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## Summary

This is the second in a series of articles about potential tipfires from promises of the 2022 Federal election campaign. It concerns the promise of a Commonwealth integrity/anti-corruption commission based on the NSW Independent Commission Against Corruption. A Bill to that effect is before Parliament.

The object of such a commission is to improve confidence in the system of government. It is to do so by identifying corruption – publicly understood to be criminal abuse of power involving politicians and officials.

After thirty-three years, the NSW Commission has not obviously made a great difference to public confidence or to abuse of power. The ongoing parade of NSW officials through its doors speaks to that. It seems to focus on the shallow-end of the pool of potential corruption. Yet serious concerns such as about enormous sums of money, withholding information likely to swing elections and claims of a ‘shadow government’ are not obviously addressed.

The NSW legislation is subject to ongoing criticism and the likely source of intractable problems. It creates irreconcilable conflicts. Its idea of corruption is at odds with common understandings of very serious crime. The Commission has the trappings of a court such as an ability to hold public hearings, but lacks attendant responsibilities – attracting epiphets like Star Chamber. Among consequences are an accompanying media circus focusing on trivia, at times grave and unfair damage to reputations and delays in achieving justice.

Recently, it became interested in grant-based pork-barrelling – use of public grants to buy votes. It broadcast that might be illegal if vote-buying is the dominant motive - even criminal, if illegality is wilful. It didn’t say grants should be presumed legal unless such a motive is proven. It did not explore implications like: pork-barrelling can involve many activities other than grants; other behaviour involving politicians – including claims about some interactions with the media - fits its idea of criminality. Nor did the Commission explore implications of grant-based pork-barrelling – like all public spending - being controllable by parliaments.

The push for a Commonwealth anti-corruption commission gained impetus from allegations the former Government engaged in pork-barrelling. The above suggests the ensuing debate suffers an unduly shallow basis. Further evidence of superficiality is ignorance of restrictions on public spending that apply only to the Commonwealth. These restrictions create the potential for illegal - perhaps criminality in - spending even if there is not any pork-barrelling. That potential is most serious as evidenced by it being called ‘democratic decay’ a label indicating activities directly opposed to the object of establishing an anti-corruption commission.

Nonetheless, in late September 2022, the Government introduced a Bill for a commission largely based on the NSW approach and without addressing the spending issue – indeed, perhaps exacerbating it.

The Bill repeats the serious flaws of the NSW legislation and adds more. These include: retrospectivity; an extraordinarily uncertain width of corruption - something that possibly could or did, rather than positively has, happened; allowing a commission to call anything corruption. Perhaps the worst part of the Bill, the one most debated, is the proposal for a commission to conduct public hearings and make determinations of corruption.

This suggests a grossly deficient myopic policy development process in which the public purpose of tackling corruption is subjugated in a rush to set-up a commission – public functions have become subserviant to organisational form. That the debate is almost exclusively concerned with the commission’s powers – in particular public hearings and determinations - rather than what functions are needed to deal with corruption, virtually confirms policy development has been perverted and means the debate will be stalemated.

Instead, were the focus put on functions, common ground would appear. Corruption should be identified, prosecuted, publicly exposed and punished. That means it should be criminal. Identification and prosecution are functions naturally fitting with a commission. In democracies, public exposure and punishment, through public hearings and determinations, are matters for courts. That means the Bill – and NSW approach - should be amended to create a corruption court and a corruption commission which brings prosecutions to it.

## B1. Introduction

At the start of the 2022 Federal election season, then Deputy Opposition Leader Mr Marles (Labor) likened part of the (then) Coalition Government’s campaign to a ‘dumpster fire’. In early June, new Prime Minister Mr Albanese followed-up saying the former administration had left a dumpster fire.[[1]](#footnote-1)

Those Americanised references to bin-fires are too limited: during the election campaign the Opposition, other candidates and mass media soon lit their own bins. Risking an inferno in a rubbish dump of policies. The new Government shouldn’t worry about bin-fires – it faces a tip fire.

The jade beagle is carrying a series of articles about some of these burnt offerings. The first article was about Labor’s proposal for a royal commission into the former Commonwealth Government’s responses to the pandemic. Such a limited inquiry would destroy public confidence in the integrity of the new Government, as almost all suspect responses were made by States not the Commonwealth. It would be worse than failure to establish a royal commission. [[2]](#footnote-2)

This second article concerns calls and a Bill for a Commonwealth anti-corruption commission, similar to the NSW Independent Commission Against Corruption. Proponents say such a commission is necessary to restore confidence in the integrity of the system of government debased by ‘pork-barrelling’ – use of public resources to ‘buy votes’ from the electorate.

This article explores whether the latest populist corruption cause celebre - grant-based pork-barrelling - is a problem needing a commission such as is proposed by the new Government. Section 2 looks at the NSW Commission. Section 3 looks at some general issues regarding vote buying. Section 4 raises some issues specific to the Commonwealth. Section 5 looks at some elements of the Bill presently before Parliament. Section 6 draws conclusions.

Comments and corrections are welcome.

## B2. NSW model

### B2.1 Introduction

In 2020-21, several models for a Commonwealth integrity commission were put before Parliament. These included one from the Government, which followed a discussion paper. It was criticised for not allowing public hearings, and alternatives were offered. Parliament did not agree on a model.[[3]](#footnote-3)

In the 2022 election campaign, others proposed a federal integrity commission based on the NSW Independent Commission Against Corruption. This part briefly reviews the Commission. Some aspects of the Bill now before Parliament for a Commonwealth anti-corruption body - also based on the Commission - are covered in section 5 (below).[[4]](#footnote-4)

The NSW Commission commenced operations in 1989. Its legislated purpose is to promote integrity and accountability of public administration. It is to do so by exposing corruption affecting public authorities and by deterring corruption via education.[[5]](#footnote-5)

The Commission has been subject to several reviews, most recently in 2015 by former High Court Chief Justice Gleeson and Mr McLintock. That review was called after a High Court majority found the Commission operated beyond its powers in investigating crown prosecutor Cuneen. At issue was the term ‘*corrupt conduct*’ defined by legislation establishing the Commission.[[6]](#footnote-6)

That legislation has been regarded by the courts as obscure, badly drafted and, in the case of some amendments, not properly thought out. Gleeson’s review reported an echo of that criticism:

*‘the public would assume that a finding of corrupt conduct meant what it said, and was not  based on some artificial construct’.*[[7]](#footnote-7)

The reference to ‘*artificial construct*’ relates to the purpose and activities of the Commission – which arise from and confine the extent of the meaning of ‘corrupt conduct’. Those activities fundamentally changed in 1990, however, the definition was not suitably revised.

### B2.2 Purpose and activities

The original context for the Commission was a new Government’s – led by Mr Greiner - perception that NSW administration was notorious for corruption. By 1988, some Ministers, senior police officers etc. had been jailed for bribery and fraud. The issue was not so much guilty verdicts, but suspicions others had avoided detection. [[8]](#footnote-8)

Anti-corruption arrangements in Hong Kong - prior to its return to China - are said to have been one model for the Commission. However, they reportedly aim to combat infiltration of administration by organised crime - vastly different to the aims of the NSW Commission.[[9]](#footnote-9)

The NSW Commission is involved in detecting evidence of corruption. The Commission has great powers to acquire such evidence – like those of a royal commission. These include compulsory examination of witnesses, phone taps, and requirements that those under investigation not reveal they have been interviewed. Evidence gained might be referred to a court for prosecution.

The NSW Commission is not able to determine legal guilt. However, since amendments to legislation in 1990, it may make findings about corruption. It can publicly declare a person to be corrupt. Given the public thinks corruption is criminal, such declarations effectively label people as criminals.

Many in the public think the Commission is a court. While not being one, the Commission adopts trappings of a court - tending to confirm public perceptions. For example, part of its process for considering corruption findings can include public examination of witnesses and suspects.[[10]](#footnote-10)

With a widespread perception of corruption as criminal, the fact the Commission is not a court has major implications. First, unlike court decisions, declarations by the Commission do not need to reflect satisfaction of guilt beyond reasonable doubt – balance of probabilities suffices.[[11]](#footnote-11)

Second, a declaration of corruption has no direct legal effect. As such, Commission findings are more difficult to legally challenge than a court determination. Court challenges to corruption findings are limited to claims the Commission erred in law – often seen as a ‘technicality’.[[12]](#footnote-12)

Ironically, one ‘successful’ appeal against a corruption finding was by the Commission’s architect - Premier Greiner. That is, if overturning a finding years after it was made is success.[[13]](#footnote-13)

Findings of corruption, even if of no legal effect, have substantial impacts on reputations and livelihoods.

The mere fact of a public hearing can have serious adverse consequences for suspects – even if no corruption finding eventuates. As an Inspector of the Commission said in the report to Parliament:

*‘There should be no doubt the public perception of a finding that a person engaged in “corrupt conduct” amounts to a label – as potent as any criminal label short of “murderer”……(even in) circumstances where the DPP has been unwilling to take the matter to court.’[[14]](#footnote-14)*

In 2020-21, Commission spent around $29m on the activities outlined in Figure 1.

**Figure 1: NSW Commission activities 2020-21**



<https://www.icac.nsw.gov.au/about-the-nsw-icac/nsw-icac-publications/nsw-icac-corporate-publications/annual-reports>

While lags are involved, Figure 1 indicates a ‘pyramid’ of activities. In orders of magnitude for 2020-21 there were: several thousand matters put to it; around twenty preliminary investigations; three public hearings; advice on prosecutions of nine individuals.

Since the turn of the century, the number of matters put to the Commission each has been fairly consistent at around 3,000. The annual report disaggregates matters received. Of the matters put to the Commission in 2020-21: 1,500 were complaints about possible corrupt conduct; 726 were mandatory notifications from officials; 22 were referrals from other accountability bodies.[[15]](#footnote-15)

Of the complaints made in 2020-21: 30 percent were anonymous; 40 percent related to local government; 37 percent related to allocation of funds etc; 34 percent related to enforcement actions; 16 percent related to development applications etc.; 37 percent related to each of partiality and personal interests; 33 percent to improper use of resources.

Among other things, this indicates the Commission is a place receiving large numbers of corruption allegations and apparently deeply investigating only a few.

### B2.3 Corruption definition

The legislation for the Commission has long lists of examples of corrupt conduct. However, these do not accord with common views of corruption.[[16]](#footnote-16)

The legislation divides such conduct into behaviour that: leads to dishonesty of officials etc. - s.8(1); adversely affects official functions etc. - s.8(2). To make a finding of corrupt conduct, the Commission must also be satisfied the relevant (in)action was a criminal, disciplinary, dismissible or breach-of-Ministerial-code matter. [[17]](#footnote-17)

The Commission’s concern is behaviour within public offices and authorities. This is unlike authorities in New Zealand, the United Kingdom and the United States which can also be concerned with private organisations and associations. An implication: corrupt behaviour in NSW must be capable of causing a public official to act dishonestly or be part of a dishonest scheme.[[18]](#footnote-18)

### B2.4 Shortcomings - overreach?

Among the controversial aspects of the NSW Commission are its public hearings - what have been called show-trials – to make findings of corruption. Defenders of the Commission seek to exculpate these on the basis such findings do not equate with criminality. That excuse misses the point of the Commission – it is to engender public rather than lawyers’ confidence in administration.

During the 2022 election campaign, Prime Minister Mr Morrison dismissed such practices as part of a ‘kangaroo court’. The NSW Premier – from the same political party - staunchly defended the Commission.[[19]](#footnote-19)

While the public expects a corruption finding will lead to criminal sanctions, this is not always the case. Prosecutors have not always pursued matters referred to them by the Commission. Of thirty-eight references since 2010, twenty-three people were prosecuted (to June 2022). There are lags between Commission referrals and commencement of proceedings – averaging over four years. Prosecutors were still considering eleven references five years after they were made.[[20]](#footnote-20)

The Commission can also take a long time to refer matters or make findings. This was the case for a Police Minister Mr Gallacher who, after the Commission raised allegations against him, was forced to resign from the Ministry and then Parliament. Five years passed before Mr Gallacher’s name was cleared - after a parliamentary inquiry revealed the Commission’s inspector claimed his treatment was *‘wrong and unfair’.*

The Commission’s pronouncement on former NSW Premier, Ms Berejiklian, remains pending long

after her resignation as Premier and nearly a year since her public hearings.*[[21]](#footnote-21)*

As noted above, some Commission’s findings have been quashed as they exceeded its powers.[[22]](#footnote-22)

Despite the laborious definition, there is some uncertainty about what the Commission regards as corruption. The topical issue of pork-barrelling was a subject of obtuse comments. A claim some politicians were spreading disinformation was not accompanied by a supposed better view. While a Commission report concluded pork-barrelling could be corrupt if politicians have certain motives, it did not spell out the corollary – it could not be corrupt if those motives were unproven.*[[23]](#footnote-23)*

A criticism is the Commission is like the medieval Star Chamber – an ersatz-court started with the best intentions which became a ‘monster’ seeking unlimited power:

*‘Its proceedings are a humiliating ordeal, at times needlessly repeated in public after taking place in private; the investigators and those conducting the proceedings are not properly institutionally separated; the hearings are not strictly confined to the matters that triggered the investigations, creating the risk of fishing expeditions that abuse the power to compel evidence under oath; the names of those being investigated are routinely disclosed before there is any reason to believe the criminal standard of proof will be met; … its processes more than twice as slow as those for which the Star Chamber was pilloried in 1641*.’[[24]](#footnote-24)

### B2.5 Shortcomings – underreach?

#### B2.5.1 Introduction

The Commission’s public focus includes high-profile individuals and situations involving relatively small amounts of money. The media has created titillating stories from these. Yet situations suggestive of large-scale systemic corruption, or crimes involving sums many orders of magnitude greater, do not attract the same attention - at least in the media. Several are outlined below.[[25]](#footnote-25)

#### B2.5.2 Officials hide $4.3bn to $5.3bn cost blow-out until after an election

The Commission produced a long report on its investigation of some 2011 election campaign funding – Operation Spicer. At issue were amounts up to $0.2m which likely did not influence the result.

However, nothing has been said about dishonesty that likely affected the 2019 election. Around seven months prior to that election, a $4.3bn to $5.3bn Sydney Metro cost blow-out was identified in a report by a Government agency. The relevant Minister claimed to be informed only after the election. The public found out only by revelations in the press.[[26]](#footnote-26)

#### B2.5.3 Prevention of container terminal at Newcastle port

The Operation Spicer report noted some prohibited donors, who wanted to prevent a container terminal at Newcastle Port, approached members of the incumbent Labor Government and the then Liberal Opposition. The latter was expected to – and did - take office after the election.

The report observed the Labor Government in 2010-11 prevented the terminal. It labelled the former Minister for Ports corrupt for ‘leaking’ a cabinet document.

However, it did not comment on the new Coalition Government continuing to prevent the terminal by a secret anti-competitive arrangement. The arrangement was denied until exposed in the press. After exposure there were less than plausible explanations. Nor did the Operation Spicer report comment on supposed 2014 NSW Treasury comments inverting the corruption concern by suggesting the Port, rather than politicians, were to blame.[[27]](#footnote-27)

#### B2.5.4 Wood royal commission into police

Five years after the start of the NSW Commission, in 1994, a royal commission into police corruption was established. At the time, the Commission’s anti-corruption responsibilities had covered the NSW police service. It had made eleven reports into police matters.[[28]](#footnote-28)

The royal commission found long-standing chronic police corruption notwithstanding the existence of agencies like the Commission. Subsequent legislation established the Police Integrity Commission with essentially the same powers as the Corruption Commission over NSW police. While the Corruption Commission retained its powers, this was hardly a vote of confidence. *[[29]](#footnote-29)*

Legislation twenty years later, in 2016, to continue the Integrity Commission’s functions via the Law Enforcement Conduct Commission, suggests Parliament’s confidence has not radically increased.[[30]](#footnote-30)

#### B2.5.5 Charges against Cabinet Minister Harwin

A more recent example concerns the treatment of Cabinet Minister Mr Harwin during the early days of the Covid-19 pandemic. The police issued him a penalty notice for breaking stay-home orders by moving to and from his holiday house on the Central Coast. However, the orders exempted travel to holiday houses. The notice was invalid, as quickly noted in media reports.[[31]](#footnote-31)

He resigned from the Ministry and sought a court hearing. On the day of the hearing – twelve weeks later – the notice was revoked. A Sydney Morning Herald article basically alleged corruption.

The appearance: a false allegation led to a Cabinet Minister’s removal from office for some hidden reason. That is a very serious matter striking at the heart of the legitimacy of administration.[[32]](#footnote-32)

#### B2.5.6 Harwin and media influence

Later events - Mr Harwin was subsequently reinstated, the police commissioner ‘stood-by’ the decision to issue the notice etc. - raise more questions.

