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NSW Parliamentary Research Service

**Integrity in government: issues and
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by Gareth Griffith

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developments in New South Wales, 2011-2015**

by

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SUMMARY

The main concern of this paper is to review the reforms introduced over the life of the 55th NSW Parliament, from 2011 to 2015, policy and legislative in nature, intended to address concerns about integrity in government.

Representative democracy under stress: These developments take place against the background of a broader debate about the decline of public confidence in representative democracy. For example, a 2012 Lowy Institute poll found that only 60% of Australians believed “democracy is preferable to any other kind of government”, a figure that fell to just 39% for those aged between 18 and 29. The *Australian Constitutional Values Survey 2014* conducted by Griffith University’s Centre for Governance and Public Policy reported that nearly 27% of those surveyed thought that democracy in Australia today works “not very well” or “not well at all”, up from 16.4% in 2008. 36% responded that “the current system of government, with three main levels, does not work well”. Tending to confirm these findings, the 2014 *Essential Report* on Trust in Institutions found that 72% of respondents had “A little trust/no trust” in either State or Federal Parliament, a figure that climbed to 83% for political parties.

There are many entry points into this debate. Party politics has been transformed in recent times, towards a focus on the party leader, not the party brand, along with an emphasis on marketing and market research. Comment is made on the declining rate of membership and decreasing levels of intra-party activism amongst Australia’s major political parties. Conversely, the impact of social media on new forms of political participation, among the young especially, is widely discussed.[2.1]

NSW and the ICAC: In 2012 Michael Hogan surveyed “The state of democracy in NSW”. His focus was on such issues as:

- the negative impact of the modern 24/7 mass media on the quality of political debate and decision making, a theme common to the literature;
- on the independence and integrity of a “politicised” public service, again a feature of the broader debate in other polities; and
- on the state of the party system, with Hogan arguing that “there are signs that the Australian party system is in deep trouble”

Hogan’s broad conclusion was that, while “Democracy is not about to disappear in NSW”, underpinned as it is by a “very strong civic culture”, there is room for “substantial reform”. The truth of that assertion is not readily contradicted when, since the last State election in 2011 the work of the Independent Commission Against Corruption (the ICAC) has opened new windows onto NSW politics, seeming to reveal disturbing signs of endemic corruption in areas of the political system. The events featuring in these ICAC investigations hark back to the last stanzas of Labor’s 16 year odyssey in power. However, instances of scandal and corruption did not end with the defeat of Labor in 2011. Instead, over the past four years the NSW public has been fed with almost a daily fare of claims and findings reflecting poorly on the Labor and Liberal parties alike.

A recent report has noted that findings of fraud and corruption, together with alleged breaches of election funding laws, “have led the community to distrust politicians and to question the integrity of government”. Nonetheless, the precise impact of the ICAC hearings and their aftermath are hard to gauge, in particular when it comes to analysing their contribution to long terms trends in public views about the political system.[2.2]

Integrity and the public interest. For those occupying representative positions in public life, having sought and gained a position of power and trust in their community, integrity has a particular and specific significance. With power and public office comes the temptation to use that position for personal advantage. At the very least, at the level of the individual politician, integrity is taken to mean that public office will not be used to attain personal or family gain; integrity requires the individual politician to recognise and avoid conflicts of interests, to act honestly and honourably at a personal level, for public not private benefit.[3]

The Coalition’s Five Point Action Plan: When the Coalition Government came to power in 2011 it was with a [Five Point Action Plan](#). Among the items on the reform list were plans to:

- Properly regulate lobbyists
- Restore trust in the public service and establish a Public Service Commissioner
- Reform election campaign finance laws
- Strengthen whistleblower protection
- Strengthen ICAC laws
- Eliminate taxpayer funded “political” advertising
- Reform FOI laws.[4]

Political Lobbying: The [Lobbying of Government Officials Act 2011](#) introduced a number of [changes](#) to the regulation of lobbying in NSW, including the prohibition of success fees for lobbyists who lobby Ministers, Parliamentary Secretaries and other Government officials and, based on an amendment moved by the NSW Greens, the prohibition of former ministers and parliamentary secretaries from engaging in lobbying activities in the 18 months after they cease to hold office.[5.2]

With lobbying remaining on the political agenda throughout the 55th Parliament, a further round of reform followed. On 8 May 2014 the Leader of the Opposition, John Robertson introduced the ICAC Amendment (Ministerial Code of Conduct) Bill 2014 which would have made the Ministerial Code of Conduct an “applicable Code” under s 9 of the ICAC Act, thus allowing for findings that substantial breaches of the Code would amount to “corrupt conduct” (as applies for the Code of Conduct for Members). Under the same proposed legislation Ministers would have been required to disclose information about meetings with lobbyists. The Bill was defeated at the second reading stage.[5.3]

In 2014 Premier Mike Baird announced a major overhaul of the regulatory regime for lobbyists. He said the reform package would include:

- Establishing the Electoral Commission as an independent regulator of lobbyists;

- Applying a set of ethical standards to all third-party lobbyists and other organisations that lobby government;
- Empowering the independent regulator to investigate alleged breaches and impose sanctions, which could result in lobbying firms being removed from the Lobbyist Register and other organisations placed on a Watch List and their access to government restricted; and
- Requiring Ministers to publish quarterly diary summaries of scheduled meetings with external organisations on portfolio-related activities; and
- Approving a recommendation from ICAC that the Ministerial Code of Conduct become applicable under the ICAC Act, giving the watchdog the power to investigate and make findings on a Minister's compliance with the Code.

These amendments were the basis of the *Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014*.**[5.4]**

Ministerial Code of Conduct. A new Ministerial Code of Conduct – [M2014-09](#) was issued by Premier Baird, commencing on 20 September 2014. This replaced the version issued by the then Premier Barry O'Farrell on 2 June 2011 - [M2011-09](#), which in turn was based on a 2006 Code issued by Premier Morris lemma. The current [Code of Conduct](#) is set out in an Appendix to the ICAC Amendment (Ministerial Code of Conduct) Regulation 2014. A key feature is that a substantial breach of the Code could constitute corrupt conduct for the purposes of s 9 of the ICAC Act (cl 4A). In addition, while much of the substance of the Code remains broadly the same, many of its features find more detailed expression and its terms are more clearly defined.**[6.1]**

Ministers and post-separation employment. The position as it currently stands is set out under Part 5 of the Schedule to the Ministerial Code of Conduct. The 2014 Code makes it clear that the Parliamentary Ethics Adviser (PEA) may advise against the acceptance of an offer of post-separation employment either generally or unless certain conditions are met. Further, while in office, a Minister cannot accept an offer where the Parliamentary Ethics Adviser has advised against it. It is also the case that, where a Minister accepts an offer of post-separation employment, any advice provided by the PEA must be tabled in the House of Parliament to which the Minister belongs.**[6.2]**

Members' Code of Conduct. The ICAC has been critical of the [Code of Conduct for Members of the NSW Parliament](#), describing it as “a feeble document”, and of the Register of Disclosures that Members are required to complete. The Code has been the subject of discussion and review by relevant parliamentary committees, as has the disclosure of pecuniary interests.**[7]**

Political donations: Of all the issues raised by the “integrity” debate in NSW, the most vexed, constitutionally and politically, is the regulation of political donations. Against the background of a successful High Court challenge to the 2012 reform model, the torrent of allegations of wrongdoing flowing from ICAC's hearings in Operations Spicer and Credo, calls for political campaigns to be fully publicly funded and the passing of controversial interim legislation, in December 2014 an Expert Panel released a major report, [Political Donations](#), setting out its recommendations on all aspects of this fraught subject. Its key

recommendation was for an immediate, comprehensive review of the *Election Funding, Expenditure and Disclosures Act 1981*.**[8]**

Public service ethics: The key features of the *Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Act 2011* (and retained in the *Government Sector Employment Act 2013*) included:

- providing an ethical framework for the public sector comprising core values (namely, integrity, trust, service and accountability) along with principles guiding the implementation of those core values; and
- providing for the appointment by the Governor of a Public Service Commissioner, as an independent statutory office.**[9]**

Government advertising: The *Government Advertising Act 2011* prohibited party-political material in government advertising and advertising campaigns designed to benefit a political party. Under the Act, governing political parties are liable to pay back the costs of advertising campaigns that breach its prohibitions. The Act also provides for the cost benefit analysis and peer review certification of government advertising campaigns by the heads of government agencies, a role that is defined to be “independent” of the relevant Minister. A performance audit role for the Auditor-General to scrutinise government advertising campaigns was further provided for. The Act also provides for the making of government advertising guidelines, which can now be found as an appendix to the [NSW Government Advertising Handbook](#).**[11]**

Other reforms and potential reforms: Amendments were also made to legislation relating to whistleblowers, the ICAC, the PIC and freedom of information.**[10]**

Continuing developments: At the time of writing the political donations scheme is the subject of another High Court challenge, further to *McCloy v NSW*. This concerns the validity of the ban under the *Election Funding, Expenditure and Disclosures Act 1981* against certain classes of prohibited donors, specifically property developers and liquor, gambling and tobacco industry business entities. Another ongoing High Court challenge relates to the powers of the ICAC, further to the high profile case of Crown Prosecutor Margaret Cunneen. Following a decision of the NSW Court of Appeal in Ms Cunneen’s favour - [Cunneen v Independent Commission Against Corruption](#) [2014] NSWCA 421 (5 December 2014) - special leave to appeal to the High Court was granted, with the matter due to be heard in March 2015.**[12]**

Further, concern has also been expressed regarding prosecutions arising from ICAC findings of corruption, an inquiry into which is to be conducted by the Joint Parliamentary Committee on the ICAC.**[12]**

1. INTRODUCTION

In the 2011 paper *Key Issues and Regional Profiles for the 55th Parliament* the comment was made that:

Concerns about integrity in government are as old as government itself. But if concerns of this kind are more or less ubiquitous, it is also the case that there are moments when they come into particular focus, when standards in public life seem to be under stress for one reason or another. Challenging and difficult as such moments are sure to be, they may nonetheless present an opportunity for reform and renewal, a chance for a political system to take a good long hard look at itself. At issue, fundamentally, is public confidence in that system.¹

The main concern of this paper is to review the reforms introduced over the life of the 55th NSW Parliament, from 2011 to 2015, policy and legislative in nature, intended to address concerns about integrity in government. Placing these more specific developments in context, the paper starts with a comment about the broader challenges facing representative democracy in the new millennium.²

2. REPRESENTATIVE DEMOCRACY UNDER STRESS

2.1 From scepticism to cynicism?

Contemporary literature about Australian politics and the politics of comparable western democracies often strikes a bleak note,³ signalling a decline in popular engagement in the political process, noting growing cynicism about representative democracy and reflecting the gathering negative perception of political parties and politicians. From academic and other quarters a picture of “disaffected democracies” emerges, with one commentator stating that, from around the turn of the millennium, there was “an almost global shift in public attitudes from one of healthy scepticism to corrosive cynicism”.⁴ Across many advanced industrialised democracies empirical research suggests an erosion of public confidence in political parties and parliaments alike.⁵ *Why we hate politics* is one influential work on the phenomenon of contemporary political disenchantment, reflecting on the fact that, in established democracies,

¹ NSW Parliamentary Research Service, *Key issues and regional profiles for the 55th Parliament*, Background Paper 2/2011, p 5.

² Note that this paper does not deal with all potentially relevant developments, notably relating the local government and reforms affecting intra-party democracy.

³ See for example such title as: J Kurlantzick, *Democracy in retreat: the revolt of the middle class and the worldwide decline of representative democracy*, Yale University Press 2013. Another example in this vein is M Chou, *Democracy against itself: sustaining an unsustainable idea*, Edinburgh University Press 2014.

⁴ M Flinders, *Defending politics: why democracy matters in the twenty-first century*, Oxford University Press 2012, p 2.

⁵ RJ Dalton, *Democratic challenges, democratic choices: the erosion of political support in advanced industrial democracies*, Oxford University Press 2004; for a summary of the issues see K Deschouwer and S Depauw eds, *Representing the people: a survey among members of statewide and sub-state Parliaments*, Oxford University Press 2014, pp 2-6.

“membership of political parties and most other indices of participation in formal politics are down...to unprecedented levels”.⁶

One concern is that the relationship between democracy and civil society is in disrepair; that a civic culture informed by values and attitudes supportive of the system of democratic politics is declining.⁷ Rather than thriving democratic movements rooted in communities, political parties are described as “hollowed out...husks”.⁸ Again from a British perspective it is said that “politics itself is in considerable difficulty”:

There is disengagement from party, and voting is on course to become a minority activity. Distrust of politicians has reached toxic proportions. It is not too much to say that there is a kind of civic crisis. A vision of a political future opens up in which a political class ceases to have organic connection to the wider society but floats over it, its accountability enforced not by an active democracy but by an assortment of external regulators.⁹

Associated with this line of argument is the idea of the “democratic deficit”,¹⁰ concerned about “a sizeable and persistent gap between citizens’ aspirations for democracy and their evaluations of the performance of democratic governance”.¹¹ It may be that the expectations of citizens have outstripped “the capacities of democratic institutional performance to meet them”, which suggest a mixed message in which citizens are at once supportive of the ideals of democracy but critical of contemporary practice.¹² It may also be that the connection between “representation” and “democracy”, always conceptually difficult, has become more empirically problematic, with one commentary stating that “the debates about the crisis of democracy point at difficulties for creating a meaningful linkage between the population and the elites representing them”.¹³

The issues are many and varied and are likely to bear closer investigation on a case by case basis, taking the specific aspects of political cultures into account. Certainly it would be unwise to leap to conclusions, either by positing long-term trends towards political disillusionment or else suggesting that the current

⁶ C Hay, *Why we hate politics*, Polity 2007, p 1.

⁷ P Whiteley, *Political participation in Britain: the decline and renewal of civic culture*, Palgrave Macmillan 2012, p xv and p 10.

⁸ O Jones, *The Establishment: and how they get away with it*, Allen Lane 2014, p 69.

⁹ T Wright, “What are MPs for?” (July-September 2010) 81(3) *The Political Quarterly* 298 at 307.

¹⁰ The term “democratic deficit” originated in the EU, reflecting concern about the elitism and bureaucracy of community decision making as well as the weakness of the elected European Parliament: PT Lenard and R Simeon eds, *Imperfect Democracies: the democratic deficit in Canada and the United States*, UBC Press 2012, p 20.

¹¹ P Norris in *Imperfect Democracies: the democratic deficit in Canada and the United States*, p 24.

¹² PT Lenard and R Simeon in *Imperfect Democracies: the democratic deficit in Canada and the United States*, p 19.

