good outcome, paraphrasing of course. Can I just get back to looking at what we know about lobbying at the moment. Lobbying's all about relationships, as
40 we know, and it's been said that these relationships can over time develop into almost friendships after a while between public officials and lobbyists or clients of lobbyists, and that they deal with one another on the basis which is, some people call it clandestine, some say it's secretive, some say it's in private, but there's almost it's said a situation, a culture, if you like, grows up around this type of relationship whereby the lobbyist and public official impliedly know that they're going to deal with this in private or secretively, that the process itself draws them to this culture, some I've seen refer to it as a privacy culture. They don't expressly agree we're not going

to tell anyone about this, it just happens through evolving of the relationship. Now, it may be said that many perhaps in government, not referring to any particular government at the moment, many benefit and many lobbyists would say, look, really we don't need regulation, if we do then what we've got and made is quite enough, thank you very much, because it works. Then you ask yourself the question, well, why do they say it works? What makes it work for them? Well, obviously putting a proposal forward wanting government, usually in general terms, support, and it works because often they get the support. And you sometimes ask yourself the question, but why would they get their support, what's the quid pro quo, if you like. And that's the difficult question, sometimes you don't know what it is, but it works, it seems to be there. All of this is taking place in a minimalist environment, regulation environment or no regulation, and that's the way many of those people in government or the lobbying industry want it to be. Then you say, well, yes, but that doesn't satisfy transparency and accountability principles, which you've referred to before lunch and of course the High Court has referred to. So what needs to be done, obviously disclosure is right at the forefront of all of this, whether there should be disclosure and if so in what form. And we'll hear from you on that in due course. But lobbying can involve one of a number of things. It can involve policy changing, licencing approvals, contracting with government, planning issues and so on and with all of those areas, you might say, well, there are three aspects. There's the special interest that the lobbyist or his client has in mind, usually, often a commercial interest. Then there may be some sort of benefit to the public, they might argue it provides employment, for example. And then you have impacts. So special interest, queried benefits, impacts on the environment perhaps. So you've got, if you're a decision maker, thinking it through, I've got to think about three things. Special interest, what is it, he wants to build a tower building or put in a new casino, a third casino in Sydney or something like that. They say that will be a considerable benefit to the community because of tourism and so on. Benefits, yes, it will employ perhaps 1,000 people, that's a benefit. The impacts, well, this impact will have social repercussions of a high order. So there might be a high special interest and a high social impact. What's the process that has to be put in place so that if lobbying is regulated, the problems identified with, sometimes, these conflicting issues and the quid pro quo issue, how can it all be approached? And I think, I pick up on what you've spoken about, efficiency, effectiveness, equity, but it seems to be if there's more required than transparency and more required than accountability, what is it? How do you fix this problem so that these competing, pulling forces can be resolved? I know it's a, this is a large topic, I know, but I just invite you to at least step into that pool and try and provide some guidance.---Well, I think, I think the, the, putting aside the transparency and the accountability, I think the question is whether there is a decision-making process in place that will test all of those assumptions and factors and where the, where it can, where, where you have a basis, a clear basis that everybody accepts for being able to judge whether in fact what is the appropriate decision making process for that decision has been fulfilled

irrespective of that fact that you have particular interests, lobbying that, or even creating that process, creating the opportunity for that decision.

So if I could just interrupt you, to create and turn around and create a new culture, a new approach, do you do it on an ad hoc basis or do you say there should be established a structure for decision-making which would apply to most of not all situations and it's up to the minister, who's got a lobbyist saying, "We want you to hear our great you-beaut program." The minister would say well, "If you want to get me to deal with it, you've got to go through a whole process before it comes back to me." Is that what you're envisaging or is it an ad hoc situation?---It may be a process but it might be done with respect to the values that had to be fulfilled in the course of the decisions and I guess it comes, in terms of how you regulate this. To my mind it comes back to, if you look at a Lobbyist Code of Conduct, for example, the Commonwealth one, then you'll find very little reference to the values that, the process values or the substantive values that, that the decision making process that lobbyists are seeking to influence are meant to reflect so that it's then impossible to actually say, well, there's been a breach of this code of conduct, either by the lobbyist or by the official because in fact the values that are meant to be being fulfilled in that decision haven't been identified. So, I mean, those sort of codes of conduct make it clear that if somebody's convicted of an offence or they've, you know, they're revealed to have done something dishonest or they've failed to fulfil their registration obligations or update their details on the register, then they can be removed from the register and they're not allowed to lobby. But that doesn't actually help inform decisions about what is a legitimate process and when should both lobbyist and decision makers know that it's fine to lobby me. But what, where it will become undue influence is whether I as the decision maker or you as a lobbyist actually lead this decision process in a direction which is inconsistent with these other process values, then we know we've done the thing. And, and I guess that's, to my mind where those values of fairness or integrity or, on top of efficiency, effectiveness and equity which are really just the performance auditor's values, those other fundamentals about diversity and pluralism, equity of access to decision making, are there stakeholders who have a stake in this decision who have not been incorporated in this process or who are being excluded by, by the privacy of the discussions or – and so those things, they have to be quite general, high-level process values because they've got to be able to fit any situation, any decision, any type of decision and any kind of decision process. But, but I think it's worth trying to identify them and articulate them otherwise we don't have a consensus about what, what due influence is as opposed to what undue influence is and I think it's, unless there's ground rules for what those process values are at least, then, then how do we – if a lobbyist's job is to go in and get the best outcome for their client or for themselves, if they're lobbying on their own behalf, then, the of course they're entitled to, you know, pull whatever trick in the book, put out whatever bottles of wine they can find and go for it. But if, if part of the conduct, the code of conduct that they have to sign onto actually means that

they have to agree that, that if they affect those process values then, then they will have transgressed beyond what's acceptable, even though, they're fulfilling their, you know, their, their duty as a, as a lobbyist, then we'll have something which can actually be used to judge whether the influence is due or undue, not necessarily by its outcome but by the nature of the process and whether it's being respected. And then somebody can examine that and the question becomes, well, who examines it and makes that judgement that in fact those process values haven't been followed, that this actually was inconsistent with getting value for money, that this was inconsistent with equity of access and, you know, pluralism in terms of stakeholder involvement, this was inconsistent with actually involving all the necessary expertise or knowledge or this was actually not a rational decision process, it was actually influenced from the word go. So all of those values are fairly traditional, some might say they're quite old-fashioned and Weberian but I think some of those values are also ones that most decision makers, even politicians and the general public would identify as being the things that we expect of decisions that are decisions being made in the public interest as opposed to, you know, to achieve more specific outcomes for particular interests. And so I think if there's going to be some sort of – and I guess to, to sort of cut to another key point, is that I think we can spend a lot of time setting up infrastructure that is aimed at transparency and accountability, like, registers, like, diary, you know, publishing diaries. And yet, especially if I go back to the point I made earlier about the problem about undue influence in plain sight and corruption in plain sight, conflicts of interest in plain sight, then all we will do is succeed in revealing something without being able to form a judgment about it and specific, I think I said, I think I said this earlier, if there is genuinely dishonest conduct involved, then the transparency itself will eradicate some of it or prevent some of it or remove some of it but I'm not sure that we're necessarily removing all that much because a lot of what we're dealing with is in fact, there, you know, there are no rules for the, in the game, for judging that this is undue influence. So I guess that would be, that would be how I would try and sum up the distinction between an approach that was aimed at being able to identify and make judgements about the dueness, if you like, of the influence, as opposed to simply its transparency and accountability.

