



Premier & Cabinet

25 SEP 2013

2013-365676

The Hon Revd. Fred Nile MLC
Chairman
General Purpose Standing Committee No. 1
Legislative Council
Parliament House
Macquarie Street,
SYDNEY NSW 2000

Dear Mr Chairman

I refer to your letter of 19 September 2013 to the Premier in relation to the hearing of the portfolios of the Premier and Western Sydney.

I note that when the original questions on notice were sent by the Committee, the issues concerning Mr Tannous had not been highlighted as parts of the transcript requiring a response.

Please find enclosed a copy of the letter (and its attachment) that I sent to Mr Tannous on 17 September 2013. I also enclose a copy of my letter to Mr Tannous dated 21 August 2013, a letter I received from Mr Tannous dated 11 September 2013 and the Corrs Chambers Westgarth submission sent on his behalf.

I have also provided a copy of these documents to the Premier.

On 19 September 2013, the Premier amended the NSW Lobbyist Code of Conduct to ensure that lobbyists do not occupy or act in an office or position concerned with the management of a registered political party. These changes take effect from 31 October 2013.

Yours sincerely

Chris Eccles
Director General



Premier & Cabinet

2013-333351

Mr Joseph Tannous
Executive Director
First State Advisors & Consultants Pty Ltd
Level 10, Park House
187-191 Macquarie Street
SYDNEY NSW 2000

Dear Mr Tannous

I refer to my previous letters of 21 August 2013 to you and to First State Advisors & Consultants Pty Ltd, trading as 1st State Government & Corporate Relations (**First State**).

On 16 August 2013, during a public hearing for the Budget Estimates 2013-14 inquiry conducted by the Legislative Council General Purpose Standing Committee No 1, the Hon Luke Foley MLC alleged that your LinkedIn profile carried the statement:

"Joseph currently holds a number of senior positions within the NSW Liberal Party. In these roles he enjoys constant contact with elected representatives from across the political divide enabling him to attain the desired results for his clients." (the **Statement**)

I note that there is no dispute that this Statement appeared on your LinkedIn profile, until it was removed on 16 August 2013.

I have read your response of 11 September 2013 (the **Tannous letter**), which enclosed a submission prepared by Corrs Chambers Westgarth on behalf of you and First State (the **Corrs submission**).

Having regard to the above matters, and taking into account the submissions made in the Tannous letter and the Corrs submission, I have formed the opinion that there has been a breach of clause 7.1(c) of the *NSW Government Lobbyist Code of Conduct* (the **Code**), which provides that:

Lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions.

I do not consider that the breach on this occasion is such as to warrant the exercise of my discretion under Clause 8.3 of the Code to remove part or all of First State's details from the Lobbyist Register.

Reasons for my decision are attached.

Consultation on possible disclosure of documents

There may be a public interest in releasing a copy of this letter (and the attached reasons), as well as my letter to you of 21 August 2013, the Tannous letter and the Corrs submission. In particular, the release of these documents may contribute to open discussion of public affairs, enhance understanding of Government processes, and provide information of relevance to others about compliance with the Code.

I am therefore considering pro-actively releasing these documents under section 7 of the *Government Information (Public Access) Act 2009 (GIPA Act)*.

Before doing that, I invite you to indicate, within 7 days of the date of this letter, whether you have any objections to the public release of any or all of those documents. If you do have any objections, please indicate the basis of those objections by reference to the public interest considerations set out in the Table to section 14 of the GIPA Act.

I note that, even if you do have objections, which I will take into account, I may nevertheless decide to release the documents if I determine that, on balance, it is in the public interest to do so.

You should also be aware that, even if I decide not to pro-actively release the documents, if they subsequently become the subject of a formal GIPA application, this Department will be legally obliged to release them unless there is an 'overriding public interest against disclosure' as defined in the GIPA Act.

Thank you for your co-operation in this matter, and for your detailed submission.

Yours sincerely


Chris Eccles
Director General

17 SEP 2013

Attachment:

**Alleged breach of the Lobbyist Code by Mr Tannous and First State -
Reasons for decision**

Nature of complaint and questions to be addressed

First State Advisors & Consultants Pty Limited (**First State**) is a Lobbyist registered on the NSW Register of Lobbyists. Mr Joseph Tannous is listed on the Register as a person engaged by First State to undertake lobbying activities.

On 16 August 2013, during a public hearing for the Budget Estimates 2013-14 inquiry conducted by the Legislative Council's General Purpose Standing Committee No 1, the Hon Luke Foley MLC alleged that Mr Tannous' LinkedIn profile carried the statement:

"Joseph currently holds a number of senior positions within the NSW Liberal Party. In these roles he enjoys constant contact with elected representatives from across the political divide enabling him to attain the desired results for his clients." (the **Statement**)

There is no dispute that this Statement appeared on Mr Tannous' LinkedIn profile, until it was removed on 16 August 2013.¹

I note as a preliminary matter that Corrs, on behalf of Mr Tannous and First State, has submitted that, in considering this matter, I should have regard to "the political nature of the complaint [from the Hon Luke Foley MLC]".² I reject that submission.

My power under clause 8.3 of the *NSW Government Lobbyist Code of Conduct* (the **Code**) to remove a Lobbyist's registration (in whole or in part) from the Register is discretionary and arises in circumstances including among others where I have formed the opinion that the Lobbyist or a person engaged by it to carry out lobbying activities has breached section 7.1 of the Code.

Although it would be reasonable to expect that this might ordinarily occur following the receipt of a complaint, it is not necessary that a formal complaint have been received in order for me to form such an opinion.

