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INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

OPERATION ECLIPSE: LOBBYING, ACCESS AND INFLUENCE IN NSW

An interim paper

October 2019

Introduction

The NSW Independent Commission Against Corruption ("the Commission") is conducting a public inquiry (Operation Eclipse) into lobbying, access and influence in NSW. Among other issues, the Commission will examine whether risks and undue influence or corruption exists in lobbying and, if so, in what circumstances, and whether any such risks can be satisfactorily managed and eliminated.

The Commission last examined lobbying practices in its 2010 report, *Investigation into corruption risks involved in lobbying*, also known as Operation Halifax. Not all the recommendations made by the Commission at that time were adopted.

In April 2019, the Commission released a discussion paper, *The regulation of lobbying, access and influence: a chance to have your say*, which identified four foundational principles that would underpin an ideal model for lobbying: transparency, integrity, fairness and freedom. The paper included a range of consultation questions to stimulate debate around how current regulation of lobbying, access and influence in NSW might best be enhanced in accordance with these principles. In response, the Commission received 43 formal submissions from individuals and organisations, including academics, registered lobbyists, government departments, local councils, and advocacy and community groups.

Like Operation Halifax, Operation Eclipse differs from investigations usually conducted by the Commission, in that it is not concerned with examining whether any particular individual may have engaged in corrupt conduct, but rather seeks to examine particular aspects of lobbying activities and the corruption risks involved in the lobbying of public authorities and officials.

Chief Commissioner, the Hon Peter Hall QC, presided during the first phase of a public inquiry (5–8 August 2019), at which witnesses examined foundational principles relating to the regulation of lobbying and the duties of public officials, as well as approaches to the regulation of lobbying, access and influence in other jurisdictions.

This interim paper is intended to update interested parties on the Commission's public inquiry and provide information on specific issues that will be explored during phase 2 of the public inquiry, commencing 21 October 2019, and to seek further feedback from interested parties.

This paper also includes comments by the Chief Commissioner concerning the nature of corrupt conduct as it might apply to lobbying in NSW (see appendix).

Operation Eclipse – phase 1

In his opening address, Senior Counsel Assisting the Commission, Dr Nicholas Chen, outlined the key elements of a lobbying regime as had been proposed by the Commission in its previous investigation into lobbying in NSW (Operation Halifax). He noted that the current scheme adopted in NSW to regulate lobbying "remains well below international best practice". Dr Chen reiterated the key foundational principles considered relevant to this inquiry.

Phase 1 of the Operation Eclipse public inquiry involved evidence from six experts, the transcripts of which can be found on the Commission's website. These witnesses provided evidence to the

Commission about principles that apply to the exercise of public power generally, and to lobbying in particular.

The Commission heard from Professor AJ Brown of Griffith University, who elaborated on key concepts of corruption, integrity, undue influence, public trust and core public sector values. Professor Brown stressed the need to define "due influence", so as to clarify the nature of conduct to which that expression may apply and, thereby, make it easier to identify what constitutes conduct amounting to undue influence. Until a more efficient mechanism is derived at regulating the relevant behaviour to promote public trust and integrity in government decision-making, Professor Brown proposed that transparency and accountability measures, such as a comprehensive lobbyist register and real time disclosure of meaningful ministerial diaries, would assist.

The Director of the Ethics Centre, Dr Simon Longstaff, raised concerns that Australia's "ethical infrastructure is broken", leading to loss of trust in institutions. He was of the view that leaders of public institutions need to understand their essential purpose and discharge their obligations according to an appropriate framework of values and principles. Dr Longstaff cautioned against "extreme transparency" as it could "make trust redundant", noting that society works best 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". Dr Longstaff noted that checks and balances have a role in ensuring accountability and transparency, as "at the moment the trustworthiness has to be earned rather than merely claimed by those who are exercising public power".

Kate Griffiths from the Grattan Institute referred in her evidence to the institute's 2018 report on lobbying, *Who's in the room? Access and influence in Australian politics*. She referred to surveys that indicated that there is "real suspicion about whether politics is working for the people, for the many rather than just the few". The institute's research also showed that access is quite skewed towards certain industries, and lobbying firms that employ former government officials are more successful in getting access. When queried about a "culture of secrecy", Ms Griffiths observed that secrecy is the norm, and proposed that transparency could become a new norm, which would act as a reminder for public officials that they are acting in an official and public capacity.