MR CHEN: Thanks, Commissioner. Professor Brown, I'm going to move now just to invite your comments on regulation in general terms, if I can. I want to ask firstly in relation to the bounds of any register of lobbyists and whether you hold a view about whether that should be extended to include others and third-party lobbyists, such as in-house lobbyists, those representing other interests or other bodies, and to the extent you hold a view, your justifications for it, please.---Yes, certainly. And the recommendations, the draft recommendations from our national integrity system assessment obviously touch on that issue and some of the other issues. And I think, yes, I mean I think it's quite clear that if you're going to rely on the registration of lobbyist as a mechanism for attempting to regulate their activity, then you have to have quite a comprehensive

definition of what lobbyists are, and I think you have to recognise that it's not necessarily the person in the room who is doing the lobbying who has actually created the access, that is the key thing for the decision. I mean the person who set up the appointment or who enabled the opportunity for the lobbying is actually just as important and sometimes more important. And so that goes to the revolving doors issue of people, you know, employed in whatever industry or whatever firm to provide strategic advice or basically in-house services as opposed to actually be registered as lobbyists. If, if, if, if it's, if it's those people who are actually setting up the circumstances where the access is provided then, then they should be just as accountable and just as transparent and their role should be just as accountable and just as transparent as, as the person who actually rocks up and says, oh, yes, I'm here to talk to you about this, to be told, oh, yes, so-and-so told me you were coming. So how, you know, how are they.

THE COMMISSIONER: So in short you see if you're going to have a register it should embrace not only third-party lobbyists but other in-house lobbyists who are perhaps employed by either a company or association with commercial interests?---Absolutely. I guess, I guess the point, I guess the limit of this is that you can't register absolutely everybody.

No, I appreciate that.---And - - -

So not, it would necessarily apply to all non-government organisations or charities and the like.---And I think you do then start to face a difficulty in terms of well, why, why do some people have to register and why not others, and I mean the core of, of, of, of creating lobbyist registers in the first place was basically to turn a shadow industry into a quasi-professional industry, and that's a good thing, but in terms of actually, if you register, if you're actually going to regulate the activities of everybody who is lobbying then, then relying on registration systems to do that is, you know, is a much more difficult challenge.

Sure.---And I think that's where you do need to look at, so certainly it's pretty clear that if you're going to be registering commercial lobbyists then you need to be registering everybody who's supporting the commercial lobbying operation.

All right.---But then where, how much further you go beyond that I think starts to reveal the limits of registration as a, as a mechanism for, for controlling undue influence.

Yes, thank you.

MR CHEN: And what about an independent body with oversight, investigative and disciplinary powers for lobbying generally, Professor Brown?---Yeah, I mean I think that's a no-brainer. I mean there is no regulatory system in the world that works without someone in a position to

enforce it. So the idea that, that any of these regimes would ever work without somebody being able to independently verify what's actually happening in any given situation or response to any particular allegation I think is a, is a long-distance, long, concept of a long-distant past. So - - -

10 Ministerial diaries is the next topic, Professor Brown, that I was going to invite your comments on.---I mean, our draft recommendation was that the, was essentially to the effect that the real-time publication of, of diaries and other decision-making records, you know, has got to assist. And again I
10 guess the big question is that – I mean, and, so, I mean, to that extent our recommendation is certainly that transparency and accountability should be used to enhance the process and make, make undue influence less likely and more difficult through transparency. But again, it's, it's a little bit like registration. It's still, it's a question of, of to what extent is this the most efficient way to get to, to the heart of the problem, so I think it's something that is a logical mechanism until such time as we identify mechanisms that are even more efficient at actually regulating the behaviour that we're talking about, and I would have thought at the end of the day, you know,
20 there might be some hope of finding some – I mean, active enforcement that sets precedents is, is more likely to influence behaviour than fulfilling endless requirements to fill out paperwork and post it online in my view.

THE COMMISSIONER: One issue that's arisen with ministerial diaries is that some of the entries might be one or two words such as "update". It's not very informative. It might reveal the identity of the person who's come to visit the minister, but plainly that's not what you're talking about. You're talking about something that conveys some information about what was discussed by way of a lobbying proposal in order for there to be transparency and, indeed, accountability. Is that right?---Mmm. I think, I
30 think that's the principle. Whatever information is published has got to be meaningful, and there's also the reality that the more information that is published, then the bigger the question becomes about who's in a position to actually process it and assess it, and, and make use of it. So the, again it's a case of I think where there's, you know, there's limits to how much – I mean, it's, it's natural for us to assume and I think it's correct to assume that, that, that any requirements to publish that sort of information can provide opportunities for greater transparency and scrutiny. But, but the question of the quality of that is something that I think, you know, is deservedly an open question.

40 Well, Senior Counsel Assisting referred to what the High Court said or the Chief Justice in Australian Capital Television Case, that what the Chief Justice said is fairly direct and to the point in the sense that he said that – he's dealing with elected officials in that case – elected officials hold the power and the trust for the people and, to use his words, "are accountable to the people for what they do", those were his words, in terms of both executive and legislative functions or Acts. You can't be accountable for what you do if you're an elected official unless you have a process in place

that satisfies that requirement so that you can be accountable for what you do, and aside from record keeping and maybe other means of transparency and accountability. But doesn't that mean not that it's optional but it's necessary to have in place a process or processes so that you can be accountable for what you do in terms of executive or legislative functions in the case of elected officials, and of course it might be said the same applies to appointed officials. So diary entries, that might have a couple of lines or two words to it, don't seem to me on the face of it to satisfy what the Chief Justice had in mind. So I just wondered what your view is on it.---Yep. No, I, I mean, I think in relation to this, I think the, the, the, the starting point has got to be that records are kept. The question of whether and when they should be published should be a different question. But, and, and we go back to the old, the old reality that the less likely it is to be published automatically, then the more likely are, you are to actually have an accurate record of what happened. So I think the – and this is where as a board member of Transparency International, I can say that transparency is not the be all and end all of the solution to these things – the, the assumption that transparency will help solve the problem, if you factor transparency is more likely to cause less or fewer or less accurate records to be kept is actually to, you know, to become counterproductive. So I think, I think the first test has got to be that the, that the records are kept, and then, then the second question is, then is, you know, who is entitled to access them.