Further, where information concerning a possible or alleged breach is received, the motivation of the informant in providing that information would appear to have no relevance to either my forming an opinion as to whether a breach has in fact occurred or in deciding what if any action should be taken if it has.³

¹ Submission from Corrs Chambers Westergarth on behalf of First State and Mr Tannous dated 11 September 2013 (the **Corrs submission**), paragraph 2.2 and 2.8. It is not clear from the Corrs submission when the Statement first appeared on the LinkedIn profile.

² Corrs submission, paragraph 3.31(a).

³ An exception might be a circumstance where the information itself is in dispute and the credibility of the informant has been raised, but that is not the case here.

Whether the matters raised by Mr Foley were “likely done for political reasons”⁴ is of no relevance to the exercise of my functions under the Code.

The Corrs submission also points out that Mr Foley MLC has not directly identified in what particular manner it is alleged that Mr Tannous and First State might have breached the Code.⁵ While I accept that point, it is for the same reason not a relevant consideration in this case.

The information that has been raised is sufficient to lead me to consider it necessary to consider the following questions:

- (1) Did the making of the Statement itself breach section 7.1(d) of the Code by constituting a failure to “keep strictly separate from their duties and activities as Lobbyists any personal activity or involvement on behalf of a political party”?
- (2) Does the Statement otherwise point to conduct that has breached clause 7.1(d) of the Code?
- (3) Does the Statement breach clause 7.1(c) of the Code by constituting “a misleading, exaggerated or extravagant claim about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions”?

Although these questions were not put in precisely these terms either by Mr Foley MLC or in my earlier letter of 21 August 2013, they may be said to flow self-evidently from the matter that has been raised. In any event, each of them has been addressed in the Corrs submission,⁶ and I therefore do not consider that any practical unfairness can be said to result in those questions not having been put to Mr Tannous and First State in those exact terms.

Question 1

Clause 7.1(d) of the Code states that “Lobbyists shall keep strictly separate from their duties and activities as Lobbyists any personal activity or involvement on behalf of a political party.”

Corrs submits that a finding that simply making the Statement itself has breached clause 7.1(d) “would go beyond what even a highly technical reading of what section 7.1(d) could ordinarily be understood to cover”.⁷ I am inclined to agree.

Clause 7.1(d) is clearly directed toward the substantive activities of lobbyists. The making of a statement such as this may well lead to a question as to whether

⁴ Letter from Mr Tannous to the Director General of the Department of Premier and Cabinet dated 11 September 2013 (the *Tannous letter*).

⁵ Corrs submission, paragraph 3.7 and 3.31.

⁶ Corrs submission, for example, as to Question 1, paragraphs 3.28 to 3.29; as to Question 2, paragraphs 3.9 to 3.21; and as to Question 3, paragraphs 3.22 to 3.30.

⁷ Corrs submission, paragraph 3.28.

separation has been maintained in respect of those activities and party political activities (this being the issue to which Question 2 is addressed). However, it does not provide an answer to that question. I do not consider that the mere making of the Statement could, *of itself*, reasonably be considered to constitute a breach of clause 7.1(d).

Question 2

The Corrs submission concedes that, in so far as the Statement says that “[r]oles within the NSW Liberal Party, and the contact with elected representatives enjoyed as a result] “enabl[e] him to attain the desired results”, it may suggest the possibility of conduct having taken place in breach of section 7.1(d).⁸

It is implicit in clause 7.1(d) that a lobbyist may have an involvement with a political party outside of their position as a lobbyist. The Code does not prohibit, explicitly or implicitly, a lobbyist from also being the holder of an office in a political party. Rather, its requirement is that the *activities* of the two roles be kept “strictly separate”.

Other than any possible suggestion arising from the Statement itself, there is no evidence before me to suggest that Mr Tannous has failed to comply with the requirements of clause 7.1(d).

To the contrary, Mr Tannous asserts that he has complied with those requirements and that he does “scrupulously separate his personal political activities”.⁹ I note that the Corrs submission provides details of Mr Tannous’ lobbying activities, which support Mr Tannous’ assertion.¹⁰

Question 3

Clause 7.1(c) of the Code provides that:

“Lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions”.

The Corrs submission suggests that, in determining whether a statement or other conduct contravenes this provision of the Code, regard should be had to what courts have considered to be misleading or deceptive for the purposes of section 18 of the *Australian Consumer Law* (ACL) and/or what might be considered to constitute a misrepresentation at common law. Corrs notes that, at common law, a distinction has sometimes been made between representations and ‘puffery’, the latter not misleading except where it leads a person into error.

Corrs submits that a similar distinction should be drawn here such that, to make a

⁸ Corrs submission, paragraph 3.26. Albeit the submission states that this would putting the suggestion “at its highest”.

⁹ Corrs submission, paragraph 3.30.