¹³ K Deschouwer and S Depauw eds, *Representing the people: a survey among members of statewide and sub-state Parliaments*, p 6.

malaise is altogether historically unique.¹⁴ Indeed, it may be that we are too quick to jump on to the bandwagon of political disillusionment. In Australia the evidence is not straightforward, as reviewed by Ken Turner and Michael Hogan in their 2006 introduction to *The Worldly Art of Politics*, where it is said:

Analysts of the polls seem to agree with [Murray] Goot that the extent of discontent has been “exaggerated and decontextualised”; that there is little evidence of a continuing decline in trust; that the volatile responses to questions about political trust are best seen as reflecting changing judgments about incumbents at different stages of the life cycle of governments; and that scepticism about incumbents does not necessarily imply chronic distrust of the regime and its institutions.¹⁵

All the same, the finding of the 2012 Lowy Institute poll that only 60% of Australians believed “democracy is preferable to any other kind of government” is sobering enough, the more so when this figure was only 39% for those aged between 18 and 29.¹⁶ The 2014 poll reported in summary:

Confirming our previous Poll results, only 60% of Australian adults, and just 42% of 18-29 year-olds, say ‘democracy is preferable to any other kind of government’. Only a small majority of the population (53%) choose ‘a good democracy’ over a ‘strong economy’. For those who do not see democracy as the preferable form of government, the strongest reasons are that ‘democracy is not working because there is no real difference between the policies of the major parties’ (45% citing this as a major reason) and ‘democracy only serves the interests of a few and not the majority of society’ (42%).¹⁷

Other comparable findings point in a similar direction. The *Australian Constitutional Values Survey 2014* conducted by Griffith University’s Centre for Governance and Public Policy reported that nearly 27% of those surveyed thought that democracy in Australia today works “not very well” or “not well at all”, up from 16.4% in 2008.¹⁸ 36% responded that “the current system of government, with three main levels, does not work well”. The same survey found that 46.5% said they had “not very much/none at all” trust and confidence in the federal level of government to “do a good job in carrying out its responsibilities”,¹⁹ with a comparable figure of 44.6% recorded for State governments.²⁰ In light of the Griffith University findings the *Australian* reported

¹⁴ For a brief but nuanced account from a British perspective see this 2011 [Hansard Society](#) commentary “Beyond the headlines: has trust in politicians really declined?”; for an historical discussion from an Australian perspective see J Dickenson, *Trust me: Australians and their politicians*, UNSW Press 2013. Dickenson concludes that politicians themselves must lead the way towards “new, higher standards of behaviour” (p 258).

¹⁵ K Turner and M Hogan eds, *The worldly art of politics*, The Federation Press 2006, p 7.

¹⁶ *The Lowy Institute Poll 2012: Public opinion and foreign policy*.

¹⁷ *Lowy Institute Poll 2014*.

¹⁸ Griffith University, *Australian constitutional values survey 2014: results release 1*, October 2014. The findings are based on a Newspoll survey of 1,204 Australian citizens and permanent residents aged 18 years and over.

¹⁹ Compared to 15.8% in 2008.

²⁰ Compared to 42.4% in 2008.

that:

Dysfunctional government has created a crisis of faith in our political leadership, with federal government now the least-trusted tier of power and more than one in four Australians convinced democracy is not working.²¹

Tending to confirm these findings, the 2014 [Essential Report](#) on Trust in Institutions found that 72% of respondents had “A little trust/no trust” in either State or Federal Parliament, a figure that climbed to 83% for political parties.

2.2 Australia, NSW and the ICAC

There are many entry points into this debate. Party politics has been transformed in recent times, towards a focus on the party leader, not the party brand, along with an emphasis on marketing and market research.²² Comment is made on the declining rate of membership²³ and decreasing levels of intra-party activism amongst Australia’s major political parties.²⁴ Conversely, the impact of social media on new forms of political participation, among the young especially, is widely discussed. It may just be that, try as the established political parties might to tinker with membership strategies, pre-selection processes and the like, the traditional forms of engagement in politics do not appeal to generations nurtured on campaigning through the electronic media. It may not be politics that young people hate, still less democracy, but particular “forms of politics”.²⁵

Reflecting on the state of federal politics in Australia, Paul Kelly comments on the “power of negative politics”, saying that the “price of honesty is too high” in the current climate, with the result that difficult policy decisions fail to be properly confronted. According to Kelly, “The trust between the political system and the public to sustain ambitious policy is close to being severed”.²⁶ For Kelly, one symptom of the political malaise is the decline of executive decision making. He states:

The rise of the ministerial office has run in parallel with the rise of political advisers and decline of policy advisers. Within the executive arm that old axiom – good policy is good politics – is deeply compromised.²⁷

²¹ P Hudson, “Dysfunction strips faith in politics”, *The Australian* 10 October 2014.

²² I Marsh and R Miller, *Democratic decline and democratic renewal*, Cambridge University Press 2012, p 173.

²³ The membership of party organisations is said to have “largely collapsed”: I Marsh and R Miller, *Democratic decline and democratic renewal*, p 171.

²⁴ See for example W Cross and A Gauja, “Evolving membership strategies in Australian political parties” (2014) 49(4) *Australian Journal of Political Science* 611.

²⁵ M Chou, “Commentary: democracy’s not for me – the Lowy Institute polls on Gen Y and democracy” (2013) 48(4) *Australian Journal of Political Science* 485 at 492.

²⁶ P Kelly, *Triumph and Demise: the broken promise of a Labor generation*, Melbourne University Press 2014, p 509.

²⁷ P Kelly, *Triumph and demise: the broken promise of a Labor generation*, p 504.

Bringing matters closer to home, writing in 2012 Michael Hogan surveyed “The state of democracy in NSW”. His focus was on such issues as:

- the negative impact of the modern 24/7 mass media on the quality of political debate and decision making, a theme common to the literature;
- on the independence and integrity of a “politicised” public service, again a feature of the broader debate in other polities; and
- on the state of the party system, with Hogan arguing that “there are signs that the Australian party system is in deep trouble”.²⁸

Hogan’s broad conclusion was that, while “Democracy is not about to disappear in NSW”, underpinned as it is by a “very strong civic culture”, there is room for “substantial reform”.²⁹ The truth of that assertion is not readily contradicted when, since the last State election in 2011 the work of the Independent Commission Against Corruption (the ICAC) has opened new windows onto NSW politics, seeming to reveal disturbing signs of endemic corruption in areas of the political system, encapsulated in the activities of Labor’s Eddie Obeid.³⁰ In July and August 2013 the ICAC published its reports on Operation Jasper and Operation Acacia.³¹ This was followed in October 2013 by a report arising from these inquiries, titled *Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources* which contained wide ranging recommendations for reform, including concerning the conduct of MPs and ministers. Chapter 6 of that report started by observing:

The corrupt conduct identified by the Commission in operations Jasper and Acacia was only possible because of the policy and regulatory problems of the state. The execution of the grand corruption was ultimately due to improper influences on an unfettered minister, his disdain for departmental advice and secret meetings with proponents. Edward Obeid Sr also did not declare interests in the Mount Penny area, effectively hiding his actions and those of Mr Macdonald from public scrutiny. These behaviours bring into question the adequacy of parliamentary control over the behaviour of its members and the degree to which this contributed to the corrupt conduct that occurred.

The NSW *Code of Conduct for Members* does not provide a broad framework within which acceptable conduct can be measured. Similarly, the principle of frank and fearless advice is not enshrined in the NSW *Code of Conduct for Ministers of the Crown*. The adoption of comprehensive and objective standards to assess the conduct of members and ministers is necessary to establish clear boundaries for acceptable behaviour.

²⁸ M Hogan, “The state of democracy in NSW” in *From Carr to Keneally: Labor in office in NSW 1995–2011* edited by D Clune and R Smith, Allen and Unwin 2012, p 318.

²⁹ M Hogan, “The state of democracy in NSW”, p 325.

³⁰ K McClymont and L Besser, *He who must be Obeid*, Vintage Books 2014.

³¹ *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others* and *Investigation into the conduct of Ian Macdonald, John Maitland and others* respectively.

The current Register of Disclosures for members is also limited, in that there is no requirement for members to disclose family interests. Nor is there sufficient transparency around the lobbying of ministers and their staff. This means potential sources of private influence for members and ministers are not subject to public scrutiny.

The conduct of members must also be open to judgment. A comprehensive, timely and independent system for dealing with complaints about the conduct of members is absent in the current system. The NSW Parliament lacks an effective mechanism to manage its own members.³²

On a similar theme and with the same characters in the spotlight, in June 2014 ICAC released the reports arising from Operations Cyrus,³³ Cabot and Meeka,³⁴ again bringing deep seated problems of fraud and corruption to the fore involving Labor Government Ministers:

Millions of dollars were involved. It was alleged for example that the tender for mining leases was 'rigged' to the personal benefit of two Ministers and others; that the terms and conditions of valuable café leases at Circular Quay were set favourably to benefit a Minister's family; and that an attempt was made to improperly award the right to provide water and sewerage services in the developing north-west region of Sydney.³⁵

The events featuring in these ICAC investigations hark back to the last stanzas of Labor's 16 year odyssey in power.³⁶ However, instances of scandal and corruption did not end with the defeat of Labor in 2011. Instead, over the past four years the NSW public has been fed with almost a daily fare of claims and findings reflecting poorly on the Labor and Liberal parties alike. Not least, in April 2014 Premier, Barry O'Farrell resigned after he could not recall to the ICAC that he had received a gift of expensive wine from Liberal donor and lobbyist Nick Di Girolamo.³⁷ Ongoing are Operations Spicer and Credo, hearings that involved allegations that political donations were accepted from banned donors; that some were made in breach of the applicable caps; that false invoices were created to hide donations; and that schemes were devised to "wash" illegal donations through the federal branch of the Liberal Party and channel them back to into New South Wales.³⁸ These hearings have seen a

³² ICAC, *Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources*, October 2013, p 41.

³³ ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, June 2014.

³⁴ ICAC, *Investigations into the conduct of the Hon Edward Obeid MLC and other in relation to influencing the granting of water licences and the engagement of direct Health Solutions Pty Ltd*, June 2014.

³⁵ NSW Panel of Experts, *Political Donations: Final Report – Volume 1*, Executive Summary.

³⁶ In a damning analysis, one British commentator described former Premier Kristina Keneally as "a marionette controlled by shady Labor chieftains" and as "a telegenic face on an unsightly political machine": N Bryant, *The rise and fall of Australia: how a great nation lost its way*, Bantam 2014, p 153.

³⁷ B Norington, "Former premier O'Farrell quits seat", *The Australian*, 25 November 2014, p 8.

³⁸ NSW Panel of Experts, *Political Donations: Final Report – Volume 1*, Executive Summary.

total of 10 Liberal members of Parliament stepping aside from the Party to sit on the cross-bench.

A recent report has noted that findings of fraud and corruption, together with alleged breaches of election funding laws, “have led the community to distrust politicians and to question the integrity of government”.³⁹ Nonetheless, the precise impact of the ICAC hearings and their aftermath are hard to gauge, in particular when it comes to analysing their contribution to long term trends in public views about the political system. Are we looking at a “blip” on the screen or something of more perennial interest? Is cynicism and apathy towards politics genuinely different in kind or degree today than it was at various points in the past? Does ICAC point to the road to recovery for NSW democracy or to its inherent flaws? Does it confirm the argument that, in modern democracies, accountability is enforced “not by an active democracy but by an assortment of external regulators”.⁴⁰ Are the “integrity” reforms introduced in recent years evidence of system renewal and regeneration, or are we rather moving deckchairs on the *Titanic* of representative democracy?

One observation to make is that, because of compulsory voting, in Australia disillusion with the major political parties has not translated into falling rates of electoral participation. Rather, the trend is towards voter de-alignment from the major parties: at the 1953 and 1981 NSW State elections the ALP and Coalition parties attracted 94.5% of the total vote, a figure that had declined to 83.8% by 1991 and to 76% by 2007, rising slightly to 76.8% in 2011.⁴¹ A further observation is that, voter re-alignment notwithstanding, the system of public funding tends to entrench the major parties in the electoral system, this in circumstances where funding is not tied to levels of party membership or any other indicator of party support beyond the mere recording of a vote in the context of a system based on compulsory voting.

Even if the ship is going down, a cynic might say, the deckchairs are still in place. That is one reading, in which, together, compulsory voting and the funding regimes in place might be said to mask the extent and degree of the underlying decline in popular confidence in politicians and representative political institutions. But even if that is the case; even if the “formal political structure and its social base are now misaligned”;⁴² even if the active work of accountability has passed largely to external regulators; and even if it is recognised that formal accountability mechanisms are no substitutes for popular trust in government,⁴³ there is still the need to articulate the argument for constructive reform, including those rules and mechanisms designed to facilitate integrity in government. Representative democracy may indeed be the worst

³⁹ NSW Panel of Experts, [Political Donations: Final Report – Volume 1](#), Executive Summary.

⁴⁰ T Wright, “What are MPs for?” (July-September 2010) 81(3) *The Political Quarterly* 298 at 307.

⁴¹ A Green, *2011 NSW election: analysis and results*, NSW Parliamentary Research Service Background Paper 3/2011, p 56.

⁴² I Marsh and R Miller, *Democratic decline and democratic renewal*, p 183.

⁴³ F Fukuyama, *Political Order and Political Decay*, Farrar, Strauss and Giroux 2014, p 522.

form of government, except, as Churchill said, all the other forms that have been tried from time to time. If measures designed to bolster the integrity of government, tougher codes and more powerful regulators, are not the complete answer, they are nonetheless one plank in the broader project of democratic renewal and reform.

3. CONCEPTS IN THE INTEGRITY DEBATE

Brief comment can be made on the use and meaning of some key concepts in the “integrity” debate. One point to make is that, for some concepts, there may be technical or statutory definitions to bear in mind, as in the case of “corrupt conduct” in the context of the *ICAC Act 1988*.

For those occupying representative positions in public life, having sought and gained a position of power and trust in their community, integrity has a particular and specific significance. With power and public office comes the temptation to use that position for personal advantage. At the very least, at the level of the individual politician, integrity is taken to mean that public office will not be used to attain personal or family gain; integrity requires the individual politician to recognise and avoid conflicts of interests, to act honestly and honourably at a personal level, for public not private benefit. The [Members’ Code of Conduct](#) in NSW provides that:

Members of Parliament acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution of Parliament, and using their influence to advance the common good of the people of New South Wales.

Public servants are in a similar position, employed as they are to provide impartial and honest service to the community, not in a representative capacity, but in a professional context, consistent with established ethical standards and practices. From this it follows that, in contemporary debate the concept of integrity is applied in an institutional or organisational context, where it is associated with factors that facilitate trustworthiness and conditions that resist corruption, such as accountability and sound ethical practices. The codes of practices and the like that apply in NSW to parliamentarians, Ministers, ministerial staff and public servants are discussed in later sections of this paper.

For government, the institutional integrity issues go to the mechanisms in place to establish and maintain appropriate organisational behaviour and practice. These are in addition to the traditional mechanisms associated with parliamentary scrutiny and judicial review. It has become commonplace to refer to the newer breed of oversight bodies as belonging to “the integrity branch” or “the integrity system”,⁴⁴ including the Ombudsman, the ICAC, the Police

⁴⁴ The term “integrity branch” was coined by former NSW Chief Justice James Spigelman. For developments beyond NSW see for example [A Guide to the Integrity System in Victoria](#), 2014; D Solomon “The integrity branch –parliament’s failure or opportunity? *Paper presented at the Australasian Study of Parliament Group Annual Conference*, Perth 2-4 October 2013 (Dr Solomon is the Queensland Integrity Commissioner).