Professor Mark Evans, Director of Democracy 2025 at the Museum of Australian Democracy, elaborated on the key concept of public trust, the consequences of a decline in public trust and on ways to promote and restore trust. He emphasised the need for a co-design approach to policy-making and collaborative problem-solving. Professor Evans provided evidence to show "democratic renewal is an ongoing process".

The Commission heard from Annabelle Warren, a representative of the Public Relations Institute of Australia, which is Australia's peak body for professional communicators. She provided feedback on NSW's current Register of Third-Party Lobbyists, and topics raised in the Commission's discussion paper. She proposed that any reform should target the business community, elected public officials, and government staff, as it would be an administrative burden for third-party lobbyists to log all their contacts with public officials.

The Commission's April 2019 discussion paper included a paper co-authored by Dr Yee-Fui Ng, Senior Lecturer in Law at Monash University, who provided further evidence during the first phase of the public inquiry. Dr Ng outlined a range of shortcomings and corruption risks in NSW's system of lobbying regulation, and compared it with other jurisdictions both within Australia and overseas (namely Canada, the United States, the United Kingdom, Ireland and Scotland). She supported reform proposals to "help rebuild trust in our political and democratic institutions".

Operation Eclipse – phase 2

Corruption risks

In this phase of the public inquiry, the Commission will examine the question as to whether there are inherent corruption risks in relation to direct and indirect lobbying. Where such risks in fact exist, it does not, of course, follow that corruption will occur. This may be so for a number of reasons.

Corruption risks may be controlled by the processes employed in a particular case or by reason of the nature of an interest or project being lobbied and/or the integrity of the lobbyist and the public officials involved. In other cases, however, particular facts and circumstances may raise a real corruption risk especially where the risk is not addressed through corruption controls.

Corruption in lobbying

The exercise of public power or public functions by public officials may, depending on how the power or function is exercised or performed, favourably affect the contracting or other legal rights and responsibilities of individuals, corporations, non-government organisations (NGOs) and others. Those who seek a favourable outcome may seek access to, and exercise undue influence (directly or indirectly) over, public officials who are the decision-makers.

Generally speaking, official decisions are normally required to be made in accordance with prescribed or proper processes. These guide the mode or method by which decisions are to be made. They are also directed to recording the basis or bases on which such decisions are made.

In what circumstances may conduct associated with lobbying activities constitute corrupt conduct within the *Independent Commission Against Corruption Act 1988* ("the ICAC Act")?

The concept of corrupt conduct is broadly defined in the ICAC Act. Conduct that falls within the provisions of s 7, s 8 and s 9 of the ICAC Act may be the conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions. It may also include the conduct of any person that adversely affects or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official.

A matter of singular importance to lobbyists and public officials is for them to be aware of the circumstances that could render conduct associated with lobbying activity as corrupt conduct within the meaning of the ICAC Act.

As indicated above, corrupt conduct under the ICAC Act is not limited to dishonesty in the exercise of official functions. It extends beyond conduct that may constitute a criminal offence involving dishonesty to conduct involving a *partial* exercise of official power or functions or to conduct amounting to a breach of public trust (see appendix).

Transparency and accountability measures act as safeguards. They are essential at two levels:

1. They operate to underpin the public trust obligations of public officials in the exercise of power and in the performance of public functions.

2. They can validate the activities of both lobbyists and public officials from accusations of corrupt conduct.

Most lobbyists and public officials do not wish to circumvent the principles that require public power to be exercised honestly and impartially. Additionally, such measures also support trust and confidence in government and public administration. Governments that promote and support accountability in lobbying in doing so act in accordance with the common law principles that apply to integrity in official decision-making and, deservedly, win the approval of the community for acting in accordance with the public-trust concept.

Developing a regulatory framework

Phase 2 of the public inquiry will focus on whether there exists a case for regulatory improvement of lobbying practices or activities and, if so, as to what are the matters that may warrant legislative or other change. As was discussed in phase 1, lobbying is found in some industries more than others. It is prevalent in property development and where government approvals or licensing are required or necessary.Other areas include contracting by government to private industry and NGOs, and areas of government policy and legislation.