¹⁰ Corrs submission, paragraph 1.1 to 1.16.

finding of a breach of the Code, I would “need to be satisfied that Mr Tannous’ comments were misleading and more than mere puffery that is part of the ‘ordinary stuff of commerce’”.¹¹

In relation to this aspect of the Corrs submission, I make the following comments:

- (a) A statement of the type referred to in clause 7.1(c) of the Code might, in some circumstances, also contravene the prohibition on misleading and deceptive conduct under section 18 of the ACL, in so far as it occurs in trade and commerce. Such a statement might, in certain circumstances, also involve a misrepresentation at common law.
- (b) In considering whether a statement is misleading for the purposes of clause 7.1(c) of the Code, regard may usefully be had to the manner in which the Courts have considered that term elsewhere. The general proposition that a misleading statement is one which induces or is capable of inducing error is accepted, as too is the proposition that a statement may be considered misleading even in the absence of any evidence that any particular person has in fact been misled.
- (c) However, the provisions of the Code must also be read in their context. The formation of an opinion that a Lobbyist’s statement contravenes clause 7(1)(c) should not necessarily be taken to imply an opinion that the statement would also be misleading at law or vice versa.
- (d) Given that the Code (unlike section 18 of the ACL) is concerned not only with statements that are misleading, but also with statements that are exaggerated or extravagant, the distinction that has sometimes been made at law between representations that might lead a person into error and those that constitute mere puffery would seem to offer little, if any, assistance.
- (e) The public policy objectives of the Code do not suggest that puffery should be exempt from the application of the Code. Indeed, they would seem to point to the opposite conclusion.

The Code was adopted amidst concerns including, among other things, about possible perceptions that lobbyists may have excessive influence and privileged access. Whether or not these perceptions had any basis in fact is, to some extent, beside the point. The mere existence of such perceptions has the potential to undermine public confidence in the institutions of government.

It may be that some statements that would be considered puffery, to the extent that they might fuel such perceptions and therefore undermine public confidence in the institutions of government, are the very type of statement that the Code is intending to proscribe.

¹¹ Corrs submission, paragraph 3.18.

I therefore reject the submission that statements that might elsewhere be considered puffery are necessarily excluded from the ambit of section 7.1(c).

That said, having regard to the purpose of the Code, I do not consider that it is necessary or appropriate for me to scrutinise in detail every statement that a lobbyist might make in the course of their business. I do not, for example, propose to consider or express any views as to the factual veracity of claims such as whether Mr Tannous' contact with government officials was "constant", whether that contact involves representatives "from across the political divide", or whether he does, in fact, "attain the desired results" for his clients.

In regard to those matters, I refer simply to my general comments above regarding the importance of lobbyists avoiding all misleading, exaggerated or extravagant claims, even those that, in other contexts, might be considered little more than puffery.

My present concern is with the implied link in the Statement between, on the one hand, Mr Tannous' position within the Liberal Party and, on the other hand, his activities as a lobbyist.

The Corrs submission states that "Mr Tannous' credentials as a lobbyist stem from his long-standing involvement in the Liberal Party".¹² If the Statement had said no more than this then it would appear to be unobjectionable. As noted above, the Code permits involvement in political party activity and, as a practical matter, such involvement whether past or continuing may form the basis upon which a lobbyist will claim to have acquired some additional experience of or insight into government processes, if only by having some knowledge of the structures of government and the identity of individuals within those structures.

In so far as the Statement suggests more than this, however, then it must follow from Mr Tannous' own submission that it is, to some extent at least, 'misleading, exaggerated or extravagant' within the meaning of clause 7.1(c) of the Code.

A fair reading of the Statement suggests that it is the contact that Mr Tannous has with elected officials "in these roles" (that is, in his capacity as an officeholder within the Liberal Party) that is what enables him to "attain the desired results" for his clients.

If such a claim were true, then it would point to a breach of section 7.1(d) and the requirement that there be a strict separation between lobbying and party political activities. The Corrs submission goes to some length to explain why this is not, in fact, the case. If it is not true, however, then it would seem almost necessarily to follow that it must be in some way misleading, exaggerated or extravagant. It is hard to see how it could be possible to have it both ways.

I agree with the comment made by the Premier, and repeated in the Corrs submission, that any breach in this regard would appear to be slight.¹³

¹² Corrs submission, paragraph 1.11.

¹³ See Corrs submission, paragraph 3.7 and 3.20.

I note Mr Tannous' advice that he neither authored nor authorised the Statement and, indeed, was not aware of the Statement until it was raised in the Budget Estimates hearing.¹⁴ I also note his evidence that any breach of the Code was not deliberate on his part and that he took immediate action to remedy it at the first available opportunity.

Nevertheless, the Statement appeared on Mr Tannous' LinkedIn profile and he has a responsibility for statements made in his name. I note also that First State has now adopted a policy requiring all public statements regarding First State or any of its lobbying activities to be signed off by an appropriately senior officer.

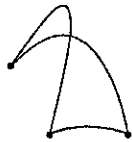
In light of the above, I have determined that the breach of clause 7.1(c) that has occurred in this case does not warrant the exercise of my discretion under clause 8.3 of the Code.

This matter will, however, be taken into account as an aggravating factor in determining whether Mr Tannous' details should be removed from the Register, in the event any other breach of the Code occurs in the future.



Director General
Department of Premier and Cabinet
September 2013

¹⁴ Corrs submission, paragraph 2.4 to 2.6.



1ST STATE

GOVERNMENT & CORPORATE RELATIONS

Level 10
Park House
187-191 Macquarie Street
Sydney NSW 2000

p 02 9223 4800
f 02 9222 1533
www.1ststate.com.au
ABN: 99 153 936 719

Mr Chris Eccles
Director General
Department of Premier and Cabinet
1 Farrer Place
Sydney NSW 2000

By e-mail to Mr Paul Miller, General Counsel: paul.miller@dpc.nsw.gov.au

Dear Mr Eccles and Mr Miller,

NSW Government Lobbyist Code of Conduct

Thank you for your letter of 21 August 2013 to Mr Joseph (Joe) Tannous and to 1st State Advisers and Consultants Pty Limited (1st State).

