

WHEN IS PORK-BARRELLING CORRUPTION AND WHAT CAN BE DONE TO AVERT IT?

By Professor Anne Twomey*

‘Pork-barrelling’ involves the exercise of public powers, such as the making of grants or commitments to build infrastructure, in a biased or ‘partial’ manner that favours the interests of a political party, rather than in the public interest. Politicians on all sides engage in such behaviour, asserting that it is not unlawful and that it is ‘just politics’. Is that so?

The exercise of power for an improper purpose, being a purpose other than that for which the power was granted, or in a biased manner, may be the subject of judicial review in accordance with administrative law. Such a decision is not lawfully made. It may be quashed upon judicial review and the decision-maker required to re-make the decision according to law. This paper does not directly deal with this administrative law aspect, although it would be wise for Ministers to become better acquainted with the administrative law constraints upon their exercises of power.

Instead, the first part of this paper addresses the duties imposed by law upon Members of Parliament and Ministers and considers when a breach of those duties may result in the commission of the common law criminal offence of misconduct in public office or give rise to a finding of ‘corrupt conduct’ by the Independent Commission Against Corruption (‘ICAC’). The NSW Government has recognised that misconduct in grants administration may give rise to statutory and common law offences, including misconduct in public office.¹ Its Review into grants administration noted that:

Conduct arising from pork-barrelling may be unlawful depending on the circumstances. The conduct may be unlawful where it amounts to, for example, corruption, or bribery, or maladministration or records mismanagement/destruction. Criminal sanctions following prosecution may also arise.²

It is corruption and the criminal offence of misconduct in public office that this paper concentrates on.

The second part of the paper then focuses more narrowly on the political aspects involved. If a decision is made by a Minister for the purpose of aiding the interests of his or her political party, does this fall within the criminal offence or the ICAC definition of corrupt conduct? Where is the dividing line between policy commitments, especially during election campaigns, and partiality in the exercise of public power?

The third part of the paper considers allegations of pork-barrelling that have been made at both the Commonwealth and State levels, the existing legal mechanisms that govern the making of such commitments, a recent review of grants administration carried out by the NSW Government and what reforms could be made to prevent or limit improper conduct in the future.

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¹ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 17.

² NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 37 and [5.7] of the proposed Guide.

PART I – BREACH OF DUTY BY MPs AND MINISTERS

The Duty of Members of Parliament and Ministers

It is well-recognised that Governments are constitutionally required to act in the public interest.³ But that obligation extends beyond the executive government to Ministers and Members of Parliament in the exercise of their constitutional offices.

In *Re Day*, Kiefel CJ, Bell and Edelman JJ observed that ‘parliamentarians have a duty as a representative of others to act in the public interest’ and have ‘an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations.’⁴ Their Honours read the disqualification provision in s 44(v) of the Commonwealth Constitution in the context of this existing duty, noting that one of its objects is to ensure that Members of Parliament will not ‘put themselves in a position where their duty to the people they represent and their own personal interests may conflict.’⁵ In a similar vein, Nettle and Gordon JJ said that the ‘fundamental obligation of a member of Parliament is “*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community”.’⁶

Edelman J added in *Hocking v Director-General of the National Archives of Australia*, that holders of high public offices exercise their powers and perform their duties on trust for the public. They have a duty of loyalty to act for the benefit of the State. This ‘duty falls to be determined against a background of general expectations, based upon custom, convention and practice, which impose upon the public officer “an inescapable obligation to serve the public with the highest fidelity”.’⁷

This duty to act in the public interest is reflected both in the Constitution and the common law. At the constitutional level, it is reflected in the disqualification provisions of ss 44 and 45 of the Commonwealth Constitution. Section 45(iii) provides that the place of a Senator or Member becomes vacant if he or she takes any fee for services rendered in Parliament to any person or State (eg being paid to ask questions in Parliament). Section 44(v) provides for the disqualification of any Member who has a direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth. The High Court has in recent times interpreted this disqualification broadly, capturing a Member’s beneficial interest in a family trust which holds such an interest in an agreement with the public service.⁸