Contrary to Government claims and media reports, Mr Harwin was not cleared. The court did not consider the penalty notice. The official explanation of discontinuing the prosecution – lack of evidence – was misleading. In fact, there was a lack of law.[[33]](#footnote-33)

Presumably the notice was dropped in fear the court would reveal it false, sparking questions why it was issued. Aspects of which include how a commercial radio broadcast predicted the outcome of the relevant police investigation before it started. A former Director of Public Prosecutions said the media had been used by police. A barrister commented among the possibilities is that the police:

*‘responded to political and media pressure to prosecute Harwin, who by that stage had become a bete noire of the tabloid press’.* [[34]](#footnote-34)

#### B.2.5.7 Mass media influence in NSW

That comment calls to mind an apparent lack of media reports about Commission activities concerning potential corrupting influences on Parliamentarians by the media. That is despite long-standing claims of media influence including one commentator in 2021 saying ‘shock jocks’ wield:

*‘a form of political power incommensurate with their position in Australia’s democratic institutional arrangements. They have become a kind of shadow government in New South Wales.’[[35]](#footnote-35)*

Such claims have existed since at least the early 2000s. They include claims sackings of the police commissioner and senior public servants circa 2003 related to media influence on politicians. A Departmental head wrote to the then Corruption Commissioner suggesting - as had the former police commissioner - some media personalities (sought to) exert influence on public administration and offering to discuss the issue further:

*‘Threats to ministers and senior public servants that they will be axed unless certain commentators get their way are having a serious negative impact on the NSW public sector.’[[36]](#footnote-36)*

At the time, noted NSW commentator Mr Dempster claimed Ministerial responsibility had been abrogated. Officials were offered as scapegoats when media appeasement was thought necessary.[[37]](#footnote-37)

He added:

*‘One of the consistent complaints of experts is that the political-media culture overwhelms intelligent and logical policy formulation and implementation……*

*‘there is a need for debate about …the question of where artful implementers draw the line in serving their vote-hungry or media-conscious ministers' short-term political objectives at the expense of good policy or their own career advancement’.[[38]](#footnote-38)*

So strong were perceptions about media influence on the Government, Sydney was given a nickname – JonesTown - via a TV program and book.[[39]](#footnote-39)

The situation – of publicly expressed claims of toleration of a ‘shadow ‘government’ by NSW administrations - might be contrasted with actions of courts to counter ‘trial by media’.

That is not to conclude or say any of this involved corruption. It is merely to observe claims that were not obviously addressed by the NSW Commission.[[40]](#footnote-40)

### B2.6 Conclusion

The NSW Independent Commission Against Corruption’s public face comprises senior lawyers. It claims a ‘jurisdiction’. It conducts public hearings in a court-room like atmosphere and makes pronouncements of corruption – interpreted by the public as criminal guilt - that cannot be factually challenged.

Yet it does not have the responsibilities of a criminal court – it can operate in secret, it need not conform with the laws of evidence etc. It’s public activities have an attendant media which produces lurid headlines and titillating stories. Results have included unfair damage to reputations and occasional overstepping legal boundaries.[[41]](#footnote-41)

After thirty-three years the Commission has not obviously achieved its underlying purpose: to buttress public confidence in the system of government. While introduced against a backdrop of criminal behaviour by some in positions of authority, examples of alleged criminality continue. The number of corruption allegations remains relatively constant.

It has not visibly addressed matters the public would see as serious departures of administration from the law. While it has engaged in high profile pursuits of a few NSW senior politicians, to the public most of its concerns appear to be relatively minor matters.

There is less – if any – mass media reporting on the Commission dealing with the potential for much more significant questions about corruption. Examples involve: enormous sums of money; use of the police for political purposes; some media as a ‘shadow Government’.

It is appropriate, and perhaps necessary, for NSW to have a body to initiate and conduct investigations to detect criminal offences in administration.

However, the NSW legislation has effectively put the organisation at large – inviting it to determine its own scope, conduct quasi trials and make quasi-legal rulings until curtailed by the inevitable court challenges. That does little to instil public confidence in administration, and it is not immediately apparent it has done much to reduce serious corruption.

There is a strong argument the NSW legislative definition of corrupt conduct should be revoked and apply only to criminal behaviour.

There also is a strong argument the NSW Independent Commission Against Corruption should be:

* given a simple objective of improving public confidence in administration;
* limited to detecting behaviour affecting administration likely to: seriously affect public confidence in administration; be considered criminal;
* limited to providing evidence of such behaviour to courts;
* able to – be the organisation that does - initiate prosecutions for offences involving ‘corruption’;
* amalgamated with other law enforcement agencies such as the Crime Commission.

The Commonwealth should not base an anti-corruption commission on the current NSW model.

## B3. Vote buying?

### B3.1 Introduction

The recent kerfuffle about grant-based pork-barrelling arises from concerns about ‘vote buying’ However, it is not the main mechanism of trying to buy votes. This section considers issues arising.

### B3.2 United States origins

Like dumpster fire, ‘pork-barrelling’ has American origins - and is used to score political points.[[42]](#footnote-42)

In the United States, pork-barrelling involves legislators delivering federal monies to their local areas in exchange for votes or campaign contributions.

Wiki calls it legislative control of national funding programs whose benefits are concentrated in a particular area.  It cites criteria for pork spending: requested by only one chamber of Congress; not specifically authorized; not competitively awarded; not requested by the President; greatly exceeds the President's budget request; not the subject of Congressional hearings; serves only a special interest. Examples include large scale defence spending, agricultural subsidies and infrastructure.

### B3.3 Australian analogies

Analogies of United States and Australia are fraught. In Australia, pork-barrelling is commonly perceived to involve relatively modest amounts of public monies – grants - for electorate specific projects. United States criteria are ignored.

The systems of government differ. In Australia, the Executive – Government - is elected by legislating Parliaments, not directly by the people. Unlike in the United States, the Executive undertakes, rather than is sidelined by, pork-barrelling.[[43]](#footnote-43)

However, this can only occur with legislative permission – approval of a majority of Parliamentarians in each of the House of Representatives and the Senate. Those seen to be engaged in pork-barrelling are directly answerable to Parliament and indirectly answerable to the electorate.[[44]](#footnote-44)

### B3.4 NSW Corruption Commission definition

The NSW Independent Commission Against Corruption recently published a paper on its seminar about pork-barrelling. It was based on articles by former appellate justice Professor Campbell, Constitutional lawyer Professor Twomey and ethicist Dr Longstaff. Its definition:

*‘allocation of public funds and resources to targeted electors for partisan political purposes’.*[[45]](#footnote-45)

Twomey preferred a broader definition going beyond funds and into public powers. All articles assumed the purpose is to attract votes or donations. This is done by promising to advantage a group of people.[[46]](#footnote-46)

### B3.4 Legality

The professors and the Commission said the legal issue for pork-barrelling is whether attracting votes is the dominant motive. Pork-barrelling is said to be lawful if attracting votes is a, but not the, decisive motive for conferring advantage on a group. If attracting votes is the decisive motive, pork-barrelling is illegal.

As key to (il)legality is motive rather than outcomes, proof is potentially problematic. Direct evidence could include: maps (a favourite: colour coded by electorate); notes and records of conversations; the timing of providing or promising pork. Distributions other than on need could be indirect evidence.[[47]](#footnote-47)

### B3.5 Criminality

#### B3.5.1 Introduction

The professors said pork-barrelling can be criminal if illegal and undertaken with wilful disregard to the law. The reason: Ministers and Parliamentarians hold positions of public trust. A breach of that trust damages *the public*. Criminality is not displaced by the potential for Parliament to punish those involved. Examples of types of crimes follow. [[48]](#footnote-48)

#### B3.5.2 Misbehaviour in public office

The essence of misconduct or misbehaviour in public office is: a public official – elected or not - wilfully misconducts him/herself in a serious manner without reasonable excuse. The Commission referred to criteria formulated by former High Court Chief Justice Mason.[[49]](#footnote-49)

It does not matter if the perpetrator acted beyond actual or apparent authority. It also does not matter whether self or financial gain was the motive. As against these, public sector employees conducting menial tasks do not breach the criminal law.

The question of seriousness has a low threshold. Even representations by members of Parliament aimed at securing benefits for others are considered serious.

#### B3.5.3 Bribery

Bribery occurs at the time of offer or solicitation of a reward. In the case of an offer, acceptance is not necessary for the crime. In the case of solicitation, fulfilment is not necessary. The offering - or solicitation - of bribes to those in power is criminal.

Can pork-barrelling be bribery in the sense of it bribing some electors? Campbell gave examples of election candidates offering ‘charity’ to electors in the hope of being elected. Courts held these to be crimes – a type of breach of public trust - even when candidates were not elected.

One difference with what are normally considered bribes is: pork-barrelling is public. As such there is a potential for political accountability not present for traditional, clandestine bribes.

In NSW, the *Electoral Act (2017)* s.209(1) makes it an offence to seek to influence a person’s ‘election conduct’ by offering a reward. Election conduct includes the way a person votes but is not limited to an election or an election campaign. However, s.209(4) excuses ‘*a declaration of public policy or a promise of public action’*. Pork-barrelling *promises* might thus be excused.[[50]](#footnote-50)

Apart from this being extraordinarily suspect in public policy terms – an offence is excused because there was a promise to offend? - that raises some questions. One is: would actual, as distinct from promised, pork-barrelling be excused? Another: does the *Electoral Act* supplant other crimes like, misbehaviour in public office?

#### B3.5.4 Blackmail

The counterpoint to bribery - reward for doing something - is threat of punishment unless something is done: blackmail. Its origins relate to seeking property by threat of physical violence. In NSW it now involves an unwarranted demand, accompanied by menaces, with the intention of making a gain/causing a loss or influencing a public duty. Menaces are threats of something unpleasant and are not limited to violence.[[51]](#footnote-51)

Blackmail is closer to the common definition of corruption – a cause of administration rotting from the inside - than those in authority ‘bribing’ voters. One reason is its clandestine nature - there is usually little direct or public evidence of blackmail. Another reason is its effectiveness – while there will be uncertainty about whether gifts induced certain conduct, blackmail has a surer effect because the threat is maintained until the sought-after result is achieved. [[52]](#footnote-52)

The NSW Commission has considered some blackmail allegations. Several of its inquiries sought evidence about blackmail – including threats to oust public sector employees unless they conform with wishes of other parties. One headline implied it had convicted a person of blackmail.[[53]](#footnote-53)

However, it is not clear whether the Commission has considered allegations about media threats – such as outlined in B2.5.6 and B2.5.7 (above).

Blackmail was not discussed in the Commission’s pork-barrel forum. Yet it can be among the factors that give rise to pork-barrelling. A threat can be used to solicit a pork-barrel type reward.

The *Electoral Act 2017* s.209(2) makes it an offence to solicit a reward - benefit of any kind - by offering to influence a person’s election conduct. While that section might have been primarily intended to discourage electors from soliciting benefits it does not appear so limited. Whether s.209(4) can be used as an excuse for the type of alleged threats identified in sections B2.5.6 and B2.5.7 above should be clarified.[[54]](#footnote-54)

#### B3.5.5 Conspiracy, assisting unlawful activity

Campbell noted that even if misbehaviour in public office can only be committed by a person in public office, under the *NSW Crimes Act* those who urge or assist such misbehaviour can be guilty of a criminal conspiracy. He said a conspiracy is agreement:

*‘of two or more people to do an unlawful act, or to do a lawful act by unlawful means’.*

He added for the purposes of conspiracy the unlawful act must be criminal in nature.

Concealing a serious crime is an offence under the *Crimes Act.* For the purposes of the *Act,* misbehaviour in public office, bribery, blackmail and conspiracy are serious crimes.

### B3.6 Spending to buy votes?

#### B3.6.1 Programs

In Australia, Governments or Parliaments establish ‘programs’ or ‘funds’ with public monies. One example was for ‘nation building infrastructure’. The Government then grants monies to proposals that, in its view, conform with program’s purpose. Important in this is assessment of proposals submitted to the Government, including by Parliamentarians and political party members, rather than just those generated by the Government.

Many discussants in the debate assume pork-barrelling occurs when: a grant does not conform with program purpose or; the totality of grants appears to serve one political party even if each individual grant conforms with purposes; the program’s purpose is to advance the interests of a political party.

Grants are not the only way in which such pork-barrelling – use of public resources for partisan political purposes - might occur. Indeed, the money involved in the grants in question suggest they are not a primary mechanism.[[55]](#footnote-55)

Other, more sizeable mechanisms include: location of major infrastructure; regulation; government procurement. Examples include: the North West Rail Link; location of government offices; taxi, hire car and flight path regulation; preferences for locally produced goods.[[56]](#footnote-56)

In transport – referred to as the ‘Holy Grail’ of pork-barrelling - there also are placement (and timing) of multi-billion-dollar procurement contracts. Even more pervasive are roads and public transport services - traffic routes; train schedules, bus routes - determined after political representations. That raises a question: why the interest in grant-based pork-barrelling now? [[57]](#footnote-57)

#### B3.6.2 Why attention to grants - Commonwealth?

The Commission’s report suggested its interest in pork-barrelling was piqued by attention paid to the NSW Stronger Communities Fund – a grants program - by the Audit Office, media and Public Accountability Committee of the Legislative Council in 2020-22. There were allegations public monies were used for partisan political advantage. The Commission observed some politicians held misguided views about the legality of such actions. Nonetheless, and despite the Commission commencing an investigation, its interest was not sufficiently piqued to hold a public inquiry.

In my view, several other factors contribute to the present focus on grant-based pork-barrelling. One is a political push, including by campaigning media, for the NSW Commission model to be adopted by the Commonwealth for reasons including the hounding of the then Morrison Government which proposed another approach.

Certain media outlets paid substantial attention to incongruities in minor Commonwealth spending on infrastructure projects – like on car parks. Omitted from commentary was the technique was pioneered by the then Opposition - a whip-around of election candidates to nominate projects – calling the results a ‘plan’ to be financially supported from a ‘fund’ or ‘program’. Indeed some of the carparks most in question had bi-partisan support – Woy Woy being an example.[[58]](#footnote-58)

The Australian National Audit Office and Grattan Institute pointed to skewing of funds to electorates the Government wanted to win and percentage of grants to those electorates – from the Community Sport Infrastructure and Urban Congestion Funds - as indicating pork-barrelling.[[59]](#footnote-59)

The publicity generated by Grattan and the Audit Office reports enabled grant-based pork-barrelling to be seen as part of a ‘burning platform’ for a Commonwealth anti-corruption commission. Promotion of such a new field for investigation could distract from the problems of the NSW model and allow the Commonwealth debate to be distracted and proceed with ignorance.[[60]](#footnote-60)

#### B3.6.3 Why attention to grants now - NSW?

Another factor likely behind interest in grant-based pork-barrelling is the haughty comments of (former) NSW Premier Ms Berejiklian such as in Parliamentary Estimates.[[61]](#footnote-61)

She claimed nothing is wrong with allocating public monies in a way advantaging the Government. She claimed the practice is common - which appears to be the case. Election campaigns promise electorate specific funding – holding-out the largesse depends on ‘winning the election’.[[62]](#footnote-62)

Ms Berejiklian reportedly went further. For the 2019 NSW election, it is claimed she advised funding for a $25m sporting facility in the Orange electorate would depend not only on her Coalition being returned to Government, but on that electorate electing her Coalition’s candidate.[[63]](#footnote-63)

Some of her Government’s Ministerial offices went further still. Her office, and that of the Deputy Premier, influenced allocation of the Stronger Communities Program (Round 2, 2017-19) via advice to the Department supposed to determine the grants. The advice lacked formality e.g. *‘The Premier has approved’, ‘everyone is comfortable’*. Almost all of the value of grants – 96% - went to electorates held by the Government, compared with the roughly 52% of electorates it held.[[64]](#footnote-64)

Ms Berejiklian claimed to not be responsible for the allocation of grants. Her office unlawfully destroyed records of reasons for approval. The NSW Auditor said the scheme lacked integrity:

*‘We cannot rule out ……. a purposeful attempt to avoid transparency and accountability over the involvement of the former Premier and Deputy Premier in approving grant allocations. Deficient record-keeping and program guidelines have meant in practice that no person involved in the grant allocation process is specifically accountable for decisions about the grant allocation’*.[[65]](#footnote-65)

Matters arising have been investigated by the Public Accountability Committee of the Legislative Council. Ms Berejiklian resigned as Premier in October 2021 while under investigation by the NSW Commission. Among the issues being investigated were funds for a project in the electorate of her (former) Parliamentarian boyfriend.[[66]](#footnote-66)

#### B3.6.4 Simplistic?

The use of statistics – percentage of a program’s funds allocated to certain electorates - to identify pork-barrelling is simplistic. There may be reasons other than buying votes behind grant-based allocations to certain electorates. Among possibilities:

* those electorates would yield the highest benefits from the program – for example after a former Government had been pork-barrelling its own (i.e., other) electorates;
* the program may be intended to compensate, fill the gap, left by other programs that favoured other electorates – for example an outer-urban program;
* the program may be intended to compensate electorates which ‘miss out on’, or are adversely impacted by, major infrastructure or structural change – for example a program intended to facilitate transition away from coal dependent energy targeted at inner-city electorates.

Whatever the reasons, contrary to suggestions made in the Bill before the Commonwealth Parliament, the fulfilment of election promises is not among them – section 5.3.4 below.

Politicians may seek votes other than from the public. Horse-trading is known as the way of buying and selling votes among themselves.[[67]](#footnote-67)

‘Horse-trading’, is particularly likely if Labor or the Coalition needs Lower House support of ‘independent’ and ‘minor party’ members to form Government. An example is Federal Labor’s 2010 arrangements with Mr Oakeshott, Windsor and Wilkie. The arrangements secured their Parliamentary votes for Labor to form Government apparently in exchange for pork-barrel projects in their electorates.[[68]](#footnote-68)

Horse-trading is also relevant for passage of legislation where the Government lacks a majority in the Upper House. Federal examples include the Tasmanian Freight Equalisation Scheme, dams in Queensland and submarines in Adelaide.[[69]](#footnote-69)

Such buying of Parliamentary votes has not been raised in the debate about pork-barrelling.

Beyond buying votes via grants to particular local electorates divisions lies the possibility of the Commonwealth buying votes State-wide – for Senate seats or for intergovernmental pork barrelling to buy votes for it political counterparts in State or local governments. This is raised in section 4.

#### B3.6.5 To conclude….

The NSW Commissions statement that grant-based pork-barrelling can be illegal should be restated: grant-based pork-barrelling is presumed legal – unless evidence of illegality is produced.