1st State was surprised to learn of the Hon Mr Foley's complaint in Estimates. 1st State and Mr Tannous believe that they have not breached the Code, and the matters raised by the Hon Mr Foley were likely done for political purposes. The opportunity to respond to the Hon Mr Foley's complaint, on the record, is most welcome.

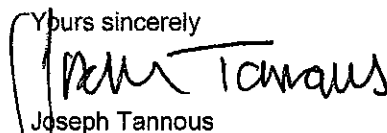
We do so against the background of being strong supporters of the *NSW Government Lobbyist Code of Conduct (Code)*, which has brought structure and clarity to the operation of government lobbying in NSW. 1st State is committed to the principles outlined in the Code. Integrity, particularly in our dealings with Ministers and public officials, is at the core of our business. Notwithstanding that we believe that we did not breach the Code, 1st State acted quickly to remove the subject matter of Mr Foley's complaint so as to minimise any suggestion that 1st State's practices fall outside of the Code's requirements.

1st State has retained Corrs Chambers Westgarth to assist it in this matter. Attached is a submission Corrs has prepared on 1st State's and Mr Tannous' behalf.

While 1st State believes that this response should be sufficient to allow the Department of Premier and Cabinet to be satisfied that the Hon Mr Foley's complaint is baseless, 1st State offers ongoing co-operation with the Department to resolve this complaint. In addition to the matters set out in our response, 1st State offers to provide the Department with any records, sworn evidence, or access to staff that the Department considers helpful in addressing the matters.

Please do not hesitate to contact us if we can provide any additional assistance to the Department.

Yours sincerely


Joseph Tannous
Executive Director

Your link to government

**Submission to the NSW Department
of Premier and Cabinet**

On behalf of

**1st State Advisors and Consultants Pty Limited and
Mr Joseph Tannous**

Matters raised by the Hon Mr Luke Foley MLC.

Structure of submission

The structure of this submission is as follows:

- Part 1 of provides an overview of 1st State and Mr Tannous' involvement in 1st State.
- Part 2 sets out the background to the content of the LinkedIn profile page, and the steps that were taken in relation to that profile upon 1st State becoming aware of the matters the Hon Mr Foley MLC referred to in Estimates.
- Part 3 identifies the matters that the Department ought to properly consider when reviewing the Hon Mr Foley MLC's complaint and whether there has been a contravention of the Code.

1 Overview of 1st State

About 1st State

- 1.1 1st State Advisors and Consultants Pty Limited (1st State) is a leading government and corporate relations advisory firm based in Sydney. The proprietors of 1st State are:
- (a) Mr Joseph (Joe) Tannous, the founder and Executive Director; and
 - (b) Mr Zachary Miles, Partner.
- 1.2 1st State also engages a number persons as consultants or employees, including:
- (a) The Hon Mr Peter Reith;
 - (b) Dr John Tierney OAM;
 - (c) Mr Neil Harley; and
 - (d) Mr Amer Hussein.
- 1.3 1st State was formed in 2012 and is registered (either as a company or through its personnel) on the registers of lobbyists maintained by the Commonwealth Government, and the Governments of the states of NSW, Victoria and Queensland.

Services provided by 1st State

- 1.4 The core aspects of 1st State's business are the provision of government relations advisory services and lobbying services.
- 1.5 Although Mr Tannous is associated with the Liberal Party, he has been involved in politics for over 15 years. As is natural for any person engaged in politics for any length of time, Mr Tannous has a range of contacts outside of the Liberal Party, which he is in regular contact with, as a result of his political roles, his business roles and his role as a lobbyist. Mr Tannous' long involvement in politics, and his contacts within different political parties, is a key credential for his business as a lobbyist.
- 1.6 When 1st State provides government relations advisory services to clients, it assists clients by connecting them with the appropriate government department, individuals within that department or ministers responsible for the relevant portfolios. 1st State may arrange a meeting on behalf of a client, but, when engaged to provide government relations advisory services, 1st State does not attend that meeting.
- 1.7 When 1st State provides lobbying services to clients, it will attend the meeting on behalf of a client. It will advocate for that client with the aim of achieving a client's objectives.
- 1.8 The majority of services provided by 1st State to its clients are government relations advisory services. 1st State primarily operates in the federal jurisdiction but does some limited work in the NSW jurisdiction.

- 1.9 1st State operates from level 10, Park House 187-191 Macquarie Street, Sydney. Mr Tannous also operates a separate business called JTM Cargo Management Pty Ltd (**JTM Cargo**). JTM Cargo is a freight forwarding business and is also operated from the same office as 1st State.
- 1.10 The employees of 1st State and the employees of JTM Cargo all work from the same office.

