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INQUIRY INTO MINISTERIAL PROPRIETY IN NEW SOUTH WALES

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The Hon. Robert Borsak MLC
Committee Chair
Select Committee on Ministerial Propriety
in New South Sales

Via email: ministerialpropriety@parliament.nsw.gov.au

Dear Mr Borsak

Thank you for your invitation to make a submission to your Committee's inquiry.

I enclose my submission, which includes extracts from two books, one of them written by me, about the notion of individual ministerial responsibility.

I would be prepared to supplement this with oral evidence, if the Committee wished.

Yours sincerely

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Queensland Integrity Commissioner

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Submission to the NSW Legislative Council Select Committee Inquiry into Ministerial Propriety in NSW

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As Queensland Integrity Commissioner I have several functions relevant to the matters set out in the Committee's terms of reference. I have recently provided advice to the Queensland Premier, at his request, on the Queensland Ministerial Code of Conduct, including whether the Code should require Ministers to observe the conventions of individual Ministerial responsibility (collective Ministerial responsibility is mandated by the Queensland Constitution). Under the Qld *Integrity Act 2009* I have responsibility for keeping a register of lobbyists and for writing the Lobbyists Code of Conduct. That Code has recently been amended to require lobbyists to report all their lobbying contacts with Ministers and their staff and members of Parliament, and other government officials. Members of the Qld Legislative Assembly may seek my advice on any ethics or integrity matter and on issues relevant to their declarations of interest.

(a) Ministerial responsibility to Parliament, including the doctrine of individual ministerial responsibility

As a journalist, political scientist and lawyer I have been writing about the doctrine of ministerial responsibility in Australia for more than 45 years. Rather than personally attempting a new analysis I attach an extract from my book, *The People's Palace*,[1] which was commissioned by the Commonwealth Parliament as part of its bicentenary publishing project, along with an extract from a book published 20 years later by the acknowledged expert on the cabinet system in Australia, Professor Patrick Weller AO.[2] It will be seen that nothing really has changed.

As I mentioned in my introductory remarks, collective ministerial responsibility is a requirement of the Queensland Constitution which says, in s. 42(2):

> The Cabinet is collectively responsible to the Parliament.[3]

Since October 2012, the Queensland Ministerial Code of Conduct has contained the following section:

> Ministers are also responsible individually to Parliament. Ministers have a duty to Parliament to account, and be held to account, for the policies, decisions and actions of themselves and their departments and agencies. Ministers must give accurate and

[1] (1987) MUP, Melbourne.
[2] Weller (2007) Cabinet Government in Australia, 1901-2006, UNSW Press, pp 209-212.
[3] *Constitution of Queensland 2001*.

truthful information to Parliament, and correct any inadvertent error at the earliest opportunity. Ministers must not knowingly mislead Parliament.[4]

Not mentioned here are ministerial staff. In my view Ministers must not only be held to account for the activities of their personal staff, they must also be fully responsible for the political and official activities of the members of their personal staff. It is desirable, in my view, that this should be spelt out in detail in any ministerial code.

(b) Measures to reduce potential conflicts of interest between a minister's public duties, private interests and membership of a political party, particularly in relation to financial and commercial activities

It seems to me that the provisions in the NSW Code of Conduct for Ministers of the Crown[5] in relation to the registration of ministers' interests and conflict of interest[6] sufficiently reflect good practice, as it has been understood in Australia. However the reference in the heading to this matter to "membership of a political party" does raise a question as to whether there should be a specific reference to such membership as possibly giving rise to a conflict. I think it should not. Many decisions that ministers take are intended, and properly so, to advantage their own political party: they put into effect the party's policies, which have public support, and presumably this benefits the party. I accept that there may be situations where seeking to advance the interest of a Minister's party may give rise to a conflict of interest, but I think it would be extremely difficult to codify the distinction between when it is acceptable to make decisions or take actions that benefit the party and when it is not, unless public interest is made part of the formula.

