

**Submission  
No 2**

## **INQUIRY INTO MINISTERIAL PROPRIETY IN NEW SOUTH WALES**

**Organisation:** Department of Premier and Cabinet

**Date received:** 8/10/2013

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## **Ministerial responsibility to Parliament, including the doctrine of individual ministerial responsibility**

Ministerial responsibility, in its most general sense, refers to a central organising concept underpinning Westminster-style parliamentary democracy – responsible government. In that sense, it refers to those principles that make up the system of government under which the executive is constitutionally responsible to – that is, removable by, answerable to, and legally subordinate to – the legislative branch, rather than a system under which the executive and legislative branches are separately-elected autonomous bodies as they are, for example, under the United States model.

As such, ministerial responsibility “is not a single doctrine or rule but rather a complicated bundle of distinct though related principles”.<sup>2</sup>

These principles are commonly grouped under two broad categories – *collective* ministerial responsibility and *individual* ministerial responsibility. These are briefly outlined in the NSW Ministerial Handbook, which is published by the Department of Premier and Cabinet.<sup>3</sup>

There does not appear to be any significant difference between the application of these principles in New South Wales and their application in other comparable jurisdictions.<sup>4</sup>

Collective ministerial responsibility finds its expression particularly through the conventions and practices of the Cabinet. In New South Wales, these were outlined in a paper that was issued by the NSW Cabinet Office (as it then was) in 2006.<sup>5</sup>

Individual ministerial responsibility, on the other hand, concerns the responsibility of each Minister for matters occurring within his or her portfolio. The NSW Ministerial Handbook explains one aspect of individual ministerial responsibility, the so-called convention of Ministerial accountability, as follows:

*“The convention [of Ministerial accountability] is that Ministers are individually accountable for all actions taken within their administration. Despite the centrality of this convention to the Westminster system of government, its practical application is somewhat unclear and inconsistent. There are a number of reasons for the lack of clarity in this regard. The large scale of government activity means that Ministers are no longer, if they ever were, able to be held responsible for all administrative actions within their charge. The preponderance of semi-autonomous agencies within governments alongside more traditional departments has further complicated the issue.*”

<sup>2</sup> See eg Marshall G (ed), *Ministerial Responsibility*, Oxford University Press, 1989, at 1.

<sup>3</sup> NSW Department of Premier and Cabinet, *Ministerial Handbook*, June 2011, available at <[www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0010/96229/Ministerial\\_Handbook\\_-\\_June\\_2011.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0010/96229/Ministerial_Handbook_-_June_2011.pdf)> (*Ministerial Handbook*).

<sup>4</sup> See eg in relation to collective Ministerial responsibility: Cth Department of Prime Minister and Cabinet, *Cabinet Handbook*, 7<sup>th</sup> edition, March 2012, available at <[www.dpmpc.gov.au/guidelines/docs/cabinet\\_handbook.pdf](http://www.dpmpc.gov.au/guidelines/docs/cabinet_handbook.pdf)>; UK Cabinet Office, *The Cabinet Manual: A guide to laws conventions and rules on the operation of government*, 1<sup>st</sup> edition, October 2011, available at <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/60641/cabinet-manual.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf)>.

<sup>5</sup> Twomey A and Wilkins R, “Cabinet Conventions: NSW Practice” (2006), Annexure D to the Ministerial Handbook, at D1, also available at <[www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0010/2125/Cabinet\\_Conventions.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0010/2125/Cabinet_Conventions.pdf)>.