Mr Joseph Tannous – lobbying activities

- 1.11 Mr Tannous' credentials as a lobbyist stem from his long-standing involvement in the Liberal Party, having volunteered his time over the course of 15 years. During this time he has held and continues to hold various positions within the Liberal Party. He is presently a member of the Executive of the NSW Liberal Party, and has held this role since 2011.
- 1.12 Because 1st State's lobbying activities generally occur in the federal sphere, there is a natural separation between Mr Tannous' political activities and any NSW lobbying 1st State conducts. In particular, Mr Tannous' lobbying activities (within the meaning of the Code) in NSW have been infrequent.
- 1.13 Mr Tannous has instructed us that he has reviewed his records, and his NSW lobbying activities (within the meaning of the Code) in 2012 and 2013 are limited to the following engagements:
 - (a) 17 January 2012. Mr Tannous arranged and attended a meeting on behalf of a client, (Southern United Minerals) with the Minister for Resources and Energy, Special Minister for State and Minister for the Central Coast, The Hon. Chris Hartcher. This meeting was held at Governor Macquarie Tower and was arranged through the usual protocols for arranging a meeting with a NSW Government Minister; and
 - (b) 5 September 2012. Mr Tannous attended a meeting with two other staff on behalf of a former client (Investron) with the Parliamentary Secretary Craig Baumann MP Member for Port Stephens and Department of Planning staff to discuss the Department's view on Macquarie Park and the draft rezoning plans proposed by Investron. This meeting was held in Parliament House and was arranged through the usual protocols for arranging a meeting with a Parliamentary Secretary.
- 1.14 1st State was also retained to survey a number of persons within the NSW Government on behalf of the NSW Aboriginal Land Council. Although this survey was not lobbying within the meaning of the Code or the *Lobbying of Government Officials Act 2011*, 1st State wishes to be transparent in relation to its activities. 1st State met with various persons involved in the NSW Government. The persons covered by the Code, that 1st State met with for the purposes of the NSW Aboriginal Land Council survey were:
 - (a) Mr Tony Chappel, Chief of Staff to the Minister for Environment and Heritage;

- (b) Mr Andrew Humpherson, Chief of Staff to the Minister for Resources and Energy, Special Minister of State and Minister for the Central Coast;
 - (c) Mr Tim Scott, Chief of Staff to the Minister for Primary Industry, Minister for Small Business;
 - (d) Mr Anthony Benschel Chief of Staff to the Minister for Family and Community Services, Minister for Women;
 - (e) Ms Anne King, Senior Policy Adviser to the Minister for Family and Community Services, Minister for Women; and
 - (f) Ms Tara Black, Policy Adviser to the Deputy Premier and Minister for Trade and Investment.
- 1.15 We are instructed that Mr Tannous has not conducted any federal lobbying activities since 2011.
- 1.16 Importantly, we are instructed that none of the meetings described above were arranged or occurred as a result of Mr Tannous' involvement for the NSW Liberal Party. Mr Tannous does not have any particular relationship with either the Hon Chris Hartcher or Craig Baumann MP, and does not sit on any NSW Liberal Party committees with either person. Mr Tannous does not sit on any NSW Liberal Party committees with any of the persons identified in paragraph 1.14.

2 Background to the LinkedIn profile

Statement referred to by the Hon Mr Foley MLC

- 2.1 We understand that the allegation made by Mr Foley is that Mr Tannous' LinkedIn profile contained the following statement:
- "Joseph currently holds a number of senior positions within the NSW Liberal party, in these roles he enjoys constant contact with elected representatives from across the political divide enabling him to attain the desired results for his clients." (the Statement).*
- 2.2 There is no dispute from Mr Tannous or 1st State that the statement appeared in the "Profile" section of Mr Tannous' LinkedIn page.

Basis upon which the statement was posted

- 2.3 Mr Tannous instructs us that he is a relative novice in relation to social media, and does not actively engage in discourse on social media. However, he takes the view that a social media presence is necessary in the context of his business activities.
- 2.4 An employee of JTM Cargo, who is in part responsible for the marketing and social media for that company assisted in relation to Mr Tannous' LinkedIn profile, and updated it, earlier this year. Mr Tannous did not see the profile before or after it was posted. He had assumed that the profile would reflect the contents of 1st State's website.

- 2.5 We are instructed that instead of simply extracting from the contents of the 1st State website, the JTM Cargo staff member developed a form of words about Mr Tannous based on the marketing concepts generally used for JTM Cargo. In particular the reference to "attaining results" echoes JTM Cargo's marketing as the cargo-forwarding industry is very much a results oriented business.
- 2.6 In practice, Mr Tannous does not regularly use social media. He was not aware of its contents until he was informed about the matters raised in the Hearing.
- 2.7 It is important to note that the statement does not form part of 1st State's ordinary marketing. The form of words used in the statement has not appeared in any other social media, internet page or physical marketing documents of 1st State.

Removal of the statement

- 2.8 Mr Tannous became aware of the Hon Mr Foley MLC's complaint in the afternoon of 16 August 2013. The statement was amended on the evening of Friday 16 August.
- 2.9 That step was taken without conceding the correctness of the matters raised by the Hon Mr Foley MLC in the Hearing, but instead reflects 1st State's view that as a strong supporter of the Code, there should be no questions whatsoever regarding 1st State's compliance with the Code.
- 2.10 Mr Tannous and Mr Miles have now implemented a policy that requires all public statements regarding 1st State or any of its lobbying activities to be signed off by them before publication. Again this step has been taken without conceding the correctness of the matters raised by the Hon Mr Foley MLC, but the fact that it has been taken should demonstrate to the Department 1st State's bona-fides in wanting to completely address this issue.

3 Submission in relation to the operation of the Code

Relevant sections of the Code

- 3.1 Section 3 of the Code defines:

(a) **Lobbyist as:**

A person, body corporate, unincorporated association, partnership or firm whose business includes being contracted or engaged to represent the interests of a third party to a Government Representative.

(b) **Government Representative as:**

A Minister, Parliamentary Secretary, Ministerial Staff Member, or a person employed, contracted or engaged in a public sector agency (which means a Division of the Government Service as defined in section 4A of the Public Sector Employment and Management Act 2002) other than staff employed

under section 33 of the Public Sector Employment and Management Act 2002.