In contrast, lobbying also occurs in areas not directly or primarily involving commercial or business interests or outcomes; for example, lobbying by, or on behalf of, non-profit organisations, charitable institutions, environmental organisations, religious institutions, to name a few.

There is a strong argument to the effect that, given the disparate areas in which lobbying takes place, it is inappropriate to have a single regulatory regime across the board for all forms of lobbying. A one-size fits all regime would, among other matters, impose unnecessary requirements on organisations, associations or institutions falling within the second category referred to above.

Accordingly, the following are some questions to be examined in phase 2.

(i) Is the present regulatory regime under the *Lobbying of Government Officials Act 2011* ("the LOGO Act") in need of revision and change? If so, in what respects?

(ii) If change is needed and justified, should it be limited to those areas where there is a recognised or an unacceptable risk of corruption or undue influence? If so, which areas or which lobbying practices carry recognised or unacceptable risks of corruption or undue influence?

(iii) In relation to (ii):

    (a) In what circumstances can it be said that there exists a recognised or unacceptable risk of corruption or undue influence?

(b) What measures need to be taken to avoid or minimise the risk of corruption or undue influence in lobbying in those areas attendant with such risks of corrupt conduct or undue influence?

(c) In such areas, should regulatory provisions place the primary responsibility on public officials (elected or appointed) for adopting and implementing appropriate transparency and accountability measures?

(d) Whether standards of transparency and accountability of public officials in the conduct of lobbying activities in respect of specified classes should be codified in legislation.

Issues to be examined in phase 2

The obligations of public officials to exercise public power honestly and impartially

The principles that inform the proper exercise of public power by both elected and appointed officials are relevant in assessing and determining the conditions that should be set for particular classes of lobbying activity. As in any other area of official decision-making, relevant principles operate to ensure that public power or public functions are exercised in the public interest.

In the lobbying context, there exists, at least in certain classes of case, an important obligation on the lobbied (the public official who undertakes the decision-making function) to ensure that public interest considerations are properly balanced against private interests and that all such interests are properly considered.

In that respect, the public official is accountable for both the *process* utilised as well as for the ultimate *decision* or *determination* of the lobbied proposal. Transparency obligations of public officials in respect of the latter involve disclosure as to both *how* the relevant decision was made (the process) and the *basis* on which the decision or the outcome was determined in the public interest (substantive decision-making). Transparency in process and in actual decision-making is, generally speaking, not considered to be an onerous obligation nor an impractical one. Exclusions for proper confidentiality reasons or for other matters may be satisfactorily addressed in a regulatory regime.

Accountability, at least in particular classes of case, would include disclosure of any evaluations or assessments made of a lobbying proposal before a decision is reached. The accountability for decisions made on lobbying proposals would seem to be best served through appropriate recordkeeping. That would also assist in alleviating any concerns in the community over secretiveness in lobbying.

Accountability, among other matters, enhances trust and confidence in the processes utilised in government and public administration.

In regulating lobbying, it is necessary to separately distinguish between decision-making occurring at the political and ministerial level (in respect of policy, law-making and operational matters, such as contracting and planning) and lobbying of senior bureaucrats at the departmental level. In respect of

the latter, phase 2 will examine the extent to which departments or agencies of government have already implemented lobbying protocols or regimes. A comparative exercise of such departmental or agency protocols or regimes will form part of that consideration.

Definition and registration of lobbyists

At present, all lobbyists in NSW are regulated by the NSW Electoral Commission, which oversees compliance with the Lobbyist Code of Conduct ("the code"). However, only third-party lobbyists are required to register with the Electoral Commission. Registration imposes some additional statutory requirements. There are exemptions for certain third parties whose lobbying is incidental to other professional services they may be providing.

Broadly speaking, third parties required to register must disclose information about their own business, key employees and a list of their clients.

It is noted that lobbying in the local government sector is, for the most part, not captured by the LOGO Act.[1]

If the point of a register is simply to provide transparency about who are the professional, available-for-hire lobbyists and who they act for, then the design of the current register is appropriate. However, if the community expects a greater level of transparency about who lobbies government, when and why, then it may be desirable for other classes of lobbyists, such as in-house lobbyists, to be registered.