Who's entitled to see it. Well, take the example I gave before of a proposal to build a large building or enterprise. It might have, on the face of it, a very good commercial case to be made for it, but it could have marked environmental consequences, for example. I'm thinking of mining in the middle of winegrowing region, for example. Well, if a minister were lobbied over a proposal like that and thought it was such a very good project and gave it the tick, how appropriate is that exercise of power if he hasn't taken steps, or she hasn't taken steps to disclose it to the vineyard people? So at least they know it's, this proposal's on my table and it's heading for a decision. What principle says that that minister can't shut his eyes or her eyes to doing that, but must do it?---Well, I think that's where it, I mean, in relation to this specific issue, that's a very good example of where the fact that a diary is being published that might contain a little bit of information or even a lot of information about those discussions may or may not deal with that actual issue, which is an issue to do with the quality of the process of the decision. Whereas, to go back a step to talk about some of those other process values, then you would be able to say, right, somebody independently looking at this, saying, well, what process was followed here, would be able to say, well, this process, you know, was not, didn't fulfil those basic values, and it's, so, of inclusion of relevant stakeholders or, et cetera. So, so I, I mean, I think that's where the keeping of the records is vital.

And then there's the separate question of disclosure.---The, the question of transparency, there's no reason why they shouldn't be transparent, but more

important is that, is that somebody who is in a position to judge against some standard or some principle be able to access those records, in a manner that is itself transparent, to actually verify exactly what's gone on, using those records. And I think, I mean, my experience and intuition would be that that's going to be a more effective influence, both on the behaviour of decision-makers and on the behaviour of lobbyists - - -

10 Sorry, what is?---To, to know that somebody who is actually independent, with an enforcement, if you like, role, is going to be able to access those records, and is likely to access those records if there's a question raised - - -

But given the – sorry.--- - - - and, and can reach a judgement that has sanctions or implications attached to it, that, that's going to be a more effective influence on the quality of the decision-making process and whether undue influence occurs or not, or is corrected or contained or not, then the publication of, the open, general publication of the fact that interactions and relationships have occurred which everybody knows are occurring anyway.

20 Yes. But of course, the principles we earlier referred that bind public officials in the discharge of their duties and functions would say to the loyal public official himself, I must make sure this is properly recorded, and I must disclose it. Isn't that so?---Yeah, absolutely.

You would have had to wait for the independent person to pick up that he hasn't done it or she hasn't done it.---No, it's the risk that that will occur - - -

30 The risk, that's right.---?- - - which will help make sure that it does occur.

Okay. Thank you.---And, and the failure to keep those records in and of itself should be something that is sanctionable.

40 MR CHEN: Professor Brown, just on a slightly related topic to ministerial diaries and disclosure generally, it's easy to see, bearing in mind the exchange you've had with the Commissioner, that the obligation on a public official can easily be anchored in their obligations, but what about more generally as to whether or not lobbyists themselves should be creating records of a similar style and kind. Do you hold a view about whether or not that should occur and what's the views that Transparency International has?---I'd have to check on whether Transparency International has a view in particular, but my view would be that, would be that any form of regulation has got to be designed in a way that is efficient and sustainable. So the capacity of, of lobbyists to, to comply with every type of requirement has got to be weighed, given that, given that, given that lobbying in and of itself, I mean, commercial lobbying may be more, may be more likely to be reflecting particular commercial section or interests, but lobbying in general is, you know, a natural and necessary part of decision-making. And so to

create, especially if, if the assumption is that all lobbying that might have an undue influence on decision-making should be subject to similar sorts of principles, then you can rapidly start to see some regulatory requirements becoming very onerous and very inefficient and having reverse effects. And it's a bit like requiring everybody to register, everybody to keep records of everything, I mean, A, it's onerous and going to become counterproductive, and create some sort of shadow alternative form of influence, because people aren't going to use those particular forms of influence anymore, or it's just not going to be complied with. So, so, so it really, it's going to come back to the question about what's the most efficient way of achieving the behaviour that we want to achieve. And I think it doesn't mean that, that requiring people who are lobbyists to, to keep minimum levels of, of information that would enable, you know, their conduct to be judged, that doesn't mean that there shouldn't be some minimum standard for it, but to, to assume that you can impose that it's either efficient or desirable or going to be effective to impose the same sorts of requirements on lobbyists that you would impose on officials I think is, is fairly dubious, especially if you think you're thinking of extending it, of lobbying, lobbyists' obligations being extended, you know, beyond simply well-resourced commercial lobbyists. So that doesn't really help answer the question, but I think it helps, I mean it might just help identify the factors that have to be weighed in determining what, what the right answer might be.

Right. I'll just ask you one other topic if I can to comment upon, Doctor, sorry, Professor Brown, and that's the extension of post-separation employment requirements. I think your report recommended an extension from the 18-month period to a period of either three to five years. Is that right?---That's right, yes.

And what was the justification behind extending that and to cover who in particular?---Well, it was to, certainly to cover ministers and basically people with senior executive employment, but the, but the, I guess the, the principle is, and my personal view would be five years or more. I mean I think the question that needs to be asked is, is why is it that it's appropriate for somebody who has gained that information, that influence in the course of their public, fulfilling their public duty, especially if they've been remunerated in a manner that is consistent with them having the integrity and the independence of that public duty protected to the maximum extent, then, then why is it that, that we believe that, that their post-separation career is, is appropriate at all. And I guess I'm, I think you can work back from that and see why post-separation employment, you know, could, could, you know, obviously people are entitled to work, but if it's, if it's a form of work that is intended to trade on and potentially compromise or compromise the reputation of the decision-making process itself, then it has some serious implications. And I keep coming back to the fact that ministers, for example, and other senior executives are paid what they're paid in order to protect the public interest, and they're paid, they earn the superannuation entitlements that they earn in order to be able to continue to protect the