(c) **Ministerial Staff Member as:**

A person employed under section 33 of the Public Sector Employment and Management Act 2002 to carry out work for a Minister or a Parliamentary Secretary; a person seconded to the Department of Premier and Cabinet under section 86 of the Public Sector Employment and Management Act 2002 and assigned to a Minister's office; or a person otherwise placed, contracted or engaged in a Minister's office or assigned to a Parliamentary Secretary.

3.2 **Section 7.1(c) of the Code is as follows:**

Lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions.

3.3 **Section 7.1(d) of the Code is as follows:**

Lobbyists shall keep strictly separate from their duties and activities as Lobbyists any personal activity or involvement on behalf of a political party.

The proper context of the operation of the Code

3.4 The Questions and Answers section of the Department's webpage regarding the Lobbyists Register provides the following context for the Lobbyists Register and Code:

Lobbying is a legitimate activity and an important part of the democratic process. Lobbyists can help individuals and organisations communicate their views on matters of public interest to the Government, and in doing so, improve outcomes for the individual and the community as a whole.

In performing this role, there is a public expectation that lobbying activities will be carried out ethically and transparently, and that Government officials who are approached by lobbyists can establish whose interests lobbyists represent so that informed judgements can be made about the outcome lobbyists are seeking to achieve.

3.5 The Code exists to give structure to the operations of Lobbyists on the Register. The Preamble in the Code states:

The Government has established the Lobbyist Code of Conduct to ensure that contact between Lobbyists and Government Representatives is conducted in accordance with public expectations of transparency, integrity and honesty.

3.6 In considering whether the Statement is in breach of the Code, we submit that the overriding goals of these two statements provide the proper context.

3.7 The Hon Mr Foley MLC has complained about the Statement, and the Department is investigating that complaint. In conducting that investigation and reaching a determination, we submit that the following overall matters are relevant considerations for the decision maker:

- (a) There is no legitimate complaint or circumstance alleged whereby Mr Tannous or 1st State has engaged in conduct said to have breached the Code; there is simply no incident or circumstance identified or identifiable. Mr Tannous' connections with the Liberal Party are well known. It is likely that the Hon Mr Foley MLC was engaging in a political exercise when he raised the Statement with the Premier. Mr Foley was not raising the issue in the context of there having been a complaint made to him, to the Premier, or to the Department of Premier and Cabinet about Mr Tannous or 1st State. Mr Foley did not identify any persons who are said to be misled for the purposes of section 7.1(c), nor did he identify any occasions upon which Mr Tannous or 1st State are said to have failed to maintain a strict separation between political activities and lobbying activities for the purposes of section 7.1(d) of the Code.
- (b) The Statement appeared in Mr Tannous' profile page of a social media website. Objectively considered, there is no risk that the Statement constituted a communication that could mislead anybody or constitute a failure to separate political and lobbying activities by Mr Tannous, within the framework that the Code is intended to regulate. It is extremely unlikely that any person who sought to formally engage the lobbying services of Mr Tannous or 1st State would do so only on the basis of the profile contained on Mr Tannous' LinkedIn page.
- (c) Absent the most careful scrutiny of the Statement, it is difficult to ascertain the relevance of the Code to the Statement. Any suggestion that the Statement contravenes the Code, based on a plain reading of the Statement is, at best, equivocal. We would submit that on a plain reading of the Statement, the suggestion that the Statement is in breach of the Code is an objectively weak assertion.
- (d) It is entirely unclear what the "sting" of the Statement is said to be, in terms of a breach of section 7.1(c). The lack of certainty as to how the Statement might be said to breach the Code is borne out by the Estimates Transcript, which records that when the Hon Mr Foley MLC asked the Premier whether the Premier thought the Statement breached the Code, the Premier indicated:

I notice he said "across the political divide," so it seems to be a slight exaggeration, but I will defer to the Director General.

It is unclear to us whether the statement "across the political divide" constitutes the sting that the Hon Mr Foley MLC complains about, and we respectfully submit that the lack of certainty as to how exactly the Statement is said to breach the Code is more than an adequate basis for you to make a finding that it does not.
- (e) On the question of whether the Statement breached section 7.1(d) of the Code, the Premier quickly got to the heart of the matter, being that a breach of section 7.1(d) of the Code goes to the actions taken by Mr

Tannous and 1st State, rather than what the Statement said. The following exchange is apposite:

The Hon. LUKE FOLEY: Premier, is it true that Mr Tannous's occupancy of senior positions within the Liberal Party enables him to attain the desired results for his clients?

Mr BARRY O'FARRELL: I have seen no evidence of that. However, as I said, until you raised it with me I did not know the name of his business. I am unaware whether I have dealt with any of his clients. I have no responsibility to review his business model or to undertake an annual review of his outcomes. Your question is based on something that I do not know.

- 3.8 We set out below a more detailed analysis of the requirement of sections 7.1(c) and 7.1(d) of the Code.

What does section 7.1(c) cover?