The Commission will seek feedback on the question as to which classes of lobbyist should be registered and the level of detail that ought to be included in the register. This will also involve consideration of lobbyists who should be exempt from registration and the question of how to clearly articulate and monitor those exemptions. It may also be necessary to consider any need to refine the definition of "lobbying" or "lobbyists".

Consideration needs to be given to the question as to whether administering a larger register of lobbyists is the best use of the Electoral Commission's resources. In this regard, a question arises as to whether it would be desirable to focus regulation and the Electoral Commission's resources on particular classes of lobbying or lobbyist that may be considered to carry higher risks of undue influence on corruption. The issue of *risk* can be categorised and/or influenced by factors such as the following:

- nature of the industry (for example, industries that, under existing legislation, are banned political donors) or associated factors that may entail greater risk of undue influence or corruption

[1] By operation of the definition of "government official" in s 3 of the LOGO Act, only parts 5 (dealing with the ban on success fees) and 6 (imposing cooling off periods on former ministers and parliamentary secretaries) apply to local government.

- type of lobbyist (for example, conduct of an amateur lobbyist might entail more risk than a professional lobbyist that has completed relevant training)

- relationship between the lobbyists and the lobbied (for example, a former "insider"-turned-lobbyist might carry greater risk, at least in particular circumstances)

- form of lobbying (for example, meetings that are secretive may carry more risk than lobbying made via an open submission or communication process)

- nature of the benefits or changes sought and the range of affected people (for example, lobbying to change a piece of legislation may be quite different from lobbying about an individual contract or development application)

- discretion available to the decision-maker (for example, matters that can be decided by one person may carry more risk than those that must be considered by a committee).

Disclosure of lobbying activity

There are already some ways that citizens can find information about lobbying activities. The two main ones are via an application under the *Government Information (Public Access) Act 2009* and by examining the published summaries of ministers' diaries. Some government processes, such as the Independent Planning Commission determinations and parliamentary inquiries, involve public hearings and, therefore, embody a high-level of transparency. Others involve an open process through which any member of the public (including any lobbyist) can make submissions (see, for instance, consultation opportunities listed at www.haveyoursay.nsw.gov.au).

The existing Register of Third-Party Lobbyists is not presently designed to provide information about the individual lobbying activities or topics being pursued about which lobbyists seek to influence government.

During phase 1 of the public inquiry, the Commission heard about regulatory models in countries, including Ireland, Scotland and Canada, where there is such public disclosure about specific lobbying activities. In Queensland, third-party lobbyists are also required to provide information about each contact they have with relevant public officials. These contact logs are available on the website of the Queensland Integrity Commissioner.

It is possible that some discussions between lobbyists and public officials on some matters may need to be conducted in private but accountability must still exist. That is to say, discussions held between lobbyists and public officials behind closed doors, without appropriate accountability measures in place (for example, contemporaneous and proper recordkeeping), are among other matters likely to erode confidence in public administration and may give rise to the perception and/or the actuality of corrupt conduct.

On 2 February 2019, the Hon Gladys Berejiklian MP, NSW Premier, emphasised this point when she said, "The NSW community has a right to know who their politicians are meeting with, and why".[2]

The matters for discussion and consideration in the public inquiry include the following:

- the practical measures that can be implemented in order to bring the Premier's statement into effect
- whether some aspects of transparency and accountability models operating in Queensland, Ireland, Scotland and Canada (where the onus for disclosure of lobbying activities is on lobbyists) ought be considered and possibly adopted in NSW
- whether adequate transparency could be achieved by improving the current system of published ministerial diaries, such as by requiring a greater level of information to be divulged
- whether other public officials, in addition to ministers of the Crown, should be compelled to maintain and, if necessary, disclose relevant diary information
- whether an oversight body, such as the NSW Electoral Commission, should be able to obtain and publish information about lobbying activities.

The NSW Lobbyists Code of Conduct

The code has been in place in NSW since late 2014. Other than some instances where third-party lobbyists may have failed to update relevant documentation, no lobbyist has been suspended or placed on the watchlist. This may suggest that the current regulatory system is not effectively identifying and managing problematic lobbying practices or promoting transparency, integrity and honesty as per the stated purpose of the code.