Grants are not the only – probably not even a main - way public resources can be or are used for partisan political purposes. They are not the main form of pork-barrelling.

Partisan political purposes do not stop at seeking votes or donations from the public. Purposes can include seeking votes of colleagues and of Parliamentarians.

While revelations by Auditor Generals and the NSW Independent Commission Against Corruption about grant programs are interesting, it is far from clear they reveal important systemic issues needing expungement by ‘integrity’ bodies.

The debate on pork-barrelling, and the Commission’s report, is incomplete and unsatisfactory.

An anti-corruption commission chase of grants-based-elector-buying programs may be useful. However, it is more important to place such activities into a coherent framework addressing the purpose of integrity functions: support public confidence in democratic institutions. A first step is to consider an accountability framework for all pork-barrelling – vote-buying - whether via grants or other ways.

###

### B3.7 Accountability and spending

#### B3.7.1 The issues

If pork-barrelling is to be discouraged, the question is: how should it be controlled – how should there be accountability for it? Section B3.5 pointed to accountability via courts. As pork-barrelling is done by politicians for political purposes, it is directly controlled by the political system.[[70]](#footnote-70)

The issue about an anti-corruption commission is: how can it support those mechanisms?

#### B3.7.2 Ministerial discretion?

Many objectors to pork-barrelling see Ministerial discretion as a problem. Ministers can make funding decisions without – or conflicting with - advice from others such as officials or agencies ‘independent’ of the Government like Infrastructure Australia. That annoys technocrats.[[71]](#footnote-71)

As against this, a foundation principle of Australian democracy is: public monies must be under the (ultimate) control of elected representatives. Inevitably, elected representatives – including Ministers - will have discretion over spending, as they have over decisions like: appointments to official positions; disposition of public facilities and resources; regulations.

Arguments to have officials - rather than Ministers - determine grants are akin to arguments to replace other Ministerial discretions.

Given Departments are generally under the control of Ministers and the most senior officials hold offices at the pleasure of Ministers, such arguments involve more than a touch of unrealism.

The Covid-19 pandemic responses offer a powerful practical rebuttal. The most contentious responses were (ostensibly) made by officials. NSW – the only State where politicians lawfully exercised control - led other States out of the virtual prisons ‘officials’ created.[[72]](#footnote-72)

The contentious pandemic decisions occurred when those wielding power apparently believed they would not need to (truthfully) explain – account for - their actions. There was symbiosis between demands for subservience to ‘experts’ and clandestine influence of politicians.

The independent private panel report into pandemic responses found ‘*politics played a role*’ in lockdowns and border closures, meaning there was improper and hidden influence on decision making.[[73]](#footnote-73)

There are analogies with the Stronger Communities Fund (B3.6.3 above), including suspicions Ministers sought to avoid accountability by hiding their influence behind the statutory pretence that public servants made decisions.[[74]](#footnote-74)

#### B3.7.3 NSW Commission views

The Commission’s report on pork-barrelling included twenty-one recommendations aimed at improving Ministerial accountability for spending. These included: statutory guidelines; public sector policies (Community of Practice); documenting reasons for decisions including for not accepting advice from officials; a grants website; more audits; Ministerial Code specifying Ministers must act in the public interest etc.[[75]](#footnote-75)

Most recommendations appear sensible. So much so, the questions are: why they need to be made; more importantly, are similar recommendations needed for more significant abuses of public office?

The report also recommended the NSW Procurement Board consider the need for a direction etc. that specifically prohibits or deals with pork-barrelling. Given pork-barrelling is not always illegal, let alone criminal or corrupt, that recommendation goes too far and infringes democratic principles.

#### B3.7.4 Merit and legality

Lack of economic or social merit might be an indication public spending has a *dominant* intention to ‘buy votes’ – i.e., is illegal. Accountability for public spending should start with demonstration of merit. Since merit is subjective, that is a matter for Parliament to assess. Parliament should be free to endorse any legal Government spending, irrespective of others’ views about merit – provided such views are made public.[[76]](#footnote-76)

Establishment by either chamber of Parliament that spending has merit-sapping political intention raises a legal question: was vote-buying the dominant intention? That question is not resolvable by the political process. Nor is it avoided by saying spending was promised in an election campaign.[[77]](#footnote-77)

Among the implications for public spending – whether or not pork-barrelling:

1. Political accountability should be separate from, preferably precede, legal accountability;
2. Those concerned with legal accountability should not participate in the political process.[[78]](#footnote-78)

#### B3.7.5 Political accountability

The foundation principle of elected representatives having ultimate control of public monies is implemented via Parliamentary control of spending. The legal ability of Ministers to spend, and the extent of Ministerial discretion, is subject to legislative – i.e., Parliamentary - control. [[79]](#footnote-79)

To date, the primary remedy to perceived problems with Government spending has been through accountability of Ministers to Parliament. This involved Parliament seeking information about, sometimes commenting - and sometimes voting - on what has occurred including through Upper House estimates proceedings.

Parliament can refuse an Appropriation and can place conditions on spending via legislation. In a bi-cameral Parliament, the Upper House can impose disciplines on spending.

In NSW and the Commonwealth, pork-barrel spending is not merely a result of Ministers’ decisions. Rather, it is facilitated by Upper Houses – like the Senate – failing to fulfil their principal function of imposing discipline on Governments. Previous articles have noted examples of the Senate being cavalier and hypocritical in that role.[[80]](#footnote-80)

Part of the argument that anti-corruption commissions should review public spending assumes Parliamentary accountability is failing as Ministers do not resign when censured. From that it is concluded accountability mechanisms outside Parliament are needed.[[81]](#footnote-81)

Yet Ministers still face considerable Parliamentary and democratic accountability irrespective of their respect for conventions. They have strong political responsibilities to other members of the Government and the Lower House. The Upper House can challenge and censure independently of Lower House views. Parliamentarians periodically face judgement by the electorate – an electorate that can be informed by Upper House proceedings.[[82]](#footnote-82)

Politicians can and do say pork-barrel spending is excused when put to the electorate in the form of election promises – as noted in 5.3.4 below. However, the logic in that is flawed. It will always be uncertain whether a Parliamentarian or Government was elected because, or in spite, of a particular promise. In any event, the electorate cannot excuse illegality.

#### B3.7.6 Legal accountability

Ministerial decisions can be challenged in civil Courts. However, practical difficulties mean few spending decisions are challenged. Beneficiaries are unlikely to challenge and many other citizens would lack standing in Court.

Another issue is access to information – much of which is claimed to be confidential. Courts are also reluctant to substitute their views for those of a Minister. Some illegal grants have been forgiven.[[83]](#footnote-83)

Difficulties with pursuing legal challenges to spending have allowed the Commonwealth to cynically ignore principles and precedents from successful challenges – Twomey calls this democratic decay.[[84]](#footnote-84)

Criminality was discussed in section B3.5 (above). Prosecutions need evidence of intention to abuse a position of power knowingly or with reckless disregard to legality. Action is brought by public prosecutors rather than citizens. The standard of proof for conviction is beyond reasonable doubt.

A criminal trial needs to be (seen to be) fair. Extensive prior commentary and opinion is inconsistent with fairness and can necessitate a trial being delayed. That may partly explain very lengthy delays between the NSW Commission’s public investigations and prosecutions. However, it does not excuse those delays. Protracted delays are unfair to those subject to investigation. Justice delayed is justice denied. [[85]](#footnote-85)

In theory, the answer in NSW to such injustice is for its Commission to not hold public hearings, not issue reports and not make findings.

However, the NSW experience – including media circuses surrounding Commission proceedings – may, after its considerable period in operation, have the public equating the mere fact of the commission initiating an investigation with guilt. If so, justice would best be served with a transfer of necessary functions to another organisation.

#### B3.7.7 Confusing the accountability processes

An organisation tasked with collecting evidence for a criminal trial should not publicly disclose that evidence – let alone publish it – particularly when it relates to political matters.

Hence a body should not – perhaps cannot – both serve to inform Parliament and support, or conduct, prosecutions concerning the same facts. That means an anti-corruption commission should inform the political process or be part of the legal process. It should not do both.[[86]](#footnote-86)

The NSW Commission, in publicly conducting proceedings about and offering an opinion on ‘corruption’ prior to a Court decision, becomes engaged in politics. Even a decision to not involve politicians in public hearings can be seen as a political engagement e.g why are only some politicians ‘put in the witness box’?

That politicians are eager to tell the media they have referred opponents to the Commission is evidence. Even if it decides not to investigate such a matter, the Commission is seen as a political tool.[[87]](#footnote-87)

### B3.8 Other ways to buy votes

#### B3.8.1 Information

Information – accuracy and completeness – is central to the effectiveness of political accountability.

As was the case for pandemic responses, decisions on public spending are invariably accompanied by media releases showcasing the Government’s ‘care’ about the beneficiary. Unfortunately, many media releases lack credible reasons.

Further, as was the case for the Covid responses, Governments – and officials – jealously guard information relevant to their choices, effectively co-opting parts of the media into propaganda outlets. That amplifies loss of public faith in institutions.[[88]](#footnote-88)

Budget papers are an example of spending propaganda, with pages devoted to different regions and subject matters.

At the Commonwealth level, special interest groups facilitate the process by providing – and publishing – pre-Budget pleas for funding. Media coverage is swamped by recitation of the results - praising spending and sympathising with those who missed out.[[89]](#footnote-89)

So well known is the swamping effect, Governments can pre-announce ‘popular’ measures prior to tough Budgets – lest the good news for the electorate be swamped by moans about the Budget as a whole.[[90]](#footnote-90)

The general absence of credible explanations of spending allows the term ‘pork barrel’ to be thrown around. So perverse is media coverage, some such criticisms are welcomed by pork purveyors.[[91]](#footnote-91)

#### B3.8.2 Media

Any debate on public integrity should consider the supply of relevant information to the public. Attention needs to be paid to relationships between media and should-be-accountable-politicians. A symbiotic media-politician relationship can severely damage public confidence in administration.[[92]](#footnote-92)

Section 2.5.7 (above) gave examples of allegations about NSW administrations unduly concerned about reactions from media personalities. A further example from the early 2000s:

*‘Despite budgeting for sophisticated research on crime, the government had ignored it, turning instead to advice they not only disrespected, but knew to be wrong’.[[93]](#footnote-93)*

While political parties pay for advertising during election campaigns, parts of the media carry the same messages for free at other times. Being in-favour with media outlets can be more financially and politically valuable than pork-barrel spending or even large campaign donations.

#### B.3.8.3 Media ‘management’

The Commission’s view of the problem with pork-barrelling – use of public resources for partisan political purposes - could arise through politicians cultivating the media, and vice versa.

Indeed, some cultivation could fall within the Commission’s definition of illegal pork barrelling where the dominant – perhaps only - intention is to gain votes. Little imagination is needed to envisage how this might eventuate.

Effects, including on public confidence, are likely to be far more significant than financial grants. Among reasons: rather than being confined to some types of projects and electorates, media cultivation could permeate administrative activities; rather than being ad hoc, cultivation could be continuous.

Other reasons: rather than being administered by one or two Ministers, the whole Government and the bureaucracy could be involved; politicians generally may hold similar views to those in Government which would undermine the potential for Parliamentary accountability.[[94]](#footnote-94)

There have been claims along these lines in NSW and the Commonwealth for a considerable period. These are a corollary of complaints about political bias in the media – towards conservatives by the Murdoch press, Sky News etc, and towards Labor by Channel 9 and, most notably, the ABC.[[95]](#footnote-95)

#### B.3.8.4 Potential criminality in media management

If politicians were misdirecting public resources in efforts to placate media personalities it is not outlandish to ask whether they had doubts about legality. According to the Commission’s views about pork-barrelling, that would raise questions about criminality in public office.

The criteria for criminality includes the seriousness of misconduct taking into account the office involved, the importance of the relevant function and the nature and extent of departure from responsibilities.[[96]](#footnote-96)

The Commission and its advisers appear to have been exercised about involvement grants totalling several hundred million dollars. How much more serious would-be belief of a ‘shadow government’?[[97]](#footnote-97)

It would seem no excuse for politicians to claim to be responding to perceived threats of unfavourable media commentary. Indeed, direct threats along those lines could raise questions akin to those of blackmail and conspiracy. Claims of direct or indirect threats have been made – section 2.5.7 (above). Again, this is not to speculate on the veracity of such claims, but to observe they have been made yet were not obviously addressed by the NSW Commission.

#### B3.8.5. Mass media

The source of the issues is not merely potential of media figures to create an atmosphere (un)favourable for a political party and influence an election.[[98]](#footnote-98)

Also relevant is potential to damage prospects of politicians, including by claims of serious crimes perpetrated years earlier - provided to the supposed perpetrator with a threat of high-profile broadcasting. Another technique is to put an allegation on tabloid front pages without naming the supposed perpetrator – to attract an audience interested in speculation about identities, while cutely attempting to avoid defamation actions. This has been called a form of blackmail.[[99]](#footnote-99)

Rumour, half-truths, fabrications and material gained illegally by spying or invasion of privacy can be involved. Such practices led to the Leveson inquiry into press ethics etc. in the United Kingdom and:

‘*At its worst, everybody in the power elite has heard that the punishment can amount to crude blackmail. They have all heard the stories about how Murdoch editors have safes containing dossiers of evidence about the private lives of politicians and competing businessmen; and that Murdoch and his people agree to suppress these gross embarrassments in exchange for yet more favours….The power is in the belief and in the fear it engenders. Which is widespread.”* [[100]](#footnote-100)

Leveson’s report devoted over 300 pages to the question of the effect ofrelationships between politicians and the press *on media policy alone.* It concluded:

*‘politicians have conducted themselves in a way that I do consider has not served the public interest…. to a lessening of public confidence in the conduct of public affairs, by giving rise to legitimate perceptions and concerns that politicians and the press have traded power and influence in ways which are contrary to the public interest and out of public sight.’ [[101]](#footnote-101)*

The references in the above comments - to conflicts with responsibilities, contrary to the public interest and out of sight - suggest the field to be fertile ground for corruption investigation.

### B3.9 Conclusion

The concern of the integrity debate is to minimise (mis)behaviour by Ministers and officials that undermines public confidence in institutions. Against that objective, the case for an anti-corruption commission to concern itself with grant-based pork-barrelling is very far from clear. The case presented to date has focused on alleged Ministerial misdirection of relatively small grants of public monies. There are far more significant potential for vote-buying misuses of public resources including in major infrastructure projects and media management.

The case for an anti-corruption commission to deal with pork-barrel grants is largely based on a perceived failure of democratic accountability - of Parliament and electoral processes.

The logical, democratic, response is to strengthen those processes by providing more accurate, balanced information to Parliamentarians and the electorate. That suggests a need for close examination of: relationships between politicians and the media; media bias especially of publicly funded forms; claims of confidentiality.

## B4. Issues specific to the Commonwealth

### B4.1 Introduction

A paper by Professor Twomey, commissioned for the NSW Independent Commission Against Corruption, considered when pork-barrelling is unlawful or corrupt – as (peculiarly) defined in NSW legislation – and potentially a matter for an anti-corruption commission. It offered some examples of NSW and Commonwealth grant spending.*[[102]](#footnote-102)*

It made a startling comment about Commonwealth spending:

*‘Much of the spending is unlawful, as it falls outside the Commonwealth’s constitutional powers’.*

As Commonwealth spending is more limited by the Constitution than State spending, there is more potential for illegality. That includes the possibility Commonwealth spending is illegal even if it does not seek partisan political advantage – even if it is not pork-barrelling.

Further issues arise from Commonwealth spending via the States that, even if Constitutionally valid, may be seen as large-scale intergovernmental pork-barrelling.

### B4.2 Commonwealth powers

#### B4.2.1 Requirements

Legal requirements for Commonwealth spending are: spending must be supported by an Appropriation from Parliament; there must be a separate authority to spend the Appropriation via:

1. valid legislation – where validity depends on the subject matter (of the spending) falling within a Constitutional head of legislative power; or
2. it being made to a State, possibly on condition that the State spends monies on certain matters - such condition to be set by Parliament – Constitution s.96;[[103]](#footnote-103) or
3. it being a matter falling within prerogatives, but not altering the Federal balance.[[104]](#footnote-104)

Previous articles suggested some Commonwealth spending does not apparently meet these requirements. [[105]](#footnote-105)

Spending in question includes subjects such as: health; education; cities; regions; disaster relief; sports; community facilities; local governments; infrastructure; roads.

Many arguments for such spending are irrelevant to (il)legality. Among the matters that do not make illegal spending valid are: national significance; ‘nation-building’; economic or social merit; size; ‘need’; lack of State etc. funds; election ‘mandates’; requests; community views; partnerships, deals or agreements with State Governments; convenience; ‘precedents’; long-standing practices.

Another paper by Twomey claimed the Commonwealth has a practice of ignoring Constitutional requirements about spending. That paper outlined the Commonwealth’s response to the High Court’s statements of the law 2009-14.[[106]](#footnote-106)

#### B4.2.2 Commonwealth response to statements of law

The first relevant High Court decision, Pape (2009), concerned payments to individuals to stimulate the economy during the global financial crisis. The Court determined the Commonwealth needed to do more than refer to an Appropriation. It needed to identify a head of power etc.

Twomey claimed the Commonwealth took no subsequent action to identify whether spending was supported by a head of power. The reason: it took the view the risk of challenge to spending was minimal. It made an assessment ‘Constitutional risk’ was low.

The second High Court decision, Williams No.1 (2013), dealt with Commonwealth funding a school chaplains program supported only by Appropriation. The Court decided specific legislation is needed over and above Appropriation. The reasons: to ensure accountability of Government (Executive) to Parliament and to enable Parliament to control spending.