- 3.9 Section 7.1(c) prevents lobbyists from making misleading, exaggerated or extravagant claims, about or otherwise representing the nature or extent of a lobbyist's access to government institutions, political parties or persons in those institutions or political parties.
- 3.10 Clearly, the section is intended to prevent lobbyists from attempting to mislead clients, government officials or the public with assertions about levels of access that are incorrect, exaggerated or misleading. It is not intended to prevent the ordinary promotion and marketing of a lobbyist's services.
- 3.11 The Code is silent on how a breach of section 7.1(c) is to be assessed. To this end, it is appropriate that regard be given to the meaning of 'misleading' and 'misrepresentation' at law.
- 3.12 For example, "mislead" means to "lead into error". The High Court of Australia has held that conduct will only be misleading or deceptive if, in all of the circumstances, it induces or is capable of inducing error: *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191. A misrepresentation is a statement or conduct that is false or misleading.
- 3.13 In deciding whether conduct constitutes misleading or deceptive conduct under section 52 of the *Trade Practice Act 1974* (Cth) (now section 18 of the Australian Consumer Law), the Court has found that it is wrong to select particular words or acts which although misleading in isolation do not have that character when viewed in context: *ACCC v Dukemaster Pty Ltd* [2009] FCA 682.
- 3.14 There is also a clear distinction at common law between representations and puffery.¹ Puffery will only be misleading where it leads a person into error. In *General Newspapers Pty Ltd and Telstra Corp* [1993] FCA 473 the Court said: "[I]n the ordinary course of commercial dealings, a certain degree of 'puffing' or

¹ Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated* (2013) 35th Edition, page 1453.

exaggeration is to be expected. Indeed, puffery is part of the ordinary stuff of commerce."

Does section 7.1(c) apply to Mr Tannous' LinkedIn statement?

- 3.15 As a first point, we submit that section 7.1(c) is intended not to prevent lobbyists from engaging in the usual incidents of commerce, including promoting themselves or their companies in the ordinary way. Where section 7.1(c) applies, it is aimed at controlling the conduct of Lobbyists by ensuring a Lobbyist who engages in the sort of misleading and deceptive conduct that is prevented by both common law and statute can be investigated by the Department for a breach of the Code (without the need for any party to pursue a civil remedy).
- 3.16 Section 7.1(c) only applies to claims regarding *"the nature or extent of their access to institutions of government or to political parties or to persons in those institutions."*
- 3.17 In our view, in order to find that Mr Tannous breached section 7.1(c) of the Code, we respectfully suggest that you would need to be satisfied that at the time the statement was made, Mr Tannous:
- (a) did not hold senior positions in the Liberal Party; and
 - (b) did not have constant contact with elected representatives from different sides of politics,
- (the balance of the Statement falls outside section 7.1(c)).
- 3.18 Further, you would need to be satisfied that Mr Tannous' comments were misleading and more than the puffery that is part of the "ordinary stuff of commerce".
- 3.19 As is evident by the further information provided in Part 1, Mr Tannous does hold senior positions within the Liberal Party and, by virtue of being involved in politics for 15 years, does have regular contact with elected representatives from both parties. While at its highest, the word "constant" may be considered exaggerated, isolating a word in this way is contrary to the generally accepted approach to determining whether a statement is misleading.
- 3.20 We submit that the Statement, when read as a whole was not false, nor is it apt to mislead. If it contains any exaggeration at all, that exaggeration is (as the Premier noted) slight. The Statement is more appropriately described as puffery, in the nature of a general promotional statement made on a legitimate professional networking site.
- 3.21 Furthermore, it is extremely unlikely that any person who sought to formally engage the lobbying services of Mr Tannous or 1st State would do so only on the basis of a general promotional statement contained in Mr Tannous' LinkedIn profile.

What does Section 7.1(d) cover?

- 3.22 The Code specifically contemplates that persons who hold roles in political parties may also be registered lobbyists. The requirement of section 7.1(d) is that those roles must be kept strictly separate.
- 3.23 The words used in section 7.1(d) of the Code are directed to the actions of lobbyists, rather than representations made by lobbyists.

Does section 7.1(d) apply to Mr Tannous' LinkedIn statement?

- 3.24 In order to find that Mr Tannous breached section 7.1(d) of the Code, we respectfully suggest that you would need to be satisfied that Mr Tannous did not in fact keep his lobbying activities separate from his involvement in the Liberal Party.
- 3.25 As is set out in Part 1 of this document, Mr Tannous' lobbying activities (within the meaning of the Code) are very limited. Neither of the persons Mr Tannous or 1st State has lobbied on behalf of clients have any role on the Executive of the NSW Liberal Party.
- 3.26 It might be suggested (at its highest), the statement "*enabling him to attain the desired results*" may suggest the possibility of a breach of section 7.1(d) but it goes no further than that (if it goes so far at all). There is nothing in the Hon Mr Foley MLC's complaint in the Hearing that identifies how the allegation is framed. The statement is at best equivocal, requires a strained reading to find any matter that section 7.1(d) might cover, even if that section extended beyond the **actions** of lobbyists to cover representations or other non-lobbying conduct.
- 3.27 The contents of an equivocal phrase in a LinkedIn profile would be far from a sufficient basis to legitimately suggest that Mr Tannous or 1st State do not keep their political activities and their lobbying activities strictly separate.
- 3.28 In our view, any finding that the Statement was made in breach of section 7.1(d) of the Code would go beyond what even a highly technical reading of what section 7.1(d) could ordinarily be understood to cover. It would require that:
- (a) the Statement be understood and interpreted as having being made as part of Mr Tannous' "duties and activities as a lobbyist"; and
 - (b) the Statement constitutes some kind of undertaking to clients about Mr Tannous' actual method of operating his lobbying activities.
- 3.29 Interpreting the Statement in that way would fall outside of the ordinary understanding of what the duties and activities of a lobbyist are, and a reasonable understanding of the Statement.
- 3.30 Beyond the contents of the phrase, we are instructed that Mr Tannous does scrupulously separate his personal political activities. We understand that the Department of Premier and Cabinet will have a register of all lobbying activities within the meaning of the Code. Should there be any doubt as to the fact that Mr Tannous and 1st State do strictly enforce separation between the political activities of Mr Tannous and other lobbyists engaged by 1st State, and their

lobbying activities, they would be willing to allow the DPC to review their records and to submit to an audit of their activities, if you believe that doing that would be helpful in resolving the issues raised.