public interest even though they're not even in that role anymore, in the same way that a judicial pension is entitled to ensure that former judicial officers don't have to conduct themselves while in judicial office in a way that is looking to be worrying about their quality of life in their retirement. So, so I think there's some common principles there that could be applied, and I think the longer the period is, the more that it will convey the message, the underlying message, that the purpose of being in public employment, in public service, is not to, certainly not the primary purpose, but it shouldn't even necessarily be a collateral purpose, is to, to generate the skills and the connections and the information that will then assist others in a private capacity once you've left. And so the longer the period is, the more that it will get across that, that message. So where, where you draw the line in order to, for that message to be received and internalised once again in the culture of public service on the part of the officials you're trying to affect is, you know, is, is, you know, is an interesting question, but it certainly appears to be plenty of evidence that the 18 months rule is not enough to actually have got the message across that this is actually something that is undesirable. It's just become a technicality that if you're a member, it exists, you might have to comply with, whereas a period and a regime for actually getting the message across would be, would be one that would have the type of effect that you were trying for. The only other thing I noted that, you said that was the last point you wanted to ask me about. The other specific draft recommendation we made is that information and support should be made available to, to non-commercial lobbyists, in effect, to interests that have, that are, that have a legitimate role in particular decisions, that, that aren't necessarily going to be, that aren't, interests that aren't going to be represented or protected by the same lobbying resources that particular commercial interests might have. And it, and it comes back to the same principle that if, if one of the process values for our decision-making is that all relevant stakeholders should have equity of access to that decision-making, then if we're going to basically acknowledge the role of commercial lobbyists or particularly well-resourced lobbyists, then, then we should be doing something to compensate for that by actually providing almost like a duty lobbyist in the same way that a court provides a duty solicitor to help the unrepresented litigant. We need to be thinking about – and I'm not saying that that's, you know, that in and of itself is a solution, but it's a, a concept that at least recognises that the process value that we're talking about here is, is, is the, the involvement of all appropriate stakeholders and equity of access to the decision-making and that that's part of what we're trying to regulate and ensure. So that's why that recommendation is sort of part of the suite of things for consideration.

Commissioner, they were the topics I wanted to ask the witness.

THE COMMISSIONER: Mr Brown, thank you very much for your evidence.---Thank you very much, Commissioner.

And travelling down from Brisbane, Queensland. Much appreciated.

THE WITNESS EXCUSED

[2.49pm]

THE COMMISSIONER: Yes, all right. Dr Longstaff.

MR CHEN: Yes. I call Dr Simon Longstaff, Commissioner.

10 THE COMMISSIONER: All right. We'll administer an oath or an affirmation, whatever he prefers. Thank you.

THE COMMISSIONER: Thank you, Dr Longstaff. Yes.

MR CHEN: Would you tell the Commissioner your full name, please?
---Simon Alan Longstaff.

10 Dr Longstaff, you are the Executive Director, are you not, of The Ethics
Centre?---That is correct.

And did you become the inaugural Executive Director of The Ethics Centre
in 1991?---Correct.

And in extremely brief terms, Dr Longstaff, what's your responsibilities as
the Executive Director of The Ethics Centre?---To lead the organisation and
contribute to its mission of bringing ethics to the centre of everyday life.

20 The Ethics Centre itself is a centre for applied ethics based in Sydney,
established some 30 years ago?---Correct.

And it's a not-for-profit organisation that develops and delivers programs
designed to bring ethics to the centre of personal, public and professional
life?---Correct.

Doctor, I just want to ask some questions directed to your background if I
might. Doctor, you were awarded your PhD in Philosophy, were you not,
from Cambridge University?---Yes.

30 In what year?---It was conferred in I think 1990.

And, Doctor, you remain an honorary professor at the Australian National
University, were you not, in 2016?---Correct.

You're also a fellow of the CPA Australia?---Correct.

40 You were awarded and Order of Australia Medal in 2013 for distinguished
service to the community through the promotion of ethical standards in
governance and business to improved corporate responsibility and to
philosophy?---Actually, I was appointed an Officer in the Order of
Australia.

I apologise. Dr Longstaff, you currently serve on a number of boards and
committees and an independent – sorry, and you're also an independent
integrity adviser to the Australian Taxation Office?---That's correct.

Dr Longstaff, you were the author of the centre's submission to the Commission in relation to the current inquiry which is dated 22 May, 2019, were you not?---That's correct.

Commissioner, I tender a folder of the public submissions if I can, there's an index inside.

10 THE COMMISSIONER: Thank you. Yes. Dr Longstaff's submissions, page 51, it'll be marked Exhibit 2, folder of submissions hitherto, page 51, Dr Longstaff's submission.

#EXH-02 – PUBLIC SUBMISSIONS

THE COMMISSIONER: Yes, very well.

20 MR CHEN: Now, Dr Longstaff, do you have a copy of your submission?
---As it happens, I do.

Dr Longstaff, I want to take you to the submission if I can, and just to develop some introductory concepts and ideas if I might. One of the general ideas or concepts that you do refer to is the ethical foundations underpinning institutions.---Correct.

30 Dr Longstaff, are you able to give some meaning to that phrase?---Well, in general terms all societies require an ethical infrastructure, not just physical and technical infrastructure, but an ethical infrastructure which enables it to cope with challenges, sometimes near-term, sometimes further away and they involve institutions which understand their essential purpose, which are fit for their purpose, and discharge their obligations according to an appropriate framework of values and principles. Now, unfortunately, in Australia today, much of that ethical infrastructure is broken and we see the effect of that in institutions which have progressively betrayed the purposes for which they were established and given rise to a loss of trust and an increase in public cynicism which is reflected not just in individual incidents but a general malaise in relation to politics in our society and the role that those institutions perform.

40 When you talk of the ethical infrastructure, does it mean an ethical restraint limiting the exercise of power or does it embrace that idea or something else?---The ethical infrastructure has that effect. So the use of public power and private power and its pursuit can be done without any regard or restraint at all, and any form of technical mastery which is divorced from ethical restraint in my view ultimately gives rise to a kind of totalitarianism that it loses control, and we have institutions like the professions, the courts and the role that they play in the rule of law, conventions as well as formal systems under our constitutions and laws which are all designed to exercise

that restraint, without some of those parts necessarily being formally constituted. So as one example, your own profession, the legal profession, is in existence under a social compact in which it exercises judgement in the public interest as a prior obligation, namely as an officer of the court, irrespective of what a private client might urge you to do, and society enters into that social company and accords certain privileges to the members of the profession because they will act in the public interest in a way that won't be achieved if it's just left to the market alone in which the pursuit of self-interest is effectively licensed.

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Doctor, is the key idea is that conduct that accords with that restraint is essential to the democratic processes and institutions?---It's partly to do with the restraint but it's also partly understanding what is the nature of the institution itself. If we go to democracy, I mean there are various ways that people will define different political systems, but I find most useful that which distinguishes according to where authority is ultimately located. So in a theocracy ultimate authority is located in God, in a meritocracy it's the most able, in the plutocracy it's the wealthy, in an aristocracy it's supposedly the virtuous, but in a democracy power is ultimately derived from, authority is ultimately located in the persons that are governed, the people, and once you understand that, then all sorts of implications flow in terms of institutional design and the way in which those institutions operate, and in order basically to ensure that it fulfils its proper function. So there's that sense in which restraint has to be related back to purpose. And there's also then the operation of core values and principles within the system itself that ought to be applied not just as a matter of rule but as a matter of custom by those who operate within the system.