In distinguishing between interests that give rise to disqualification and ordinary relations between governments and citizens, Kiefel CJ, Bell and Edelman JJ observed that one must look to ‘the personal financial circumstances of a parliamentarian and the possibility of a conflict of

³ *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, [34] (Gummow, Hayne, Heydon and Kiefel JJ); *Attorney General (UK) v Heinemann Publishers Pty Ltd* (1987) 10 NSWLR 86, 191 (McHugh JA); *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 51 (Mason J).

⁴ *Re Day [No 2]* (2017) 263 CLR 201, [49] (Kiefel CJ, Bell and Edelman JJ). See also [183] (Keane J).

⁵ *Re Day [No 2]* (2017) 263 CLR 201, [48] (Kiefel CJ, Bell and Edelman JJ).

⁶ *Re Day [No 2]* (2017) 263 CLR 201, [269] (Nettle and Gordon JJ), quoting from *R v Boston* (1923) 33 CLR 386, 400 (original emphasis). See also: *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, [243] (Edelman J) and *McCloy v New South Wales* (2015) 257 CLR 178, [171] (Gageler J).

⁷ *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19, [243] (Edelman J), quoting from *Driscoll v Burlington-Bristol Bridge Co* (1952) 86 A 2d 201, 221.

⁸ *Re Day [No 2]* (2017) 263 CLR 201.

duty and interest’ as this is the mischief towards which the provision is addressed.⁹ Nettle and Gordon JJ described s 44(v) as applying only when by reason of the existence, performance or breach of the agreement with the Public Service, the person ‘could conceivably be influenced by the potential conduct of the executive in performing or not performing the agreement or that person could conceivably prefer their private interests over their public duty’.¹⁰

An equivalent constitutional disqualification of Members of Parliament is contained in s 13 of the *Constitution Act 1902* (NSW). It can be traced back to the *Constitution Act 1855* (NSW)¹¹ and was included in the *Constitution Act* with ‘a view to prevent corruption’.¹² It has therefore applied in New South Wales for as long as responsible government has existed in the State. It is likely that the High Court would apply it in the same context of a duty of Members of Parliament to serve in the public interest, without consideration of private benefit.

At common law, the duty to act in the public interest was regarded in 1783 as a consequence of accepting an office of trust concerning the public. Any person who does so ‘is answerable to the King for his execution of that office’ and can be punished for any misbehaviour by way of a criminal prosecution.¹³ The High Court has applied the same duty to Members of the NSW Legislative Assembly, describing it as a duty to ‘advise the King’, which must be done in accordance with what a Member considers is ‘right and proper’.¹⁴ The ultimate requirement is the pursuit of the public interest. If a Member is influenced by money, he ‘violates a duty in which the public is interested’ and ‘puts himself in a position in which his interest and his duty conflict’.¹⁵ The Member’s duty is ‘to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community’.¹⁶ That duty extends to ‘the function of vigilantly controlling and faithfully guarding the public finances’.¹⁷

This approach has also been applied by courts at the State level in New South Wales. In *Sneddon v State of New South Wales*, Basten JA and Meagher JA both referred to the duty of Members of the New South Wales Parliament to serve with fidelity for the welfare of the community.¹⁸ In *Obeid v R*, the NSW Court of Criminal Appeal observed:

Members of Parliament are appointed to serve the people of the state, including their constituents, and it would seem that a serious breach of the trust imposed on them by using their power and authority to advance their own position or family interests, rather than the interests of the constituents whom they are elected to serve, could constitute an offence of the nature alleged.¹⁹

⁹ *Re Day [No 2]* (2017) 263 CLR 201, [66] (Kiefel CJ, Bell and Edelman JJ).

¹⁰ *Re Day [No 2]* (2017) 263 CLR 201, [260] (Nettle and Gordon JJ).