Twomey claimed the Commonwealth’s response was to create a list of all - over four hundred - funding programs then lacking such legislation. Legislation was then passed – within 24 hours of being presented – supposedly validating the list which was included in associated regulations. The use of regulations meant the Government alone – without Parliament - could add programs and new areas of spending. School chaplains were to continue to be funded via this mechanism.[[107]](#footnote-107)

Implicit behind that response was again an assessment of low ‘Constitutional risk’ – the potential of challenge to spending was minimal. That assessment proved false. The next year, the High Court in Williams No.2 (2014) considered whether the new legislation could support funding for the chaplains. It decided the Commonwealth did not have relevant power to legislate, hence Commonwealth legislation - and regulations - were incapable of authorising spending on chaplains.

Twomey argued there has been little real response to Williams (No.2). Governments continued to fund programs and projects without discernible relation to Commonwealth purposes. It continued to rely on advice about ‘constitutional risk’ – about the unlikelihood of challenge to its largesse. Statements that programs are supported by a multiplicity of heads of power are a sham.[[108]](#footnote-108)

Previous articles suggest more - the Commonwealth has advice on the (il)legality of spending. That such advice remains secret suggests it is not entirely favourable to all spending programs.[[109]](#footnote-109)

Commonwealth agencies, including ‘independent’ statutory authorities, have avoided the issue. Despite the Australian National Audit Office supposedly taking an interest in the legality of spending, it has limited its considerations to whether spending conforms with the text of legislation and ignored the Constitutional issues raised by the High Court, Twomey and others.[[110]](#footnote-110)

Infrastructure Australia – the Commonwealth’s principal adviser on project spending – has not referred to the law. Indeed, since 2014 its advice implied a Commonwealth purpose is to provide funds to projects of interest to State governments – that such spending is legally valid.[[111]](#footnote-111)

The issue of the role and limits of the Commonwealth is generally ignored despite the High Court overturning perceived wisdom in the Commonwealth. For example, it was ignored in the most recent review of the Australian Public Service.[[112]](#footnote-112)

### B4.3 Implications of ignoring the law

#### B4.3.1 Loss of direction

The immediate, observable, effect of its practice of ignoring the Constitution is the Commonwealth lacks any sense of direction regarding infrastructure. Rather, it is guided by Jack Sparrow’s compass.[[113]](#footnote-113)

The lack of direction opens the flood gates to pork barrelling. Shoddy - even strange - advice is produced to support whims. Officials do not always take pride in their work. Public explanations of policy and decisions are sometimes deceptive, almost fraudulent.[[114]](#footnote-114)

#### B4.3.2 Democratic decay

The Jack Sparrow approach to infrastructure means it is no longer possible for the public to give full credence to official advice or believe in the legality of Government spending. Twomey argued Commonwealth Governments – and Parliaments - since 2013 have taken a calculated risk their illegal spending practices would not be challenged.

The calculation involves disregard for the rule of law by those entrusted to uphold it:

*‘This is what the decay of democracy looks and smells like…. when governments calculate how they should behave according to what they can get away with, when public servants facilitate such action rather than insisting upon the application of the law, and when power is seen as giving immunity from the application of rules and impunity from the legal consequences, then the rot in the democratic system has begun and will spread unless action is taken to stop it.’*

#### B4.3.3 Criminality?

Section 3.5 presented the argument public officials – including Parliamentarians – who deliberately flout the law may be committing crimes, including the crime of misconduct in public office. The criminality criteria are not limited to pork-barrelling and the use of public resources to buy votes.

Similarly, the problem to be addressed by anti-corruption measures – public confidence in administration – is not only attributable to pork-barrelling.

The misconduct involved in illegal spending – even if the spending is not pork barrelling - can be serious. While some grants may be individually small, the programs in which they sit are larger. Major infrastructure grants involve vast sums of public monies.[[115]](#footnote-115)

#### B4.3.4 Implications for an anti-corruption commission

The aim of anti-corruption measures, including establishment of commissions, is to provide confidence in the bona fides – the adherence to law – of administration. The questionable legality of some Commonwealth spending is antithetical to that aim.

The illegal spending issue is far more serious than pork-barrelling. It may involve systematic disregard of Australia’s foundation law by those in high authority whose principal duty is to uphold that law. The effect of unconstitutional Commonwealth spending would be to undermine the system of government in its Federal respect and in respect of accountability of Government to Parliament and Parliament to the people.

Rather than merely probing motives to detect pork-barrelling, any decent anti-corruption commission would probe the behaviour of those involved in suspected illegal spending. That would include probing the behaviour of decision makers and advisers – whether or not the advisers are officials. The object of such probing would be to ascertain whether disregard of the law was deliberate – as suggested by Twomey.

Were a Commonwealth anti-corruption to include a retrospective ambit as the Bill sets out, it could find itself entirely occupied asking questions about spending since mid-2014: what did decision makers etc. know about the legality of Commonwealth spending? were they aware of warnings? what advice was sought? received?

### B4.4 Rectification

A Commonwealth anti-corruption commission faces a quagmire of checking possibly illegal Commonwealth spending practices and promises since 2014.

The answer to the problem is to bring spending – and promises - visibly back into legality. This should be done prior to the creation of an anti-corruption commission.

#### B4.4.1 Government spending

A first step involves the Government demonstrating all spending conforms with legal requirements by prominently publishing:

* the relevant Appropriation for the spending; and
* legislation authorising use of the appropriation, including the advice about the Constitutional head of power allowing such legislation to provide that authority; or
* in the case of a grant made to a State, Parliamentary approval of the grant and of any conditions on which it is made; or
* the specific prerogative which permits the spending.

Official advice on potential spending, for example on infrastructure proposals by an infrastructure adviser, should be similarly couched.

#### B4.4.2 Election promises

A second step involves promises for Commonwealth spending – including those made in election campaigns – to specify how such spending is to conform with legal requirements.

Demonstration of such conformance should include reference to a:

* proposal for legislation, and the Constitutional head of power allowing such legislation; or
* proposal for Parliament to set a condition on a State grant; or
* specific prerogative allowing the spending; or
* proposal for a referendum to allow spending of that type.

That would have the (desirable) effect of making it clear to the electorate the use of public money depends on Parliament’s approval, not merely the claims or intentions of particular candidates. It would eliminate the sophistry that Commonwealth Governments can – indeed have ‘a mandate’ to - do anything the relevant party or candidates promised in an election campaign.

A requirement to demonstrate the legality of promises could be inserted in electoral legislation. Given the subject matter is merely a statement of Constitutional requirements, it is unlikely to impede political communication. Yet as is pointed out in the next section 4, the current Bill before Parliament supposedly does the opposite – creating an excuse of ‘election promise’ – in relation to questions about whether spending is corrupt.[[116]](#footnote-116)

### B4.5 Intergovernmental pork-barrelling

A further issue for the Commonwealth Government arises out of specific purpose payments to the States – Constitution s.96. Especially if it assumes the Government – not just Parliament – can make such grants, there is potential for some to be considered illegal pork-barrelling.[[117]](#footnote-117)

Section 3 noted pork-barrelling is illegal if its primary purpose is to gain votes. The tacit assumption made in much of the discussion about pork-barrelling is the pork purveyor is seeking votes for itself.

Yet it is possible for a party holding office in one level of government to seek votes at another level of government. For example, a Commonwealth Government might use public monies to encourage votes for its party at a State election. Constitution s.96 payments create potential for this.

The potential does not arise from attempts to make a particular outcome of a State election a direct condition of payments to the State. That would most likely be declared illegal.[[118]](#footnote-118)

Rather, the potential is of an announced or clearly implied preference for a particular State, over other States, based on the parties that hold office there. The fact of such an announcement etc. would suggest an intention of using Commonwealth public monies to influence votes in those States towards the favoured party. Contribution of funds to infrastructure projects are among the more likely channels for this.

The idea is not far-fetched. Previous and current rounds of Commonwealth infrastructure project funding announcements contains suggestions of such preference – referred to by the innocent sounding term ‘playing favourites’.[[119]](#footnote-119)

Often this is brought to public attention when State Governments or local media claim grievance at the amount of Commonwealth infrastructure funding given to other States. Such grievances often are supported by a type of Grattan/Audit criteria noted in 3.6.2 (above). Among the results are increased scepticism of the bona fides of Commonwealth activities.[[120]](#footnote-120)

Some comments by State and indeed Commonwealth politicians could convey inferences that differences in infrastructure funding are associated with party political considerations. That is, commonalities or differences between Commonwealth and State politicians influence spending.[[121]](#footnote-121)

Candidates for being called ‘pork-barrel’ are funds for proposals that have not been recommended by Infrastructure Australia, especially those said to be currently under review by that organisation. That would suggest reasons for such Commonwealth funding are not limited to the apolitical criteria Infrastructure Australia uses.

Of those candidates, particularly interesting are Commonwealth funds: for project proposals supported only by the party in the State that holds Government in the Commonwealth; ‘granted’ by the Government and not specifically endorsed by Parliament; announced shortly before a State election. Of most interest would be such funds to make good election promises of a new Commonwealth Government – promises it made when in Opposition.[[122]](#footnote-122)

An example, from 2014, was then Prime Minister Abbott’s announcement of $3bn in funding for the East West Link, a road in Melbourne, proposed by the then Victorian Government which was led by the Liberal Party – Mr Abbott’s party. It was strongly opposed by the then State Opposition. The Commonwealth’s announcement, confirming a 2013 Federal election promise, was re-iterated just prior to the State election in which the project was an issue. Indeed, Mr Abbott claimed that election would be a ‘referendum’ on the road – in the event, a referendum that did not succeed.[[123]](#footnote-123)

A more recent example is the pre-2022-23 Budget announcement of $2.2bn Commonwealth funding for a suburban rail loop in Melbourne. Severe criticisms of the ‘business plan’ by the Victorian Auditor General, published shortly before the Commonwealth’s announcement, add to the impression of it being intergovernmental pork. As did the Minister’s later defence of the spending referring to political parties and her seeming attempt to downplay the criticisms and, indeed, the funding.[[124]](#footnote-124)

### B4.6 Conclusion

The specific issues for the Commonwealth identified in this section are: spending that is illegal because of failure to comply with the Constitution; intergovernmental pork-barrelling.

Both have potential to be declared corrupt conduct if the present proposal to establish a Commonwealth anti-corruption commission goes ahead.

However, this has gone unremarked in the public debate so far.

That demonstrates to the debate to be under-informed and conclusions being drawn about the urgency of establishing a commission are, at best, premature.

The real urgency is for Commonwealth Parliamentarians – including but not limited to those in Government – to ‘clean-up their act’, be much more careful about what they say and do, before such issues threaten chaos and dysfunction in the Government, Parliament and the community.

## B5. The Bill

### B5.1 Overview

The Government’s Bill for a National Anti-Corruption Commission was introduced into Parliament on 28 September.[[125]](#footnote-125)

The substance of the Bill appears to be based on the NSW Commission. The stated objects of the Bill are prevention, detection, investigation and referral to authorities of corrupt conduct.

The Bill’s definition of corrupt conduct differs from common understandings and includes behaviour which is not criminal. The proposed commission is not to be a court but can make public findings of corruption. The commission is to be able to hold public hearings, at its discretion in exceptional circumstances, in considering whether to make such findings.

The Bill purports to allow the proposed commission to investigate etc. anything that could affect the honesty or impartiality of a public official.[[126]](#footnote-126)

Its provisions effectively exclude some matters from purview – such as some activities of the judiciary and non-tangible matters which may include regulations and directives.[[127]](#footnote-127)

The Bill attracted some support, and criticisms, from both sides of the debate. Some, including ‘independent’ Parliamentarians claimed it does not go far enough. Others said it goes too far.

The commentary to date has not mentioned the issues about the (in)effectiveness of the NSW Commission, politician-media interactions and Commonwealth spending outlined in sections 2, 3 and 4 of this article.

At present there is a joint Parliamentary Committee considering the Bill. The author provided a submission to the Committee. This article provides some background to the submission but does not comment on the other submissions made.[[128]](#footnote-128)

### B5.2 Repeating the problems

#### B5.2.1 Introduction

The Bill repeats the NSW problem of misleading the public into perceiving an anti-corruption commission to be a court, but failing to impose on it a court’s responsibilities or constraints and allowing it to self-initiate cases and to operate in secret.

The problem arises from a definition of corruption that differs from public understanding and the proposed commission’s ability to hold public hearings and make findings about corruption.

It is appropriate for an investigatory body to be able to initiate inquiries and collect evidence.

However, that is very different to initiating public hearings – ‘show trials’ – such as have caused substantial injustices in NSW. It also is very different from drawing conclusions the public assumes to relate to criminality from such investigations – prior to proper court processes.

The Bill appears to attempt to somewhat mitigate the potential for injustices by limiting such hearings to those the proposed commission considers are in exceptional circumstances and in the public interest.

Yet, apart from that attempt being weak – the NSW legislation has similar provisions – ‘show trials’ do more than damage reputations. They can delay or render impossible fair trials in proper courts. Moreover, it is conceivable such provisions will influence the proposed commission’s interest towards the types of people and corruption ‘meriting’ public hearings and media attention.

#### B5.2.2 Support

Supportive commentary appears to presume public hearings and determinations by a commission to be of unalloyed benefit. One supporter implied, probably inadvertently, the merit of a commission with such functions is a matter of belief. Some comments on arguments from supporters follow.[[129]](#footnote-129)

In Mr Menadue’s *Pearls and Irritations*, Dr Solomon, former Queensland Integrity Commissioner praised the (then expected) Bill’s scope. He did not distinguish between the elements of the Bill – coverage of all officials, commission able to initiate inquiries, corruption should include non-criminal conduct, ability to hold public hearings arguing:

*‘it is distinguished from, and superior to, the pitifully weak organisation proposed by the previous government. That body would have had a very limited jurisdiction, been unable to pursue rogue ministers or parliamentarians, severely limited in who it could receive complaints from, and unable to hold public hearings. Toothless, hamstrung and dumb.*[[130]](#footnote-130)

While that correctly asserted arrangements should not exclude politicians – which is a matter of logic and factual evidence to date - it went further. For example, it appeared to argue, contrary to common understanding and the observations reported by former High Court Chief Justice Gleeson, corruption - ‘rogue’ behaviour – need not be criminal. It implicitly asked for creation of a new, indeterminate, class of non-criminal activities ‘punishable’ outside courts.

Mr Waterford, former Editor *Canberra Times*, railed against supposed weakness of the Bill. Some of his points - about the exclusion of political party officials from potential investigation, and the Cuneen limitation - might be well made.[[131]](#footnote-131)

However, his primary concern was restrictions on public hearings. In particular, he tried to scotch the former Government’s argument such hearings unfairly damage reputations. He emphasised:

*‘Reputation is important. But so is the demonstration effect of exposing and punishing official corruption’.*[[132]](#footnote-132)

Those remarks are telling. In democracies, state-sponsored decisions to administer punishment – giving rise to ‘demonstration effects’ – are tasks exclusive to courts. It was common ground that a Commonwealth corruption commission would not have punitive powers because it is not a court.

He may have been referring to the practical effect of public hearings as punishment. If so, the comments support a type of extra-judicial punishment including for matters neither Parliament nor the common law regards as criminal. In a democracy that is a dangerous stance.

Mr Waterford’s argument also was suggestive that a Commission’s success should be measured by a ‘demonstration effect’. That implies a view the proposed commission should seek interest from the public in its investigations – e.g. media attention. The danger in that is an institutional incentive for the focus to be skewed towards cases of media interest – an interest that includes publication of titillating trivia - rather than on serious institutionalised corruption. Notably there is no incentive – and probable disincentives – to investigate corruption involving the media. This article’s comments on the apparent focus of the NSW Commission on the shallow end of the pool of potential corruption – in Sections 2 and 3 - might be borne in mind.

In *The Conversation*, Professor Ng of Monash University argued a commission’s ability to ‘*stamp-out corruption’* is a function of public hearings, with the NSW approach to more public hearings preferred over Victoria. She did not refer to evidence – results, or even the very few public hearings each year in NSW – relevant to this. Nor did she acknowledge injustices or ongoing corruption in NSW.[[133]](#footnote-133)

Mr Charles, former Victorian Appeals Court judge, congratulated the Government for the speed with which the Bill was produced. Like Professor Ng he argued, without resort to factual evidence, the importance of public hearings - concluding they should not be limited to exceptional circumstances. He added Commissioners of the NSW and Victorian Commissions thought public hearings important, and that Royal Commissions hold public hearings. He claimed retrospective operation of a commission is ‘*no different from police forces which regularly investigate past events’*. He also implied present funding estimates are inadequate, claiming more than $100m pa needed.[[134]](#footnote-134)

Such arguments are easily refuted. Opinions of apparently self-interested parties – present State Commissions - unsupported by facts are hardly authoritative.[[135]](#footnote-135)

The claim Royal Commissions – which are temporary and limited by terms of reference - do something good is at most an argument for them rather than for a permanent body with less than well-defined powers.

On the production of the Bill, speed in legislation is often taken to be haste making legislation vulnerable to significant flaws. Which later parts of this section suggest to be the case for this Bill.

The comment on retrospective operation is wrong. Analogies of the proposed commission and police forces are false – those forces do not have powers to hold public hearings and make determinations.

Nor are police powers activated by the mere possibility a person *could* commit an offence. Further, police investigatory powers are directed to criminal matters – unlike the proposed commission where corrupt conduct is almost enthusiastically said to include some behaviour which is not criminal. The issue of retrospectivity arises not because past crimes can be investigated, but because the Bill creates a new quasi-offence – corrupt conduct.

#### B5.2.3 Defective public policy development?

The concentration on whether a commission should conduct public hearings suggests the Commonwealth’s anti-corruption policy development process suffers serious flaws – of wanting to establish a new organisation first and then looking for functions it might perform.