*The extent of Ministerial responsibility, in regard to a particular act, is often a political question rather than one which can be addressed by the application of a general principle. Actions of Ministers can be questioned both within and outside the political process. They can be sued in the courts, and can be subjected to various forms of inquiries including, most commonly, Parliamentary and Independent Commission Against Corruption (ICAC) inquiries.*

*The outcome of such inquiries, however, often only has relevance to the particular situation and it has been difficult to define the convention in general terms any more clearly. The accumulated history of cases where the application of the convention has been an issue does shed some light, however, and the view is increasingly common that where the Minister is not personally at fault, and with all reasonable care could not have prevented the mistake, the Minister would not be held responsible in terms of the convention.”<sup>6</sup>*

The question of whether a Minister ought to be considered to be individually responsible for some particular act, omission or outcome within his or her portfolio under the above convention is primarily a political matter upon which it would be inappropriate for a public servant to express an opinion.<sup>7</sup>

### ***The Ministerial Code of Conduct***

A Ministerial Code of Conduct has been adopted by successive NSW Governments to govern the conduct of their Ministers. The current Ministerial Code is reproduced as Annexure A to the Ministerial Handbook, which is provided to all Ministers and is publicly available on the Department of Premier and Cabinet’s website.<sup>8</sup>

Compliance with the Ministerial Code is the responsibility of each individual Minister and the Premier of the day. In the event that a Minister fails to comply with a requirement of the Ministerial Code, it is for the Premier to determine what (if any) action would be appropriate.

Although the Department of Premier and Cabinet has no independent role in enforcing the Ministerial Code, and therefore does not investigate or make findings in relation to compliance with the Code, the Department is responsible to the Premier and subject to his direction and control.<sup>9</sup> It is therefore open to the Premier to request advice from the Department of Premier and Cabinet as to compliance with the requirements of the Code, either in general or in a specific situation, as he sees fit. Ultimately, however, enforcement of the Code always remains a matter for the Premier.

Traditionally, Ministerial Codes of Conduct have been adopted by NSW Premiers and Cabinets as a matter of internal discipline. In particular, they provide for the establishment of a range of practices and behavioural norms that are directed toward enabling the Premier and the Cabinet to avoid, or at least minimise the risk of, non-compliance with

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<sup>6</sup> Ministerial Handbook, at 13-14.

<sup>7</sup> The Committee should be mindful of this in the conduct of its hearings, noting that any public servant appearing as a witness before the Committee is a witness as to facts only. A question calling for an *opinion* as opposed to a *fact* would not be a “lawful question” under the *Parliamentary Evidence Act 1901*: see *Crafter v Kelly* [1941] SASR 237, at 241-242.

<sup>8</sup> Ministerial Code of Conduct, Annexure A to the Ministerial Handbook, at AI (*Ministerial Code*).

<sup>9</sup> The responsibility of public service departments to their portfolio Minister(s) – in the case of the Department of Premier and Cabinet, its responsibility to the Premier – is itself a key aspect of responsible government, ensuring that all divisions of the public service are, through the mechanism of Ministerial responsibility to Parliament, also ultimately responsible to the Parliament and thereby indirectly to the public who elected the Members of Parliament.

Ministers' substantive legal duties and community expectations as to appropriate standards of Ministerial integrity.

As such, while actions (or omissions) which breach the Ministerial Code may separately constitute a criminal offence or a breach of some other applicable requirement, non-compliance with the Ministerial Code, of itself, gives rise to political consequences only.

It is noted that the New South Wales Ministerial Code was only first made generally available as a public document in 2010.

The publication of the Ministerial Code of Conduct may have contributed to a changed perception as to the function of the Code over recent years, including a tendency toward viewing compliance with that Code as being, of itself, a relevant touchstone for determining whether particular Ministerial conduct is deserving of censure.

If the Ministerial Code of Conduct is to be an instrument against which Ministers are to be held directly to account not only to their own Premier and Cabinet, but also within and outside Parliament, then it may be appropriate for the Government to consider reviewing some aspects of the Code with a view to drafting it in a more 'legislative' style.

#### ***Adoption of the Ministerial Code for the purposes of the ICAC Act***

It is a matter for the Governor-in-Counsel to determine whether the Ministerial Code should, by regulation, be adopted as an applicable code for the purposes of the *Independent Commission Against Corruption Act 1988* (ICAC Act).