I note that the NSW Parliament decided in 1998 to appoint an independent Parliamentary Ethics Adviser. Advice is provided to Members, if they seek it, in relation to such matters as the pecuniary interest register and conflicts of interest. In my view it would be desirable to expand the responsibilities of the Ethics Adviser to include providing advice to Ministers about their responsibilities under the Ministerial Code of Conduct, including conflicts of interest, as is the case in Queensland. In my experience, Ministers find this very useful.

Since October last year the Queensland Integrity Commissioner has been required to audit ministerial compliance with the Ministerial Code of Conduct on an annual basis, and report to the Premier.

(c) The operation and enforcement of the *Lobbying of Government Officials Act 2011*, and any associated codes of conduct, registers or administrative arrangements

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[4] *The Queensland Ministerial Handbook, Governing Queensland*, Appendix 19.
[5] Annexure A, New South Wales Government Ministerial Handbook, June 2011
[6] Parts 2 and 3 of the Code

With effect from 1 May 2013 the Queensland Lobbyists Code of Conduct has required lobbyists in that State to report all their lobbying contacts the State and local government. Details must be provided of the date of contact, the name of the lobbying organisation, the individual lobbyist, the name of the client, the name or title of the government representative present, and the purpose of the contact. Lobbyists are required to record these details for each month, by the 15th day of the following month. The information is filed onto the website of the Integrity Commissioner, where it is immediately accessible to the public. The result is that, in Queensland, the public is able to know who is lobbying whom about what.[7]

Of course this applies only to registered lobbyists. I agree with the recommendations made by the Independent Commission Against Corruption (ICAC) several years ago, that the range of people and organisations required to register as lobbyists should be greatly expanded, to cover, for example, in-house lobbyists and organisations that represent the interests of their members, such as industry groups and trade unions.[8] Victoria is scheduled, in November, to extend registration to cover former Ministers and senior officials employed by corporations to lobby on their behalf.

(d) The interaction and appropriate relationship between the Code of Conduct for Members of Parliament, the Lobbyist Code of Conduct, and the current Code of Conduct for Ministers of the Crown

Once again I can refer only to my experience in Queensland. The advantage we have in ensuring that there is a proper, ethical relationship between MPs, lobbyists and Ministers is that lobbyists come under the jurisdiction of the Integrity Commissioner, rather than officials of the government. In addition, Ministers can seek advice from the Integrity Commissioner on any ethics or integrity issue arising from their Code of Conduct or from the Code of Conduct for MPs, including matters arising out of their declarations of interest. Similarly, MPs other than Ministers can seek advice about ethics or integrity issues arising under their Code of Conduct.

(e) Whether the current Code of Conduct for Ministers of the Crown should be adopted as an applicable code for the purposes of section 9(1)(d) of the *Independent Commission Against Corruption Act 1988*

To me it seems extraordinary that the conduct of MPs in relation to their Code of Conduct can be caught by ICAC, while Ministers remain exempt in relation to their much more important Code. For the most part it is the Ministers who wield power. They are the government. If they are exempt, the Ministers who constitute the government are not answerable to ICAC for breaches of the Code of Conduct that applies specifically to them as Ministers. I can understand some historical sensitivity flowing from the way ICAC treated

[7] An ideal expressed by a UK Parliamentary committee, the House of Commons Public Administration Select Committee's 2009 report on "Lobbying: Access and influence in Whitehall", at p. 60.
[8] ICAC, Investigation into corruption risks involved in lobbying, November 2010.

(wrongly, as the NSW Court of Appeal decided) Premier Nick Greiner. But that is not a sufficient reason for the Ministerial Code to be kept outside of the ICAC's jurisdiction.

(f) Any other relevant matters

At present, Queensland is the only Australian jurisdiction that bases its regulation of lobbyists in legislation. Western Australia considered doing so and a Bill was passed by the Legislative Assembly several years ago but debate had not been finalised by the Legislative Council before its elections last year. NSW has legislation[9] to ban success fees for lobbying and to impose a cooling-off period for former Ministers and Parliamentary Secretaries.