That is the converse of the proper way to develop public policy. The proper way is ‘functions-first’ – identification of useful functions prior to considering which organisations might best undertake them.

One reason functions-first is a better way is it lessens the possibility of duplication and consequent turf wars, and of performance accountability gaps. Another is it focuses attention on public benefits and minimises the potential for promotion of hidden self-interests and bureaucratic empire building.

The reason concentration on public hearings and determinations etc. is suggestive of poor policy processes is the absence of consideration of appropriate organisational location for those functions. Rather the ‘debate’ is about a commission. A consequence of that presumption that a commission is all important is the importance of corruption is downplayed, evidenced by it being proposed to be considered something other than criminal.

The case for formal legal – criminal - sanctions against corruption is compelling. Corruption, as commonly understood, weakens democratic institutions and damages the public. Sanctions should include aiming at deterrence. As such, the facts surrounding a person being sanctioned – the offending behaviour and the penalty - should be made public.

It is perhaps not too cynical to observe some supporters of a Commonwealth commission perceive public hearings and determinations to be its key functions and the primary way to demonstrate its worth. Such a view has the garnering of popular and political support for the organisation among the objectives of enabling it to conduct public hearings etc, perhaps to highlight to the public it is much more valuable than impressions that might be formed from statistics about its activities.[[136]](#footnote-136)

#### B5.2.4 Opposition

Ms Albrechtsen, the Australian, summarised the problems as establishment of a quasi-court without external controls.

She took aim at the proposals for public hearings and an ability to investigate matters which could affect honesty and partiality of officials.[[137]](#footnote-137)

Regarding the former she claimed those demanding public hearings by a commission:

*‘…are admitting one of two things. Either they are ignorant about the critical difference between a court and one of these commissions. Or they are signalling reckless support for public show trials that do not adhere to due process.’….*

*‘If one does understand the critical difference between a court and an anti-corruption body, then it is entirely reckless to demand public hearings. Indeed, it is the antithesis of progress to applaud this medieval feature of some of the state ICACs and demand it be replicated at federal level. Public hearings will cause a surge in public ambushes and show trials as anti-corruption commissioners seek to satisfy this appetite for scalps. Imagine the glee in sections of the media, especially among some ABC journalists, from providing saturation coverage of corruption show trials every bit as warped as their media witch-hunts.’*

Some comments on media ‘witch-hunts’, campaigning and the potential application of anti-corruption rules to the ABC are in other articles at the jadebeagle. Given those, it is not entirely surprising for the ABC to seek to protect some of its activities from the purview of the proposed commission.[[138]](#footnote-138)

Regarding the ability to investigate matters which could affect honesty etc:

*‘The “could” test is a bit like empowering a cop to arrest a person who “could” commit a serious offence but hasn’t. That hopelessly wide wording should scare all of us.’*

Supporters for the Bill and a commission are yet to properly address such criticisms. Among the best offered to date is:

*‘The Australian’s writers* (e.g. Ms Albrechtsen) *were never supporters of the proposal for a federal integrity commission, so it is unsurprising that the only model to gain their support was a farce’.*

That ‘criticism’ merely asserts the Australian’s writers have been consistent. And it implies the purpose is to establish a commission, confirming the validity of concerns about bad policy process.

### B5.3 Adding new problems

In the very limited time since presentation, several significant new problems – over and above those noted above – can be seen in the Bill.

#### B5.3.1 Could?

One problem is the commission’s powers being activated by *‘any conduct of any person …. that* ***could*** *adversely affect, either directly or indirectly… the honest or impartial exercise of any public official’s functions’* (emphasis added).[[139]](#footnote-139)

There appears to be no reason for, and plenty of reasons against, a purview as wide as ‘could’ allows. Such a purview was severely criticised in 2017 by the then Inspector of the NSW Commission as an uncertain standard eroding the presumption of innocence. [[140]](#footnote-140)

The Inspector noted the critical issue to be the seriousness with which the public treats corruption, considering the label to be as strong as any crime up to murder. To which it might be added falsely labelling a person corrupt is defamatory. Even labelling a person corrupt prior to conviction for corruption-related offences can be defamatory.[[141]](#footnote-141)

In that context, ‘could’ involves a triple reduction of the presumption of innocence. It covers the future not just what has occurred. It includes matters in the past that might have, but did not, occur. It relates to a mere possibility rather than any likelihood.

The effect is the NSW Commission and the proposed national commission can make findings of corrupt conduct when there is no more than a possibility of a criminal offence, a disciplinary offence or a termination of employment matter – an offence or termination event that might have but did not happen, may happen, or be a possible future event. The Inspector observed, in contrast:

‘*the test for a Magistrate committing a defendant to trial on an indictable offence is a reasonable prospect that a reasonable jury properly instructed would convict.*’[[142]](#footnote-142)

The Inspector added the word ‘could’ fails a critical test of good legislation – whether all consequences of the law are foreseeable. His first recommendation in the report to NSW Parliament was to remove the word ‘could’ from the NSW legislation. NSW Parliament has not done so. The Bill repeats the mistake.

#### B5.3.2 Serious or systemic corruption

Reports claim the new Government, prior to the election, indicated the commission would focus on the worst kind of corruption – “*serious* ***and*** *systemic*” (emphasis added). The idea apparently was to avoid the commission wasting time and money on issues that were widespread but not serious.[[143]](#footnote-143)

However, the Bill allows the proposed commission to consider corruption that is (either) serious **or** systemic (emphasis added). While this might be perceived as a minor matter, it has substantial implications.

If it is assumed serious corruption involves criminality, the serious or systemic formulation in the Bill establishes conditions which will likely involve substantial injustices.

A person the commission finds to be involved with others in (minor) systemic corruption would be treated the same as a person found to be solely involved in serious criminal corruption. It is possible treatment of the former – non-criminal - would be even worse, because a person found to be involved in criminal corruption may be subsequently prosecuted in, but exonerated by, courts. The probability of that is raised by the courts having a higher standard of proof-of-guilt than the proposed commission.

An answer to that injustice is to limit the proposed commission to serious corruption, possibly defined as corruption likely to substantially undermine confidence in the integrity of public authorities, or as corruption being criminal behaviour. Such a definition would pick-up systematic corruption which had serious consequences.

#### B5.3.3 Circularity

The issues arising from retrospectivity, ‘could’ and serious or systematic corruption (in the previous three sections of this article) are amplified by Bill s.8(1)(e) which appears to be an open-ended ‘catch-all’. It reads: corrupt conduct is *‘any conduct…..that constitutes, involves or is engaged in for the purposes of corruption of any other kind’.* [[144]](#footnote-144)

As corruption is not elsewhere defined in the Bill, the section introduces a circularity – corrupt conduct is conduct that constitutes corruption. This may be an attempt to allow the proposed commission to create its own jurisdiction at any time – which should be regarded as abhorrent.

#### 5.3.4 Loophole?

The Ethics Centre, a lead participant in the NSW Commission’s forum on pork-barrelling, drew attention to a possible loophole of the Bill intending that election promises about public spending or legislation, and their fulfilment, will not be investigated for or classed as corrupt conduct:

*‘The suggestion seems to be that what otherwise might be deemed impermissible will be allowed if made in the context of an ‘election promise’. In general, we hope that we are mistaken in this reading of the Bill.’[[145]](#footnote-145)*

The suggestion appears to be correct. It is obtusely referred to in the Explanatory Memorandum with an irrational explanation.[[146]](#footnote-146)

It is difficult to understand how a promise to do something can excuse its illegality. If anything, publicly promising – highlighting an intention for – illegality should compound any offence.

The purpose of that section of the Explanatory Memorandum is highly questionable. At best it appeals to the worst political instincts. It suggests a less than proper commitment to tackling corruption. There is a possibility it seeks to create an environment that precludes challenge to the Government’s behaviour including on infrastructure promises.

### B5.4 A solution?

The primary issues regarding the Bill, and the proposed Commission, relate to it conducting activities in public – public hearings and determinations of corruption. All sides in the debate assume – correctly – such activities constitute punishment.

The most credible argument for public hearings is they deter corruption and increase public trust. Supporters point to opinion polls suggesting many in the public want to see public hearings. As do many in the media. Mr Waterford summarised it accurately:

*‘public hearings have the benefit of exposing corrupt conduct to the public and making the public aware of it (and some of its perpetrators)’.*[[147]](#footnote-147)

Debate about the proposed commission has ignored the common ground of this summary. The common ground is that there should be public hearings to expose corrupt conduct. Few, if any oppose public hearings into corruption allegations.

However, supporters of the Bill have drawn the false conclusion that such hearings can only be held by a commission.[[148]](#footnote-148)

Yet courts hold public hearings. These hearings can be into matters the Bill now proposes to be called ‘corrupt conduct’.

Some court hearings are very widely reported – even more so than public hearings in the NSW Commission. Public hearings in courts also involve some of the highest profile people in the community.[[149]](#footnote-149)

Only courts have the power to make legal determinations about activities that constitute corruption. Only courts are authorised to administer punishments on behalf of society.

This points to an answer able to satisfy the rational elements of both sides of the debate. There should be a corruption court, which conducts public hearings and exposes and punishes corruption. To do so, corruption should be made a criminal offence.

If so, a commission’s role would be to initiate prosecutions and provide evidence to the court. It would also provide education about how to avoid corruption.

This can be done by:

* amending the Commonwealth Criminal Code to specify certain offences as corruption, and adding to that code other offences as desired;
* investing the Federal Court with a specific jurisdiction over corruption offences;
* establishing a function of investigating and commencing relevant prosecutions in the Federal Court;
* placing that function within a specialist commission.

It would be desirable for there to be a single national court able to publicly hear and determine prosecutions for corruption from all jurisdictions. That is: a national scheme in which public hearings and determinations for corruption are made in a single court, with prosecutions made from any State or Commonwealth commission.

However, it is not possible to do so at present via administrative or legislative means. That arises from a bona fide quirk in the Constitution – an ability of the Commonwealth to invest jurisdictions in State courts but no ability for States to invest jurisdiction in a Commonwealth court. If ever there was a topic for a referendum, this is one.[[150]](#footnote-150)

Finally, the suggestion that making promises in an election campaign can excuse what otherwise would be illegal needs to be undone. There would be merit in putting a specific clause in legislation to this effect.

## B6. Conclusions

### B6.1 Overall

The public policy objective of an anti-corruption body is to provide the public with confidence in the bona fides of those involved in the system of government. It pursues this objective by assisting state-sponsored punishment of dishonest abuses of power.

While there is enthusiastic support for some form of Commonwealth anti-corruption commission, aspects of pre-existing models - such as the NSW Independent Commission Against Corruption - are problematic. Application of such models to the Commonwealth at present is fraught, yet this is the model on which the current Bill is based.

A precondition for any worthwhile Commonwealth anti-corruption commission is visible compliance by the Government with spending laws. At present this is not the case. Unless this changes, a national commission will fail to advance its purpose or could spend its time investigating whether those involved in current practices should be tried in criminal courts.

The risk of hasty fulfilment of present enthusiasm is a public policy tip fire, impeding democratic accountability and creating chaos in Government, Parliament and the community. Federal Parliamentarians should spend less time on drafting and debating the intricacies of the present Bill and clean-up their spending and election promises.

### B6.2 NSW

Section 2 considered the NSW model – the Independent Commission Against Corruption.

NSW legislation establishes a Commission that, in the public mind, has a fundamental problem – it aids prosecutions yet determines guilt. It is beside the point for lawyers to argue the public does not understand legislative subtleties as the purpose is to improve public confidence.[[151]](#footnote-151)

Statistics concerning the work of the Commission show a very steep pyramid – from around 3,000 matters put to it, to advising around ten prosecutions (2020-21). Its high public profile arises from just a few public hearings and determinations of corrupt conduct – and an attendant media circus.

The evidence of the Commission advancing the public policy objective is not easy to immediately discern. The same types of corruption that are said to have led to its establishment thirty-three years ago continue today. New dishonest abuses of power have emerged. Public cynicism remains.

On several occasions, courts found the Commission exceeded its powers. There is inordinate time between its inquiries, findings, and commencement of prosecutions, during which the reputation of those accused greatly suffers, including at the hands of political foes. In some cases, this caused very substantial injustice.

Despite this, the NSW Commission seems stuck with the ‘shallow-end’ of the pool of potential corruption. It has not visibly dealt with claims of some forms of behaviour that damage public trust in administration. Among the better known is the alleged relationship between some politicians and parts of the media – drawing the epithet: ‘shadow government’.

Perhaps the best case for its current work is a Keyser Sozy effect – officials stay in line because of fear the Commission knows everything about them and will prosecute for even minor infractions.[[152]](#footnote-152)

### B6.3 Pork-barrelling

Part of the eagerness for a Commonwealth anti-corruption commission stems from outrage over claims of grant-based pork-barrelling – ‘buying votes’ by use of public monies. Section 3 dealt with the NSW Commission’s apparently recent discovery of the issue.

The Commission convincingly argued some pork-barrelling – vote buying - is illegal. An unmentioned corollary: some vote-buying is legal. Legality is said to hinge on motives. If vote buying is the dominant motive, pork barrelling is illegal. It can be criminal if the behaviour is wilful – knowingly or recklessly indifferent to illegality – and serious.

Despite legal dimensions, allegations about pork-barrelling have a political purpose. The right way to raise issues about pork-barrel spending is the political process. Parliaments control public spending. Failure to exercise that control risks adverse judgement by the electorate. More rigorous legislation about, and stronger Parliamentary oversight of, spending is needed. As is removal of confidentiality restrictions on information about Government dealings.

Legal questions and processes should be kept separate from politics. Investigating organisations should be precluded from pronouncements or ‘determinations’ – such as whether behaviour is pork-barrelling, or whether particular pork barrelling is illegal or corrupt - able to be used for political ends and which delay or jeopardise legal decisions.

The recent NSW kerfuffle about grant-based pork-barrelling reinforces practical concerns about the apparent focus on the shallow end of the potential corruption pool. The debates about vote buying – and indeed anti-corruption commissions - have not been properly informed.

The risk of formulating policy on such a superficial basis is the opening of a Pandora’s box full of distractions and facilitating political witch-hunts. Meanwhile, truly serious threats to public confidence in the system of government – and the system itself – from the deep-end of the corruption pool such as in major projects, emergency responses, media relations and potential infiltration of administration by organised crime - might be overlooked.

### B6.4 Commonwealth issues

The need for better practices of democratic accountability is even greater in the Commonwealth.

While the recent interest in public spending in NSW threatens to open a Pandora’s box, the situation would be greatly amplified were there to be a Federal anti-corruption commission. The reason: unlike in NSW, the legality of Commonwealth spending does not rest just on motives – but on Constitutional conformance. The likelihood of illegal spending is far higher.

Section 4 outlined how the legality of Commonwealth spending depends on following particular Constitutional processes. As the processes aim to protect the Federal system of government, non-conformance would be of direct interest to any bona fide anti-corruption agency. Even more so as those doing the spending – Ministers – are entrusted with upholding the Constitution.

Despite the legal requirements being clarified by the High Court in 2014, at present there is little visible evidence they are being met – several experts have said they are not. There are claims Commonwealth Governments since 2014 have been deliberately disobeying the law, those claims extending beyond funding of community projects into many areas of public spending. Given that criminality hinges on deliberate flouting – or reckless indifference – to the law, those claims are most serious.

It is irrelevant whether commentators regard spending as meritorious or mandated by the electorate, whether spending is ‘nation building’ or nationally significant, and whether spending has bipartisan support etc.

The introduction of a national anti-Corruption commission while claims of such illegality continue threatens chaos in Government, Parliament and the community. A bona fide anti-corruption commission could hardly avert its eyes to allegations of flagrant disregard of the law by those entrusted to uphold it. A bona fide commission could be overwhelmed investigating whether the Commonwealth is deliberately acting illegally in such spending – whether or not pork-barrelling.

Even for legal Commonwealth spending, there is another potential issue – intergovernmental pork-barrelling. The issue would arise if a Government showed a spending preference to one State over others and there were suspicions party-political factors were among its motives. Infrastructure is one likely channel for any preference, with very large sums – orders of magnitude greater than the pork complained about to date – being involved.

Among factors that could give rise to public suspicion of Commonwealth pork barrelling on behalf of a State would be: substantial differences in funding among States; commentary about different relationships between the Commonwealth and various State Governments; funding to some but not all State projects being provided in advance of a formal, published Commonwealth assessment; preference to States whose Governments face an election in the near future.

These matters appear to have been overlooked in the present debate. Rather than the debate continue as it has, with attention given to the Bill and denunciations of the evils of pork-barrelling, Commonwealth Parliamentarians should immediately review their own practices and publish definitive advice on the legality of their current spending practices and election promises.

### B6.5 The present Bill

The Bill presented to Parliament in late September is largely based on the NSW legislation. It suffers the same serious flaws and adds more.

The policy process behind the Bill is unsatisfactory. It assumed an anti-corruption commission is needed, and consideration was apparently myopically channelled into giving the commission tasks.

Those claiming to be most strongly against corruption argued the commission should have maximum scope - it should hold hearings and make determinations in public in order to punish suspected miscreants. However, myopic focus on a commission leads to a perverse conclusion - corruption should not (always) be classed as criminal, despite the public considering corruption to be among the worst of crimes. In effect, corruption is downgraded. Unfortunately, this perverse result is a centrepiece of the Bill.

In a democracy, courts determine who should be punished for breaching laws set by Parliament. The eagerness of some of the Bill’s supporters to have the commission effectively punishing corruption leads to promotion of a form of state-sponsored extra-judicial public trials and punishments for indeterminate matters ‘proven’ to significantly lower standards lower than in courts.