To date, the Ministerial Code has not been adopted for the purposes of the ICAC Act by this or any previous Government.

Under the ICAC Act, corrupt conduct is defined in general terms by section 8, but section 9 provides that conduct does not amount to corrupt conduct unless it could constitute or involve:

- (a) a criminal offence;
- (b) a disciplinary offence;
- (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official; or
- (d) in the case of conduct of a Minister of the Crown or a member of a House of Parliament – a substantial breach of an applicable code of conduct, being one adopted for the purposes of the ICAC Act by regulation.

Accordingly, if the Ministerial Code were to be adopted for the purposes of the ICAC Act, its nature as a self-regulatory instrument may change, as substantial non-compliance with the Code would, of itself and provided the relevant conduct otherwise fell generally within the description of conduct set out in section 8 of the ICAC Act, be considered in law to constitute "corrupt conduct", even if that conduct would not otherwise constitute a criminal offence. Again, if the Code were to be adopted for the purposes of the ICAC Act, a review of its drafting may be appropriate.

## ***The Lobbyist Code and Lobbying of Government Officials Act 2011***

The Lobbyist Code of Conduct was established in February 2009.<sup>10</sup>

The Code applies to lobbyists whose business is to represent the interests of a third party to government officials.<sup>11</sup> It provides that, if such lobbyists wish to lobby government officials, they must be registered on the Register of Lobbyists, which provides public transparency as to both who those lobbyists are and who their clients are.<sup>12</sup>

The Lobbyist Code of Conduct covers lobbying of Government representatives, broadly defined to cover Ministers, Parliamentary Secretaries, Ministerial staff and persons employed, contracted or engaged in a public sector agency.<sup>13</sup>

Although the Lobbyist Code requires lobbyists to be registered before they are permitted to engage in lobbying of NSW Government representatives, it confers no obligation on Government representatives to meet with or otherwise allow themselves to be lobbied by a lobbyist. To put the matter another way, a registered lobbyist has no *right* to lobby a Government representative.

In 2011, the *Lobbying of Government Officials Act 2011* was enacted to make it a criminal offence to pay or receive a success fee for lobbying.<sup>14</sup>

The *Lobbying of Government Officials Act 2011* also makes it a criminal offence for a former Minister to engage in lobbying activities for the first 18 months after leaving office if the activities concern his or her former portfolio responsibilities in the 18 months prior to leaving office.<sup>15</sup> A consequential amendment was made to the Lobbyist Code of Conduct to require the Director General to remove a lobbyist from the Register if they have been found guilty of that offence.<sup>16</sup>

Also in 2011, the Government introduced restrictions on the appointment of lobbyists to Government boards or committees.<sup>17</sup> These policies apply to all NSW Government boards and committees, including the boards of State Owned Corporations.

Lobbyists (as defined in the Code) and the employees, contractors or persons otherwise engaged by lobbyists to carry out lobbying activities are now ineligible for appointment to any government board or committee if the functions of the board or committee relate to any matter on which the lobbyist (or person engaged by the lobbyist) represents the interests of third parties, or has represented the interests of third parties in the 12 months prior to the date of the proposed appointment.

Further, the Code now provides that a lobbyist who is appointed to a Government board or committee is then prohibited from lobbying in the interests of third parties in

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<sup>10</sup> The current version of the Lobbyist Code is available at <[www.dpc.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0017/32066/Lobbyist-Code-amendments-2013-strict.pdf](http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0017/32066/Lobbyist-Code-amendments-2013-strict.pdf)> (*Lobbyist Code*).

<sup>11</sup> Lobbyist Code, clause 3.

<sup>12</sup> Lobbyist Code, clause 4.1(a) and (b).

<sup>13</sup> Lobbyist Code, clause 3.

<sup>14</sup> Section 5, *Lobbying of Government Officials Act 2011*.

<sup>15</sup> Section 8, *Lobbying of Government Officials Act 2011*.

<sup>16</sup> Lobbyist Code, clause 8.2 and 8.3.