Britain has long resisted using legislation to regulate lobbying, but recent scandals involving MPs lobbying for outside interests persuaded the Cameron Coalition Government to introduce a Bill in July this year, with the expectation that it will become law by May 2014. It prohibits "consultant lobbying" unless registered, includes significant penalties and provides for a registration fee.[10]

One of the advantages of using legislation to regulate lobbying is that it makes it possible to impose penalties where conduct is shown to be contrary to the norms established in the regulatory scheme. In my view this is a sound reason for using legislation as the means to regulate lobbying.

[9] *Lobbying of Government Officials Act 2011*
[10] Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Bill

Ministerial responsibility

At the core of the concept of 'responsible government' is 'ministerial responsibility', a term which describes three different and distinct relationships or codes of conduct.

The first sense in which ministerial responsibility is used is to describe the relationship between the Governor-General and the elected Government of the day; the second concerns the relationship of individual Ministers to their colleagues in the Cabinet and to the Cabinet as a whole; and the third is to describe the relationship between Ministers and the House of Representatives.

Ministerial responsibility in relation to the Governor-General involves the theory that the Crown can do no wrong (a concept designed to protect the Crown). It means that any action taken by the Crown is either taken directly on the advice of 'responsible Ministers' (which is how the term 'ministerial responsibility' is involved) or alternatively that there is a group of responsible Ministers who will take responsibility for the action. This is why in 1975 the Governor-General could not just call an election in defiance of the wishes of the Whitlam Government; he had to sack that Government first and install a new Prime Minister who would take 'responsibility' for his action—a responsibility which has to be answered for at the ballot box. Responsible government in this sense means that there are always elected persons who take responsibility for the actions of Government, and that such actions are not to be sheeted home to people who are appointed (Governors-General or Governors) or who occupy their position through inheritance (the Queen or her successors).

The second manifestation of the notion of ministerial responsibility concerns the relationship between a Minister and his colleagues, both individually and collectively when they are the Cabinet. This is really concerned with the idea that the

Government is a single unit, and it is often referred to as 'cabinet solidarity' (and is really a formal way of expressing the idea that all the members of the Cabinet must sink or swim together). Decisions are taken either by individual Ministers or by the Cabinet as a whole, but in either eventuality all the members of the Government are bound by what is decided. A Government cannot have more than one policy on an issue, and individual members of the Government cannot distance themselves from a particular decision, or opt out of a course of action which the Government has determined.

The theory of Cabinet solidarity is faced with two strong Australian distortions. The first is provided when a Liberal–National coalition is in Government. Because the interests of the two parties are not always the same, some of the members of the Cabinet may sometimes make known their disapproval of a particular decision by the coalition Cabinet, for the sake of their relations with their own party members and/or for their own party's electoral advantage. A second concerns the Labor Party when in office. Labor Ministers and the Labor Cabinet are responsible to the party Caucus as a whole, and Ministers are able to appeal to the Caucus against decisions of the Cabinet. This was a problem for the Whitlam Government but less so for the Hawke Government whose Ministers agreed to be bound by Cabinet solidarity.

The third aspect of ministerial responsibility concerns the responsibility that individual Ministers have to the Parliament. Ministers are constitutionally responsible for the administration of their departments, though actual responsibility lies with the public servant who heads the department. Those public servants, however, have to answer to their Ministers. Ministers are liable to be questioned in the Parliament about any aspect of policy for which they are responsible and for any action taken by their departmental officers. They are responsible for those actions in the sense of being liable to be held to account for them (for example, by being censured) only in so far as it would be expected that the Minister himself should have known what was happening and permitted an erroneous decision or course of action. In parliamentary terms, the worst crime (to judge by the complaints which MPs and Senators have made over the years) is to have 'misled' (that is, lied to) the Parliament.

Ministers who make serious mistakes or who knowingly mislead Parliament are theoretically expected to resign. What occasionally happens is that a Minister who has made a political mess of a

situation will offer his resignation to his Prime Minister, who will make a decision as to whether the resignation will be acepted on his evaluation of the political harm which may be done to the Government by not acknowledging the mistake. That will often depend more on the reaction of the media to the particular problem than to the reaction of the Members of the Parliament to whom the Minister is supposed to be responsible. And this is because the tight party system means that a Minister is in no danger of being censured in the House of Representatives, because his party controls a majority of votes there. A censure might be passed in the Senate (and has been on several occasions) but this has had no direct effect on the Minister continuing in office because of the idea that Governments (and Ministers) are made and unmade in the House of Representatives, not the Senate.