Whether or not that stance is affected by a belief the holding of public trials – ‘hearings’ - and punishments is the best way of demonstrating to the community the worth of a commission, it is dangerous to democracy and downplays the threat of corruption.

In contrast, a focus on functions rather than a rush to create a commission would see widespread agreement that corruption should be publicly exposed and punished.

It is possible to do so while maintaining the public’s expectation that corruption will be held criminal. The reason: criminal offences can and are publicly exposed and punished in courts – in some cases with a far higher public profile than a commission could achieve. The implication is that courts, not the commission, should conduct hearings and make determinations about corruption.

That would leave the commission with investigatory powers which are not commented on in this article. It would allow the commission to conduct prosecutions in the courts, thus removing the potential of manifest injustices to individuals and inordinate delays seen in NSW. It would push a commission towards the more serious corruption issues and reduce temptations to pursue those cases of most interest to the media.

Beyond that, the attempt to allow a loophole for pork and partiality promised in elections is a further indicator of a lack of interest in addressing corruption. Obviously that part of the Bill should be amended.

The proposals for Commonwealth anti-corruption arrangements should be modified to:

* amend the Commonwealth Criminal Code to specify certain offences as corruption;
* specifically include election promises as being within some such offences;
* invest the Federal Court with a specific jurisdiction over corruption offences;
* establish a function of investigating and commencing relevant prosecutions in the Federal Court;
* place that function within a specialist commission.

There are other very serious flaws with the present Bill. One problem is the proposed commission’s powers are to activated by conduct that *could* be associated with corruption. The effect is the commission can make findings of corrupt conduct when there is a mere possibility of a criminal or disciplinary offence or a termination of employment matter – a possibility that might have but did not happen, may happen, or be a possible future event. That idea has been previously condemned*.*

Another problem is the Bill allows the proposed commission to consider corruption that is (either) serious or systemic. That creates potential for perverse injustices such as a person involved with others in (minor) systemic corruption would be treated worse than a person found to be solely involved in serious criminal corruption.

A further problem involves a ‘catch-all’ provision which is circular: corrupt conduct is *‘any conduct…..that constitutes, involves or is engaged in for the purposes of corruption of any other kind’.* This it appears to allow the proposed commission to create its own jurisdiction at any time – it should be regarded as abhorrent.

Unless those problematic aspects of the Bill are corrected, the Commonwealth faces a tip fire especially with its current attitudes towards spending.

J Austen

27 October 2022

1. Mr Albanese referred to a dumpster fire on television Sunday 5 June joining Labor’s dumpster fire analogists Mr Marles and Mr Chalmers [https://www.naroomanewsonline.com.au/story/6985992/coalition-inte grity-dumpster-fire-labor/?cs=356](https://www.naroomanewsonline.com.au/story/6985992/coalition-inte%20%20grity-dumpster-fire-labor/?cs=356). It is a north American saying – deserving of an explanation from wiki: *‘The term "dumpster fire" derives from fires that start in large trash bins. These bins are often termed "dumpsters" after the*[Dempster Dumpster](https://en.wikipedia.org/wiki/Dempster_Dumpster)*brand of trash bin in the United States, which eventually came to be colloquialized as "dumpster". The earliest known use of the term dates back to a 2003 review of*[a remake of The Texas Chainsaw Massacre](https://en.wikipedia.org/wiki/The_Texas_Chainsaw_Massacre_%282003_film%29)*, in which*[The Arizona Republic](https://en.wikipedia.org/wiki/The_Arizona_Republic)*'s Bill Muller said that the film was "the cinematic equivalent of a dumpster fire – stinky but insignificant".*[Urban Dictionary](https://en.wikipedia.org/wiki/Urban_Dictionary)*added a definition for the term as early as 2008, with one entry listing it as "a laughably poor performance." Usage of "dumpster fire" would remain relatively obscure throughout the early 2010s, but would see widespread usage starting in 2010 in the world of American sports, where teams that performed exceptionally poorly would be labelled with the term in news, social media, and talk radio’* <https://en.wikipedia.org/wiki/Dumpster_fire> [↑](#footnote-ref-1)
2. <https://www.thejadebeagle.com/tip-fire-a.html> [↑](#footnote-ref-2)
3. <https://www.abc.net.au/news/2022-05-20/fact-check-scott-morrison-federal-integrity-commission-icac/101081616>

<http://classic.austlii.edu.au/au/legis/cth/bill/aficb2021418/> [↑](#footnote-ref-3)
4. Labor: <https://www.alp.org.au/policies/national-anti-corruption-commission>; This followed a report from a Senate Committee: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/National_Integrity_Commission/IntegrityCommissionSen/Report> [↑](#footnote-ref-4)
5. The legislation has: *‘The principal  objects  of  this  Act  are: (a)to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption…: (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and (ii) to educate public authorities, public officials and*members of*the public about corruption…’* [*https://legislation.nsw.gov.au/view/html/inforce/current/act-1988-035*](https://legislation.nsw.gov.au/view/html/inforce/current/act-1988-035) [↑](#footnote-ref-5)
6. Gleeson: <https://www.oiicac.nsw.gov.au/assets/oiicac/reports/other-reports/Independent-Panel-Review-of-the-jurisdiction-of-ICAC-2015-Report.pdf> Mr McLintock conducted a review in 2005. There also was a conference: <https://australiainstitute.org.au/wp-content/uploads/2020/12/Cowdery-Lessons-from-NSW-ICAC.pdf>

Cuneen advised a relative how to avoid a roadside breath test: <https://eresources.hcourt.gov.au/downloadPdf/2015/HCA/14cuneen> [↑](#footnote-ref-6)
7. For example: *‘in 1990, following amendments to the Act….the commission was to make public findings that people had engaged in corrupt conduct, then the relationship between the definition of corrupt conduct and the legal and public understanding of that term took on a new importance.  There was, however, no amendment of the definition’.* Gleeson, note 6 (above). [↑](#footnote-ref-7)
8. Gleeson (note 6 above) cited Premier Greiner in 1988 claiming: ‘*a Minister of the Crown gaoled for bribery; an inquiry into a second, and indeed a third, former Minister for alleged corruption; the former Chief Stipendiary Magistrate gaoled for perverting the course of justice; a former Commissioner of Police in the courts on a criminal charge…..  No government can maintain its claim to legitimacy while there remains the cloud of suspicion and doubt that has hung over government in New South Wales...’* The concern is: *‘deliberate misuse of power, authority or responsibility, which is given for the public benefit and is, instead, used for some extraneous and wrongful purpose…’* [↑](#footnote-ref-8)
9. Submission by David Flint (130) at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Anti-Corruption_Commission_Legislation/NACC/Submissions>; <https://www.theaustralian.com.au/commentary/integrity-body-no-place-for-political-witch-hunts/news-story/9c415d49a039f14918058b4829073ef4> [↑](#footnote-ref-9)
10. For example, Ms Berejiklian resigned from the position of Premier after hearings but before the Commission made any findings: <https://www.abc.net.au/news/2021-10-01/nsw-premier-gladys-berejiklian-resignation-icac-explained/100507412> [↑](#footnote-ref-10)
11. Nor do they need be based solely on evidence admissible in court <http://classic.austlii.edu.au/au/journals/CICrimJust/1990/8.pdf>

<https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d842424a694cc474a0eb4/1553826856740/vol26chap9.pdf>

<https://www.sydneycriminallawyers.com.au/blog/the-icac-and-nsw-corruption-offences/> [↑](#footnote-ref-11)
12. Appeals against corruption findings are based on claims the Commission exceeded its jurisdiction – as if the finding was a criminal conviction. Appeals are more difficult than appeals against convictions - where the court can find the jury must have had a reasonable doubt about a defendant’s guilt. An appeal’s success depends on the appellant showing guilt was less probable than innocence. [↑](#footnote-ref-12)
13. <http://www.austlii.edu.au/au/journals/CICrimJust/1994/25.pdf> The Court found the Premier’s behaviour was not grounds for dismissal grounds which are necessary to sustain a corruption finding <https://www.parliament.nsw.gov.au/ladocs/inquiries/1642/Report%20Review%20II%20Jurisdictional%20Issues.PDF>

The Court criticised the legislative definition as: ‘*misleading and apt to cause injustice. … The injustice arises because the Act applies ‘corrupt conduct’ to conduct which, in the ordinary meaning of the term, is not corrupt.’* <https://www.parliament.nsw.gov.au/ladocs/inquiries/1642/Report%20Review%20II%20Jurisdictional%20Issues.PDF> [↑](#footnote-ref-13)
14. <https://www.oiicac.nsw.gov.au/assets/oiicac/reports/special-reports/Operation-22Vesta22-Andrew-Kelly-Charif-Kazal-and-Jaimie-Brown-complaints.pdf> [↑](#footnote-ref-14)
15. Costs of each group of activity were not presented. <https://www.icac.nsw.gov.au/about-the-nsw-icac/nsw-icac-publications/nsw-icac-corporate-publications/annual-reports> [↑](#footnote-ref-15)
16. The explanation: *‘the concept of corruption may be wide enough to embrace any act or omission that constitutes a serious transgression of a moral precept.  However, in a legal context… the word corruption is often used as a general or summary description …. applied to a category of criminal offences, such as bribery, abuse of office, extortion….’* Gleeson (note 6 above). [↑](#footnote-ref-16)
17. ‘*s.8(1)  Corrupt conduct is…any conduct of any person ….. that adversely affects…. the honest or impartial exercise of official functions...*

*(2) Corrupt conduct is also any conduct of any person …… that adversely affects…. the exercise of official functions by any public official…. and which could involve any of the following matters— (a)  official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition), (b)  bribery, (c)  blackmail, (d)  obtaining or offering secret commissions, (e)  fraud, (f)  theft, (g)  perverting the course of justice, (h)  embezzlement, (i)  election bribery, (j)  election funding offences, (k)  election fraud, (l)  treating, (m)  tax evasion, (n)  revenue evasion…..*

s.*9(1)  …. conduct does not amount to corrupt conduct unless it could constitute or involve—(a)  a criminal offence, or (b)  a disciplinary offence, or (c)  reasonable grounds for dismissing…. a public official, or (d) in the case of conduct of a Minister … or a member of a House of Parliament—a substantial breach of an applicable code of conduct.’*  [↑](#footnote-ref-17)
18. United Kingdom etc: see Gleeson and Cuneen (note 6 above).

Dishonest scheme: following Gagelar J’s dissent in Cuneen, legislation was amended by s.8(2A) *‘Corrupt conduct is also any conduct of any person….. that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters—(a)  collusive tendering, (b)  fraud in relation to applications for licences, permits or other authorities….’ etc.* [↑](#footnote-ref-18)
19. The recent claim by an outgoing Commissioner that criticisms of the Commission come from ‘buffoons’ does not address the issues, or recognise former practices of the Commission have been declared unlawful by the High Court.

<https://www.theaustralian.com.au/commentary/porkbarrelling-or-corruption-voters-should-be-the-judge/news-story/9b7278f8b75bc146e008d547e3378cfe> [↑](#footnote-ref-19)
20. At June 2022 a Commission report shows: eleven ‘operations’ by the Commission between 2010 and 2019 resulted in thirty-eight persons referred to the Director of Public Prosecutions. Of these the Director has recommended prosecution of twenty-three. The Director is ‘still’ considering 17 referrals – two since 2016, nine since 2017 and six (for breach of the Act) since 2019. Average lag between referral and commencement of proceedings is 4.4 years – the maximum time was 6 years. ICAC%20prosecution%20outcomes\_web%20table\_1%20June%202022\_FIN.pdf. [↑](#footnote-ref-20)
21. Mr Gallacher commented his treatment was worse than serial killer Ivan Milat who could answer allegations within a day – Mr Gallacher was not permitted to answer the Commission for three months during which there was a damning trial-by-media. The Hon Jonathan O’Dea MP Speaker of the NSW Legislative Assembly, *Submission to the Joint Committee on the Independent Commission Against Corruption (ICAC)’s Inquiry into the reputational impact on an individual being adversely named in the ICAC’s investigations,* 23 June 2020 <https://www.parliament.nsw.gov.au/ladocs/submissions/68133/Submission%204%20-%20Speaker%20of%20the%20NSW%20Legislative%20Assembly.pdf>. Hearings involving Ms Berejiklian were in mid and late October 2021. [↑](#footnote-ref-21)
22. Notably Cuneen and Greiner (notes 6 and 13 above).

 [↑](#footnote-ref-22)
23. Phoebe Loomes, *Don’t assume pork barrelling is legal: ICAC*, Canberra Times, June 4 2022. [↑](#footnote-ref-23)
24. <https://www.theaustralian.com.au/commentary/icac-eventhe-star-chamber-did-better/news-story/e6c0424b20412f9cac1f4894a4877c02> [↑](#footnote-ref-24)
25. For example: <https://www.thejadebeagle.com/dogs-breakfast-for-all.htmll>; <https://www.thejadebeagle.com/ps3-news.html> [↑](#footnote-ref-25)
26. Operation Spicer report: <https://www.icac.nsw.gov.au/investigations/past-investigations/2016/nsw-public-officials-and-members-of-parliament-operation-spicer>; <https://www.thejadebeagle.com/sydney-metro-blowout> Recent reports have the blow-out increasing to at least $6bn <https://www.abc.net.au/news/2022-06-21/nsw-budget-reveals-metro-tunnel-cost-blowout/101171264> [↑](#footnote-ref-26)
27. <https://www.australianpolice.com.au/wp-content/uploads/2017/05/RCPS-Report-Volume-1.pdf> Secret arrangement: <https://johnmenadue.com/john-menadue-newcastle-port-another-botched-privatisation-a-repost-from-5-september-2016/> Former Labor Minister Mr Tripodi was found corrupt and referred to the Director of Public Prosecutions. The Director has not laid charges. Of the 6 other people referred to the Director: in 2017-18 the Director decided not to proceed with three. In 2020, the Director proceeded with two. Mr Gallacher was adversely mentioned in the report and it appears his treatment during the investigation led to a letter from the Inspector saying he had been unfairly treated - see note 19 (above). Treasury: *“Treasury alleged on 22 August 2014 that the*[*Anglo*](http://www.containerterminalpolicyinnsw.com.au/wp-content/uploads/2016/01/Anglo-Ports-10-February-2015-NSW-Parliament.pdf)*Ports negotiation* (my comment: regarding a container terminal*)… involved .. the kind of rent seeking activity likely to encourage influence peddling or corruption’.*  <http://lcit.com.au/how-the-nsw-government-contrived-teh-container-shipping-market/>;

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryOther/Transcript/6535/Anglo%20Ports%20Statement10215.pdf>

 [↑](#footnote-ref-27)
28. Panel: Justice Wood, Judge Urquhart <https://www.australianpolice.com.au/wp-content/uploads/2017/05/RCPS-Report-Volume-1.pdf> [↑](#footnote-ref-28)
29. The Commission’s: *‘existence and participation in the oversight of the Service, along with the other areas for which they have statutory responsibility, has not prevented corruption from continuing, nor brought about the substantial changes needed to break the cycle of corruption.’* [↑](#footnote-ref-29)
30. <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/lecca2016353/s9>

<http://www.lecc.nsw.gov.au/what-we-do/who-we-are-and-what-we-value/our-legislation>

 [↑](#footnote-ref-30)
31. <https://www.thejadebeagle.com/covid---may.html> [↑](#footnote-ref-31)
32. *‘the idea that the apparatus of police investigations and criminal charges might be used as a mechanism to quell media attacks is even more disquieting’:* see note 31 (above) [↑](#footnote-ref-32)
33. Then Premier Berejiklian said his resignation was ‘*appropriate’* but *‘now he has been cleared it is appropriate that he return to Cabinet’.*  <https://www.abc.net.au/news/2020-07-03/don-harwin-court-covid-travel-restrictions-fine-withdrawn/12419448> Legislative Council: <https://www.parliament.nsw.gov.au/lc/papers/runningrecord/Documents/Combined%20Notices%204%20August%205pm.pdf> [↑](#footnote-ref-33)
34. Also, interesting would-be explanation of why it took twelve weeks, ongoing public confusion by the Premier, Ministers and the police, and Mr Harwin’s appearance at the courthouse, for the charge to be withdrawn. A former Director of Public Prosecutions said police had dug a hole: *‘by prematurely tipping off compliant media outlets. The only motive for that could have been to big note themselves and curry media favour. That is becoming all too common and carries the risk of distorting proper process as happened in this case’.* <https://www.abc.net.au/cm/lb/12638386/data/cowdery-data.pdf>; Prior:[https://www.abc.net.au/mediawatch/episodes/harwin/12636978](https://www.abc.net.au/mediawatch/episodes/harwin/12636978%5C) [↑](#footnote-ref-34)
35. <https://theconversation.com/right-wing-shock-jock-stoush-reveals-the-awful-truth-about-covid-politics-and-media-ratings-164489> and <https://newsroom.unsw.edu.au/news/law/rational-law-reform-still-possible-shock-jock-world> [↑](#footnote-ref-35)
36. <https://www.griffithreview.com/articles/media-rules-in-the-court-of-carr/>. Police Commissioner Ryan had just left the force after falling-out with Police Minister Costa. He claimed policy and recruitment sought media praise: *‘… they will burn and sacrifice, just so, no matter who it is or what it is, just so they will get good reports from the media’.* <https://www.abc.net.au/pm/stories/s595843.htm> <https://www.crikey.com.au/2015/02/06/peter-ryans-bugging-raises-uncomfortable-questions-for-nsw-police/>

<https://www.smh.com.au/national/his-last-days-20020629-gdfeqr.html><https://www.crikey.com.au/2006/04/03/has-the-parrot-changed-perch-on-taxi-reform/>; <https://www.abc.net.au/news/2003-04-12/leaked-memo-sparks-speculation-over-deegan-sacking/1835174>