Integrity Commission, the Auditor-General and the Public Service Commissioner.⁴⁵

4. OVERVIEW OF THE REFORM AGENDA, 2011-2015

When the Coalition Government came to power in 2011 it was with a [Five Point Action Plan](#).⁴⁶ Among the items on the reform list were plans to:

- Properly regulate lobbyists
- Restore trust in the public service and establish a Public Service Commissioner
- Reform election campaign finance laws
- Strengthen whistleblower protection
- Strengthen ICAC laws
- Eliminate taxpayer funded “political” advertising
- Reform FOI laws and establish a Public Service Commissioner.

The key statutes and subordinate legislation introduced in this period are as follows:

Regulation of lobbyists	<p><i>Lobbying of Government Officials Act 2011</i></p> <p><i>Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014</i></p> <p>Lobbying of Government Officials (Lobbyists Code of Conduct) Regulation 2014</p> <p>Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Regulation 2014</p>
Public Service reform	<p><i>Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Act 2011</i></p> <p><i>Government Sector Employment Act 2013</i></p>
Reform of election campaign finance laws	<p><i>Election Funding, Expenditure and Disclosures Amendment Act 2012</i></p> <p><i>Election Funding, Expenditure and Disclosures Further</i></p>

⁴⁵ For Professor John Keane, the proliferation of such power-monitoring devices has given rise to a new model of democracy, one he calls “monitory democracy”, a “post-Westminster” form of democracy which “no longer bear resemblance to textbook models of representative democracy, which supposed that citizens’ needs are best championed through elected parliamentary representatives chosen by political parties”: J Keane, *The life and death of democracy*, Simon and Schuster 2009, p xxvii. For an account that places Parliament at the apex of this oversight process see – G Griffith, “Parliament and accountability” (2006) 21(1) *Australasian Parliamentary Review* 7.

⁴⁶ Liberals NSW/The Nationals, [Start the change: make NSW number one again](#), 2011.

	<i>Amendment Act 2012</i> <i>Election Funding, Expenditure and Disclosures Amendment (Administrative Funding) Act 2013</i> <i>Election Funding, Expenditure and Disclosures Amendment Act 2014</i> <i>Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014</i>
Whistleblower protection laws strengthened	<i>Public Interest Disclosures Amendment Act 2011</i> <i>Public Interest Disclosures Amendment Act 2013</i> <i>Ombudsman and Public Interest Disclosures Legislation Amendment Act 2014</i>
ICAC laws strengthened	<i>ICAC Amendment Act 2011</i> <i>ICAC Amendment (Disciplinary Proceedings) Act 2013</i>
Political advertising reform	<i>Government Advertising Act 2011</i> Government Advertising Regulation 2012
FOI reform	<i>Government Information (Public Access) Amendment Act 2012</i>

5. POLITICAL LOBBYING

Much of the debate in NSW in recent times has focused on the networks of influence that operate beneath the surface of political life, the corrosive connections that result in holders of public offices, politicians and public servants alike, acting for the benefit of third parties instead of the public interest. This debate centres on lobbying in its many guises and the corruption risks it can involve.

Concern about the influence of lobbying is by no means new. Writing in 1921 Viscount Bryce took a dim view of lobbying, a largely American phenomenon he believed at the time. Adopting a florid turn of phrase, he wrote:

As on a rocky sea-shore one can tell how far the tide has fallen by observing how many limpets adhering to the rocks are to be seen above the level of the water, so the healthiness of public life may be judged by seeing how many rich men or their agents are found slipping into the halls of a legislature and approaching persons who can bring political influence to bear.⁴⁷

In 2008 the NSW Parliamentary Research Service published a briefing paper on [The Regulation of Lobbying](#). It began by noting that:

⁴⁷ Viscount J Bryce, *Modern Democracies, Volume 2*, Macmillan 1921, p 525. With the idea of fixing persuasion within “reasonable limits”, Bryce suggested that “Lobbyists might...be recognized as a sort of profession and subjected, like parliamentary agents in England, to disciplinary rules”, p 530.

The role and influence of political lobbyists on the democratic process is a source of comment and concern in Australia and beyond. While lobbying is undoubtedly a 'legitimate activity', there is a perception that lobbyists can sometimes wield undue influence and that, without appropriate regulation, their activities may skew the political decision making process. At stake is the legitimacy of that process, which threatens to dissolve when decisions are perceived to arise from secret deals made behind closed doors.

By 'lobbying' is meant the attempt to influence decision makers into choosing a course of action preferred by the lobbyist or his client. It may be to pass or amend certain legislation, or to oppose its passage through Parliament. It may be to oppose, adopt or amend a government policy, or to influence the awarding of a government contract, or the allocation of funding.⁴⁸

5.1 The ICAC and political lobbying

The ICAC's interest in lobbying is long standing. As far back as 1990 in its Report on North Coast Land Development the ICAC considered that lobbying could easily lead to corruption and recommended the establishment of a public register of lobbyists, and perhaps their clients. The report concluded a register could provide a sound basis for regulation of lobbying activities, by legislation or self-regulation. This recommendation was reiterated in the 1998 report *Strategies for Managing Post Separation Employment* where it was stated:

In the absence of laws in NSW to deal with influence from former public officials, public sector organisations need to take responsibility for minimizing the possibility that former public officials will attempt to influence government decision making. The ICAC maintains that there should be a register of political lobbyists in NSW, as recommended in its 1990 report Investigation into North Coast Land Development.⁴⁹

Returning again to the issue in 2005, in its *Report on investigation into planning decisions relating to the Orange Grove Centre* the ICAC recommended:

That the NSW Government amend the Ministerial Code of Conduct to include guidelines about lobbying activities. The guidelines should address issues such as transparency, equality of access and ethical conduct in relation to lobbying.⁵⁰

It was only in 2006 that the NSW Premier's Department first issued guidelines for Ministers, their staff and public officials in dealing with lobbyists. That same year, the Code of Conduct for Ministers was amended to provide an advisory role for the Parliamentary Ethics Adviser: first, to require Ministers who, while in office, were considering an offer of post-separation employment as lobbyists on behalf of third parties to obtain advice from the Parliamentary Ethics Adviser where the prospective work relates to their portfolio responsibilities; and

⁴⁸ G Griffith, *The Regulation of Lobbying*, NSW Parliamentary Research Service, Briefing Paper 5/2008 ,p 1.

⁴⁹ ICAC, *Strategies for Managing Post Separation Employment*, 1998.

⁵⁰ ICAC, *Report on investigation into planning decisions relating to the Orange Grove Centre*, p 102.

secondly, when considering the offer of similar employment within 12 months of leaving office, former Ministers were also required to obtain advice from the Parliamentary Ethics Adviser.

Then in 2009 a Lobbyist Code of Conduct and Register came into operation. The Code provided that “government representatives” (Ministers, Parliamentary Secretaries, Ministerial staff, staff working for a Parliamentary Secretary, and persons working in public sector agencies) could only be lobbied by a professional lobbyist who is registered and had the lobbyist’s details on the Register. The definition of “government representatives” did not extend to members of Parliament, persons employed by State-owned corporations or to local government.

Also coming into effect in 2009 was the NSW Department of Planning’s Meeting and Telephone Communications Code of Practice, which was complementary to the Lobbyist Code but provided a more detailed and rigorous regime concerning the conduct of meetings and telephone discussions.

These developments were reviewed by the ICAC in its 2010 report, titled *Investigation into corruption risks involved in lobbying*. An extended definition of “lobbying activity” was provided, as follows:

A communication with a Government Representative in an effort to influence government decision-making, including as to the:

- making or amending of legislation
- development or amendment of a government policy or program
- awarding of a government contract or grant
- making of a decision about planning or giving a development approval under the Environmental Planning and Assessment Act 1979.⁵¹

The ICAC also provided examples of what does not amount to lobbying, including communications with a parliamentary committee, or with an MP in their capacity as a local representative on a constituency matter. A “third party lobbyist” was defined as:

A person, body corporate, unincorporated association, partnership, trust or firm who or which is engaged to undertake a Lobbying Activity for a third party client in return for payment or the promise of payment for that lobbying.

The 2010 report recognised that, in general, professional lobbyists act ethically and that lobbying, when done well, can enhance rather than detract from good decision making by public officials. However, the 2010 report also commented that:

A lack of transparency in the current lobbying regulatory system in NSW is a major corruption risk, and contributes significantly to public distrust. Those who

⁵¹ ICAC, *Investigation into corruption risks involved in lobbying*, p 49.

lobby may be entitled to private communications with the people that they lobby, but they are not entitled to secret communications. The public is entitled to know that lobbying is occurring, to ascertain who is involved, and, in the absence of any overriding public interest against disclosure, to know what occurred during the Lobbying Activity.⁵²

As identified by the ICAC, the key features of the regulatory system in NSW, as at 2010, were as follows:

- The main features of the Lobbyist Code were that: (a) it related only to a limited class of third party lobbyists, as defined by the Code, who must register on a public register that sets out prescribed information about the lobbyist and the lobbyist's clients. The Code did not apply to "in-house" lobbyists (those who as part of their employment with an organisation engage in lobbying on behalf of that organisation),⁵³ peak bodies or third party professionals, such as lawyers or accountants who lobby for their clients. According to the ICAC, "This means that most lobbying in NSW is unregulated".
- The ICAC was of the view that the Lobbyist Code should include a requirement for meetings to be conducted in appropriate venues and for the government representative who is lobbied to make or retain any records of discussions with a lobbyist.⁵⁴ It was noted that a regime of this kind had already been adopted under the NSW Department of Planning's Meeting and Telephone Communications Code of Practice.
- The Code of Conduct for members of Parliament did not refer specifically to lobbying or how members were to deal with lobbyists. Nor did it prevent MPs from engaging in paid secondary employment, although such employment would have to be disclosed when an MP participated in parliamentary debates.⁵⁵ The ICAC recommended that the [Members' Code](#) be amended to extend prohibition on paid advocacy by MPs to the promotion of matters to public officials outside the Parliament or its committees, and that the Constitution (Disclosure by Members) Regulation 1983 also be amended accordingly.

The 2010 ICAC report set out a comprehensive set of reforms for the regulation of lobbyists, the main features of which have been summarised on Peter Timmins' [Open and Shut website](#) as follows:

⁵² ICAC, *Investigation into corruption risks involved in lobbying*, p 7.

⁵³ In-house lobbyists can be found in government relations, public relations, public affairs or corporate affairs roles in multinationals, Australian companies and the not-for-profit sector.

⁵⁴ The ICAC's discussion was based on the recommendation of the NSW Legislative Council GPSC No 4 report *Badgery's Creek land dealings and planning decisions*, Report 21, November 2009. The report recommended that protocols be established requiring properly recorded minutes of meetings and guidelines regarding venues.

⁵⁵ The [Code of Conduct](#) states (in part): "A Member must not knowingly or improperly promote any matter, vote on any bill or resolution or ask any question in the Parliament or its Committees in return for any remuneration, fee, payment, reward or benefit in kind, of a private nature...".

- establish a public sector meeting protocol for the conduct of meetings with lobbyists, for the minuting of these meetings and relevant telephone calls, and for the retention of records of Lobbying Activity in accordance with the State Records Act 1998
- amend the Government Information (Public Access) Act 2009 (“the GIPA Act”) to include records of Lobbying Activity in the definition of “open access information”, for which there is no overriding public interest against disclosure. Under the GIPA Act, open access information held by an agency must be made publicly available, including on a website maintained by the agency
- expand the class of lobbyists that are to be regulated to include all Third Party Lobbyists and Lobbying Entities
- impose statutory regulation of Third Party Lobbyists and Lobbying Entities, including a mandatory prescribed code of conduct
- require Third Party Lobbyists and Lobbying Entities to register before they can lobby a Government Representative
- establish a two-panel Lobbyists Register – one for Third Party Lobbyists and one for Lobbying Entities – that requires disclosure of the month and year in which they engaged in Lobbying Activity, the identity of the government department, agency or ministry lobbied, the name of any Senior Government Representative lobbied, and, in the case of Third Party Lobbyists, the name of the client or clients for whom the lobbying occurred and the name of any entity related to the client the interests of which did derive or would have derived a benefit from a successful outcome of the lobbying
- enable an interested person to use the information disclosed on the proposed Lobbyists Register, in relation to the date of lobbying and who was lobbied, in order to seek access to further information from the relevant public sector agency through the various mechanisms set out in the GIPA Act
- provide for an independent government entity, such as the NSW Information Commissioner, to maintain and monitor the Lobbyists Register, and have powers to impose sanctions on lobbyists
- impose restrictions on former ministers, parliamentary secretaries, their staff and senior government officers from acting as lobbyists
- ban lobbyist success fees.

Reflecting on these recommendations in its October 2013 report, *Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources*, the ICAC Commissioner observed that:

The Commission’s [2010] report made a number of recommendations regarding the regulation of lobbyists in NSW. The recommendations sought to improve transparency in the system without unduly interfering with access to government. By way of example, it was recommended that a model policy and procedure for ministerial offices concerning the conduct of meetings with lobbyists, the making of records of these meetings, and the making of records of telephone conversations be adopted. While some of these recommendations

were adopted, most were not. The Commission's recommendations should be considered in their entirety as representing an integrated control system that allows third parties to determine who or what lobbied, for whom and for what purpose. Consequently, the Commission believes that the government should consider implementing the remaining recommendations.⁵⁶

5.2 The Lobbying of Government Officials Act 2011

What has occurred, in the wake of successive revelations at ICAC hearings, is a gradual drift towards the recommendations made by the ICAC in 2010, with some aspects yet to be adopted.

On 4 May 2011, the second day of the 55th Parliament, Premier Barry O'Farrell introduced the [Lobbying of Government Officials Bill 2011](#); supported by the Labor Opposition, the Bill received Royal Assent on 16 May 2011. The [Lobbying of Government Officials Act 2011](#) introduced a number of [changes](#) to the regulation of lobbying in NSW, including the prohibition of success fees for lobbyists who lobby Ministers, Parliamentary Secretaries and other Government officials and the prohibition of former ministers and parliamentary secretaries from engaging in lobbying activities in the 18 months after they cease to hold office.

The Premier stated in the second reading speech for the Bill:

One of the things that the people of New South Wales voted for on 26 March was to have honest, accountable government in New South Wales again. This bill is part of a series of measures that the Government will take to restore confidence in public administration in New South Wales....We are determined that people understand that decisions are made on the basis of public interest.⁵⁷

The Premier continued:

The payment of a success fee for achieving a favourable outcome can create not just the perception but the reality that access to government has been bought. Banning payments that are contingent upon a particular government decision removes a potential incentive for unethical or inappropriate conduct by lobbyists. The ban will also create a more level playing field by improving the ability of all stakeholders to present their input, their advice and their comments in relation to policy development. While in Australia only Queensland at this stage has so far legislated to ban success fees, success fees are banned in Canada and in the United States of America, at both Federal and State levels. This legislation will regulate third-party lobbyists—that is, persons or organisations that carry on the business of lobbying on behalf of others. It will apply to communications by a lobbyist with government officials, whether they are made in person, by telephone, electronically or in writing.⁵⁸

⁵⁶ *Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources*, p 44.

⁵⁷ *NSWPD*, 4 May 2011, p 105.