<sup>17</sup> See Premier's Memorandum 2011-13 *Lobbying of NSW Government Officials*, available at <[www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/2011/m2011-13\\_lobbying\\_of\\_nsw\\_government\\_officials](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2011/m2011-13_lobbying_of_nsw_government_officials)>.

relation any matter relating to the functions of the board or committee.<sup>18</sup> A lobbyist can be removed from the Register for a breach of this requirement.<sup>19</sup>

Most recently, the Lobbyist Code of Conduct was further amended to prohibit individuals who occupy or act in an office or position concerned with the management of a registered political party from lobbying government officials. The amendments to the Lobbyist Code of Conduct also prohibit owners of the Lobbyist's business and other individuals associated with the Lobbyist's business from occupying or acting in an office or position concerned with the management of a registered political party. These changes take effect on and from 31 October 2013.<sup>20</sup>

#### *Administration of the Lobbyist Code*

The Director General of the Department of Premier and Cabinet is given the function, under the Code, of administering the Register of Lobbyists. The Code also confers certain powers and discretions on the Director General, including the power to remove lobbyists from the Register in certain circumstances, including in the event of a breach.

In practice, the Director General is supported in his role by the Information Access Unit, which is part of the Office of General Counsel within the Department. The Office of General Counsel provides both administrative and legal advice to the Director General concerning the exercise of his functions, and makes recommendations to the Director General as to how he should discharge those functions.

The Director General personally exercises, on the advice and recommendation of the Office of General Counsel, the functions specifically conferred upon him by the Code, including:

- To approve an application for a new lobbyist to be listed on the register;
- To approve a lobbyist's registrations details being amended to add a new employee, contractor or other individual engaged to carry out lobbying activities for the lobbyist; and
- To remove a lobbyist from the register (other than at the lobbyist's own request).

#### *Enforcement of the Lobbyist Code*

There are three broad categories of requirements that apply to lobbyists under the Code:

- (a) Requirements with respect to maintaining the accuracy and currency of information on the Register, including a requirement to confirm registration details three times a year.<sup>21</sup>
- (b) Specific requirements with respect to information that must be disclosed upon contacting Government officials, including a requirement, when first making contact with a Government official, to identify themselves as lobbyists, to disclose the identity of their client, and to describe the matter in respect of which they wish to lobby.<sup>22</sup>

<sup>18</sup> Lobbyist Code, clause 7.1(e).

<sup>19</sup> Lobbyist Code, clause 8.3.

<sup>20</sup> Lobbyist Code, clauses 7.3 and 8.1(c).

<sup>21</sup> See eg, clauses 5.3 to 5.6 Lobbyist Code.

<sup>22</sup> See eg, clause 4.3 Lobbyist Code.

(c) General behavioural requirements imposed on the conduct of lobbyists when engaging with Government representatives, such as a prohibition on the making of misleading claims.<sup>23</sup>

It appears that the requirements in paragraphs (a) and (b) are primarily directed toward improving transparency and, in particular, avoiding the possibility of a government official being lobbied without their being aware of the underlying client for whom that lobbying is being done.

The requirement to Register does not apply, for example, to in-house lobbyists (that is, lobbyists who are employed within a particular corporation to represent the interests of that corporation), charities or associations. In part, this may be because there would seem to be little risk in those cases that it will not already be apparent on whose behalf the lobbyist is lobbying – if the government relations manager of company X contacts a Government official for the purpose of lobbying, it will be obvious that he or she will be doing so in the interests of company X.

If any person becomes aware of any suspected breach of the Code by a lobbyist, they should report this to the Director General of the Department of Premier and Cabinet.

Since its establishment, there have been a number of occasions when lobbyists have been removed from the Register pursuant to clause 5.6 due to a failure to comply with the requirements referred to in paragraph (a) above. Clause 5.6 provides that a lobbyist's registration "shall lapse" if they do not satisfy those requirements. In practice, however, the Department will, in the event of non-compliance, make reasonable efforts to contact the lobbyist and afford them an opportunity to remedy the non-compliance before removing them from the Register.