 [↑](#footnote-ref-36)
37. Note the Commission also has relations with the press e.g.: <https://www.weeklytimes.com.au/ex-ryde-mayor-ivan-petch-to-appeal-icac-blackmail-conviction/>. Two other points are worth noting about that article: the headline wrongly implies ICAC determines criminality – it is a court; the appeal against the ICAC ‘conviction’ was eventually resolved – by the High Court – in favour of Mr Petch. [↑](#footnote-ref-37)
38. Perhaps unknowingly, Mr Dempster also referred to those in the media participating in an environment reliant on those in authority exercising power – over information – in a partial way: *‘Such is the level of cabinet, departmental and agency secrecy and paranoia that only those with time to develop back-channel sources of information can hope to discover what is really going on.’* [↑](#footnote-ref-38)
39. <https://www.abc.net.au/4corners/jonestown/12240362> [↑](#footnote-ref-39)
40. A recent example being Ms Wilkinson <https://7news.com.au/sunrise/on-the-show/lisa-wilkinson-hires-lawyer-who-blasted-her-logies-speech-as-ill-advised-on-sunrise-c-7264351>; <https://www.crikey.com.au/2021/03/23/watchdog-doesnt-bark-corruption-australian-media/> [↑](#footnote-ref-40)
41. Jurisdiction: <https://www.icac.nsw.gov.au/media-centre/media-releases/2022-media-releases/icac-finds-pork-barrelling-could-be-corrupt-recommends-grant-funding-guidelines-be-subject-to-statutory-regulation> [↑](#footnote-ref-41)
42. Wiki says: ‘*The term pork barrel politics usually refers to spending which is intended to benefit constituents of a politician in return for their political support, either in the form of campaign contributions or votes. In the popular 1863 story "The Children of the Public"… used the term pork barrel as a homely metaphor for any form of public spending to the citizenry. However, after the American Civil War, the term came to be used in a derogatory sense. …By the 1870s, references to "pork" were common in Congress, and the term was further popularized by a 1919 article by Chester Collins Maxey in the National Municipal Review, which reported on certain legislative acts known to members of Congress as "pork barrel bills". He claimed that the phrase originated in a pre-Civil War practice of giving slaves a barrel of salt pork as a reward and requiring them to compete among themselves to get their share of the handout…..* [↑](#footnote-ref-42)
43. <https://www.thejadebeagle.com/tip-fire-a.html> [↑](#footnote-ref-43)
44. Governments can only spend monies appropriated by Parliament via legislation. Appropriation legislation can only deal with monies, and can only be initiated in the lower House e.g., Representatives. As the Government is formed from the majority in the House, the Government initiates legislation allowing for spending. [↑](#footnote-ref-44)
45. <https://www.icac.nsw.gov.au/media-centre/media-releases/2022-media-releases/icac-finds-pork-barrelling-could-be-corrupt-recommends-grant-funding-guidelines-be-subject-to-statutory-regulation> Twomey: <https://www.icac.nsw.gov.au/ArticleDocuments/1029/When%20is%20pork%20barrelling%20corruption%20and%20what%20can%20be%20done%20to%20avert%20it_Anne%20Twomey.pdf.aspx> [↑](#footnote-ref-45)
46. Twomey: *‘the exercise of public powers, such as the making of grants or commitments to build infrastructure, in a biased or ‘partial’ manner that favours the interests of a political party, rather than in the public interest’.* A promise to confer advantage on all people would not be pork-barrelling. [↑](#footnote-ref-46)
47. Longstaff: *‘where needs are equally distributed amongst citizens who differ in no material respect except for the electorate within which they reside, one would expect an equal distribution of public resources. Yet, as has been seen in recent months following devastating flooding in Northern NSW, people with identical needs were treated in distinctly different ways – based on the political allegiance of their elected representative. This deficiency was only corrected after a public outcry.’*  [↑](#footnote-ref-47)
48. Campbell cited former High Court Chief Justice Brennan: *‘a member of Parliament holds “a fiduciary relation towards the public… and has imposed upon him a public duty and a public trust”…. all decisions and exercises of power* (must) *be taken in the interests of the beneficiaries…....a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party.’* [↑](#footnote-ref-48)
49. Mason criteria: ‘*(1) a public official; (2) in the course of or in relation to his public office; (3) wilfully misconducts himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty; (4) without reasonable excuse or justification; and (5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities. The misconduct must be deliberate rather than accidental in the sense that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful. Wilful misconduct which is without reasonable excuse or justification is culpable.*’ [↑](#footnote-ref-49)
50. *(1) A person must not, in order to influence or affect any person’s election conduct, give or confer, or promise or offer to give or confer, any property or any other benefit of any kind to the person or any other person… (2) .. (a) ask for, receive or obtain, or (b) offer to ask for, receive or obtain, or (c) agree to ask for, receive or obtain, any property or any other benefit of any kind, whether for the person or any other person, on an understanding that the person’s election conduct will be in any manner influenced or affected….(3)…election conduct means— (a) the way in which the person votes… (b) the person’s nomination as a candidate…(c) the person’s support of, or opposition to, a candidate or a political party…(d) any act or thing by the person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector. (4) This section does not apply in relation to a declaration of public policy or a promise of public action*…. <https://legislation.nsw.gov.au/view/html/inforce/current/act-2017-066> According to Campbell, the effect is: *‘the making of a promise of a benefit to the electors of a particular area or demographic to encourage them to vote for a particular party is no longer an offence’*. [↑](#footnote-ref-50)
51. Including an (threatened) accusation that a person has committed a serious crime. S.249K *Crimes Act* NSW <http://www5.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s249k.html> [↑](#footnote-ref-51)
52. History: [https://docs.google.com/document/d/1v0e\_MM7kdStGEJMU-x4xA47dsqWyt2MB/edit#](https://docs.google.com/document/d/1v0e_MM7kdStGEJMU-x4xA47dsqWyt2MB/edit) [↑](#footnote-ref-52)
53. <https://www.abc.net.au/news/2015-07-29/icac-recommends-charges-against-former-ryde-mayor-ivan-petch/6657614>

<https://www.abc.net.au/news/2018-04-16/icac-probes-blackmail-allegations-at-ex-canterbury-council/9663090> *‘A corruption inquiry has heard a council general manager was "blackmailed" into hiring a staffer who approved dodgy developments at Canterbury….’* [↑](#footnote-ref-53)
54. Campbell: *‘it is hard to think of an example of an occasion when an elector ever makes a declaration of public policy, or a promise of public action, in a way that relates to the elector’s own electoral conduct, or the electoral conduct of any other elector.’* That appears to imply a drafting error - where the excuse of s.209(4) should have been placed immediately after its target s.209(1). It assumes ‘public policy’ and ‘public action’ can only be undertaken by officials. Yet neither term is defined in the *Act.* The ordinary meaning of ‘public action’ includes action undertaken in public, whether or not by a person in authority. It includes, for example, mass media activities. [↑](#footnote-ref-54)
55. Grants in NSW total around $4bn pa <https://www.dpc.nsw.gov.au/updates/2021/11/04/review-of-grants-administration-in-nsw/> This is around 3% of total Government sector expenses <https://www.budget.nsw.gov.au/sites/default/files/2022-06/2022-23_03_Budget-Paper-No-1-Budget-Statement.pdf> [↑](#footnote-ref-55)
56. Such measures can be on a grand scale – famously for defence capability such as submarine building in Adelaide; proposed relocation of the navy to Brisbane etc.<https://www.macrobusiness.com.au/2021/02/coalitions-90b-french-subs-are-australias-worst-ever-pork-barrel/> <https://www.sbs.com.au/news/article/navy-relocation-plan-criticised-as-a-ploy-for-votes/fymqrt3a3> [↑](#footnote-ref-56)
57. Holy Grail: <https://grattan.edu.au/news/they-keep-bringing-a-bigger-barrel/>; <https://www.pressreader.com/australia/the-monthly-australia/20190301/281479277745497> <https://www.9news.com.au/national/transport-minister-andrew-constance-quizzed-over-funding-of-conflicting-bus-routes/2389cb06-8762-49fa-9fd8-1b2c4d757cf2> [↑](#footnote-ref-57)
58. E.g., <https://www.abc.net.au/news/2020-09-21/federal-government-western-sydney-airport-audit-office/12686208>

Government and Opposition whip-arounds had common projects – like the Woy Woy car park. <https://johnmenadue.com/john-austen-post-election-infrastructure-review/>; <https://www.thejadebeagle.com/road-to-woy-woy.html>; [↑](#footnote-ref-58)
59. Grattan: <https://grattan.edu.au/report/roundabouts-overpasses-carparks-hauling-the-federal-government-back-to-its-proper-role-in-transport-projects/>. Grattan misrepresents the Commonwealth’s role claiming it to be funding for nationally significant transport projects. That claim was repudiated by the High Court in 2014: *‘It is hard to think of any program requiring the expenditure of public money appropriated by the Parliament which the Parliament would not consider to be of benefit to the nation.’* <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2014/23.html> Australian National Audit Office: ‘*Departmental advice did not contain an assessment against …policy objectives…. Project distribution reflected the geographic and political profile of those given the opportunity to identify candidate projects…nationally, 77 per cent of the commuter car park sites selected were in Coalition-held electorates…..’*  The Office commented *‘Insufficient assessment work has been undertaken by the department to satisfy itself that projects are eligible for funding under the National Land Transport Act 2014.’* This points to the same mistake as Grattan – an assumption the Land Transct could cover such projects, which the High Court’s decision had upended. The Office did not consider the legality of the Land Transport Act <https://www.anao.gov.au/work/performance-audit/administration-commuter-car-park-projects-within-the-urban-congestion-fund>; <https://michaelwest.com.au/the-pork-henchmen-morrisons-ministerial-spies-give-australian-national-audit-office-the-cold-shoulder/> [↑](#footnote-ref-59)
60. It may indeed be closer to the burning platform than users of that term appreciate. The term reputedly comes from the Piper Alpha oil platform fire (1988). A story is there three men faced the choice of waiting on the platform or jumping into the sea. Two jumped and survived with injuries – the other died. The supposed moral is that it is better to embrace risky change than certain doom. A more accurate interpretation is the two jumped from a known danger into an unknown danger. A more accurate moral, drawn by the inquiry by Lord Cullen, is the desirability of preparing for action prior, as once the platform is on fire it will be too late to manage risks: <https://www.highperformancechange.com/blog/why-wait-until-the-platform-is-burning/> [↑](#footnote-ref-60)
61. <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2606/Report%20No%208%20-%20Public%20Accountability%20Committee%20-%20NSW%20Government%20grant%20programs%20-%20First%20report.pdf> [↑](#footnote-ref-61)
62. <https://www.abc.net.au/news/2019-02-07/gladys-berejiklian-orange-stadium-election-promise-backlash/107905300> [↑](#footnote-ref-62)
63. *`Ms Berejiklian said the stadium would not be built unless Nationals candidate Kate Hazelton was elected. "Well it is, I am not going to be shy about that because I really want Orange to come back to the government," the Premier said. "It is important for us to have a voice in government to make sure that Orange doesn't miss out.”*  The ploy failed to convince the electorate – the Coalition’s previous losing margin of 0.2% (84 votes) increased to 30.3% (12,925 votes). Despite Ms Berejiklian’s Government being returned – with a substantially reduced majority - the proposed facility has not advanced. [↑](#footnote-ref-63)
64. <https://www.smh.com.au/politics/nsw/premier-s-office-provided-a-list-of-grants-to-approve-despite-saying-she-s-not-responsible-20201028-p569fi.html>; <https://www.abc.net.au/news/2020-10-23/gladys-berejiklian-approval-of-council-grants-shredded/12806962>

<https://www.theguardian.com/australia-news/2020/nov/26/berejiklian-admits-140m-grant-scheme-was-pork-barrelling-as-approval-documents-revealed>; https://www.abc.net.au/news/2021-01-22/report-says-nsw-premiers-office-breached-laws-document-shredding/13084492 [↑](#footnote-ref-64)
65. Advice as only the Minister for Local Government - not those offices or indeed the Premier – had any authority to issue directions to the Department <https://www.theguardian.com/australia-news/2022/feb/08/nsw-auditor-general-lashes-program-that-directed-96-of-grants-to-coalition-electorates>; <https://www.audit.nsw.gov.au/our-work/reports/integrity-of-grant-program-administration> [↑](#footnote-ref-65)
66. <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2606>;

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2606/Report%20No%208%20-%20Public%20Accountability%20Committee%20-%20NSW%20Government%20grant%20programs%20-%20First%20report.pdf> [↑](#footnote-ref-66)
67. <https://www.abc.net.au/news/2022-04-23/greens-billion-dollar-plan-solar-battery-renewable-election/101010790> [↑](#footnote-ref-67)
68. <https://www.smh.com.au/politics/federal/the-1-billion-cost-of-pork-barrelling-revealed-20180117-h0judh.html>; <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop55/c06> [↑](#footnote-ref-68)
69. <https://www.dailytelegraph.com.au/getting-the-pork--and-a-statue-of-slim-dusty/news-story/0c5ede251b177574701c0776b5c0bfd6>

Tasmanian Freight Equalisation: <https://www.servicesaustralia.gov.au/tasmanian-freight-equalisation-scheme>; Queensland dams: <https://www.theguardian.com/australia-news/2022/apr/21/morrison-governments-74bn-in-dam-commitments-could-be-biggest-pork-barrel-in-history>; Adelaide submarines: <https://amp.theaustralian.com.au/commentary/editorials/team-abbott-launches-hmas-pork-barrel/news-story/c6b5e7acfa90873aa9105561126aee4d> Wilkie Among the notable claims in the most recent Federal election was of Commonwealth pork-barrelling in Northern Tasmania to demonstrate the ineffectiveness of an independent member in the south of the State.<https://www.smh.com.au/politics/federal/the-1-billion-cost-of-pork-barrelling-revealed-20180117-h0judh.html>; <https://www.eurekastreet.com.au/article/pork-barrel-politics-rolls-regional-australia> [↑](#footnote-ref-69)
70. As per section 2, the non-political, extra-legal form of accountability of public labelling by an anti-corruption commission is not recommended and is not reviewed here. [↑](#footnote-ref-70)
71. The term ‘independent agency’ can be a misnomer. See: https://www.thejadebeagle.com/nifrastructure-australia-review-2022.html [↑](#footnote-ref-71)
72. <https://www.thejadebeagle.com/covid---july-2020.html>; <https://www.thejadebeagle.com/acrpa.html> [↑](#footnote-ref-72)
73. Panel report: *‘There were too many instances in which government regulations and their enforcement went beyond what was required to control the spread of the virus, even when based on the information available at the time. Such overreach undermined public trust and confidence in the institutions that are vital to effective crisis response. Many Australians came to feel that they were being protected by being policed*’ <https://assets.website-files.com/62b998c0c9af9f65bba26051/6350438b7df8c77439846e97_FAULT-LINES-1.pdf>; <https://www.thejadebeagle.com/tip-fire-a.html>; [↑](#footnote-ref-73)
74. Compare 4.3b in <https://www.thejadebeagle.com/acrpa.html> and Loeilo v. Giles in <https://www.thejadebeagle.com/not-so-fast.html> with the NSW Auditor’s comments in note 65 (above). [↑](#footnote-ref-74)
75. That the Ministerial Code be amended to read, “A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act in the public interest, and must not act improperly for their private benefit or for the private benefit of any other person”. [↑](#footnote-ref-75)
76. For example, by bodies providing reports to Parliament such as auditor generals. [↑](#footnote-ref-76)
77. Strictly, that question is also relevant for meritorious decisions. As the Government is formed from confidence of the Lower House, it is likely that House will assume spending has merit. Therefore, it is the Upper House’s view about merit that will be important. [↑](#footnote-ref-77)
78. This echoes separation of powers, and is part of a debate about whether the NSW Commission in effect is a judicial or executive body. While that debate may be academic in NSW, with Parliament seeking to arm an executive agency with quasi-judicial functions. it could prove real at the Commonwealth level because that is the tier at which there is Constitutional requirements for separation: <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2018/93.pdf> [↑](#footnote-ref-78)
79. Control of prerogative. <https://www.journalofcommonwealthlaw.org/article/24261-the-prerogative-and-the-courts-in-australia> [↑](#footnote-ref-79)
80. Review, for example via Legislative Council or Senate Committees. [↑](#footnote-ref-80)
81. Conventions such as ‘Westminster responsibility’ – Ministers resigning when censured in Parliament. <https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/practice5/chapter2#asp>

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2004-07/migration/report/c01#:~:text=1.13%20The%20doctrine%20of%20individual,actions%20taken%20under%20their%20authority>.