This does not mean that Ministers can ignore their duties to the House (or Senate). A Minister's relationship with the Parliament can be an important element in the general political situation, and in the Minister's standing within his own party. So that while Ministers are no longer liable to be forced from office by censure in the Parliament, their fate within their party and the political fate of their party, can be affected by their actions. While Ministers who make mistakes do occasionally resign in Australia, and it is frequently said that their resignations are in accordance with the principles of ministerial responsibility, their resignations are normally related more to their relationship with their party and their Prime Minister, the sort of relationship which is concerned about their party's political fortunes. The resignations frequently have little or nothing to do with the Minister's responsibilities to the Parliament.

Another series of distortions of the ministerial responsibility system concern the relationship between Ministers and public servants. Australian Governments (federal and State) developed a method of drawing a line between a Minister's responsibility and the conduct of government administration by creating statutory authorities—government activities which were carried on under legislative authority which pushed them a step away from direct ministerial control, and more importantly made the Minister less responsible for their activities. Ministers were generally given power to direct various statutory authorities as to the policies they should adopt, but Ministers were not required to answer to Parliament for their administration.

But even ordinary Public Service departments have taken on

roles which suggest they have at times some independent authority. In the past decade or two, many heads of Public Service departments have become public figures, and their views have become well known, particularly when they are different from those of the Government which directs their work. Departments have in some cases leaked material to the media about differences over policy issues with Ministers, and Ministers have responded in similar ways. The result is that while Public Service departments are not meant to be independent at all, many of them have developed some autonomy and corporate character which Ministers may not always be able to control.

Ministerial responsibility has a different character in Australia from its theoretical model, but it does remain an important concept whose name is often summoned in political debate as though it was some inviolable principle at the heart of Government. The problem is that the Australian political system has not fully defined the place the concept really occupies in the Canberra system.

Ministerial responsibility

Ministers are members of parliament who are appointed 'to administer departments of state' according to section 64 of the Constitution. By implication they are responsible to parliament for the activities of their department. In practice this convention means that they answer questions about their department and, where inadequacies are uncovered, seek to ensure that they are fixed. It does not mean, and never has meant, that ministers

should resign if the departments fail in some respect or other. Nor has that happened in Britain or any other Westminster system. Demands for resignation are easy rhetoric, but no more. Snedden, as attorney-general, made the position explicit:

> What of cases where the minister is not personally involved? Responsible, yes, in the sense that he may have to answer and explain to parliament, but not absolutely responsible in the sense that he has to answer for (is liable to censure for) everything done under his administration ... There is no absolute vicarious liability on the part of the Minister for the 'sins' of his subordinates. If the Minister is free of personal fault, and could not by reasonable diligence in controlling his department have prevented the mistake, there is no compulsion to resign.

What is important is the way in which ministers interact with their departments, and with the broader public service, and respond to parliamentary examination of their activities.

In December 1998, Howard issued *A Guide on Key Elements of Ministerial Responsibility*, which seeks to define relations with the public service. The guide raises the values enshrined in the *Public Service Act* 1999, notably the provision of frank and comprehensive advice to ministers, and party-political impartiality, as well as emphasises the need for trust:

> Ministers will obtain advice from a range of sources, but primarily from their private office and from their departments. There is clearly no obligation on ministers to accept advice put to them by public servants, but it is important that advice be considered carefully and fairly. It is not for public servants to continue to press their advice beyond the point where their ministers have indicated that the advice, having been fully considered, is not the favoured approach. Public servants should feel free, however, to raise issues for reconsideration if they believe there are emerging problems or additional information which warrant fresh examination.

This account, like the exhortations in sections 2.8 and 2.9 of the handbook quoted above, may be unexceptional; that is how it is meant to work. No one would have demurred 80 years earlier. What is interesting is that, by now, it is considered necessary to write it down.