In relation to the requirements referred to in paragraphs (b) and (c) above, there have, to date, been no instances where the Director General has exercised his discretion to remove a lobbyist's registration (in whole or in part) for a breach of those requirements.

Government officials, Members of Parliament and members of the public may from time to time bring to the attention of the Department of Premier and Cabinet questions, comments or concerns they have regarding the conduct of lobbyists. Infrequently, concerns have arisen as to a lobbyist's compliance with the Code. In those cases, the Director General will, as a matter of procedural fairness, generally write to the lobbyist identifying the concern that has been raised, seeking an explanation and reiterating the lobbyist's relevant obligations, noting that the Director General has the power to remove a lobbyist from the Register.

The most recent instance of this related to statements that appeared on an Internet 'LinkedIn' profile of Mr Joseph Tannous, a person engaged by a registered lobbyist, First State Advisors & Consultants Pty Ltd. The correspondence with Mr Tannous concerning that matter is annexed for information, and is indicative of the Department's approach to dealing with allegations of non-compliance with the Code.<sup>24</sup> (It should be noted that the attached correspondence was undertaken prior to the Government's recent decision to impose a general prohibition on an individual who occupies or acts in an office or position

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<sup>23</sup> See eg, clause 7.1 Lobbyist Code.

<sup>24</sup> As the matter dealt with in that correspondence was raised during a hearing of the General Purpose Standing Committee No. 1, a copy of this correspondence was also provided to that Committee on 25 September 2013.

concerned with the management of a registered political party from lobbying government officials.<sup>25)</sup>

***The relationship between the Ministerial Code, the Code of Conduct for Members of Parliament, and the Lobbyist Code of Conduct***

The Code of Conduct adopted by the Legislative Assembly and the Legislative Council continues to apply to Ministers in their capacity as Members of Parliament. That Code has been adopted for the purposes of the *Independent Commission Against Corruption Act 1988*.

Ministers, as Members of Parliament, also continue to be subject to the pecuniary interest disclosure requirements of the *Constitution (Disclosure by Members) Regulation 1983*.

The requirements of the Ministerial Code of Conduct, the Members of Parliament Codes, and the *Constitution (Disclosure by Members) Regulation 1983* apply separately. However, there does not appear to be any inconsistency between them, in the sense that it is both necessary and possible to comply with all three at the same time. Further, the obligations are otherwise generally consistent and mutually reinforcing so as to avoid unnecessary confusion or administrative burden.

For example, the Ministerial Code of Conduct expressly reinforces that Ministers must comply with their obligations under the Members of Parliament Codes, and the *Constitution (Disclosure by Members) Regulation 1983*,<sup>26</sup> and it imposes pecuniary interest disclosure requirements that cross-refer to the categories of matters that are required to be disclosed under the *Constitution (Disclosure by Members) Regulation 1983*.<sup>27</sup>

Similarly, the Ministerial Code contains a provision requiring Ministers to comply with the Lobbyist Code of Conduct and the *Lobbying of Government Officials Act 2011*.<sup>28</sup>

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<sup>25</sup> See above n 20 and related text.

<sup>26</sup> Ministerial Code, clause 2.1.

<sup>27</sup> Ministerial Code, clause 2.2.

<sup>28</sup> Part 8 *Lobbying of Government Officials Act 2011*.





# 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 1<sup>st</sup> 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.<sup>1</sup>

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]".<sup>2</sup> 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.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> Corrs submission, paragraph 3.31(a).

<sup>3</sup> 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"<sup>4</sup> 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.<sup>5</sup> 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,<sup>6</sup> 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".<sup>7</sup> 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

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

<sup>5</sup> Corrs submission, paragraph 3.7 and 3.31.

<sup>6</sup> 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.