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Doctor, what's the source of the ethical restraint, as I termed it, on the public official, whether appointed or elected?---Well, in a democracy it goes back, as I said, to the ultimate source of authority, namely that of the citizen, and then a requirement that public officials therefore only ever exercise public power for public benefit. If you see any individual in public office exercising their public power in order to advance the interests of purely private interests, and particularly if that is against the public interest, then it's a corruption of the system as it ought to operate. So it's understanding the design of a democracy, whether it's in participatory form or representative democracy such as we have, and once you understand that, making sure it's given practical effect in the institutional arrangements you make.

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Doctor, I want to now take you a little bit more to some of the content if I can of your, or sorry, the submission on behalf of The Ethics Centre, if I might. The submission draws a distinction between contact with a public official in three situations.---Yeah.

So the first is, activities of the individual citizens – I'm actually looking at the last paragraph on page 1.---Thank you.

Sorry, the activities of individual citizens when engaging with politicians and government, secondly direct representations made on behalf of organisations and formal measures for exercising influence made on behalf of third parties, that is third-party lobbying?---Yes.

And the way in which you've approved or the centre has approached the submission is, you're using lobbying in that third sense. Is that right?

10 ---Yes. And I think there are cases to be made for why in the second case, where you may have particularly frequent contact by organisations that you might want to expect, extend some of the general provisions, but principally for the sake of the submission we were focussing on the formal group, the lobbyists, and just worth thinking a little bit about why we may have done that. If you, if you look at the history of democracy you can go back to its earliest form in places like Athens where it's a small group of people, a relatively narrow franchise of male citizens who are all playing a role in the democratic processes, they're discharging justice, they're legislating, they can see for themselves what's going on. Where now you have a much more complicated and extended network and the tendency of the system has been
20 to try and professionalise it in ways that make it less cumbersome. So you see the rise of political parties. You see the rise of the professional politician, who might begin in student politics or be a trade union official or a ministerial advisor, and they clump together and they become expert in operating that machine. And then you've, not surprisingly, got a group of people who've emerged out of that way of thinking, which are the professional lobbyists who are integrated into the machine. It, it serves the value of efficiency, if you like, to have them there, but not necessarily effectiveness if you're looking for democratic outcomes. So I think identifying it in the way that we have sought to do, where you try to
30 underlie, understand the underlying potential mischief in those arrangements and then guard against them is the appropriate way to think about this.

That's leading to the next point is that, well, picking up on lobbying used in that third sense, you identified what you thought were the particular ethical risks with that kind of lobbying, and why were there particular ethical risks in that kind of lobbying?---I think if you distinguish it, I mean, the ordinary citizen, who may wish to make representations to their member of parliament, or even to an elected or appointed official, who comes in with very little familiarity, most likely, with the person and the processes, if they
40 are heard at all will be based, really judged on the merits of the case they put and nothing else, whereas a professional lobbyist may have established a series of relationships over time, and they may even have been part of the other side of the machinery of government. They may have come from working in politics as an elected official or a public official and jumped over the fence, and they start to be able to trade, potentially, on a whole series of tacit understandings, existing relationships, potential favours owed, in a way which distorts the opportunity that they enjoy to their favour, or those of their, favour of their clients, which wouldn't be enjoyed by the citizen who

just happens to appear before their member of parliament. So that's the risk. It's, it's the risk that familiarity with a system, that a set of relationships begin to condition the terms under which any case being made by the lobbyist is being heard and evaluated.

10 So the two points, are they, access and influence?---Access in part – well, well, both of them, coming back, either to, if you like, some form of power or influence they're able to bring to bear, which either gives you access, or once you have access, give you any easy familiarity, which means that perhaps the degree of scrutiny that an ordinary citizen might have to satisfy isn't required.

When the relationships deepen and broaden, do the ethical risks expand as well?---Indeed, they are.

20 Why are they of, and only of a particular concern as – well, I withdraw that. Those ethical considerations, access and influence, would also apply, would they not, to businesses or organisations who similarly have access and influence?---Yes, I've been thinking about this since we put in the submission, and it's possible that it would. I think, I think you're correct to point to the source of the mischief and then say, well, wherever that applies, then the regulatory framework such as it might be ought to be brought to bear, because I can imagine a situation – in fact, I was listening to Professor Brown's testimony just before now and thinking about three cases where you might put into an envelope where they all belong together to some degree. One, where you have former members of parliament or ministers or officials who have recently been doing the business of government, where that might be an initial reason to pay attention. Secondly, the formal lobbying group that I mentioned. But also, perhaps, where you have
30 organisations that have such frequent contact with government or its officials that you would say they are starting to develop those relationships, however they might formally be defined. So, Commissioner, I'd probably go back to that submission and adjust it somewhat to take account of that.

40 What the submission of The Ethics Centre goes on to point out is the need for public officials to act within an ethical framework or infrastructure, and presumably that's in order to protect the public interest, and to serve the public interest.---It is, and that is because, I think that the obligations to our democracy fall on us as citizens and not merely on public officials, elected or otherwise. I think we all share a common ethical obligation to uphold the quality of our democracy. And it's very difficult to lose sight of that in circumstances where governments themselves tend to discount that foundation of democracy that I was talking about. For example, there, there are some states, including New South Wales, where although it's entirely well intentioned, the relationship between the state and the citizen has been redefined in terms which now tend to express it as between a service provider, the state, and a customer, the citizen. In other words, the relationship is seen as being one which is about a transaction, and I don't

think that's healthy for a democracy. I think the relationship between the citizen and the democratic state is far more profound than can be defined by way of transaction. But if my criticism of that arrangement is right, what it points to in part is the need to recognise that if that is the general thought of government, where transactions are the ways that define it, then it increases the danger in some of these lobbying arrangements where "Oh, it's just a deal. It's just a transaction. They can afford to pay. We're just providing a service." That kind of logic starts to erode some of the protections that we would want to see in place in order to ensure that public power is only used in the public interest.