The *Cabinet Handbook* and the 1998 guide provide an insight into the current state of thinking on the processes of ministerial decision-making and responsibility. So ministers are told that ministerial responsibility:

> Does not mean that ministers bear individual liability for all actions of their departments. Where they neither knew, nor should have known about matters of departmental administration which come under scrutiny it is not unreasonable to expect that the secretary or some other senior officer will take the responsibility.
>
> Ministers do, however, have overall responsibility for the administration of their portfolios and for carriage in the parliament of their accountability obligations arising from that responsibility. They would properly be held to account for matters for which they were personally responsible, or where they were aware of problems but had not acted to rectify them.

Again the guide is merely spelling out the way the doctrine of ministerial responsibility had always worked; in fact, it describes the existing understandings. It also allows the minister to transfer blame to the public servants if anything goes wrong. That is not entirely new either, even if it has become more explicit. One minister learning the ropes said that initially, when he answered a question in parliament, he largely repeated the advice provided by the public service. After an occasion when that advice was wrong and he was severely embarrassed, he ensured that every answer thereafter was prefaced by the words 'I am advised ...' in case the advice was wrong.

Now there is not even a pretence that ministers should cover for public servants. In Senate committees, ministers will not seek to defend officials, even though by convention officials still often protect their ministers. When the Department of Immigration was severely criticised for the failure of its system and the detention or deportation of Australian citizens in 2005, both the current and the former ministers denied any responsibility; both argued that they did not know, so how could they be responsible? The report blamed officials; that was enough, in their view, to absolve ministers, even if the culture of the department, for which the ministers could be held responsible, was under fire too.

The question then is what can, and did, ministers know. Not much, if they do not want to. The inquiry into the Wheat Board's sales to Iraq in 2006 found that numerous cables had been sent to the offices of the prime minister and the ministers for foreign affairs and trade. The minister of foreign affairs once asked for further information. Yet ministers were comfortable with the statements that just because information had reached their office, it did not mean that they had seen warnings. In the past, one of the arguments against the demands to make ministerial staffers accountable

to parliament was the assumption that, if staffers knew, ministers knew. That belief can be no longer sustained.

In equity law there is a principle of constructive notice. It arises where someone knows enough that objectively they should have made further inquiries that, had they been made, would have revealed the full facts. It stems from Chancery notions of fiduciary obligation and trusteeship; it basically prevents someone pleading ignorance when they should have done more to become informed. In politics, the reverse is true. Unless it can be proved that ministers had been explicitly informed, they can shuffle off responsibilities, arguing that they *should* have been informed but were not.

Ministers resign only when they have been somehow personally involved. Thus a royal commission decided in 1978 that Senator Withers had committed an 'impropriety' in ringing the chief electoral commissioner about the name of an electorate; John Brown misled parliament in 1987; Ros Kelly, Minister for Arts, Sport, the Environment, Tourism and Territories under the Hawke government, made decisions on funding on a white board that broke proper practice; John Sharp, Minister for Transport and Regional Development under Howard, failed to pursue misuse of travel claims; others had undeclared share holdings.

In these cases ministers are responsible, not really to the parliament, but rather to the prime minister and potentially to the party. The prime minister has to make a decision: is it better to ask for the resignation of the minister as a means of ending the scandal or should he ride out the rough water in the expectation that the tide will turn and the issue will be forgotten? Often prime ministers begin in the first camp of strict application of standards and demand resignations, but end in the second when it is apparent that crises are forgotten whereas resignations are often listed as a sign of government instability. In all cases the calculation is political, not constitutional. Retribution on the ministers can come later, when they can be dropped or reshuffled into less sensitive areas. An immediate reaction admits fault on the part of the minister and, in the adversarial political system, admitting fault may be more damaging than the original error. There is no evidence that prime ministers are rewarded for running a tight ship; rather they are damned for heading one that is accident-prone. Choices are determined by convention, and the prime minister is the judge and jury in the application of the convention. Ministers are responsible first to the prime minister, and only thereafter will they explain to parliament the reasons for the decisions.