<sup>7</sup> 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 “[roles 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).<sup>8</sup>

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”.<sup>9</sup> I note that the Corrs submission provides details of Mr Tannous’ lobbying activities, which support Mr Tannous’ assertion.<sup>10</sup>

### 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

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

<sup>9</sup> Corrs submission, paragraph 3.30.

<sup>10</sup> 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'".<sup>11</sup>

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.

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<sup>11</sup> 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".<sup>12</sup> 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.<sup>13</sup>

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<sup>12</sup> Corrs submission, paragraph 1.11.

<sup>13</sup> 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.<sup>14</sup> 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.

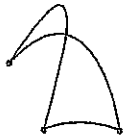
This matter will, however, be taken into account as an aggravating factor in determining whether Mr Tannous' details should be removed from the Register, in the event any other breach of the Code occurs in the future.

Director General  
Department of Premier and Cabinet  
September 2013

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<sup>14</sup> Corrs submission, paragraph 2.4 to 2.6.





1<sup>ST</sup> STATE

GOVERNMENT & CORPORATE RELATIONS

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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:**

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 1<sup>st</sup> State Advisers and Consultants Pty Limited (1<sup>st</sup> State).

1<sup>st</sup> State was surprised to learn of the Hon Mr Foley's complaint in Estimates. 1<sup>st</sup> 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. 1<sup>st</sup> 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, 1<sup>st</sup> State acted quickly to remove the subject matter of Mr Foley's complaint so as to minimise any suggestion that 1<sup>st</sup> State's practices fall outside of the Code's requirements.

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

While 1<sup>st</sup> 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, 1<sup>st</sup> State offers ongoing co-operation with the Department to resolve this complaint. In addition to the matters set out in our response, 1<sup>st</sup> 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

**1<sup>st</sup> 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 1<sup>st</sup> State and Mr Tannous' involvement in 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> State

## About 1<sup>st</sup> State

- 1.1 1<sup>st</sup> State Advisors and Consultants Pty Limited (1<sup>st</sup> State) is a leading government and corporate relations advisory firm based in Sydney. The proprietors of 1<sup>st</sup> State are:
- (a) Mr Joseph (Joe) Tannous, the founder and Executive Director; and
  - (b) Mr Zachary Miles, Partner.
- 1.2 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> State

- 1.4 The core aspects of 1<sup>st</sup> 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 1<sup>st</sup> 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. 1<sup>st</sup> State may arrange a meeting on behalf of a client, but, when engaged to provide government relations advisory services, 1<sup>st</sup> State does not attend that meeting.
- 1.7 When 1<sup>st</sup> 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 1<sup>st</sup> State to its clients are government relations advisory services. 1<sup>st</sup> State primarily operates in the federal jurisdiction but does some limited work in the NSW jurisdiction.

- 1.9 1<sup>st</sup> 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 1<sup>st</sup> State.
- 1.10 The employees of 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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*, 1<sup>st</sup> State wishes to be transparent in relation to its activities. 1<sup>st</sup> State met with various persons involved in the NSW Government. The persons covered by the Code, that 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> State's website.

- 2.5 We are instructed that instead of simply extracting from the contents of the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> State's view that as a strong supporter of the Code, there should be no questions whatsoever regarding 1<sup>st</sup> State's compliance with the Code.
- 2.10 Mr Tannous and Mr Miles have now implemented a policy that requires all public statements regarding 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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.<sup>1</sup> 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

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<sup>1</sup> Russell V Miller, *Miller's Australian Competition and Consumer Law Annotated* (2013) 35<sup>th</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> State do strictly enforce separation between the political activities of Mr Tannous and other lobbyists engaged by 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 [redacted] 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

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 [redacted] if you would like to discuss this matter.

Thank you for your co-operation.

Yours sincerely

**Gris 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.

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 Mr Tannous's LinkedIn profile carried the statement:

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

Thank you for your co-operation.

Yours sincerely

**CMS ESCOS**  
Director General

**21 AUG 2013**