



INQUIRY INTO RECOMMENDATIONS OF THE ICAC REGARDING ASPECTS OF THE CODE OF CONDUCT FOR MEMBERS, THE INTEREST DISCLOSURE REGIME AND A PARLIAMENTARY INVESTIGATOR

Background Paper No. 1:

Amendment of the *Code of Conduct for Members* relating to improper influence by members

Recommendation 22 of the ICAC

- 1.1 In October 2013, the Independent Commission Against Corruption (ICAC) released a report entitled *Reducing the opportunities and incentives for corruption in the State's management of coal resources*. The report is available on the website of ICAC at www.icac.nsw.gov.au.
- 1.2 Chapter 6 of the report contained recommendations concerning the conduct of members of parliament and ministers. Recommendation 22 was as follows:

That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee consider amending the Code of Conduct for members to deal comprehensively with improper influence by members.

The *Code of Conduct for Members*

- 1.3 The *Code of Conduct for Members* was originally adopted by resolutions of the Legislative Council and Legislative Assembly in 1998. An expanded version of the Code was adopted by the Houses in 2007 following a report by ICAC concerning the regulation of members' secondary employment. A copy of the *Code of Conduct for Members* is attached.
- 1.4 The Code consists of a preamble and seven clauses which deal with disclosure of conflicts of interest, bribery, gifts, use of public resources, duties as a member of Parliament and secondary employment or engagements.
- 1.5 The preamble includes an acknowledgement that members are responsible for 'using their influence to advance the common good of the people of New South Wales'. However, there is no substantive provision which specifically addresses the use of influence as such.

- 1.6 Each House of Parliament has adopted the *Code of Conduct for Members* for the purposes of section 9 of the *Independent Commission Against Corruption Act 1988*. As a result of this nexus with the Act a substantial breach of the Code may amount to ‘corrupt conduct’ under the Act and attract the investigatory jurisdiction of ICAC.

Background to the ICAC recommendation

- 1.7 In July 2013 ICAC reported to Parliament on its investigation concerning Operation Jasper. The investigation concerned the circumstances surrounding a decision made in 2008 by the Hon Ian Macdonald MLC, then minister for primary industries and minister for mineral resources, to grant a coal exploration license at Mt Penny in the Bylong Valley in the Western New South Wales Coalfield. The report included findings that:

- Mr Macdonald had engaged in corrupt conduct in relation to the creation of the Mt Penny tenement.
- The corrupt conduct was motivated by an agreement between Mr Macdonald and another member of the Legislative Council, the Hon Edward Obeid, to financially benefit the Obeid family.
- Mr Macdonald and Mr Obeid had engaged in corrupt conduct by conspiring to defraud in relation to the creation of the Mt Penny tenement.

- 1.8 In August 2013 the ICAC reported to Parliament on its investigation in relation to Operation Acacia which concerned the granting of a further coal exploration license by Minister Macdonald.

- 1.9 In October 2013, in its report entitled *Reducing the opportunities and incentives for corruption in the State’s management of coal resources*, ICAC noted that Operations Jasper and Acacia had highlighted shortcomings in the accountability framework governing the conduct of ministers and members. With respect to the *Code of Conduct for Members*, ICAC specifically observed:

There are currently no specific provisions concerning members attempting to influence ministerial or bureaucratic decisions that affect their private interests and those of their family and associates, although such conduct seems quite contrary to the preamble. This ignores the reality that major decisions of considerable value are taken by the executive and by state agencies and do not come before Parliament.¹

Previous consideration of the regulation of members’ influence

- 1.10 Prior to the adoption of the Code of Conduct for Members in 1998 the Legislative Council Standing Committee on Parliamentary Privilege and Ethics and the Legislative Assembly

¹ ICAC, *Reducing the opportunities and incentives for corruption in the State’s management of coal resources*, October 2013, p 42.

Standing Ethics Committee conducted separate inquiries into the development of a draft code of conduct for the members of their respective Houses. The draft code developed by each Committee included provisions regulating the use of influence by members.

1.11 The Council Committee's draft code addressed the issue as follows:

- Clause 1, 'Conduct – General', included a requirement for members to 'exercise the influence gained from their public interest to advance the public'.
- Clause 5, 'Use of public office for private gain', included the following prohibitions on the use of public office for private gain and the improper use of influence:
 - 5.1 Members will not at any time act in a manner that takes improper advantage of their status or position as a Member of Parliament.
 - 5.2 Members must not engage in conduct that exploits for private reasons their positions or authorities.
 - 5.3 Members shall not use the resources and status of their public office to seek to influence a decision by another person to further, directly or indirectly, their private interests or the private interests of their family.
 - 5.4 Members shall not use improperly their influence in order to obtain appointment, promotion, advancement, transfer or any other advantage within the public sector on behalf of themselves or another or to affect the proper outcome of any procedure established under legislation for the management of the public sector.
 - 5.5 Members should not approach Ministers, public servants or public bodies on a matter connected with a private interest, without appropriate disclosure.²

1.12 The Assembly Committee's draft code addressed the use of influence as follows:

- The preamble included an acknowledgement of members' responsibility to 'use the influence gained as elected office-holders to advance the common good of the people of New South Wales'.
- Clause 1 required members to 'exercise the influence gained from their public office to advance the public interest'.³

1.13 The Code of Conduct ultimately adopted by the Houses in 1998 included reference to the use of influence in the preamble but not in any substantive clause, as previously discussed. In support of that Code the then Premier argued that the draft codes which had been developed by the committees were too wide and uncertain in scope to provide

² Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the establishment of a code of conduct for members*, Report No. 3, October 1996.