⁵⁸ *NSWPD*, 4 May 2011, p 106.

The giving or receiving of a success fee and agreeing to give or receive a success fee was made an offence punishable by a fine of a maximum of \$55,000 for a corporation and a maximum of \$22,000 for an individual.⁵⁹

In the Legislative Council an amendment moved by the NSW Greens was agreed to on the voices. The amendment introduced the prohibition against former ministers and parliamentary secretaries from engaging in lobbying activities in the 18 months after they cease to hold office, subject to a maximum fine of \$22,000. Introducing the amendment, Dr John Kaye said it implemented “a recommendation of the Independent Commission Against Corruption inquiry into the corruptive influences of lobbying”.⁶⁰ Supporting the amendment, the Leader of the Government in the Upper House, stated:

The amendments create a new offence provision for a Minister or a parliamentary secretary who engages in lobbying in the 18 months after they cease to hold office. It will be an offence if the ex-Minister or ex-parliamentary secretary lobbies a government official in relation to an official matter dealt with by the ex-Minister or ex-parliamentary secretary in relation to their portfolio responsibilities in the 18 months before they ceased to hold office. There are provisions restricting the post-separation employment in the lobbying of Ministers and parliamentary secretaries in the Lobbyist Code of Conduct in other Australian jurisdictions. In the Commonwealth and in Victoria the cooling-off period post separation is 18 months and in South Australia and in Queensland the cooling-off period is two years. Most of these sorts of provisions are in the codes of conduct of other jurisdictions. In Queensland the provision is set out in the Integrity Act 2009. However, this provision will be stronger than those in other jurisdictions as it creates a criminal offence for a breach of the restriction.⁶¹

5.3 The Robertson proposals

With lobbying remaining on the political agenda throughout the 55th Parliament, a further round of reform followed. On 8 May 2014 the Leader of the Opposition, John Robertson introduced the ICAC Amendment (Ministerial Code of Conduct) Bill 2014 and the cognate Constitutional Amendment (Disclosures by Members) Bill 2014. In the [second reading speech](#) for the ICAC Bill, Mr Robertson said that one feature would:

transform politics in New South Wales as we know it. Ministers would be required to disclose and have published on a monthly basis all contact they have had with lobbyists and in-house lobbyists working for corporations, businesses, unions and industry peak bodies; all occasions on which they have been lobbied by a member of Parliament representing the interests of a lobbyist

⁵⁹ Note that an Opposition amendment, moved in the Legislative Council, to raise the maximum fine for a corporation to \$550,000 and \$220,000 for an individual was defeated on the casting vote of the President: *NSWPD*, 10 May 2011, p 527.

⁶⁰ *NSWPD*, 10 May 2011, p 528.

⁶¹ *NSWPD*, 10 May 2011, p 528.

or in-house lobbyist; and all other occasions on which they have been lobbied in relation to any Government decision, with the exception of electorate matters.⁶²

Specifically, under the [ICAC Amendment \(Ministerial Code of Conduct\) Bill 2014](#), Ministers would have been required to disclose: the date of each meeting; the name of the lobbyist; the identity of the corporation or organisation represented; the subject matter of the lobbying; and its outcome.

The proposed amendment to the ICAC Act would also have made the Ministerial Code of Conduct an “applicable Code” under section 9 of the ICAC Act, thus allowing for findings that substantial breaches of the Code would amount to “corrupt conduct” (as applies for the Code of Conduct for Members).

5.4 Electoral and Lobbying Legislation Amendment (Electoral Commission) Act 2014

In the event, the Robertson Bills were defeated at the second reading stage.⁶³ Not to be outflanked, on 13 May 2014 Premier Mike Baird announced a major overhaul of the regulatory regime for lobbyists. He said the reform package would include:

- Establishing the Electoral Commission as an independent regulator of lobbyists;
- Applying a set of ethical standards to all third-party lobbyists and other organisations that lobby government;
- Empowering the independent regulator to investigate alleged breaches and impose sanctions, which could result in lobbying firms being removed from the Lobbyist Register and other organisations placed on a Watch List and their access to government restricted; and
- Requiring Ministers to publish quarterly diary summaries of scheduled meetings with external organisations on portfolio-related activities; and
- Approving a recommendation from ICAC that the Ministerial Code of Conduct become applicable under the ICAC Act, giving the watchdog the power to investigate and make findings on a Minister’s compliance with the Code.⁶⁴

Subsequently, in the [second reading speech](#) for the 2014 Bill, Mr Baird explained that that the amendments responded to ICAC’s 2010 and 2013 reports, noting that

These amendments implement, in particular, the recommendations to provide a legislative basis for the regulation of lobbying and to appoint an independent body to maintain and monitor the Register of Lobbyists and to impose sanctions for breaches.⁶⁵

⁶² *NSWPD*, 8 May 2014, p 28444.

⁶³ *NSWPD*, 19 June 2014, p 29904.

⁶⁴ M Baird, “Transforming politics: tough new rules for lobbyists”, *Media Release*, 13 May 2014.

⁶⁵ *NSWPD*, 17 June 2014, p 29620.

Summarising the 2014 reforms, the NSW Electoral Commission website states:

On 1 December 2014, amendments to the Lobbying of Government Officials Act 2011 commenced which establishes the NSW Electoral Commission (NSWEC) as an independent regulator of lobbyists; applies a set of ethical standards to all third-party lobbyists and other individuals and organisations that lobby Government; and enables the NSWEC to investigate alleged breaches and impose sanctions, which could result in lobbying firms being removed from the lobbyist register and other organisations being placed on a watch list.

The amendments also prescribe a new Code of Conduct for lobbyists that will apply ethical standards to all organisations who seek to influence government policy or decision making

Professional lobbyists who act on behalf of third party clients (“third-party lobbyists”), and individuals engaged by third-party lobbyists, must be registered with the NSWEC before they can lobby Government representatives or Government Members of Parliament.

All lobbyists, whether third-party lobbyists or any other individual or body that lobbies Government officials (including an individual engaged to undertake lobbying for a third-party lobbyist) must comply with the requirements of the Lobbyists Code of Conduct. The Register of Third-party Lobbyists is a public document that contains the following information in respect of each registered third-party lobbyist:

- (a) the name and business contact details of the lobbyist
- (b) the names of the individuals engaged to undertake the lobbying of Government officials for the lobbyist
- (c) the names of the persons having a management or financial interest in the lobbyist
- (d) the names of the third parties who have retained the lobbyist to provide, or for whom the lobbyist has provided, lobbying services (whether paid or unpaid)

For their part, the NSW Greens argued that neither the Labor Opposition nor the Government were prepared to adopt the full raft of ICAC’s 2010 recommendations. One concern in relation to the Government’s proposal was that exemptions for commercially sensitive material could be “an excuse for business as usual”; and both proposals were criticised for their “failure to capture ministerial staffers and parliamentary secretaries”.⁶⁶

Coming into effect on 1 July 2014 was M2014 – 07 Publication of Ministerial Diaries, setting out the requirement, for all Ministers to regularly publish extracts from their diaries detailing scheduled meetings held with stakeholders, external organisations and individuals. According to the Memorandum:

Ministers must publish summaries in the attached form one month after the end of each quarter... The summary should disclose the organisation or individual

⁶⁶ J Kaye, “Gaping holes in Baird’s lobbying clean-up”, *Media Release*, 13 May 2014.

with whom the meeting occurred, details of any registered lobbyists present, and the purpose of the meeting...Ministerial staff should obtain the consent of meeting attendees to summary information about the meeting being disclosed.

It is not necessary to disclose information about;

- meetings with Ministers, ministerial staff, Parliamentarians or government officials;
- meetings that are strictly personal, electorate or party political;
- social or public functions or events;
- matters for which there is an overriding public interest against disclosure.

Commenting on the “first fruits of Premier Mike Baird’s big transparency push”, in the form of the quarterly publication of ministerial diaries, Sean Nicholls writing in the *Sydney Morning Herald* described the “new system as a bit of a joke”. This was because the disclosures contained “the barest of information”, especially as regards “detail about what the meeting was called for and what was discussed”; the diary summaries were also said to be “completely silent on the meeting outcome”.⁶⁷ For Nicholls, at least, the Government’s transparency regime remains a work in progress, pointing to the ICAC’s recommendation for the reform of the GIPA Act to include records of Lobbying Activity in the definition of “open access information”, for which there is no overriding public interest against disclosure.

6. MINISTERS CODE OF CONDUCT

6.1 The 2014 Code

In the interim, with the ICAC reporting its findings in respect to Operations Acacia and Jasper in June 2014, in August 2014 the Government again tweaked the accountability regime. A new Ministerial Code of Conduct – [M2014-09](#) was issued by Premier Baird, commencing on 20 September 2014.

This 2014 Ministerial Code of Conduct replaced the version issued by the then Premier Barry O’Farrell on 2 June 2011 - [M2011-09](#), which in turn was based on a 2006 Code issued by Premier Morris Iemma. The 2011 Code stated that 2 principles must guide ministerial conduct, namely: Ministers will perform their duties honestly and in the best interests of the people of NSW; and Ministers will be frank and honest in official dealings with their colleagues and will maintain the confidentiality of information committed to their secrecy. The Code was in eight parts, as follows:

- **General obligations:** for example, that Ministers exercise their office honestly and in the public interest, that they avoid conflicts of interest between their private interests and public duties, and that they comply with their oath of office.

⁶⁷ S Nicholls, “Diaries expose Baird’s transparency drive as a flop”, SMH, 8-9 November 2014, p 37.

- **Registration of Minister's interests:** including that Ministers comply with s 14A of the Constitution Act 1902, by which all MPs are required to disclose their pecuniary interests, and that a copy of their most recent return and any further particulars be made available to the Premier within 4 weeks of their appointment. The Premier was also to be updated of any further relevant developments. Ministers were, in addition, at the Premier's request, required to divest themselves of any interests "which could create the impression of a material conflict" with their Ministerial portfolio duties; their interests could not be transferred to family members. Directorships had to be divested as a matter of course where perceptions of conflicts of interests were likely to arise.
- **Conflict of interest:** all actual or apparent conflicts of interest were to be disclosed to the Premier and placed on a Schedule to the Register of Interests. Ministers were to abstain from further acting in the relevant matter and from participating in any Executive Council or Cabinet dealings where actual or apparent conflicts of interest arose. Responsibility for knowing of such conflicts rested with the individual Minister.
- **Confidentiality of information:** including that, on resignation or retirement, Ministers were to maintain the secrecy of information acquired in office.
- **Misuse of Public Property and Service:** Ministers were directed to be scrupulous in their use of public property, services and facilities.
- **Gifts and hospitality:** Ministers were warned against soliciting and accepting gifts or benefits, on their own behalf or by their family members, which might influence them directly or indirectly in their official capacity. Gifts valued at or above \$500 had to be declared. Guidelines were also set out for the giving of gifts by Ministers in their official capacity.
- **Employment or engagement:** Ministers were prohibited from engaging in secondary employment and were advised to consider perceptions of conflicts of interest that might arise when considering alternative employment. Specifically, Ministers in office and considering post-separation employment were directed to obtain advice from the Parliamentary Ethics Adviser where this would relate to their portfolio responsibilities. The same also applied upon ceasing to be a Minister where former portfolio responsibilities over the past 2 years were involved. Note was also made of the requirements under the *Lobbying Government Officials Act 2011*.
- **Lobbying:** Ministers were directed to comply with the Lobbyist Code of Conduct and with the *Lobbying Government Officials Act 2011*.

The current [Ministerial Code of Conduct](#), operative since September 2014, is set out in an Appendix to the ICAC Amendment (Ministerial Code of Conduct) Regulation 2014, as well as in a Schedule to that Appendix. A key feature, consistent with the earlier Robertson proposal, was that a substantial breach of

the Code could constitute corrupt conduct for the purposes of s 9 of the ICAC Act (cl 4A). In addition, while much of the substance of the Code remains broadly the same, many of its features find more detailed expression and its terms are more clearly defined. This includes the requirements relating to directorships and the disclosure of interests for Members and their immediate family. The role of the Parliamentary Ethics Adviser is discussed in the next section of this paper. Other new features of the 2014 code include:

- **Lawful directions to the public service:** Ministers are prohibited from knowingly directing or requesting public servants “to act contrary to the law” or from directing a public service agency to “provide advice with which the agency does not agree” (Appendix cl 5)
- **Premier to determine sanctions:** The enforcement of the requirements of the Schedule, including any sanctions for a breach, were a matter for the Premier.

6.2 The Parliamentary Ethics Adviser and post-separation employment

Writing in a British context, one commentator has argued that “The borders between the political and business elite are now so porous that it is increasingly difficult to treat them as separate worlds”.⁶⁸ One issue in this context is that of post-separation employment, which is of central concern to any debate about lobbying, in part because of the steady flow of former politicians, Ministers in particular, into lobbying positions, some connected to their former portfolios. Since 2006, in NSW the guardian that is now placed on such activity is the office of the Parliamentary Ethics Adviser, a position held from 1998 until 2013 by Ian Dickson.

As discussed in [Briefing Paper 5/2008](#), post-separation employment rules for Ministers have been a particular issue of interest to the ICAC. According to the ICAC:

The purpose of post-separation employment rules for Ministers is twofold. Firstly, they are intended to reassure the public that Ministers are not taking unfair advantage of their public office positions. Secondly, they provide guidance to Ministers in making decisions about their future careers which are inevitably subject to public scrutiny and possible criticism.⁶⁹

After considering post-separation models in other jurisdictions, including options for codes of conduct or specific legislation, the ICAC recommended:

That the Government introduce rules to restrict the range of employment that Ministers can take up immediately after leaving office.

⁶⁸ O Jones, *The Establishment: and how they get away with it*, Allen Lane 2014, p 71.

⁶⁹ ICAC, *Report on investigation into conduct of the Hon J Richard Face*, June 2004, p 78.

The position as it currently stands is set out under Part 5 of the Schedule to the Ministerial Code of Conduct:

- while in office or within 18 months of leaving office, a Minister who is considering an offer of post-separation employment that relates to any portfolio, current or held in the last 2 years, must “first obtain the advice of the Parliamentary Ethics Adviser”;
- the 2014 Code makes it clear that the Parliamentary Ethics Adviser may advise against the acceptance of an offer of post-separation employment either generally or unless certain conditions are met. Further, while in office, a Minister cannot accept an offer where the Parliamentary Ethics Adviser has advised against it. It is also the case that, where a Minister accepts an offer of post-separation employment, any advice provided by the PEA must be tabled in the House of Parliament to which the Minister belongs.

As for the position of Parliamentary Ethics Adviser, this has attracted some criticism in recent times. For example, writing on [Crikey](#) in March 2009, Alex Mitchell commented that:

Diane Beamer, Acting Speaker of the NSW Parliament, has tabled the annual reports of the Parliamentary Ethics Adviser for the years ended 30 November 2004, 30 November 2006, 30 November 2007 and for the period 1 December 2007 to 30 June 2008.

The four reports all landed on the same day without explanation or apology.

For inexplicable reasons there were reports for 2004, 2006, 2007 and 2008, but not for 2005. Perhaps there were no ethics in parliament in 2005 and the parliamentary adviser’s services weren’t needed.