In addition, neither the LOGO Act nor the code set out meaningful conduct obligations for public officials.

The Commission is interested in feedback on options such as:

- amending the code to create obligations for public officials who deal with lobbying proposals
- enhancements to the code that proscribe conduct by lobbyists such as offering gifts or hospitality
- enhancements to the code that make it easier for improper practices to be identified and for the watchlist to be used as intended.

[2] "Tough new public sector integrity measures", media release, 2 February 2019.

The revolving door

Section 18 of the LOGO Act makes it an offence for a former minister or parliamentary secretary to lobby a public official "in relation to an official matter that was dealt with by the former Minister or Parliamentary Secretary in the course of carrying out portfolio responsibilities" within 18 months of having held office.

There have been no prosecutions of this offence, nor have there been any relevant findings of corrupt conduct in NSW. However, the practice of politicians and senior public officials moving into private sector lobbying roles linked to their former duties tends to attract questions as to the necessary safeguards to ensure integrity.

The Commission is interested in feedback on options such as:

- extending the length of the cooling off period and/or broadening it to other classes of public official
- strengthening the code to prohibit or limit lobbying activity that would place a public official in a conflict of interest (as is the case in Canada)
- strengthening or expanding the role of the parliamentary ethics adviser, for instance, by requiring ministerial/electorate staff to seek advice in relevant situations
- creating a separate register of lobbyists who are former public officials, or otherwise identifying former public officials who are lobbyists
- placing additional obligations on public officials to disclose and manage lobbying activities made by former "insiders".

The oversight model

The NSW Electoral Commission currently oversees the LOGO Act. The NSW Department of Premier and Cabinet oversees the publication of summaries of ministerial diaries.

The Commission is interested in whether the oversight arrangements are working effectively. It is also noted that, prior to the March 2019 election, the Government announced that all parliamentarians would be required to publish diary and overseas travel information.[3]

Consideration of regulatory matters in the public inquiry may include:

- whether the powers, functions and resources of the Electoral Commission should be enhanced. In particular, whether the Electoral Commission should have a mandate that goes beyond registration and administration issues concerning the regulation of lobbyists and include a role in exposing improper or unethical conduct by lobbyists or public officials

[3] Ibid.

- whether oversight of the LOGO Act and the publication of diary summaries should be transferred to a different body, such as a standalone lobbying commissioner or other body.

Lobbying and influencing

Operation Eclipse is about "influencing" as well as lobbying and access.

It is an oversimplification to suggest that influence is simply about arranging a meeting with a public official and then obtaining a favourable decision at that meeting. The process by which real influence is brought to bear may involve numerous subtleties and relationships that are not easily managed within a statutory system of registering lobbyists and disclosing meetings.

The Commission is therefore interested in any other enhancements that make public decision-making resistant to undue influence; for example:

- improvements to relevant education and training programs to ensure the duties of public officials are understood

- changes to the way the government consults with the public about key policy and legislative decisions

- co-designing government policy with relevant interested parties.

Next steps

Phase 2 of the Operation Eclipse public inquiry is set down for 21–23 October 2019.

Any person or organisation wishing to respond to the issues raised in this paper, or any other aspect of Operation Eclipse, is invited to make a submission and/or apply to give evidence at the public inquiry by contacting the Commission as follows.

Contact: Dr Iris Kirkpatrick, Senior Corruption Prevention Officer

Telephone: (02) 8281 5702

Email: lobbying@icac.nsw.gov.au

Appendix

The evidence in phase 1 points to concerns about the efficacy of the existing regulatory regime. A further concern arises from the intersection between the nature of public office, the management of lobbying proposals and the definition of corrupt conduct under the ICAC Act. The following observations by the Chief Commissioner describe the issues.

Lobbying practices – are they susceptible to investigation under the corrupt conduct provisions of the ICAC Act?

In the event that lobbying proposals are dealt with secretively – that is, without transparency and with little or no accountability – the issue arises as to whether, in particular cases, the conduct of public officials has the effect and/or was intended to improperly favour a lobbyist. If so, whether such conduct that results in an advantage, in particular a commercial advantage to a lobbyist or a client of a lobbyist practitioner, could constitute *corrupt conduct* within the meaning of s 8 and s 9 the ICAC Act. Conduct of public officials who improperly favour lobbyists or clients of lobbyists may arguably contravene the obligation on public officials not to exercise public power partially or in breach of public trust. If it does, it could constitute *corrupt conduct* within s 8 and s 9 of the ICAC Act.