³ Legislative Assembly Standing Ethics Committee, *Report on a draft code of conduct for members of the Legislative Assembly*, October 1997.

effective grounds for findings of 'corrupt conduct' under the *Independent Commission Against Corruption Act 1988*.

- 1.14 Since the introduction of the Code of Conduct for Members in 1998 the Legislative Council Privileges Committee and the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics have conducted reviews of the Code of Conduct in each successive Parliament. These reviews have included consideration of issues relating to the use of influence by members in connection with Clause 1, 'Disclosure of conflicts of interest', and Clause 2, 'Bribery'.
- 1.15 With regard to Clause 1, 'Disclosure of conflicts of interest', the reviews have considered proposals to expand the disclosure requirements to encompass the interests of family members and associates and the use of influence by members. The Committees have generally not supported these proposals given the difficulty of encapsulating the issues raised with sufficient precision to operate effectively in the context of the statutory definition of 'corrupt conduct'. However, the Council Committee has supported consideration being given to the introduction of a requirement to disclose family interests in the pecuniary interests register under the *Constitution (Disclosures by Members) Regulation 1983*.
- 1.16 With regard to Clause 2, 'Bribery', the reviews have considered proposals to expand the current prohibition beyond the promotion of matters in Parliament in return for reward to encompass a ban on all forms of advocacy by members outside Parliament in return for reward. The Committees have not supported these proposals in the forms they have been put forward to date, noting that the *Constitution (Disclosures by Members) Regulation 1983* provides for the disclosure of income derived from the use of a member's position outside Parliament. However, the Council Committee has indicated that it would be prepared to entertain an amendment to the Code to prohibit paid advocacy if the amendment could be targeted to specific situations where the promotion of matters outside Parliament involves a clear conflict of interest or abuse of the member's position.

Submissions sought

- 1.17 The Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee seek submissions concerning the amendment of the Code of Conduct for Members to deal comprehensively with improper influence by members, including in relation to:
- The types of influence by members which should be regulated in the Code
 - The form of an appropriate amendment or amendments.



Code of Conduct for Members

PREAMBLE

- The Members of the Legislative Assembly and the Legislative Council have reached agreement on a Code of Conduct, which is to apply to all Members of Parliament.
- Members of Parliament recognise that they are in a unique position of being responsible to the electorate. The electorate has the right to dismiss them from office at regular elections.
- Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.
- Members of Parliament acknowledge that their principal responsibility in serving as Members is to the people of New South Wales.

THE CODE

1 Disclosure of conflict of interest

- (a) Members of Parliament must take all reasonable steps to declare any conflict of interest between their private financial interests and decisions in which they participate in the execution of their office.
- (b) This may be done through declaring their interests on the Register of Disclosures of the relevant House or through declaring their interest when speaking on the matter in the House or a Committee, or in any other public and appropriate manner.
- (c) A conflict of interest does not exist where the member is only affected as a member of the public or a member of a broad class.

2 Bribery

- (a) A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature, which the member has received, is receiving or expects to receive.
- (b) A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for

any remuneration, fee, payment, reward or benefit in kind, of a private nature, which any of the following persons has received, is receiving or expects to receive:

- (i) A member of the Member's family;
 - (ii) A business associate of the Member; or
 - (iii) Any other person or entity from whom the Member expects to receive a financial benefit.
- (c) A breach of the prohibition on bribery constitutes a substantial breach of this Code of Conduct.

3 Gifts

- (a) Members must declare all gifts and benefits received in connection with their official duties, in accordance with the requirements for the disclosure of pecuniary interests.
- (b) Members must not accept gifts that may pose a conflict of interest or which might give the appearance of an attempt to improperly influence the Member in the exercise of his or her duties.
- (c) Members may accept political contributions in accordance with part 6 of the *Election Funding Act 1981*.

4. Use of public resources

Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.

5 Use of confidential information

Members must not knowingly and improperly use official information, which is not in the public domain, or information obtained in confidence in the course of their Parliamentary duties, for the private benefit of themselves or others.

6 Duties as a Member of Parliament

It is recognised that some members are non-aligned and others belong to political parties. Organised parties are a fundamental part of the democratic process and participation in their activities is within the legitimate activities of Members of Parliament.

7 Secondary employment or engagements

Members must take all reasonable steps to disclose at the start of a Parliamentary debate:

- (a) The identity of any person by whom they are employed or engaged, or by whom they were employed or engaged in the last two years (but not if it was before the Member was sworn in as a Member);
- (b) The identity of any client of any such person or any former client who benefited from a Member's services within the previous two years (but not if it was before the Member was sworn in as a Member); and
- (c) The nature of the interest held by the person, client or former client in the parliamentary debate.

This obligation only applies if the Member is aware, or ought to be aware, that the person, client or former client may have an interest in the Parliamentary debate that goes beyond the general interest of the public.

This disclosure obligation does not apply if a Member simply votes on a matter; it will only apply when he or she participates in a debate. If the Member has already disclosed the information in the Member's entry in the pecuniary interest register, he or she is not required to make a further disclosure during the parliamentary debate.