Each report is typed on less than two pages of foolscap paper with a covering letter to the Speaker from the ethics adviser, Ian Dickson, the former NSW Electoral Commissioner.

To say that the reports are bare of detail is to be over-generous. They are bereft of detail.

A similar view has been taken of the most recent [annual report](#) from 2013, Ian Dickson’s last.⁷⁰ This confirmed that there had been no requests for advice by any member of either House over the last financial year.

On 1 July 2014 John Evans, the former Clerk of the Parliaments, was appointed to the position. The [resolution](#) making that appointment sets out the duties of the Parliamentary Ethics Adviser, including to advise whether the offer of post-separation employment “would give rise to a reasonable concern that”:⁷¹

⁷⁰ S Nicholls, “MPs left without a conscience as underused ethics adviser retires from Parliament”, *SMH*, 1 February 2014, p 3.

⁷¹ *NSWPD*, 18 June 2014, p 29787.

- the Minister’s conduct while in office was influenced by the prospect of the employment or engagement or the proposal to provide services; or
- the Minister might make improper use of confidential information to which he or she has access while in office.

The Parliamentary Ethics Adviser must keep records of advice given and the factual information on which it is based. Unless the Minister (or MP) requests that the advice be made public, or where an MP has “sought to rely on the advice” of the Parliamentary Ethics Adviser, there is a duty to maintain the confidentiality of information. Where a Minister accepts an offer of post-separation employment, the resolution of 18 June 2014 requires the Parliamentary Ethics Adviser to provide a copy of his “advice to the Presiding Officer” of the relevant House, which may not necessarily mean that it would have to be made public.⁷² However, as noted, the 2014 regulation, which came into effect in September 2014, requires such advice to be “tabled” and therefore made public. The later subordinate legislation can be taken to supersede the earlier parliamentary resolution.

7. MEMBERS OF PARLIAMENT CODE OF CONDUCT

7.1 Establishing a Code of Conduct

A detailed historical account of the introduction and development of the [Code of Conduct for Members](#) can found in Chapter 5 of *NSW Legislative Council Practice* and Chapter 7 of *NSW Legislative Assembly Practice, Procedure and Privilege*. The Code dates from 1998, although provision for such a Code was made in the ICAC Act following amendments made four years earlier. Those amendments in turn followed on from the “Greiner-Metherell Affair” and the subsequent case of *Greiner v ICAC*.⁷³ The upshot was that, by s 9(1) of the ICAC Act, as amended in 1994, conduct which fell within s 8 does not amount to corrupt conduct unless it could also constitute or involve:

- (a) a criminal offence, or
- (b) a disciplinary offence, or
- (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.

Only in 1998 was a Code of Conduct adopted by both Houses for the purposes of s 9 of the ICAC Act, to be superseded by a revised Code in 2007. That Code

⁷² But note that on the only occasion to date, in 2011, when the issue has arisen, the advice provided to the President of the Legislative Council was tabled: *LC Minutes*, 6 September 2011 – “The President, according to clause 6 of the resolution of the House relating to the Parliamentary Ethics Adviser, tabled correspondence from the Parliamentary Ethics Adviser enclosing advice provided to a former Minister, the Honourable John Hatzistergos, dated 30 August 2011”.

⁷³ (1992) 28 NSWLR 125.

consists of a preamble and seven clauses dealing with: conflicts of interest; bribery; gifts; use of public resources; use of confidential information; duties as a Member of Parliament; and secondary employment or engagements.

Also inserted into the ICAC Act in 1994 was Part 7A, which is headed “Parliamentary ethical standards”, by which a committee of each House is designated to draft and amend codes of conduct, as well as to conduct a review of the Code every 4 years.

7.2 The ICAC and the Members’ Code of Conduct

As noted, the ICAC has already reported on a series of scandals over the past four years and other matters are ongoing. These include Operation Spicer, which concerns allegations that certain MPs and others corruptly solicited, received and concealed payments from various sources in return for certain MPs and others favouring the interests of those responsible for the payments. It is also alleged that certain MPs and others solicited and failed to disclose political donations from companies, including prohibited donors, contrary to the *Election Funding, Expenditure and Disclosures Act 1981*.

In its report of October 2013, *Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources*, arising from Operations Jasper and Acacia, the ICAC was critical of the Code of Conduct for Members of the NSW Parliament and of the Register of Disclosures that Members are required to complete. The ICAC further commented that:

A comprehensive, timely and independent system for dealing with complaints about the conduct of members is absent in the current system. The NSW Parliament lacks an effective mechanism to manage its own members.⁷⁴

In its June 2014 report in respect to Operation Cyrus, the ICAC expressed the view that:

the current parliamentary *Code of Conduct for Members* is “a feeble document” and virtually worthless in addressing the problems identified in this investigation. The Commission has previously made a recommendation to amend the code to deal comprehensively with improper influence by MPs. This recommendation was made in the Commission’s October 2013 report, *Reducing the opportunities and incentives for corruption in the state’s management of coal resources*. The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee have established a joint enquiry into this and other recommendations made in that report. In these circumstances, the Commission has not considered it necessary to make any corruption prevention recommendations in this report concerning the code.⁷⁵

⁷⁴ *Reducing the Opportunities and Incentives for Corruption in the State’s Management of Coal Resources*, p 41.

⁷⁵ ICAC, *Investigation into the conduct of the Hon Edward Obeid MLC and others concerning Circular Quay retail lease policy*, June 2014, p 7.

7.3 A parliamentary investigator?

The Parliamentary Ethics Adviser does not have any capacity to receive complaints in relation to the conduct of MPs or to undertake investigations. Further to this, an added proposal, made by the Clerk of the Parliaments, David Blunt, is that a position of Parliamentary Commissioner for Standards be established in NSW, based on the UK model. The 2013 paper explained that:

This paper is not the first time the merits of this model have been considered in New South Wales. In 2005 Mr Bruce McClintock SC in his review of the ICAC Act recommended the adoption of what was, in effect, the UK model for two reasons: to provide for the speedy resolution of minor complaints about the conduct of members (particularly in view of the political impact of, and vulnerability of Members of Parliament to, such complaints); and for the investigation of those matters where the jurisdiction of the ICAC is limited due to parliamentary privilege.⁷⁶

The suggestion was discussed by the ICAC in its October 2013 report, *Reducing the Opportunities and Incentives for Corruption in the State's Management of Coal Resources*, where it was concluded that the Commission supported "further consideration" of the proposal, subject to there being no change in the ICAC's own jurisdiction. The ICAC recommended that the privileges committees of the two Houses consider "the establishment of a parliamentary investigator position" (Recommendation 25). It was further recommended that: the privileges committees consider amending the *Code of Conduct for Members* to deal comprehensively with improper influence by members (Recommendation 22); and that the Legislative Council Privileges Committee conduct an inquiry into the disclosure of interests of the spouses/partners and dependent children of MPs, with a view to making third party disclosure a requirement under the Constitution (Disclosure by Members) Regulation 1983 (Recommendation 24).

In the event, the privileges committees of both Houses reported on all three recommendations, the Legislative Council Privileges Committee in June 2014 and the Legislative Assembly Privileges and Ethics Committee a month later. In brief, after reviewing the position in NSW and other comparable jurisdictions, specifically on the issue of a parliamentary investigator, the Upper House Committee recommended:

The adoption of a Commissioner for Standards in New South Wales, based on the model adopted in the UK Parliament. Under this proposed regime, the roles of the existing Parliamentary Ethics Adviser and the proposed Commissioner for Standards would be combined.⁷⁷

⁷⁶ D Blunt, *A Parliamentary Commissioner for Standards for NSW, Paper to be presented at the 44th Presiding Officers & Clerks' Conference Canberra, 1-4 July 2013*.

⁷⁷ NSW Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report 70, June 2014, p 9 and p 68.

In its July 2014 [report](#), the Legislative Assembly Privileges and Ethics Committee said that:

In undertaking its inquiry the Committee has taken the approach that the ICAC's recommendations should not be seen in isolation, but in the context of what a holistic model for the management of members' conduct in NSW should look like. Hence, the Committee looked beyond the ICAC's current recommendations to consider the entire scope of the members' entitlements regime.

Noted were the consultations between the committees of the two Houses, their points of consensus and divergence. In respect to a "parliamentary investigator", in keeping with its "holistic" approach, the Assembly Committee arrived at a somewhat different conclusion to its Upper House counterpart, stating (Recommendation 4):

The Committee recommends that an office of the Parliament be established by resolution of the House to be called Ethics Commissioner and incorporating the current responsibilities of the Parliamentary Ethics Adviser with the additional responsibilities of:

- Conducting a mandatory meeting with all members to advise them on the preparation of their primary return;
- Providing legal advice to members on complying with their obligations;
- Receiving updates to the members' primary returns as required or every six months;
- Fielding public inquiries concerning members' compliance;
- Receiving complaints confidentially about members' compliance;
- Reviewing complaints confidentially;
- Making findings of members' compliance or non-compliance; and
- Using discretion to keep findings confidential or report findings to the House with recommended sanctions for breaches. Sanctions are to include ordering an apology, ordering rectification or reimbursement, recommending the Parliament levy a fine, and referring the matter to an external agency for further investigation such as the Independent Commission Against Corruption or the NSW Police Force.⁷⁸

To date, neither version of the "parliamentary investigator" model has been adopted.

⁷⁸ Legislative Assembly, Parliamentary Privilege and Ethics Committee, [Inquiry into matters arising from the ICAC report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources"](#), Report 2/55 July 2014, p 15.

7.4 Improper influence by Members

On this issue the Committees of the two Houses were broadly in agreement, recommending the adoption of a new clause in the Code of Conduct for Members dealing comprehensively with improper influence by members (Recommendation 22). The proposal was for the addition of Clause 8 in the Code, which in the Assembly's Committee's recommendation would read:

A member must not improperly use his or her influence as a member to seek to affect a decision by a public official including a minister, public sector employee, statutory officer or public body, to further, directly or indirectly, the private interests of the member, a member of the member's family, or a business associate of the member.

To this, the Upper House Committee proposed the addition of the words:

- (a)...or any other private interests; or
- (b) the financial interests of the member's political party.

Neither proposed version of a new Clause 8 has been adopted to date.

7.5 Disclosure of pecuniary interests

The same applies in respect to the recommendations for the reform of the disclosure of interests of the spouses/partners and dependent children of MPs (Recommendation 24). Prior to the Committees of the Houses reporting this was in fact the subject of a Private Member's Bill introduced by the Labor Leader, John Robertson. This was the [Constitution Amendment \(Disclosure by Members\) Bill 2014](#), a cognate measure with the [ICAC Amendment \(Ministerial Code of Conduct\) Bill 2014](#), neither of which proceeded beyond the second reading stage. The Disclosure by Members Bill would have amended the relevant regulation to:

- (a) disclose certain pecuniary interests of any spouse or de facto partner of the Member and any person under the age of 18 years who is dependent on the Member for support, and
- (b) disclose commercial arrangements that relatives of the Member have entered into, or reasonably expect to enter into, with the Government, and
- (c) disclose the Member's annual taxable income.

In the [second reading speech](#) for the Bill, Mr Robertson said that:

The Independent Commission Against Corruption recommended as much in its report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources", which was released in October 2013. The report said:

The Commission supports expanding the Register of Disclosures to include spouses/partners and dependent children. The benefits of expanding the register include added transparency, minimising

perceptions of members avoiding scrutiny, and dealing with the potential for family interests to influence decision-making.

I also point out that these bills will bring New South Wales into line with other jurisdictions on this matter. Pecuniary interest disclosures in the parliaments of the Commonwealth, South Australia, Northern Territory and Australian Capital Territory already disclose the interests of members' spouses.⁷⁹

In its June 2014 report, the Legislative Council Privileges Committee detailed the history of proposed amendments to the disclosure regime, including those it had made in 2010.⁸⁰ Broadly, the Committee recommended reform of the Constitution (Disclosure by Members) Regulation 1983:

to require disclosure by members of the interests of their spouses/partners and dependent children, together with a range of other measures to increase the timeliness and accessibility of interest returns by members.

On the other hand, the Legislative Assembly Parliamentary Privilege and Ethics Committee proposed a non-statutory model, with the interest disclosure regime to be amended by resolution of the House “to provide for a requirement that members disclose the interests of their spouses/partners and dependent children privately to the parliamentary officer to be appointed as Ethics Commissioner”.

7.6 Secondary employment

Addressed in Clause 7 of the [Code of Conduct for Members](#) is the issue of secondary employment for MPs. Clause 7 provides:

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

- (a) The identity of any person by whom they are employed or engaged or by whom they were employed or engaged in the last two years (but not if it was before the Member was sworn in as a Member); and
- (b) The identity of any client of any such person or any former client who benefited from a Member's services within the previous two years (but not if it was before the Member was sworn in as a Member); and
- (c) The nature of the interest held by the person, client or former client in the parliamentary debate. This obligation only applies if the Member is aware, or ought to be aware, that the person, client or former client may have an interest in the parliamentary debate which goes beyond the general interest of the public.

This disclosure obligation does not apply if a Member simply votes on a matter; it will only apply when he or she participates in debate. If the Member has already disclosed the information in the Member's entry in the pecuniary

⁷⁹ NSWPD, 8 May 2014, p 28444.

⁸⁰ NSW Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct 2010*.

interest register, he or she is not required to make a further disclosure during the parliamentary debate.

This resolution has continuing effect unless and until amended or rescinded by resolution of the House.

In June 2014 the Legislative Council Privileges Committee indicated that it would deal with the issue of secondary employment of members in its next review of the Code of Conduct for Members.⁸¹

8. POLITICAL DONATIONS

8.1 Development of political donations law

Of all the issues raised by the “integrity” debate in NSW, the most vexed, constitutionally and politically, is the regulation of political donations. Against the background of a successful High Court challenge to the 2012 reform model, the torrent of allegations of wrongdoing flowing from ICAC’s hearings in Operations Spicer and Credo, calls for political campaigns to be fully publicly funded and the passing of controversial interim legislation,⁸² in December 2014 an Expert Panel released a major report setting out its recommendations on all aspects of this fraught subject. Setting out the parameters of its inquiry, the Expert Panel reported at the outset that:

The *Election Funding, Expenditure and Disclosures Act 1981*...consists of four key components: disclosure of political donations and campaign spending; caps and bans on political donations; caps on election spending; and public (taxpayer) funding for elections and party administration costs. Together these measures lessen the risk of corruption and undue influence and establish a fair and transparent scheme for election funding. While the Panel supports the key components of the Act, it has become a complicated and unwieldy piece of legislation and this impedes compliance. The Act needs immediate, comprehensive review – not more ad hoc amendments. The Act should be rewritten with clear policy objectives in mind. (Recommendation 1)

Several Research Service papers have discussed the development of electoral funding laws in NSW, most recently E-brief 2/2014, *The High Court’s decision in the electoral law funding case*. In summary, as that paper explains, “the main issue has been community concern about corruption and undue influence in NSW politics”. In 2008, following a report from a Legislative Council Select Committee on Electoral and Political Party Funding, new legislative requirements were introduced governing the disclosure of political donations and electoral expenditure. In 2009, laws were enacted that prohibited the

⁸¹ NSW Legislative Council, Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, Report 70, June 2014.