You also go on to say in the submission, Doctor, that a set of institutional and cultural arrangements designed to reflect underlying ethical commitments were needed. And what are we talking about or what are the principles involved when we talk about these key ethical commitments, especially as they relate to lobbying?---Well, what we are trying to get to is that I know that you have an interest in the regulatory framework, things like transparency and accountability, things which allow people to know what is happening, why it is happening, to act as a check against, against the partial exercise of favour to the benefit of one group or another. But I also think that what we've seen often is that even well-intentioned people will do bad things. They will misapply principles and systems not because they intend to, but often they have no understanding of the purpose for which it's been established. They have no reinforcement of a culture of responsibility, not just accountability. And so what we're looking at there is trying to ensure that not only do you have a robust system of rules and an appropriate framework for surveillance, but that you also build the understanding and capacity of all of the people who are acting within the system to hold each other accountable even if no one is looking. In other words, you try to create certain dispositions within the democratic framework which ought to be applied, and in order to create a culture of expectation that people will hold each other to account, not merely because there's a third party watching but because they understand that's the role they ought to play in order to preserve the integrity of the system as a whole. I don't want to be naïve about this and say that's all that's required and just leave it and everything will be fine. You need also to have adequate checks and balances, but it's a combination of those two components which gives you a resilient system as a whole.

One of the issues that you've just touched on was whether or not reliance on the goodwill or integrity of individuals is an adequate safeguard and what else is needed in addition as part of this ethical framework or infrastructure. Could you talk about that, Doctor?---Well, as I indicated, you needed a number of elements which are both necessary and together sufficient, so I think it's necessary that individuals have certain understandings around the purposes they're serving, certain dispositions as to how they will undertake them, but you also have to be aware of the fact that we're all frail, that people can lose sight of proper objectives, and so therefore you need to have

built in various mechanisms which provide for proper accountability, and to my mind that means building in a set of processes around decision-making, a minimum standard of disclosure, and a way of checking whether those things have been applied. Not merely in order to catch people if they do something that is wrong, but also I think to enable the democratic process to be advanced. I mean, whether you are in government or in opposition, whether you are an elected official or a public official, whether you are a lobbyist or not, as I said earlier I think we have a general interest as citizens that this system work as a whole because we're looking at the effects of it failing at the moment around Australia and in other similar countries, where a loss of trust in the system and potential questions over its legitimacy is truly frightening in terms of its implications. I mean, you just have to look now where a growing number of younger people simply do not believe that democracy is the political system that's going to address their concerns, and I think they're mistaken but I can also understand why they've come to hold those beliefs, and we need in these circumstances in particular to take the additional steps to give the public confidence that the democracy of which they are a part is actually serving their interests and not constantly being subverted to serve the interests of others with very partial concerns.

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You mentioned in your submission as well, Doctor, the need to rebuild the ethical infrastructure for lobbying in New South Wales.---Yes.

And I think tied within that is the decline in public trust. Is this the, or the issues you've just raised, particularly what you had in mind?---I do. I think the Commission's inquiry is incredibly timely. It's difficult not to overstate how serious it is at the moment. Our society is facing challenges both from new forms of technology, new geopolitical realities, we've seen them just in the papers today, which are of a potential to bring about civilizational change. We can see massive displacement of people from employment because of expert systems and robotics. We can see whole areas of work being moved out of regions in the country where people are already feeling very vulnerable and this is precisely the time when we ought to have robust institutions, particularly democratic institutions that people actually trust to look after them. That is not what's happening at the moment. You can walk around Australia and you will find people in country towns and regional centres and part of cities like Sydney where they simply do not believe that those who are in charge, whether it's in parliaments or the public service or in major corporations or many other institutions, they simply do not believe that they see them or that they have any regard for their interests. What they think happens is that a small group of people, a club if you like, who know each other, are coming together regularly and making deals which suit their interests at the expense of the people as a whole. Now, that's an incredibly dangerous situation to have happen and that's why I think, when you're conducting this inquiry at the moment, we all have an interest in this actually creating a set of arrangements which improve that situation. And that may mean doing more than you would simply do if you were thinking about it in entirely theoretical terms. You

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might say theoretically you can have a system, all that you need to get these checks and balances and it should be fine. Instead I think we have to take account of the peculiar context in which we are at the moment and do what is additional, extraordinary measures to rebuild the confidence of the community.

What's the source of this decline in public trust in our institutions?

---Simple. Our institutions say one thing and they do something else. They lack integrity. We saw it with Hayne's Royal Commission, we saw it with the churches where they'd spend 200 years saying that love was more important than the law, that people were more important than property, that you should stand up and face the truth. When their moment of judgment came, what did they do? They put the law before love, people, property before people and protecting their backs and they're just one example. We've seen it in sport, we've seen it in business. People look at these places and they say, if you don't believe what you've said about it, why should we? And it creates cynicism inside organisations, and people say well, this is one of the sources of corruption, where people say, well if the leadership of this organisation doesn't believe it, I will act for what's good for me or for a narrow group around me. It just creates a kind of acid-like cynicism which eats away at the bonds of the community and you become increasingly fragile. I don't say that the people who have done this woke up in the morning and were deliberately wicked. It's a much deeper problem that often our institutions were established hundreds of years ago and people have forgotten. I mean, Commissioner, I know you know well an American case, *Driscoll v Burlington Bridge Company*, which outlines, in different language than we might use today, this notion about the obligation of the public official. They talk about it as a fiduciary obligation for the common wheel. Where do we hear that now, who believes that now?

THE COMMISSIONER: Just on this discourse. I'm interested in your inference to creating a, using your phrase, I think it was institutional cultural arrangements. That is to say that we have the well-known principles that apply to public officials and one would hope, expect that they themselves know what those principles are and also indeed principles that can apply to citizens dealing with those public officials, one would think, would hope, would be aware of the fact there's limits to how far they can go with public officials without transgressing the law. In order to shore up the transparency and accountability principles, it's plain there is a need for processes to be in place so that recordkeeping for example, disclosing information can take place as is appropriate. Now, lobbying of course covers a whole range of activities. It may be quite simple and straightforward and doesn't require a Rolls Royce approach by a minister for example and no one would probably dispute the decision made, on the other hand you can get complex commercial situations. For instance with *Dr Brown* I think the application to put a mine in the vineyard-growing Hunter Valley or something, I think there have been cases in the past which touched on that – take another one, an application to establish a casino with

poker machines and the like. Now, the proponents for those sort of projects are entitled to access to be heard. It's assumed that the officials who will deal with it are aware of their obligations, but your point is that you need more, you need to have institutional cultural arrangements. So what are you suggesting, given that we are inviting contributions from everyone in the community, be they public officials, lobbyists or whoever else, as to what can be done without creating excessive burdens and costs to lobbyists for example or their clients, what sort of outline are you talking about? I instanced for example with Dr Brown the need for there to be a process whereby if a proposal's put in and it's plain on its face it's going to have impact on some sections of the community but the community will never hear about it if the decision goes through. What sort of cultural arrangements are you talking about between the time of the interaction between the official and the lobbyist and the end point, decision-making, that is the decision's made.---Well, I think a couple of things. I think firstly your example, one of your examples is really good. I think even today in the paper there's a conflict between potential mining and racehorse people in a particular area in New South Wales. That's happening right now as, as we are speaking.