Hypocrisy: <https://www.thejadebeagle.com/emergency-achieved.html> [↑](#footnote-ref-81)
82. As the Government is formed from the support of the majority of the Lower House <https://www.canberratimes.com.au/story/7321835/bottom-of-the-barrel-can-anything-stop-the-rorts/> [↑](#footnote-ref-82)
83. For example: <https://www.thejadebeagle.com/commercial-in-confidence.html>; <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/pops/pop63/c07> [↑](#footnote-ref-83)
84. <https://www.cjccl.ca/wp-content/uploads/2021/05/10-Twomey.pdf> [↑](#footnote-ref-84)
85. <https://www.theguardian.com/australia-news/2019/sep/23/eddie-obeid-and-ian-macdonald-trial-delayed-due-to-adverse-commentary>

Clause 40 of the Magna Carta: *“To no one will we sell, to no one will we deny or delay right or justice.”* <https://www.judcom.nsw.gov.au/publications/benchbks/judicial_officers/delay_defeats_justice.html> [↑](#footnote-ref-85)
86. It also implies decisions on prosecutions should not be influenced, or be seen to be influenced, by Governments. Yet the Commonwealth Attorney General, who is a member of the Government, appears to make some decisions as to whether prosecutions should proceed - the most recent being stopping the prosecution of Mr Collaery <https://www.abc.net.au/news/2022-07-09/bernard-collaery-witness-k-saga-closed-amid-chinas-regional-rise/101220606>. [↑](#footnote-ref-86)
87. <https://www.sydneycriminallawyers.com.au/blog/shoebridge-on-delivering-a-federal-icac-with-teeth-soon-after-taking-senate/> [↑](#footnote-ref-87)
88. <https://www.theaustralian.com.au/inquirer/uncertain-science-blighted-pandemic-management/news-story/74fc01d56c2f56676f328cc8da4e94e6> [↑](#footnote-ref-88)
89. Commonwealth: There were 562 pre-Budget submissions for the 2022-23 Budget: <https://treasury.gov.au/consultation/2022-23-pre-budget-submissions>; <https://investment.infrastructure.gov.au/about/budget.aspx> NSW <https://www.budget.nsw.gov.au/budget-papers#regional-nsw>; [↑](#footnote-ref-89)
90. An example is the October 2022 Commonwealth infrastructure spending announcements nine days prior to the Budget, and in the context of speculation the Budget may announce reduced spending on projects initiated by the former Government <https://minister.infrastructure.gov.au/c-king/media-release> [↑](#footnote-ref-90)
91. <https://www.abc.net.au/news/2022-02-11/pork-barrelling-in-nsw-hasnt-always-worked/100823744>

<https://www.smh.com.au/national/nsw/pork-barrel-shrug-set-the-standard-at-a-cynical-low-20211003-p58wq9.html> [↑](#footnote-ref-91)
92. <https://www.theaustralian.com.au/business/media/of-course-theres-a-symbiotic-relationship-between-media-and-politics/news-story/4529abc983756d564b43d2d20dde3d76> <https://www.theaustralian.com.au/business/media/of-course-theres-a-symbiotic-relationship-between-media-and-politics/news-story/4529abc983756d564b43d2d20dde3d76> Leveson: the press and politicians at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270942/0780_iii.pdf> [↑](#footnote-ref-92)
93. Chris Masters, *Jonestown,* Allen & Unwin, 2006, at p.416. [↑](#footnote-ref-93)
94. For those lacking imagination, this might occur if: a. politicians aim for praise in the media because this is thought to enhance election prospects; media outlets have opportunities to seek favour – for themselves or others - from politicians by (explicitly or implicitly) promising to provide favourable publicity; or by promising unfavourable publicity unless favour is bestowed; politicians seek favour of appearance on programs, exclusive interviews etc. which give the public the appearance of the media personality having some power over the politician; media seeks favour by agreements for installing or removing Ministers or their advisers; politicians or advisers ‘second guess’ media outlets to curry favour with them; the media outlets claim – in public or in private - they have thus influenced politicians; that tends to create within the bureaucracy a culture of compliance with the outlet’s wishes. [↑](#footnote-ref-94)
95. <https://www.crikey.com.au/2014/08/22/bill-shorten-and-the-news-corp-method-of-blackmail/>

<https://www.abc.net.au/news/2018-04-16/icac-probes-blackmail-allegations-at-ex-canterbury-council/9663090> [↑](#footnote-ref-95)
96. Mason: see note 49 (above)<https://www.abc.net.au/news/2012-10-01/newton-alan-jones/4288824> [↑](#footnote-ref-96)
97. <https://radiotoday.com.au/ray-hadley-versus-alan-jones-covid/>

and its citation: <https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/27520/Nicholas-Cowdery-Influence-of-the-media-on-the-criminal-justice-system-in-NSW-Legal-Aid-NSW-Criminal-Law-Conference-2017-.pdf> [↑](#footnote-ref-97)
98. Expressed as: it was the sun wot won it <https://www.sciencedirect.com/science/article/abs/pii/S0049089X15001854> [↑](#footnote-ref-98)
99. Perhaps not the reference you expected: <https://www.crikey.com.au/2014/08/22/bill-shorten-and-the-news-corp-method-of-blackmail/> [↑](#footnote-ref-99)
100. The inquiry was established after several employees of News of the World were convicted of hacking private phones and computers. Reportedly over 6,000 phones had been hacked by various organisationshttps://en.wikipedia.org/wiki/Operation\_Weeting [↑](#footnote-ref-100)
101. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270942/0780_iii.pdf> p1439. [↑](#footnote-ref-101)
102. <https://www.icac.nsw.gov.au/ArticleDocuments/1029/When%20is%20pork%20barrelling%20corruption%20and%20what%20can%20be%20done%20to%20avert%20it_Anne%20Twomey.pdf.aspx> [↑](#footnote-ref-102)
103. <https://law.unimelb.edu.au/__data/assets/pdf_file/0009/3159144/04-Gogarty.pdf> [↑](#footnote-ref-103)
104. For example: <https://www.thejadebeagle.com/williams-case.html> [↑](#footnote-ref-104)
105. E.g., <https://www.thejadebeagle.com/nifrastructure-australia-review-2022.html> [↑](#footnote-ref-105)
106. <https://www.cjccl.ca/wp-content/uploads/2021/05/10-Twomey.pdf> [↑](#footnote-ref-106)
107. S.32B Financial Framework (Supplementary powers) Act, ‘Financial Framework Regulations’. [↑](#footnote-ref-107)
108. Twomey notes the Regulations (see note 5 above) establish a regional fund which supposedly *‘relies upon the Commonwealth’s powers in relation to subjects including: territories, Indigenous Australians, financial assistance to the States, aliens and immigrants, interstate and overseas trade and commerce, Australia’s obligations under international agreements, the provision of welfare benefits, electronic communications, assistance to foreign, trading or financial corporations and measures that are peculiarly adapted to the government of a nation that cannot otherwise be carried on for the benefit of the nation.’ Funded projects included the construction of an aquatic centre in Robertson, upgrading the Terrigal Rugby clubhouse, improving the heating in the Pool Hall of the Whyalla Leisure Centre, a Healthy Living Centre in Norlane, a basketball stadium extension in Frankston, a youth hub and skate park in Mansfield and a Community Health and Wellbeing Space in Romsey. It is doubtful that these projects would fall under any of the above heads of power’* . [↑](#footnote-ref-108)
109. <https://johnmenadue.com/car-parks-certainly-corrupt-and-probably-illegal/>  [↑](#footnote-ref-109)
110. Twomey and others: also see note 99. <https://www.thejadebeagle.com/road-to-woy-woy.html> [↑](#footnote-ref-110)
111. <https://www.thejadebeagle.com/australian-infrastructure-plan.html> (2016); <https://www.thejadebeagle.com/infrastructure-priorities.html> (2017); <https://www.thejadebeagle.com/infrastructure-principles---august-2018.html> (2018); <https://www.thejadebeagle.com/infrastructure-priorities-2020.html> (2020); <https://johnmenadue.com/john-austen-time-to-call-time-on-infrastructure-australia/> (2021) [↑](#footnote-ref-111)
112. <https://www.thejadebeagle.com/submission-to-aps-review-2019.html>; <https://www.thejadebeagle.com/how-high-is-the-dome.html> [↑](#footnote-ref-112)
113. <https://johnmenadue.com/john-austen-the-high-court-the-williams-case-and-transport/> [↑](#footnote-ref-113)
114. <https://johnmenadue.com/john-austen-placating-the-infrastructure-club/>; <https://johnmenadue.com/john-austen-post-election-infrastructure-review/>; <https://johnmenadue.com/john-austen-time-to-call-time-on-infrastructure-australia/> [↑](#footnote-ref-114)
115. Twomey referred to $189m in one program. In comparison, in May 2022 the (then) Labor Opposition offered $2,200m for a single project – the Melbourne rail loop – albeit over several years. [↑](#footnote-ref-115)
116. Because it is aimed at reducing corruption: e.g., McCloy’s case: <https://www.hcourt.gov.au/cases/case_s211-2014> [↑](#footnote-ref-116)
117. Validity: see note 99. [↑](#footnote-ref-117)
118. Analogous to s.96 conditions being invalid if they threaten the sovereignty of a State. [↑](#footnote-ref-118)
119. For example: <https://www.theguardian.com/australia-news/2022/oct/16/liberals-accuse-albanese-government-of-playing-favourites-in-infrastructure-spending> [↑](#footnote-ref-119)
120. For example: <https://www.smh.com.au/politics/nsw/we-re-getting-dudded-kean-accuses-canberra-of-favouring-labor-states-with-infrastructure-spending-20221016-p5bq68.html> [↑](#footnote-ref-120)
121. *‘Insiders host David Spears grilled Ms King as to why New South Wales was receiving less than half of Victoria’s funding.“I would say we had a slightly different relationship in opposition with the Victorians as we did with New South Wales,” she said.'*  Context to the comment about relationship includes to Ms King, Commonwealth infrastructure Minister, being a member of the Federal Opposition – Labor - prior to the 2022 election after which Labor took office. Labor is in government in Victoria but not in New South Wales;

<https://www.skynews.com.au/australia-news/politics/albanese-government-commits-22-billion-towards-suburban-railway-loop-amid-96-billion-infrastructure-budget-spend/news-story/87c5318367a0948c7a12aac04f5b3851> [↑](#footnote-ref-121)
122. If for no reason other than Infrastructure Australia’s later consideration being irrelevant. That, however, entails a probity risk of placing pressure on the organisation to ‘validate’ the Government’s decision. <https://www.thejadebeagle.com/infrastructure-principles---august-2018.html>

 [↑](#footnote-ref-122)
123. <https://www.sbs.com.au/news/article/vic-election-referendum-on-ew-link-pm/mm112mlkr> [↑](#footnote-ref-123)
124. Announced 16 October prior to Budget Bill being submitted to Parliament <https://minister.infrastructure.gov.au/c-king/media-release/257-billion-infrastructure-boost-victoria> Victorian election scheduled for 26 November. Auditor General: <https://www.parliament.vic.gov.au/file_uploads/20220921_Business_Cases_7ZQhc8pH.pdf>

Reference to political parties and downplay: *"We certainly know that the Victorian state Labor government is committed to it. I certainly hope the Liberals see the light," she told ABC's Insiders on Sunday. When asked about criticism of the business case for the rail loop, Ms King said she had spoken to her Victorian counterparts and was very confident in the work they had done to ensure the project stacked up. She said the government's pre-election pledge relied on Victoria's business case and she confirmed Infrastructure Australia was yet to properly review the project. "There have been some challenges around that (business case), but this (funding) is for the early works of that project. We haven't made any further commitments and we'll talk to the Victorians around that as we go forward," she said.’* In terms of the project (as it is known) the current Commonwealth commitment of $2.2bn is minor when compared with costs of $125.0bn<https://www.begadistrictnews.com.au/story/7943645/fed-funds-for-rail-loop-east-west-dead/> [↑](#footnote-ref-124)
125. <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6917> [↑](#footnote-ref-125)
126. Could: Bill s.8(1); Retrospectivity: s.8(4). [↑](#footnote-ref-126)
127. Judiciary: Bill s.8(2) and (6); Non-tangible matters: the references in s.8 (11), (13) to public resources as defined in the PGPA Act – which are monies, property or appropriations. [↑](#footnote-ref-127)
128. Committee: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Anti-Corruption_Commission_Legislation/NACC> Submissions: <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Anti-Corruption_Commission_Legislation/NACC/Submissions> [↑](#footnote-ref-128)
129. The headline used for Mr Waterford’s article was: **‘Non-believers, the timid and party rorters have got at corruption bill’** <https://johnmenadue.com/non-believers-the-timid-and-party-rorters-have-got-at-corruption-bill/> [↑](#footnote-ref-129)
130. Solomon: <https://johnmenadue.com/judging-the-national-anti-corruption-commission/> [↑](#footnote-ref-130)
131. Cunneen limitation: see notes 6 and 16 (above). [↑](#footnote-ref-131)
132. Waterford: <https://johnmenadue.com/non-believers-the-timid-and-party-rorters-have-got-at-corruption-bill/> [↑](#footnote-ref-132)
133. Ng: <https://theconversation.com/will-the-national-anti-corruption-commission-actually-stamp-out-corruption-in-government-191759> [↑](#footnote-ref-133)
134. Charles: <https://johnmenadue.com/the-nacc-bill/> [↑](#footnote-ref-134)
135. The apparent self-interest includes the prospect of increased budgets and organisations based on arguments of a substantially larger budget for a Commonwealth commission – the NSW and Victorian Commissions have publicly complained about funding. Budgets: Victoria’s Independent Broad Based Anti-Corruption Commission: 2020-21 - $42m; 2021-22 (projected) - $62m <https://www.ibac.vic.gov.au/microsites/202021annualreport/summary/financial-report.html>; <https://www.ibac.vic.gov.au/docs/default-source/reports/ibac-annual-plan-2022-23.pdf?sfvrsn=e4efd41a_4>. NSW Independent Commission Against Corruption: 2020-21 - $29m <https://www.icac.nsw.gov.au/about-the-nsw-icac/nsw-icac-publications/nsw-icac-corporate-publications/annual-reports>, NSW Law Enforcement Conduct Commission; 2020-21 - $22m

<https://www.lecc.nsw.gov.au/news-and-publications/annual-reports/lecc-annual-report-2020-21.pdf/view> [↑](#footnote-ref-135)
136. See, for example section 2.2 (above). [↑](#footnote-ref-136)
137. <https://www.theaustralian.com.au/inquirer/demand-for-public-hearings-at-odds-with-genuine-justice/news-story/337e130106be396c191375ab8723a1a3> [↑](#footnote-ref-137)
138. Submission 78 at <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Anti-Corruption_Commission_Legislation/NACC/Submissions> [↑](#footnote-ref-138)
139. Bill s.8(1) [↑](#footnote-ref-139)
140. <https://www.theaustralian.com.au/nation/politics/serious-and-systemic-flaws-by-design-for-federal-icac/news-story/1efd28eb33f46a6b5fff2aba393f29bf> [↑](#footnote-ref-140)
141. For example: *‘Eddie Obeid isn't just the eternal poster boy for bare-faced political corruption, and a current inmate of Her Majesty’s prisons. He was also, back in the day, a successful defamation plaintiff, taking damages of $162,173 and more than $1 million in costs from Fairfax over a series of articles by Kate McClymont which had labelled him as, well, corrupt. When Eddie finally went down after his long career of poisoning the governmental well with his cartoonish venality, Fairfax stood vindicated — and still $1,162,173 (plus its own legal costs) poorer. You don't get it back.’* <https://www.abc.net.au/news/2018-07-09/defamation-sarah-hanson-young-david-leyonhjelm-sexual-slurs/9935244> [↑](#footnote-ref-141)
142. *‘Likewise a Coroner when adjourning a coronial hearing to refer papers to the DPP can do so either: when the Coroner ‘form the opinionthat the evidence is capable of satisfying a jury that a known person has committed an indictable offence or when there is a reasonable prospect a jury would convict a known person of an indictable offence.’* [↑](#footnote-ref-142)
143. <https://www.theaustralian.com.au/nation/politics/serious-and-systemic-flaws-by-design-for-federal-icac/news-story/1efd28eb33f46a6b5fff2aba393f29bf> [↑](#footnote-ref-143)
144. <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=LEGISLATION;id=legislation%2Fbills%2Fr6917_first-reps%2F0002;query=Id%3A%22legislation%2Fbills%2Fr6917_first-reps%2F0000%22;rec=0> [↑](#footnote-ref-144)
145. Submission 12 at [↑](#footnote-ref-145)
146. ‘*2.14  In the context of Australia’s representative democratic system of government, it would not be considered partial, in and of itself, for a Minister or public official to implement the election commitments or policy platform of the government of the day. For example:*

*â¢  where a government has made a commitment to amend legislation in a particular way then, at face value, the third and fifth elements of Mahoney JA’s concept of partiality listed above would not be satisfied—notwithstanding that some persons may benefit more than others, from the effect of the change to the legislation; and*

*â¢   where a government has made an election commitment to provide a particular grant to a particular recipient then, subject to the rules of the grants program in question allowing the grant to be made in such a manner, at face value, the third or fifth elements of Mahoney JA’s concept of partiality listed above would also not be satisfied.’*

Mahoney JA’s concept of partiality third and fifth elements were expressed as: ‘*3.  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; 5. the preference was given for a purpose which was extraneous to the power in question.’*

Explanatory memorandum: <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6917_ems_8ca94541-584a-4100-8c52-2be6478cff68%22> [↑](#footnote-ref-146)
147. Some other arguments e.g. they educate the community are a restatement of these arguments. There are a group of less than credible arguments such as public hearings increase fairness or expose corruption: <https://australiainstitute.org.au/wp-content/uploads/2020/12/National-Integrity-Commission-Design-Blueprint-Part-3-Public-hearings.pdf>

<https://australiainstitute.org.au/post/only-1-in-5-support-exceptional-circumstances-restriction-on-nacc-public-hearings/> [↑](#footnote-ref-147)
148. <https://www.canberratimes.com.au/story/7922370/federal-corruption-hearings-should-be-held-in-public/> [↑](#footnote-ref-148)
149. For example, prosecution of Cardinal Pell <https://www.bbc.com/news/world-australia-52183157> [↑](#footnote-ref-149)
150. <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1999/27.html>; <https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-kenny/kenny-j-20111028> [↑](#footnote-ref-150)
151. <https://www.thejadebeagle.com/urbans-admonition.htm> [↑](#footnote-ref-151)
152. Keyser Soze effect: <https://en.wikipedia.org/wiki/Keyser_S%C3%B6ze> [↑](#footnote-ref-152)