⁸² The *Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014*. For a comment on the legislation see S Nicholls, “More public cash for elections”, *SMH*, 23 October 2014, p 9.

receipt of political donations from property developers. When introducing these reforms, then Premier, Nathan Rees, stated that they were a first step, and it was intended that the next State election would be conducted under a public funding model. This issue of public funding was then referred to the Joint Standing Committee on Electoral Matters for inquiry and report.

In 2010, in response to the Committee's report, wide ranging electoral funding law reforms were introduced including:

- Political donations to registered parties and groups were capped at \$5,000; and political donations to other parties, elected members, candidates, and "third-party campaigners" were capped at \$2,000.
- The prohibition on receiving political donations from property developers was extended to the tobacco, liquor and gambling industries.
- Caps on electoral expenditure were imposed on political parties, candidates, and "third-party campaigners". The caps applied from 1 October prior to an election to the end of polling day for the election.
- The amount of public funding available to political parties, groups and candidates was increased in order to partly compensate for the loss in revenue arising from the caps on donations.

8.2 Reforms in the 55th Parliament, 2011-2015

Further reform followed the election of the O'Farrell Government, with the *Election Funding, Expenditure and Disclosures Amendment Act 2012* making two main changes to the Act. First, it made it unlawful for a political donation to a party, elected member, group, candidate or third-party campaigner to be accepted unless the donor was an individual who was enrolled to vote. Second, for the purposes of the caps on electoral expenditure, the Act provided for the aggregation of electoral expenditure of political parties and their affiliated organisations. In the event, in its decision in *Unions NSW v New South Wales*⁸³ the High Court held both aspects of the 2012 Act to be invalid because they infringed upon the implied freedom of political communication in the Commonwealth Constitution. The invalid provisions were removed by the *Election Funding, Expenditure and Disclosures Consequential Amendment Act 2014*.

In the interim, following concerns raised by the select committee on the Election Funding Bill 2011 that recent donations reforms could have a disproportionate financial impact on smaller political parties, and in light of a further report by the Joint Standing Committee on Electoral Matters, the *Election Funding, Expenditure and Disclosures Amendment (Administrative Funding) Act 2013* increased the amount of money paid to political parties with representation in

⁸³ [2013] HCA 58.

the NSW Parliament for administrative expenditure. Introducing the legislation on 14 March 2013, Premier Barry O'Farrell [explained](#) that:

The Administration Fund was established as part of the 2010 amendments to the Act to help offset the cost of complying with the new rules, and to make up for the loss of revenue available to parties and independent members to meet their administrative expenses as a result of caps on political donations.

With reference to the November 2012 report of the Joint Standing Committee on Electoral Matters,⁸⁴ the Premier continued:

Instead of applying the existing flat rate per endorsed member or independent member, adjusted for inflation, the committee recommends that the maximum amount of funding should be determined on a sliding scale according to the number of elected members endorsed by the party.

The committee's recommended funding formula was: \$200,000 for the first elected member of a party and \$200,000 for independent elected members; \$150,000 for the second elected member of a party; \$100,000 for the third elected member of a party; and \$83,000 for each elected member thereafter, up to a cap of 25 elected members. The committee suggests that these amounts should apply to the upcoming round of claims for administrative expenditure, which relate to expenses incurred in the 2012 calendar year. The committee also recommends that parties and independent members be reimbursed from the administration fund on a quarterly basis and within one month of lodging their claim for payment with the authority.

A detailed account of this aspect of the electoral funding law can be found in Chapter 7 of the 2014 Schott report on [Political Donations](#). There it is explained that the introduction of the Administration Fund in 2010 saw a significant increase in the amount of public funding to parties, with subsequent changes to the formula increasing this amount further. It is said that "By 2015 over \$10 million in public money will be provided to parties each year, up from \$2 million less than a decade ago".⁸⁵ It is also noted that Administration Fund payments were again increased under the *Election Funding, Expenditure and Disclosures Amendment Act 2014*:

The second reading speech introducing the amendments was largely silent on the policy reasons for this increase, simply stating 'This amendment is designed to better reflect the administrative and operational costs of political parties'.⁸⁶

As well as making specific arrangements for the forthcoming 2015 State election, the same 2014 Act increased the penalties for offences against the electoral finance laws and extended the time period for commencing prosecutions. The Act also inserted a new objects clause into the *Election*

⁸⁴ Joint Standing Committee on Electoral Matters, [Inquiry into administrative funding for minor parties](#), Report 1/55, November 2012.

⁸⁵ NSW Panel of Experts, [Political Donations: Final Report – Volume 1](#), p 83.

⁸⁶ NSW Panel of Experts, [Political Donations: Final Report – Volume 1](#), p 83.

Funding, Expenditure and Disclosures Act 1981. Section 4A of that Act now provides that its objects are:

- (a) to establish a fair and transparent election funding, expenditure and disclosure scheme,
- (b) to facilitate public awareness of political donations,
- (c) to help prevent corruption and undue influence in the government of the State,
- (d) to provide for the effective administration of public funding of elections, recognising the importance of the appropriate use of public revenue for that purpose,
- (e) to promote compliance by parties, elected members, candidates, groups, agents, third-party campaigners and donors with the requirements of the election funding, expenditure and disclosure scheme.

According to Professor Anne Twomey, the objects set out in this provision, especially the object of helping to “prevent corruption and undue influence in the government of the State”, may be drawn upon by the courts in their assessment of the intended ‘legitimate end’ of provisions in the Act. Twomey commented, “This will aid in the clarification of the purposes of provisions of the Act, which is essential to the assessment of their constitutional validity”.⁸⁷

8.3 ICAC report

Contributing to this congested area of inquiry, a matter of weeks before the release of the Expert Panel report, the ICAC released *Election funding, expenditure and disclosure in NSW: strengthening accountability and transparency*. This made 22 recommendations for the reform of electoral funding law, including that criminal and civil sanctions attach to failure of senior party office holders to meet their internal party governance responsibilities (Recommendation 14). Failure to maintain effective internal governance would result in conditions being placed on the Administration Fund, with potential loss of public funding (Recommendation 13). It was further recommended that the Administration Fund be converted from a reimbursement scheme to a grant contingent on the internal governance capability of political parties (Recommendation 1).

8.4 Expert Panel report

As noted, for the Expert Panel report on *Political Donations*, its key recommendation was for an immediate, comprehensive review of the *Election Funding, Expenditure and Disclosures Act 1981* (Recommendation 1), plus a coordinated national approach to election funding law to be pursued through COAG (Recommendation 2). Other key findings were as follows:

- *Total ban on political donations*: The Panel concluded that a total ban on political donations would not be feasible, or constitutional, or in the public

⁸⁷ NSW Panel of Experts, *Political Donations: Final Report – Volume 2*, Working Paper No 5.

interest. It was said that “Following recent events at the ICAC, there have been suggestions that political donations from private and other sources should be banned and that this would restore public trust in the integrity of the political system. The Panel could find no real evidence to support this argument”. Nor did the Panel support an opt-in, opt-out model as an alternative to a total ban on political donations (**Recommendation 4**).

- *Limits on donations*: While there have been systemic failures in the enforcement of the current regime, the Panel generally supported the limits on donations now in place. The Panel did, however, recommend that small anonymous donations be made exempt from the rules that require multiple donations from the same source to be aggregated for the purposes of the caps on political donations. (**Recommendation 5**).
- *Level of funding and electoral support*: The Panel supported linking a portion of public funding to electoral support (for example, by allocating a small proportion of public funding on a ‘dollar per vote’ basis) although this was not its preferred option (**Recommendation 14**).
- *Administration Fund*: The Panel supported some level of public funding for administration costs. It considered the amount of public funding should be scaled back to the levels that were in place before the most recent increases in 2014 (**Recommendation 18**). This would take the level of public funding for administration costs back to around \$9 million in total per year from the current level of \$11 million. The Panel also recommended clearer rules about what types of expenses can be claimed for administration and that payments should be conditional on appropriate governance standards and conditions (**Recommendations 17 and 33**).
- *Expenditure caps*: The Panel found widespread support for expenditure caps and concluded that the levels of the caps seem to be appropriate, including the automatic adjustment of the caps for inflation (**Recommendation 10**).
- *Third Party campaigners*: The Panel found widespread support for third-party participation in elections within limits. Their donations and spending are capped in the same way as parties and candidates, an approach supported by the Panel. However, the current third-party spending cap of \$1 million was considered to be too high and the Panel suggested halving the spending cap to \$500,000 to guard against third parties coming to dominate election campaigns (**Recommendation 31**).
- *Disclosure*: The Panel urged the NSW Electoral Commission to replace its paper-based disclosure process with an on-line disclosure system as soon as possible (**Recommendation 23**). It was further recommended that the Act should be amended to require real-time disclosure of political donations of \$1,000 or more in the six-month period before each election (**Recommendation 25**). Online disclosure should be mandatory for political parties that receive payments from the publicly-funded Administration Fund. The Electoral Commission should supplement raw disclosure data with explanatory material and analysis to inform the

public about donations activity (**Recommendation 24**). The Panel considered that the current threshold of \$1,000 is reasonable, but that disclosure should be more detailed. Political parties should identify political donations that have been solicited by or made for the benefit of a particular candidate (**Recommendation 26**); and parties and candidates should be required to disclose the terms and conditions of any loans (**Recommendation 27**). Also, associated entities of political parties should have the same disclosure obligations as parties to reduce the opportunities for avoidance (**Recommendation 30**).

- *Penalties, compliance and enforcement:* The Panel recommended that those offences that require the prosecution to prove knowledge or intent should be retained but must be simplified to improve the chances of successful prosecutions by the NSW Electoral Commission (**Recommendation 45**). It also favoured retaining strict liability offences for failing to lodge a disclosure and failing to keep records as these obligations are central to the election funding scheme (**Recommendation 44**). Supported was a new strict liability offence for lodging an incomplete disclosure similar to offences that exist in Queensland and the ACT. With criminal prosecution said to be a last resort, the NSW Electoral Commission should have a range of other enforcement options available to it if it is to be an effective, risk-focused regulator. These should include civil penalties and the power to withhold public funding (**Recommendation 46**). The Panel also supported measures to assist the NSW Electoral Commission with its transition from an administrative and compliance focus to risk-based regulation, consistent with the ICAC's recent recommendations (**Recommendation 47**).
- *Report to Parliament:* It was recommended that the Premier report to the NSW Parliament on progress in implementing the Panel's recommendations. This should occur in June 2015 and then annually until all recommendations are dealt with (**Recommendation 3**).

Continuing developments in respect to the case of *McCloy v NSW* are noted in a later section of this paper [12].

9. ETHICS AND THE PUBLIC SERVICE

A defining characteristic of modern representative democracies is that they are based on a model of bureaucracy that sets patronage aside in favour of a merit based system of employment and advancement. Such systems can be contrasted with tribal societies where the tendency is to favour family and close kin. Stated colloquially, 'It's who you know'. According to Francis Fukuyama, the tribal system is the default state of early human societies; so strong is the system that it never fully disappears, with the result that nepotism and patronage must always be guarded against.⁸⁸

⁸⁸ F Fukuyama, *The origins of political order*, Profile Books 2011, p 17.

In the Westminster tradition the origins of the modern public or civil service are found in the Northcote-Trevelyan Report of 1854 which replaced the “spoils” or patronage model of appointment. The revamped civil service was founded on four interrelated constitutional principles: ministerial accountability to Parliament; admission by open competition; non-partisanship; and promotion by ability.⁸⁹

This is not the place to undertake a detailed analysis of the development of the public service in NSW, including the final abolition of the Public Service Board under the Greiner Government’s *Public Sector Management Act 1988* and the establishment a year later of the Chief and Senior Executive Services. In broad terms it was this model, based on managerial principles and market disciplines, making the public service subject to contracting out and performance targets, resulting in a turnover of departmental heads and charges of “politicisation” that successive Labor Governments inherited.⁹⁰ In his end of term report on the NSW public Service, Michael de Francesco wrote that, under the *Public Sector Employment and Management Act 2002* the appointments process for senior public servants “appear to have compromised seriously the standing of the chief and senior executive services, and normalised both a growing executive role of political staffers and their unregulated movement into senior public sector management positions”.⁹¹ Quoted was an extract from Gerry Gleeson’s Spann Oration of 2010, in which the former Head of the Premier’s Department said that:

The Greiner changes, perpetuated by Carr remain. I refer to the power of ministers to hire and fire without explanation. The power to appoint political advisers even though they may lack qualifications and experience for the particular portfolio. In turn the CEO has unfettered power to hire and fire. This [sic] is no external mechanism to prevent nepotism, favouritism and to safeguard against ministerial pressures and to ensure the integrity of selection committees.⁹²

The implication is that, by the end of the Labor years in power, to some degree or other tribalism had reasserted itself in NSW, to the detriment of public sector efficiency. For Gleeson, one answer was to establish a Public Service Commission:

with responsibility for management improvement, for ensuring ethical standards in the public service, for staff training and nurturing the talented; for

⁸⁹ V Bogdanor ed, *The British Constitution in the Twentieth Century*, Oxford University Press 2003, p 237.

⁹⁰ G Griffith, *Oversight of public appointments*, NSW Parliamentary Research Service, e-brief 4/2009.

⁹¹ *From Carr to Keneally*, p 99.

⁹² G Gleeson, “If I were Premier of NSW in 2011”, [NSW Spann Oration 2010](#), Institute of Public Administration Australia, 30 September 2010, p 12.

strengthening the policy development function of Departments, with expert advice on industrial relations, with management consultancy functions.⁹³

The Coalition Government lost no time in implementing its reform agenda, with Premier Barry O'Farrell introducing the Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Bill 2011 on 15 September 2011, stating in the second reading speech:

My Government believes that Westminster traditions and processes established in the nineteenth century are our strongest resources to take the New South Wales public service into a brand new era of innovation. It is by honouring the institutions of an independent public service and the maturity of its systems and unique specialisations that we have a solid foundation from which to confidently innovate.⁹⁴

The Premier continued:

Members may recall that in November 2008 in this place I argued that the then role of the Department of Premier and Cabinet as both the "poacher and gamekeeper" in public sector employment was not in the public interest. I said that to improve the integrity, impartiality, performance and accountability of the State's public sector workforce we would, if elected, establish a Public Service Commission.⁹⁵

Reference was also made to the Government's commitment to introduce a Public Sector Ethics Act, with the Premier stating:

I do not seek to provoke political debate on this occasion and in this historic context, but I think it is important to be honest about the challenge we face in this Parliament to rebuild confidence in our public institutions, as people called for in March. We must confront the uncomfortable truth of the recent past and acknowledge that trust in public institutions has been broken. I have spoken regularly about the need to restore trust between public servants and government through clear plans and mandates, between people and elected representatives through devolution and accountability, and between Government and communities through a strong customer service and accountability culture. The inclusion of a public sector ethics framework in this bill will give strength to important networks in our civil domain whose success depends on trust. Clear rules, boundaries and standards are necessary to ensure appropriate separation between the political and administrative arms of that civil domain.⁹⁶

The *Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Act 2011*, which was passed without amendment, had three key features, as follows:

⁹³ G Gleeson, "If I were Premier of NSW in 2011", [NSW Spann Oration 2010](#), p 25.