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Right.---Look, I think the premise of your question needs a bit more examination that everybody knows just what the principles – I think they could probably say them if you asked can you articulate them. Do they understand them? I don't know. I honestly don't know. I don't know if they understand where these things came from, what purpose they're supposed to serve, I think they've become disconnected in some way from the underlying intention behind their establishment where people were trying to work out what institutional arrangements would allow a democracy to operate. So part of what I'm talking about in general terms is about knowledge, understanding and also dispositions, that is the inclination to give effect to these things. Now, to your more specific questions, well, what's to be done about this, I think you're absolutely in the case you cited where somebody's interests may be affected without their knowledge. A democracy would draw it to their attention. And if you were a public official, rather than seeing these principles or rules being constraints that you have to sort of game yourself around by finding an exception or a loophole or a way to get out of it, you would commit yourself to doing this and you say, is it an extra burdensome to do? Yes, it is, but it's a price worth paying. This the price you pay for having a democracy as opposed to having some other political system which might better satisfy the value of efficiency because, you know, you have one person who decides everything. Democracies are inherently inefficient but they are more equitable and they're more equitable because you put in place the measures you voluntarily undertake to allow citizens whose interests are being affected, A, to know about it, B, to have an opportunity to make representations, and C, if possible to trust that they will be weighed equally in the balance with others, and not just those who have special access because of preferment, familiarity, money or any of the other things that happen. So I would be

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looking at a system which says if you are a public official, you should bear in mind those whose interests may not be being articulated by the lobbyist who is before you, and put in place corrective measures so that they are at least informed of what might be decided that impinges upon their welfare and interests. I would be making sure that if a public power was going to be exercised by way of discretion, that the process by which that was done led to the proper articulation of the reasons that were transparent and open. I would put in place a process of decision-making which required those who exercise decision to establish what facts it was that they relied upon, what assumptions were made about the exercise of the discretion, how certain democratic values were brought to bear in relation to how those facts were chosen, what was the framework by which the decision was made. Was it the greatest good of the greatest number or was it because there was some duty that had been invoked where a promise had been made by a previous government which took precedence? In other words, bring some transparency to bear to the quality of the reasons and let the public – including your political opponents – assess that because our system is based on the assumption that we will have a contest of ideas in which the executive is held accountable to people through the parliament, and the only way the parliament can do that is either by being lucky enough to ask the right question during question time or by there being a process which puts, makes available to the public information in which such questions can be posed.

And for the ordinary person in the street to be satisfied and perhaps have more confidence than you say presently exists, for that which you've just addressed to happen, you're relying on something other than the individual, aren't you? Other than the particular official who's being lobbied, it's almost as if you need systemic change of some kind, if you like, under a charter which they know and will follow before the ordinary person in the street will be satisfied that this might be a system that will stand scrutiny.---I would go back, as I said to Senior Counsel Assisting, this is both necessary that the individual has a certain knowledge, understanding and dispositions and that the system is created and maintained in alignment with some core principles. So what I would do is I would go back – and it might seem like a somewhat archaic thing to do, and I'd ask what are the fundamental principles of a well-functioning democracy? What does that depend on? They're not that hard to articulate. And then how are those applied in, in this particular case to the arrangements that might be made for lobbyists? But I would apply the same principles in relation to a number of other considerations to do with how we constitute and give effect to our democratic government.

Well, we might be asking The Ethics Centre to design a prototype for us at some stage.---Indeed.

MR CHEN: This is bringing together, is it, developing a culture of public policy and administration built on solid ethical foundations?---Yep.

Could I take you back just a couple of points?---Please do.

I just wanted you to quickly address, if I can, Doctor, I asked you some questions about loss of confidence and loss of public trust, and one of the matters that you identified is that special interest groups were somehow – I’m sorry, I withdraw that. Public officials seem to be acting only and looking after the interests of some and not all.---There’s a belief that that is the case. There’s a widespread belief in the public.

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And is there also a widespread belief that pockets of the population are judged to have greater influence than others?---Yes. That’s because it’s true.

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And is that, so far as you know, or that perception, relate to lobbying in particular?---Not in particular. I think that, look, it’s very hard to speak for the public as a whole, but I think there’s a general (not transcribable) belief amongst the community that there are opportunities for those who have – they’re on the inside, if you like, of the tent. They are wealthy, well-connected individuals. They’ve often been the people who’ve bought expensive tables at political fundraising dinners. They belong to the same clubs as the, you know, of the people who happen to hold power, and they can have a quiet word in an ear whenever it’s needed or have an access, formally or informally, which allows them to be heard in a way that the ordinary citizen might not be heard. People even believe beyond that that they don’t even happen to be seen by the political class. And during the last federal election there was an extraordinary exchange on Radio National on the ABC in which people were talking about the need within their communities, these are rural and regional communities, to ensure that their electorates became marginal electorates just so they got noticed. Now, that’s the general sense and if you’ve got people who are thinking that the decisions are primarily going to be in favour of those who have got this special access then that will condition the way they think about the democracy of which they, in which they participate, what trust they’ll give to it, what legitimacy it has. Now, of course within that, that general framework there is the profession of the lobbyist and the lobbyist I think is seen as somebody who has special access. That’s, in a sense, what they are selling to those people who can afford their services and those with the greater access charge the higher fee and people are – I mean, not everybody knows the precise mechanisms, they have the general sense that that is how society works today.

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Earlier in your evidence, Dr Longstaff, you talked about that something more may need to be done, but does that involve extreme transparency or not?---Well, it certainly needs more transparency than we have at the moment. I am somewhat sceptical about extreme transparency simply for the reason that I think there’s a risk in going for that, that you destroy the foundations for trust and you make trust redundant in some sense. And I

actually still believe that trust is an important component within our society and that we operate more efficiently and I think even more effectively when people are genuinely trustworthy and are able to make good decisions without necessarily being monitored or forced to do so as a matter of compliance. So it's a very delicate balance here because if you go for complete transparency or radical transparency, then as I noted before, the trust becomes redundant and it gets, starts to wither away because it's one of those things that unless it's practised it, it doesn't maintain its proper shape. So you have to have a certain amount of trust in the system but at the moment the trustworthiness has to be earned rather than merely claimed by those who are exercising public power. So perhaps one might think of an arch in which one increases over a period of time, a short period of time, transparency is sufficient for people to be able to say, "I am informed about what's going on, I can see these wheels turning, it is what it says it is," and then as the trust levels begin to return, perhaps the degree of surveillance doesn't need to be quite as onerous as it might be for the time we're in at present.