Summary of response to the Hon Mr Foley MLC's complaint

- 3.31 For the reasons set out above, we submit that you should be satisfied that there has been no breach of the Code. In particular, we submit that you will have regard to:
- (a) the political nature of the complaint, and the lack of any suggestion that:
 - (i) any person has been misled;
 - (ii) Mr Tannous or 1st State have, as a matter of fact, failed to maintain a strict separation between their political and lobbying activities;
 - (b) the tenuous and equivocal nature of the way in which the Statement might be said to breach the Code, and the lack of any precision as to the Hon Mr Foley MLC's complaint;
 - (c) the fact that the Statement appeared only on the profile section of Mr Tannous' LinkedIn page, and not in any other communications of 1st State;
 - (d) in relation to section 7.1(c) of the Code:
 - (i) it is difficult to isolate any part of the Statement that is said to constitute the breach of the Code;
 - (ii) the information in the Statement is not misleading or incorrect. At the very highest, it might be suggested that there is a slight exaggeration about Mr Tannous being in 'constant contact', but that sort of communication is not the type of conduct section 7.1(c) of the Code is intended to regulate;
 - (iii) the Statement is well within the normal parameters of ordinary commercial communications (or 'puffery' as it is referred to in the relevant authorities) and it is not an outrageous or extravagant claim;
 - (e) in relation to section 7.1(d) of the Code:
 - (i) the section relates to the practices of lobbyists, not their communications;
 - (ii) Mr Tannous and 1st State demonstrably keep their lobbying and political activities strictly separate;
 - (iii) Mr Tannous' lobbying activities are a matter of public record, and have been set out above. None of those activities

cross-over with Mr Tannous' political activities, as is set out in part 1;

- (f) the fact that 1st State acted quickly to remove the Statement, notwithstanding the matters set out above, and have implemented further internal controls to prevent any further potential for error in relation to such public statements; and
- (g) Mr Tannous and 1st State's offer of full co-operation, should there be any matter that the Department wishes to investigate or obtain further information on.

3.32 We submit that the Department should find that neither Mr Tannous nor 1st State are in breach of the Code, and that no further action should be taken in relation to the Hon Mr Foley MLC's complaint.

Please contact Michael do Rozario on (02) 9210 6566, if we can be of further assistance.

Corrs Chambers Westgarth
11 September 2013.



Premier & Cabinet

2013-333351

Mr Joseph Tannous
Executive Director
First State Advisors and Consultants Pty Ltd
Level 10, Park House
187-191 Macquarie Street
SYDNEY NSW 2000

Dear Mr Tannous

I am writing to you and First State Advisors and Consultants Pty Ltd (First State) in relation to questions raised in a NSW Parliamentary Committee hearing about whether the *NSW Government Lobbyist Code of Conduct* (the "Code") has been breached by you and First State.

On 16 August 2013, during a public hearing for the Budget Estimates 2013-14 inquiry, conducted by the Legislative Council General Purpose Standing Committee No 1, the Hon Luke Foley MLC alleged that your LinkedIn profile carried the statement:

"Joseph currently holds a number of senior positions within the NSW Liberal Party. In these roles he enjoys constant contact with elected representatives from across the political divide enabling him to attain the desired results for his clients."

As you would be aware, Clause 7.1 of the Lobbyist Code of Conduct states:

"(c) Lobbyists shall not make misleading, exaggerated or extravagant claims about, or otherwise misrepresent, the nature or extent of their access to institutions of government or to political parties or to persons in those institutions; and

(d) Lobbyists shall keep strictly separate from their duties and activities as Lobbyists any personal activity or involvement on behalf of a political party."

Clause 8.3 of the Code provides that I may remove from the Register part or all of the details of a Lobbyist if I am of the opinion the Lobbyist or the Lobbyist's employee has contravened any of the terms of the Code. A copy of the Code is enclosed for your reference.

I would be grateful if you could provide, within 21 days of the date of this letter, all relevant information to assist in my determination as to whether or not there has been a contravention of the Code in the circumstances outlined above, and, if there has been a

contravention, any other information that may be relevant to the exercise of my discretion under clause 8.3 of the Code.

Please send your response to Mr Paul Miller, General Counsel (by email to paul.miller@dpc.nsw.gov.au, or by fax to (02) 9228 5542).


Your response will be considered for the purpose of deciding whether further action under the Code is warranted in relation to these allegations or whether the matter may be considered satisfactorily resolved.

If the Department does not receive your response within this time, I may, if advised that there has been a contravention of the Code, remove part or all of the details of First State Advisors and Consultants Pty Ltd from the Register, without further notice to you.

Please do not hesitate to contact Mr Paul Miller, General Counsel on 9228 4514 if you would like to discuss this matter.

Thank you for your co-operation.

Yours sincerely


Chris Eccles
Director General

21 AUG 2013



Premier & Cabinet

COPY

2013-333351

Mr Zachary Miles
Partner
First State Advisors and Consultants Pty Ltd
Level 10, Park House
187-191 Macquarie Street
SYDNEY NSW 2000

Dear Mr Miles

I am writing to First State Advisors and Consultants Pty Ltd (First State) and Mr Joseph Tannous in relation to questions raised in a NSW Parliamentary Committee hearing about whether the *NSW Government Lobbyist Code of Conduct* (the "Code") has been breached by Mr Tannous and First State.

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Yours sincerely



Chris Eccles
Director General

21 AUG 2013