⁹⁴ *NSWPD*, 15 September 2011, p 5823.

⁹⁵ *NSWPD*, 15 September 2011, p 5823.

⁹⁶ *NSWPD*, 15 September 2011, p 5823.

- it established an ethical framework for the public sector comprising core values (namely, integrity, trust, service and accountability) along with principles guiding the implementation of those core values. Of these values and principles it was said in the inaugural *State of the NSW Public Sector Report 2012*⁹⁷ that they were “not new” but that, in NSW, “this is the first time that the objectives, values and principles of good public sector practice have been embedded in the legislation that is the basis for employing NSW public sector employees. In turn, there is now a legal requirement for public sector agencies and employees to implement the Ethical Framework”;
- it provided for the appointment by the Governor of a Public Service Commissioner, as an independent statutory office, and conferred on the Commissioner functions in respect to the public sector workforce, including identifying reform opportunities and advising the Government on policy innovations and strategy in those areas of reform; and
- it established the expert Public Service Commission Advisory Board to determine general policies and strategic directions in respect to the functions of the Commissioner and to provide advice to the Premier on matters relating to the management and performance of the public sector.

Following release in January 2012 of the NSW Commission of Audits’ *Interim Report on public sector management* and of the release of the inaugural *State of the NSW Public Sector Report 2012*, on 23 May 2013 the Premier introduced the Government Sector Employment Bill 2013.⁹⁸ The Bill, which passed without amendment, represented a substantial overhaul of the regulation of public sector employment, repealing the *Public Sector Employment and Management Act 2002* (NSW). Basically, the reforms of 2011 were retained in the *Government Sector Employment Act 2013*, the main purpose of which was to revamp the structure of government service employment. The Premier explained:

The Government Sector Employment Bill creates an Act that will simplify decades of accreted complexity and deal only with employment matters; an Act that creates a simple and easily understood structure. The current Act provides for a complex array of employment structures, including the government service, the public sector, the public sector services and the public service. The Government Sector Employment Bill simplifies this complexity by establishing only two employment structures: the government sector and the public service.⁹⁹

⁹⁷ NSW Public Service Commissioner, *How it is: State of the NSW Public Sector Report 2012*, p 13.

⁹⁸ Also introduced was the cognate *Members of Parliament Staff Bill 2013*.

⁹⁹ *NSWPD*, 23 May 2013, p 20857.

A second phase of reforms, under the *Government Sector Employment Legislation Amendment Act 2013* aligned the NSW Police Force Senior Executive Service, the Health Executive Service and the Transport Senior Service.¹⁰⁰

10. WHISTLEBLOWERS, THE ICAC, THE PIC AND FOI LEGISLATION

10.1 Public interest disclosure reform

As part of its 100 Day Action Plan to “restore confidence in public administration in NSW”¹⁰¹ the O’Farrell Government introduced cognate measures to reform whistleblower legislation and to strengthen the ICAC, the *Public Interest Disclosures Act 2011* and the *ICAC Amendment Act 2011* respectively.

Reform of the public interest disclosure regime built on amendments made in 2010, at the end of the Labor period in power. These implemented many of the recommendations of the parliamentary ICAC Committee’s report, *Protection of Public Sector Whistleblower Employees*. These amendments included:

- lowering the threshold before a public interest disclosure can legally be made;
- extending whistleblower protections to independent contractors of public authorities;
- allowing public authorities to seek an injunction to prevent reprisal action from taking place;
- providing civil remedies for whistleblowers who suffer reprisal action; and
- allowing a public interest disclosure to be made if there is a breach of duty under the *Government Information (Public Access) Act 2009*.

Introducing the Public Interest Disclosures Amendment Bill 2011, Premier Barry O’Farrell said that:

The Public Interest Disclosures Act 1994 plays a critical role in maintaining the integrity of public administration in this State. It does this by protecting public officials who disclose wrongdoing in the public sector in accordance with the Act. Known as “whistleblowers”, they bring to the attention of Government and the community wrongdoing and corruption. They deserve to be protected. The

¹⁰⁰ Note, too, that a number of legislative and policy reforms to government procurement in NSW have been introduced in this period. Notably, under the *Public Sector Employment and Management Amendment (Procurement of Goods and Services) Act 2012* the NSW Procurement Board replaced the State Contracts Control Board. The new Board was tasked with overseeing procurement across all government agencies, including Government departments, statutory bodies and certain other public authorities. For a detailed discussion see D Montoya, [Government procurement in NSW](#), NSW Parliamentary Research Service, Issues Backgrounder 2/2014. Note the Department of Finance and Service [Code of Conduct](#) which sets out “the four core public sector values and the 18 ethical principles that guide their implementation”.

¹⁰¹ [NSWPD](#), 21 June 2011, p 2970.

Act makes it a criminal offence to take detrimental action against a public official substantially in reprisal for making a public interest disclosure.¹⁰²

The main 2011 amendments were as follows:

- requiring each public authority to provide 6-monthly data to the Ombudsman on the authority's compliance with the Act;
- requiring each public authority's public interest disclosures policy to require that a person who makes a public interest disclosure to the authority is to be provided, within 45 days of the person having made the disclosure, with a copy of the policy and an acknowledgment of the receipt of the disclosure;
- clarifying the process for the referral of evidence of an alleged reprisal for a public interest disclosure to the Commissioner of Police, the Police Integrity Commission, the ICAC, the Attorney General and the Director of Public Prosecutions;
- expanding the matters in respect of which public interest disclosures may be made to the local government investigating authority; and
- making provision for the involvement of the Ombudsman in resolving disputes arising from a public interest disclosure.

There followed a further round of reform under the *Public Interest Disclosures Amendment Act 2013*, based on the advice of the Public Interest Disclosures Steering Committee, which comprises the Ombudsman, the General Counsel of the Department of Premier and Cabinet, the Auditor-General, the Commissioner of the ICAC, the Commissioner for the Police Integrity Commission, the Chief Executive, Local Government in the Department of Premier and Cabinet, the Commissioner of Police and the Information Commissioner. The main 2013 amendments were as follows:

- to protect public officials who report wrongdoing under a statutory obligation, the Act removed the requirement that a disclosure must be made voluntarily in order for the public official who made it to be protected under the Public Interest Disclosures Act; and
- to extend the period of time, from 2 to 3 years, within which proceedings may commence for reprisal action against a person who made a public interest disclosure. This was because the Steering Committee had advised that "allegations of reprisal action can be made some time after the action is alleged to have occurred".¹⁰³

The whistleblower regime was further amended under the Ombudsman and *Public Interest Disclosures Legislation Amendment Act 2014*, specifically to:

¹⁰² [NSWPD](#), 21 June 2011, p 2970.

¹⁰³ [NSWPD](#), 20 March 2013, p 18956.

- enable regulations under the Act to exempt specified public authorities (or specified classes of public authorities) from requirements to provide reports to the Ombudsman and to Parliament about the public authority's obligations under the Act; and
- enable an investigating authority referring, or considering whether to refer, a matter to another investigating authority to exchange information or enter into arrangements with the other investigating authority, thereby avoiding duplication of action.

For the Labor Opposition, a major overhaul of the whistleblower legislation was proposed by Shadow Attorney General, Paul Lynch, under the Private Member's Bill the [Public Interest Disclosures Amendment \(Extension of Protections\) Bill 2013](#). Mr Lynch explained in the [second reading speech](#) for the Bill that its object was to extend the protections offered in a number of ways:

It extends those protections to all persons making disclosures, removing the current limitation that only defined public officials can be protected. It expands the type of public sector wrongdoing about which a person can make a disclosure and be protected from adverse consequences. It also extends the requirements to investigate and deal with disclosures about such wrongdoing so as to include the following: scientific misconduct by public authorities or their officers; acts or omissions of public authorities or their officers that create risks to the environment, including the carrying on of activities in an environmentally unsatisfactory manner; and acts or omissions of public authorities or their officers that create risks to public health or safety, or both. It extends the circumstances in which a public interest disclosure made directly to a journalist or member of Parliament will be protected so as to include circumstances when a person could not first report to any other investigating authority or body.

It further protects those who make public interest disclosures against detrimental action being taken or threatened against them in a number of ways. It makes it an offence whenever detrimental action is taken or threatened against a person for reasons that include reprisal for the fact that the person made a disclosure; it allows civil penalties for compensation to be pursued for damages for detrimental action for reasons that include reprisal for making a disclosure; and it allows those civil remedies to be pursued in the Industrial Relations Commission.¹⁰⁴

Mr Lynch said that "despite the grandiose rhetoric of the Premier and others in his Coalition, this Government has merely nibbled at the edges of current legislation". The Bill did not proceed beyond the second reading stage.

10.2 ICAC legislation amended

Introducing the cognate *ICAC Amendment Act 2011*, Premier O'Farrell said in the [second reading speech](#) that it was part of his Government's "strategy to

¹⁰⁴ [NSWPD](#), 21 November 2013, p 26214.

improve honesty and integrity in NSW”.¹⁰⁵ He further explained that the measure implemented “recommendations from two reports released in 2010 by the Parliamentary Joint Standing Committee on the Independent Commission Against Corruption, which are supported by the Independent Commission Against Corruption commissioner, as well as two more recent requests for amendments by the commissioner”. Using that speech as a guide, the main amendments were as follows:

- The bill amended section 14 of the ICAC Act to clarify the Commission's powers to gather and assemble admissible evidence for the prosecution of a person for criminal offences in connection with corrupt conduct. “This will facilitate the assembly of comprehensive briefs of evidence for the Director of Public Prosecutions to support prosecutions arising from corruption investigations”....
- The bill inserted a new subsection into section 57B of the Act to permit the reports and findings of the Inspector of the ICAC to be published more broadly. “These amendments will clarify that the inspector may communicate his findings and recommendations to the Independent Commission Against Corruption commissioner, Independent Commission Against Corruption officers, complainants and any other affected parties for the purpose of resolving a complaint or dealing with a matter. The inspector will also have broader powers to report on his activities to Parliament under amendments the bill makes to section 77A”.
- The bill also provided that section 40 of the *Surveillance Devices Act 2007* does not prevent the ICAC from providing information about its use of covert surveillance to the Inspector of the ICAC.

Premier O’Farrell introduced further reform under the *ICAC Amendment (Disciplinary Proceedings) Act 2013*, stating in the [second reading speech](#):

The Independent Commission Against Corruption Amendment (Disciplinary Proceedings) Bill 2013 is a further step in a series of measures that the Government is taking to improve confidence in public administration in New South Wales. The reforms in this bill—which stem from a previous request from the Independent Commission Against Corruption—will strengthen both the commission and the integrity of the public service by facilitating the removal of public officials who have engaged in corrupt conduct. This bill will amend the Independent Commission Against Corruption Act 1988 to enable employers of public officials to take disciplinary proceedings against public officials on the basis of corruption findings made by the Independent Commission Against Corruption. It will also make self-incriminating evidence given to the Independent Commission Against Corruption by any such public officials admissible for the purpose of those disciplinary proceedings. As a result of these reforms, there will be no need for the employer to conduct a separate investigation into the conduct of the public official if that official is found by the Independent Commission Against Corruption, in its report to Parliament following an investigation, to have engaged in corrupt conduct.¹⁰⁶

¹⁰⁵ [NSWPD](#), 21 June 2011, p 2970.

¹⁰⁶ [NSWPD](#), 28 February 2013.

Further amendments were made under the ICAC and Other Legislation Amendment Act 2013, specifically to facilitate the vetting of applicants for employment with the ICAC, the NSW Crime Commission, and the NSW Police Integrity Commission (PIC).

Continuing developments relevant to the ICAC are discussed in a later section of this paper [12].

10.3 Amendment of the Police Integrity Commission (PIC) legislation

One of the building blocks of the “integrity branch” in NSW is the Police Integrity Commission, established in the shadow of the Wood Royal Commission under the *PIC Act 1996*.

The product of a review of the legislation conducted in the previous year, the Bill for the *PIC Amendment Act 2012* was introduced in the Assembly by Premier O’Farrell on 7 March 2012. The Premier [said](#):

The review concluded that a role clearly remains for a body, separate from government and reporting to the Parliament, to oversee the integrity of the New South Wales Police Force and Crime Commission because corruption and misconduct risks inherently coexist with the discretionary exercise of significant coercive powers. The review considered whether the Police Integrity Commission was the most appropriate body to undertake that role in the future. After consulting widely and weighing the issues, the Government decided to preserve the Police Integrity Commission as a stand-alone body supported by reforms, which are implemented in this bill.¹⁰⁷

Based on the [Explanatory Notes](#) for the Bill, its object was to amend the PIC Act 1996:

(a) to give equal prominence to the functions of the Police Integrity Commission (*the PIC*) of preventing corrupt conduct of administrative officers of the NSW Police Force and misconduct of NSW Crime Commission officers as is given to the function of preventing police misconduct. In effect a consistent approach was adopted in respect to the three types of officers covered by the legislation, that is, sworn officers of the Police Force, non-sworn officers of the Police Force, and Crime Commission officers.

(b) to give guidance to the PIC in relation to the factors that are to be taken into account when it determines whether to conduct a hearing into a matter in private or in public. Section 33 of the Act was amended for this purpose, with the additional criteria being consistent with the requirements for the ICAC when it decides whether to hold public hearings.

(c) to ensure that certain senior officers are under a duty to report all of the types of conduct referred to in paragraph (a) to the PIC, and

¹⁰⁷ [NSWPD](#), 7 March 2013, p 9137.

(d) to clarify the way in which the Inspector of the PIC is to carry out certain functions. According to the Premier, the power of the Inspector of the PIC to publish reports was a matter of contention which, in late 2011, led to a public disagreement between the former Inspector of the PIC and the Commission.¹⁰⁸ The effect of the amendment was to make the Inspector's powers consistent with those conferred on the Inspector of the ICAC. Specifically, the Inspector of the PIC could at any time make a report concerning any matter relating to his functions in section 89—that is, concerning complaints, procedures or operations of the PIC—and provide a report to the commission, to the person who made a complaint or to any other affected person

(e) to ensure that a person about whom an adverse comment is to be made in a report prepared by the PIC or the Inspector of the PIC is given the grounds on which the comment is made and an opportunity to make submissions before the comment is included in the report. New section 137A was inserted into the Act for this purpose, in the form of a "persons to be heard" provision. The Premier explained that it was intended to "address concerns about procedural fairness, while allowing the Commission to continue to vigorously detect and investigate corruption and misconduct".

The *PIC and ICAC Amendment (Inspectors) Act 2013* enabled the appointment of an Assistant Inspector for the PIC and the ICAC and provided that the office could be held by the same person at the same time.

10.4 Minor reform to FOI laws

Towards the end of the Labor era in power a new FOI regime was legislated for by the *Government Information (Public Access) Act 2009*, with the inclusion of a statutory presumption in favour of the disclosure of government information. Provision was also made for establishing an Office of the Information Commissioner, over which a joint parliamentary committee exercises certain oversight functions.