Dr Longstaff, this idea of developing a culture of public policy and administration built on solid ethical foundations must have a number of elements, one of which must be politicians presumably taking responsibility for their actions?---Yes.

It must also - - -?---Novel concept, isn't it, ministerial responsibility.

Pardon me? Yes. Impartiality of the public service?---Correct.

But it also must be filled up with these core principles or the system must be aligned with these core principles as well, is that so?---It is so.

And although you said that people could probably identify them, what do you see them as being, these core principles?---Well, I think equality of the citizen is a – that, that the, that the citizen is the source of authority as a principle, being understood by governments, about the impartial gaze of the public service because the political class has a very partial gaze. It tends to see the citizen or the group of citizens who can advance their political interests. The principle about there being a general democratic accountability which sees governments and oppositions and the public service committing themselves to being transparent in terms of the quality of the reasons they give for making decisions. I heard Professor Brown talking about efficiency, effectiveness and fairness as being elements there but, and there's some, it's some mixture of those different components, all of which tend towards ensuring that the public has a general confidence that when that power is being exercised in their name, it is solely for their public interest that it's being used.

And this, I guess, ties in with this idea of rebuilding our ethical infrastructure?---Yes.

And part of that must also involve improving and teaching ethical literacy of officials or to officials?---It does. And that's, it's a slightly more subtle thing than it might seem. It's not just being, understanding that ethics are important. We live in a community in this country, as it is in every other country, where the kind of language that each of us uses to decide whether something is good or bad, right or wrong, varies in it (not transcribable) from individual to individual. So if you talked to 100 people in Australia and asked them what it is that we ought to do, only 50 per cent, on, on
10 average, will respond by saying, well, we should do the thing which increases the greatest good for the greatest number. About 30 per cent or so will say, actually, that's not even relevant. What matters here is whether we act in conformance with any obligations we have. We might be bound by a promise or a command or some other thing. And then there's a smaller group – so there are various different typesets, and as a rule, when we're thinking about public policy, you'll see that there's a, a dominant perspective taken in relation to decision-making, out of ignorance of the other kinds of languages, ethical languages which might be brought to bear
20 in relation to what ought to be done. And so, one of the things we're talking about there in terms of ethical literacy is of course being familiar with these core values and principles that democracies depend upon. But it's also having a literacy when it comes to decision-making to understand that the community needs to find different types of reasons being advanced, which they can recognise as legitimate, when explanations are given for why public power is being exercised in one way or another.

And would those, the ethical literacy and the education and training around that extend to the lobbyists as well, they being part of the process?---It would be, because I'd see, I'd, I, I don't see lobbyists as being pernicious. I
30 see them as being a potentially useful part of a system but we've got to see them as part of that system as a whole and maintain the integrity of the system as a whole. So you would hope that they would want to commit themselves also to being, you know, as well informed as they can about the ethical foundations of the system and their role within it, and that they would aspire to the highest standards because, if anything, then it starts to advance the work that they do. Yes, there may be some burden to it, but the quality of their engagement as citizens with this common interest would be enhanced.

40 Just pardon me for a moment.

THE COMMISSIONER: I referred in my opening statement this morning back to another piece of American jurisprudence was, in line I think with what you've just said, and that is that back in 1875, believe it or not, it was said that a state 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 is bound to exhibit truth, frankness, and integrity.---Mmm.

Any departure from the line of rectitude in such cases the court observed is not only bad in morals, but involved a public wrong.---Yep.

That's the principle I think you were espousing.---It is indeed. And I think it's wise to recognise that the obligations in relation to our democracy do not fall, fall exclusively on public officials. They too are citizens performing a particular role. It used to be, the noblest calling of a citizen used to be that to enter politics, so, perhaps not seen in quite that light today, but it ought to be. But the obligation falls on all of us, to be responsible for the quality of our democracy.

Indeed. Just picking up in relation to the ethical literacy to which you refer, are you aware as to whether or not there are any programs for either elected officials in this state or other officials whereby they can be tutored, if you like, in the ethical literacy to which you refer?---There's no program that I'm, I'm aware of. There's been various attempts – well, the first Commissioner of this Commission I know encouraged and supported a series of private dinners that were held in both the Speaker's dining room and the president of the Legislative Council, where members of parliament could come to discuss the ethical dimension of issues as part of an informal way while parliament was sitting to try and prove that. But that, that was not something that was sustained. I don't think there's any genuine ethical development at the time that members of parliament are inducted. I think, there may be something around codes, and, and, and sort of formal obligations, but actually going back and thinking deeply about some of the core values and principles, I, I suspect not, although it may just be my ignorance of the system.

Okay. Thank you.

MR CHEN: And similarly, public officials down from, or in the decision-making process beneath that, are you aware of any training in that respect? ---Well, well, the Public Service Commission has a general obligation, and I'm not, I just don't know the extent to which they're actively engaged in undertaking this kind of work. Occasionally The Ethics Centre's been involved with various departments within New South Wales, usually at a senior level, to present ways of thinking about issues in these more general terms, but that tends to be a bit ad hoc. I suspect it's either the, it's probably, the major bodies would either be the Public Service Commission, work that ICAC does through its education function, or occasionally the odd things that people like we do, but there's probably others as well. But I mean clearly it's in everybody's interests if we had a solid and shared understanding about, you know, not just the compliance obligations but the ethical obligations and the democratic polity which is shared by politicians and public servants and that it was possible for all to be held accountable to those, so it's to do with the quality of reasoning just rather than the position one holds. That would make for a better set of outcomes and if you could

bring the lobbyists and others into that so that they also understood the basis on which the system was operating and didn't see it as a burden but as part of their obligation as citizens to contribute and support this, then that would be a good outcome.

Commissioner, they were the questions for Dr Longstaff, thank you.

10 THE COMMISSIONER: Well, Dr Longstaff, thank you very much for your attendance and for your contribution and your submission, written submission.

THE WITNESS: Pleasure. Thank you very much.

THE COMMISSIONER: Thank you.

THE WITNESS: Thank you.

20 **THE WITNESS EXCUSED** **[3.36pm]**

THE COMMISSIONER: Well, Dr Chen, tomorrow.

MR CHEN: There are three witnesses programmed tomorrow, Commissioner, Kate Griffith in the morning, Annabelle Warren, who is the former past president of the Public Relations Institute of Australia, who's the second witness, and Professor Mark Evans is the third witness.

30 THE COMMISSIONER: Very good. Thank you. And I'll adjourn till 10 o'clock tomorrow.

At 3.37PM THE MATTER WAS ADJOURNED ACCORDINGLY
[3.37pm]