As noted at paragraph 4.1.3 in *Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption* (July 2015):

> *The unifying element of the kinds of corrupt conduct referred to in s 8(1) of the Act is the deliberate misuse of power, authority and responsibility, which is given for the public benefit and is, instead, used for some extraneous purpose and wrongful purpose such as private advantage. This accords generally, although not completely, with Transparency International's view of corruption as the abuse of entrusted power for private gain.*

In determining the application of s 8(1) of the ICAC Act, the following matters are noted:

- the provisions of s 8(1)(a) and s 8(1)(b) are concerned with the concepts of *honesty/dishonesty*, *partiality/impartiality* by public officials in the exercise of *official functions*

- section 8(1)(c) is concerned with conduct that constitutes or involves *a breach of public trust*

- there is no definition of *partiality* or of *public trust* in the ICAC Act (in order, however, to determine whether s 8 applies, a proper understanding of those concepts – *partiality* and *public trust* – as used in the ICAC Act is essential)

- once those concepts are understood, the next step involves a determination as to whether the provisions of s 8(1)(a), s 8(1)(b) and/or s 8(1)(c) apply to the particular conduct in question and, if so, whether the conduct in question falls within s 9 of the Act.

Partiality

Partiality involves the advantaging of a person for an unacceptable reason.[4] Partiality involves proof of a particular state of mind, namely an actual or imputed appreciation that what was being done, in the context in which it was done, was undertaken for a reason that is unacceptable.

By the proscription of partiality in the ICAC Act, the Parliament sought to prevent the misuse of public power. Public power may be misused in a way that involves a criminal act but, as stated by Mahoney JA in *Greiner*:

> *…the proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, eg, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that "partial" and similar terms in the Act are essentially directed.*[5]

The term "partial" in s 8 may be said to apply to a variety of contexts or circumstances; the elements of it will differ according to the context in which it is used but, as noted by Mahoney JA in *Greiner*, it involves at least five elements:

> *First, it is used in a context in which two or more persons or interests are in contest, in the sense of having competing claims … Second, it indicates that a preference or advantage has been given to one of those persons or interests which has not been given to another. Third,* ***for the term to be applicable, the advantage must be given in circumstances where there was a duty or at least an expectation that no-one would be advantaged in the particular way over the others but, in the relevant sense, all would be treated equally.*** *Fourth, what was done in preferring one over the other was done for that purpose,* ***that is, the purpose of giving a preference or advantage to that one****. And, finally****, the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed or expected that preference could be given, but for a purpose which was, in the sense to which I have referred, extraneous to that power****.*[6]
>
> (Emphasis added)

[4] *Greiner v ICAC* (1992) 28 NSWLR 125 per Mahoney JA at p. 162.

[5] Ibid. p. 160.

[6] Ibid p. 161.

Partiality is a species of public wrong. Public power has limits (for example, by the terms on which it is granted). Statutory provisions may impose limits as to the circumstances in which it may be exercised or the *mode* of its exercise and the *ends* for which it may be exercised.[7]

In addition, as was also observed in *Greiner*, even where the power is derived from a public office, for example, the office of minister, that power must be exercised to achieve only purpose(s) for which it has been conferred. Examples were stated in *Greiner*, as follows:

> *If a public power was only exercised to comply with the wishes of a political party, an employer or a trade union official, this exercise of public power, though apparently within the terms of the legislation or office, is wrong and may constitute a crime.*[8]

It was also explained in *Greiner* that the form of advantage through the performance by an official of a public function may vary depending upon the circumstances of the case. The advantage may be seen in the decision (for example to award a position, a benefit or the like). But it was also observed:

> *…the advantage may* ***lie merely in the process leading to the exercise of a power*** *or the* ***grant of a benefit****. A person may be preferred by* ***being put in a position of advantage in the process*** *leading to the decision to award an office or, indeed, by the mere fact of being brought into the contest as one of the contending parties…*[9]
>
> (Emphasis added)

These observations may, in particular circumstances, apply to a decision made by a public official in response to influences or persuasion exercised by a lobbyist leading to a decision. Where a secretive consultation process is applied in the determination of a lobbying proposal, it may be considered to be an improper one in circumstances where the process lacks any form of adequate accountability.