Only minor amendments were made to this regime, further to the *Government Information (Public Access) Amendment Act 2012*. The [second reading](#) speech for the Bill from 16 February 2012 stated:

The 2009 Act repealed the Freedom of Information Act 1989 and marked a significant break with the structure of that Act, with the aim of achieving greater openness and transparency in government. The Government Information (Public Access) Act 2009 has been in effect for approximately one and a half years. In these early stages, users of the Act identified some minor issues with its operation in practice. The bill seeks to address those issues. It has been developed in consultation with government agencies and with the Office of the Information Commissioner.¹⁰⁹

¹⁰⁸ See for example – G Jacobsen, "Battle of reports as PIC fights overseer", [SMH](#), 12 October 2011, p 9; "NSW police watchdog is incompetent, says report", [SMH](#), 20 October 2011, p 3.

¹⁰⁹ NSWPD, 16 February 2012, p 8402.

The minor amendments introduced by the 2012 Act included:

- clarifying the timing for the recording of information in the disclosure logs of agencies and what can be included in such logs and enabling affected persons who are not access applicants to object to certain information about them being included in such logs;
- removing the requirement to pay a fee for an internal review by an agency following a recommendation by the Information Commissioner;
- confirming that an agency may require proof of identity from an access applicant before providing access to government information if the access application involves certain personal factors about the applicant; and
- providing that there is no conclusive presumption of overriding public interest against disclosure of a spent conviction to the person convicted.

It was reported in November 2014 that the Government had admitted that a “significant flaw” exists in the State’s FOI laws “after a tribunal ruled that ministerial staff who deliberately fail to produce relevant documents cannot be officially reported”.¹¹⁰

11. GOVERNMENT ADVERTISING

The background to the reform of government advertising was discussed in [e-brief 4/2011](#). Prior to the *Government Advertising Act 2011*, in NSW the issue was regulated by non-statutory guidelines. These were revised in 2007 and 2010 to take account of recommendations made in reports by the NSW Auditor-General. In its 2007 report, the NSW Auditor-General had commented:

Governments may legitimately use public funds for education or information campaigns to explain government policies, programs or services. Yet there is much controversy and debate around government advertising and its ability to promote the incumbent government and influence voter behaviour.¹¹¹

The Auditor-General’s 2009 report included a recommendation for an independent person to be included on a peer review panel for advertising campaigns for whole of government initiatives. However, the Auditor-General was of the view that this independent peer review panel member should not be the current Auditor-General because:

This would limit the Auditor-General’s ability to subsequently audit the procedures followed in the approval process and give an opinion on compliance

¹¹⁰ S Nicholls, “Greens bid for documents uncovers accountability gap in GIP Act”, *SMH*, 10 November 2014.

¹¹¹ Audit Office of NSW, *New South Wales Auditor-General’s Report: Performance Audit – Government Advertising*, August 2007, p 2; quoted in L Roth, *Government Advertising*, e-brief 4/2011, p 1.

with the Guidelines, the *Public Finance and Audit Act 1983* and the *Appropriation Act*.¹¹²

In 2007, then Opposition Leader Barry O’Farrell had introduced a Private Member’s Bill – the Government Publicity Control Bill - on this issue, which would have required the NSW Auditor-General to review government publicity costing \$200,000 or more.

On coming into office then Premier O’Farrell introduced the Bill for the *Government Advertising Act 2011*, which was to pass through both Houses without amendment and come into force in October 2012. In the [second reading speech](#) of 22 June 2011, the Premier said that the Bill’s purpose was to:

restore integrity to taxpayer-funded government advertising. Governments in New South Wales have long used advertising campaigns to deliver important messages to the community. Such advertising campaigns should always be designed to benefit the community—for instance, to encourage people to be healthier, to be safer on our roads, to protect our environment or to take part in civic activities. The people of New South Wales should be able to expect that each dollar spent on a campaign is spent for their benefit, and not for the benefit of politicians or political parties. There have been examples in the past of political advertising designed to make people feel good about the government of the day, sometimes featuring Ministers spruiking the achievements of their administration.¹¹³

An outline of and commentary on the legislation is found in [E-brief 9/2011](#). Basically, the 2011 legislation prohibited party-political material in government advertising and advertising campaigns designed to benefit a political party. Under the Act, governing political parties are liable to pay back the costs of advertising campaigns that breach its prohibitions. The Act also provides for the cost benefit analysis and peer review certification of government advertising campaigns by the heads of government agencies, a role that is defined to be “independent” of the relevant Minister. A performance audit role for the Auditor-General to scrutinise government advertising campaigns was further provided for. The Act also provides for the making of government advertising guidelines, which can now be found as an appendix to the [NSW Government Advertising Handbook](#). Comparing the NSW model with those in place in other jurisdictions, [E-brief 9/2011](#) commented (in part):

A key difference between the Bill and the legislative models adopted or proposed in other jurisdictions is that the other models require a person, or panel of persons, *who are not public servants*, to review government advertising campaigns prior to their launch to ensure that they comply with the relevant statutory standards or guidelines. For example:

¹¹² Audit Office of NSW, *New South Wales Auditor-General’s Report: Performance Audit – Government Advertising*, December 2009, p 17

¹¹³ [NSWPD](#), 22 June 2011, p 3140.

- Legislation in the ACT provides for campaigns costing over \$40,000 to be reviewed by a person who must not be a public servant, and whose appointment must be approved by the Legislative Assembly. The reviewer must report to the Minister on the campaign's compliance with the Act.
- Legislation in Ontario, Canada, requires the Auditor-General to review campaigns (there is no cost threshold) to ensure that they meet the standards set out in the Act. The Auditor-General engages external advisers to assist with this role.

The Commonwealth guidelines on government advertising also provide for pre-launch review of campaigns (over \$250,000) by an Independent Communications Committee (which comprises former public servants). The Committee is required to prepare a report to the head of the relevant government agency on compliance with the guidelines. Previously, the guidelines required the Auditor-General to review campaigns above the \$250,000 cost threshold.

The review processes in the Government Advertising Bill 2011 can be compared to these other models. While the Bill provides for a peer review to be conducted for campaigns costing over \$50,000, it does not require the peer review to be conducted by persons who are not public servants. Nor does the Bill require the peer review process to attest that the proposed campaign complies with the Act or the guidelines.

As noted, however, the Bill does require the head of an agency to provide a compliance certificate and the Bill states that the head of an agency is not subject to Ministerial control or direction. In addition, the Bill requires the Auditor-General to conduct an audit of the advertising activities of one or more government agencies in each financial year.¹¹⁴

12. CONTINUING DEVELOPMENTS

12.1 The McCloy case

From the above survey it is clear that much has been done over the past four years in NSW to address the issues of integrity in government. At the time of writing the political donations scheme is the subject of another High Court challenge, further to *McCloy v NSW*. This concerns the validity of the ban under the *Election Funding, Expenditure and Disclosures Act 1981* against certain classes of prohibited donors, specifically property developers and liquor, gambling and tobacco industry business entities.

The circumstances of the case, arising from the ICAC's Operation Spicer, concern allegations that Liberal candidates attempting to win Labor-held seats on the Central Coast and around Newcastle solicited illegal donations to fund their campaigns. The illegal donations allegedly came from property developers who are banned from donating in New South Wales, and were also above the applicable cap on political donations (\$5,000 to a party and \$2,000 to a

¹¹⁴ L Roth, [The Government Advertising Bill 2011](#), e-brief 9/2011, pp 3-4.

candidate). With reference to the *McCloy* case, the Expert Panel on [Political Donations](#) commented:

This case will involve consideration of whether Part 6, Div 4A of the Act breaches the implied freedom of political communication under the Commonwealth Constitution. The High Court may conclude that the prohibited donor provisions have been superseded by caps on political donations and are therefore no longer reasonably appropriate and adapted to serve a legitimate anti-corruption end. On the other hand, it is possible that the High Court may uphold the prohibited donor ban despite the caps on political donations.

According to Professor Twomey:

If compelling evidence could be shown that donations made by persons or entities falling within these particular categories are more likely to give rise to corruption or the perception of corruption and undue influence, and that the caps on donations do not remove that risk, then such provisions might survive if regarded as reasonably appropriate and adapted to serve that legitimate end.

Although our terms of reference do not extend to local government, the Panel notes that if the prohibited donor provisions are struck down by the High Court or repealed, there could be significant implications for local government because there are no caps on political donations at that level. Without the prohibited donor provisions, property developers would again be able to make large political donations to councillors (although any political donations made at the State level would be subject to the caps on political donations contained in Part 6, Div 2A of the Act). This would no doubt enliven corruption risks given the planning and development responsibilities of local government.¹¹⁵

12.2 The Cunneen case

Another ongoing High Court challenge relates to the powers of the ICAC, further to the high profile case of Crown Prosecutor Margaret Cunneen.¹¹⁶ The key question is whether the ICAC has the power to investigate allegations that Ms Cunneen, with the intention of perverting the course of justice, counselled her son's girlfriend to pretend to have chest pains to divert police from conducting a blood alcohol test at the scene of an accident. Following a decision of the NSW Court of Appeal in Ms Cunneen's favour,¹¹⁷ special leave to appeal to the High Court was granted, with the matter due to be heard in March 2015. It is reported that, in the ICAC's view, the issues at stake in the Cunneen case go "to the heart of its powers and will affect future investigations".¹¹⁸

¹¹⁵ NSW Panel of Experts, *Political Donations: Final Report – Volume 1*, p 45. The *McCloy* case will not be heard, it seems, before June 2015 – M Whitbourn, "McCloy challenge may further delay findings from corruption inquiry", *SMH*, 20 January 2015, p 5.

¹¹⁶ For background and commentary see – M Whitbourn, "ICAC asks High Court to hear appeal over Margaret Cunneen decision", *SMH*, 11 December 2014.

¹¹⁷ *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 (5 December 2014).

¹¹⁸ M Whitbourn, "McCloy challenge may further delay findings from corruption inquiry", *SMH*,

12.3 Prosecutions and the ICAC

This latest issue arose against the background of public concern about prosecutions arising from ICAC's investigations. The matter was addressed in the September 2014 report of the Joint Parliamentary Committee on the ICAC, where it was commented that:

1.22 While the Committee recognises the ongoing efforts of the ICAC and the DPP to work together to refine processes, the Committee has observed the recent public concern regarding prosecutions arising from ICAC findings of corruption. Although some public concern may be based on a misunderstanding of the Commission's role, the Committee considers that further consideration of prosecution processes is timely. The Committee has therefore resolved to conduct an inquiry into prosecutions arising from ICAC investigations.

1.23 The Committee notes that strategies adopted by the ICAC and DPP have reduced delays in commencing prosecutions. While significant progress has been made, there is scope for further improvement. Through the inquiry the Committee will seek to assist the ICAC and DPP with their work in gathering evidence both during and after an ICAC investigation, by identifying issues and consulting on reforms to current processes.

1.24 The Committee's inquiry will examine issues including: whether gathering and assembling evidence that may be admissible in the prosecution of a person for a criminal offence should be a principal function of the ICAC; the effectiveness of ICAC and DPP processes; adequacy of resourcing; whether there is a need to create new criminal offences that capture corrupt conduct; and arrangements for the prosecution of corrupt conduct in other jurisdictions.¹¹⁹

In November 2014 the Joint Parliamentary Committee released a discussion paper titled, *Prosecutions arising from ICAC corruption investigations*, where the Chair (Greg Smith) commented that:

The current inquiry by the Committee was prompted by what were seen as inordinate delays between the time of reporting and the time of commencing prosecutions. The Committee is confident that both the ICAC and the DPP are working much more cooperatively under their current Memorandum of Understanding, but both agree there is room for improvement if the necessary resources are maintained.¹²⁰

The discussion paper presents arguments for and against altering the ICAC's functions, from a body whose primary function is the investigation of corrupt conduct to one that plays a greater role in the prosecution process, that is, from

20 January 2015, p 5.

¹¹⁹ Parliament of NSW, Committee on the ICAC, *Review of the 2012-2013 Annual Reports of the ICAC and the Inspector of the ICAC*, Report 5/55, September 2014, p 5.

¹²⁰ Parliament of NSW, Committee on the ICAC, *Prosecutions arising from ICAC corruption investigations*, Discussion Paper, November 2014, p v.

a corruption investigation body with coercive powers to more of a criminal law enforcement agency. Having considered these views, the Committee commented:

2.44 The views put to the Committee supported the current approach embodied in the legislation. Under this approach, the gathering and assembling of evidence able to be used in prosecution proceedings constitutes a secondary function of the Commission. The intent of Parliament when ICAC was established was to create a body focussed on the investigation and exposure of corrupt conduct. To vary this approach so as to place greater emphasis on obtaining and preparing evidence for subsequent prosecution would potentially detract from the ICAC's investigative role and may be inconsistent with its broad coercive powers.

2.45 The Committee accepts that if assembling evidence is not the primary function of the ICAC then it is inappropriate to assess the ICAC's performance solely on the basis of prosecutions that arise from its activities. There are other important outcomes from ICAC investigations such as disciplinary action against public sector employees and systemic reforms to decrease the scope for corruption.

2.46 While the ICAC should gather and assemble evidence that arises from its activities, this role should not detract from its primary role of being an investigative, 'truth-seeking' body, rather than being another law enforcement body.¹²¹

For its part, the ICAC lists on its [website](#) prosecution briefs with the Director of Public Prosecutions and the outcomes.

On a sobering note it was reported in December 2014 that, in part as a result of the ICAC's recent findings, for the first time since 1998 "Australia has slipped outside the top 10 'clean' countries in an annual global corruption index", resulting in calls for a "federal body with a broader reach than the NSW ICAC".¹²²

13. CONCLUSIONS

This paper has sought to present an overview of the main legal and policy developments in NSW over the period of the 55th Parliament relating to the subject of integrity in government. As discussed, the background debate is broad and complex, having a texture all of its own in NSW, but with connections to wider concerns and developments relating to the apparent decline in public confidence in representative democracy. There are many aspects to that broader debate and this paper does not purport to be comprehensive in scope.

¹²¹ *Prosecutions arising from ICAC corruption investigations*, p 12.

¹²² M Whitbourn, "Calls for federal ICAC as Australia slips outside top clean countries in global corruption ranking", *SMH*, 4 December 2014. It is explained that: "The index does not measure actual corruption, but is a reflection of international perceptions based on the response of organisations including the New York –based Political Risk Services group and a survey of business executives conducted by a non-profit World Economic Forum in Geneva".

For example, the paper has not canvassed the intra-party reforms, relating in particular to the pre-selection of candidates that have occurred since 2011.

In terms of the developments discussed in this paper, it can be observed that, added to the reforms introduced towards the end of the Labor years in power, the package of changes passed by the Coalition Government since March 2011 constitute an important and significant contribution to shifting perceptions and realities about integrity of government in this State. In some areas, notably political donations law, the reforms have been especially significant, so much so that aspects have been found to be constitutionally invalid; paradoxically, practices have been found wanting and, arising from current ICAC inquiries, this area of the law is the subject of substantial review. Other aspects of the reform agenda, including government advertising law reform and reforms to public service ethics seem more settled. Whether further changes will be made in the new Parliament to the regulation of lobbying and protected disclosures remains to be seen.