Public trust

In *Greiner*, Mahoney JA observed that it was not necessary to attempt a precise definition of the term "breach of public trust" but considered it included the misuse of an office.

Much of the discussion concerning breach of public trust is concerned with what conduct may constitute a criminal offence. While breach of public trust is part of the law relating to what may constitute the common law offence of misconduct in public office, it is not confined to such conduct. As noted in the Commission's 2004 *Report on investigation into the conduct of the Hon. J. Richard Face*:

> *Although it is helpful, in this context, to consider authorities concerning the common law criminal offence of misconduct in public office, it is necessary to keep in mind that the term "breach of public trust" in s 8(1)(c)* ***is not confined to conduct***

[7] Ibid p. 160.

[8] Ibid p. 161.

[9] Ibid.

> ***which may constitute such an offence. The term "breach of public trust" ought be given a broader meaning, especially in its statutory context within the ICAC Act. There is no reason to construe s 8(1) generally, or s 8(1)(c) in particular, as being confined to conduct which constitutes a criminal offence****. If s 8(1) was to be so confined, there would be no reason to have s 9(1)(a) in the Act. On the other hand, s 8(2) appears to list a series of criminal offences, including official misconduct (s 8(2)(a)). It is appropriate to equate "official misconduct" in s 8(2)(a) with the common law offence of misconduct in public office. The existence of that precise reference to the offence in s 8(2)(a) supports the construction that* ***"breach of public trust" in s 8(1)(c) is not to be confined to conduct which could constitute the common law offence of misconduct in public office.***
>
> (Emphasis added)

Examination of relevant case law leads to the conclusion that the over-arching principle required for breach of public trust is bad faith. As stated in the Commission's 1995 *Report on investigation into circumstances surrounding the payment of a Parliamentary pension to Mr P M Smiles*:

> *Fraud, bribery, deliberate partiality, knowingly permitting extraneous factors to affect the outcome, can all fall within the concept of bad faith, depending on the circumstances.*

Ministers of the Crown, other elected public officials and appointed public officials hold office and exercise public powers and functions in the public interest. That being so, they are bound to exercise such office, powers and functions only in the public interest and not for any extraneous purpose. The exercise of a power or function for an extraneous purpose will involve a breach of public trust.

Such a duty or obligation may spring from a number of sources, including constitutional and common law principles not infrequently supplemented by prescribed codes of conduct. While in law a distinction is made between elected and appointed public officials, all public officials hold public power and functions are subject to fiduciary-like obligations. Public power is held by public officials, not absolutely. It is held on trust on behalf of the people. That principle is well established by the highest authority.

In *Australian Capital Television Pty Ltd v The Commonwealth of Australia [no. 2]* (1992) 177 CLR 106 at p. 138, Mason CJ observed:

> *…the point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as 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.***
>
> (Emphasis added)

But for the public law principles that apply to public office-holding, public officials would be free to exercise the powers and functions vested in them, subject to express statutory prescriptions, without any constraint. In particular, absent constraint derived from legal principle, public officials would not be subject to transparency and accountability principles in the exercise of powers and function vested

in them. Legal principle however, does require, as the High Court has observed, elected public officials to be "accountable for what they do". A similar principle at common law applies to appointed public officials in the exercise of public power held on behalf of the people.

An example of wrongful advantaging arises in a case where there exists a requirement or expectation that a licence (for example, a mining exploration licence) should be made subject to an open tender process. For a public official to direct that there will only be a limited tender process in order to provide a particular party with a greatly increased chance of winning the tender, would be unacceptable; indeed it would be improper, on the above principles. Such a case, depending on the particular facts and circumstances, may involve a corrupt motive in utilising an improper process that favours the party who ultimately benefits from the process selected.

Conduct in other circumstances that is calculated to injure the public interest, while benefiting a particular party, may constitute or involve a breach of public trust and, therefore, amount to corrupt conduct within the meaning of s 8(1)(c) of the ICAC Act.