¹¹ Note, that the terms of the provision were copied from the *House of Commons (Disqualification) Act 1782* (UK). It had been enacted in the United Kingdom in response to concerns about corruption, particularly in relation to contracts to supply the navy and army.

¹² NSW Report from the Select Committee on the Proposed New Constitution, 17 September 1852, *Votes and Proceedings*, Vol 25, No 1, 477-8.

¹³ *R v Bembridge* (1783) 22 State Tr 1, 155-6 (Lord Mansfield). For an analysis of this passage, see: Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 308-13.

¹⁴ *R v Boston* (1923) 33 CLR 386, 409 (Higgins J).

¹⁵ *R v Boston* (1923) 33 CLR 386, 409 (Higgins J).

¹⁶ *R v Boston* (1923) 33 CLR 386, 400 (Isaacs and Rich JJ).

¹⁷ *R v Boston* (1923) 33 CLR 386, 401 (Isaacs and Rich JJ)

¹⁸ *Sneddon v State of New South Wales* [2012] NSWCA 351, [62] (Basten JA) and [218] (Meagher JA), both quoting from *R v Boston*.

¹⁹ *Obeid v R* [2017] NSWCCA 221, [62] (Bathurst CJ).

Bathurst CJ, with whom the rest of the Court agreed, rejected an argument by Mr Obeid that the duty imposed upon a parliamentarian is a matter of conscience only, and not subject to legal sanction.²⁰ It is a public duty which is subject to legal sanction.

While the cases mentioned above focus on circumstances where the Member of Parliament obtained a personal financial gain, these cases do not cover the full scope of the offence. The duty to act in the public interest and the legal sanctions that attach to it, extend beyond a requirement to avoid being influenced by personal financial gain. An offence may occur when the public trust has been abused by the misuse of power, regardless of whether it results in personal gain.²¹ The South Australian Court of Criminal Appeal approved of a passage by Finn where he stated that:

official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.²²

Finn observed that improper purposes that had founded convictions for misconduct in public office included showing favouritism to some individual or group, harming or disadvantaging an individual, and ‘advancing the interests of a political party, as where known supporters of one party are deliberately omitted from an electoral roll’.²³

A breach of public trust can also occur, even when the actual outcome of a decision achieves a valuable end. It is the abuse in the exercise of the power, being an exercise for an improper purpose, which is relevant, rather than the end achieved. As Finn noted, misconduct in public office does not concern ‘the correctness or otherwise of the decision as an exercise of official power’, but is, rather, directed at ‘the state of mind which informed the decision’.²⁴ If the public official acts dishonestly, corruptly or in a partial manner in exercising an official power for a purpose other than that for which the power was granted, then there is a breach of public trust, regardless of ‘whether the act done might, upon full and mature investigation, be found strictly right’.²⁵

Hence the two arguments most commonly made by politicians in response to allegations of pork-barrelling – that it is not corrupt or unlawful because they weren’t lining their own pockets and the community received valuable support – do not hold water. Such conduct can still be regarded as both corrupt and unlawful if it involves the partial exercise of public power for a purpose other than that for which the power was granted.

²⁰ *Obeid v R* [2017] NSWCCA 221, [63] and [148] (Bathurst CJ).

²¹ *Director of Public Prosecutions v Marks* [2005] VSCA 277, [35] (Nettle JA). An example is where a police officer accesses confidential police information to do a friend a favour. As Campbell J has noted in this context, ‘it is notorious that doing a friend a favour may be a most insidious form of corruption’: *Jansen v Regina* [2013] NSWCCA 301, [11].

²² *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, 64-5 (Doyle CJ), quoting from Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 308. See also: *R v Quach* [2010] VSCA 106, [20] (Redlich JA).

²³ Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 319. See Lord Mansfield’s scathing judgment about those who ‘would engross the whole franchise, and right of election to themselves’: *R v Phelps* (1757) 2 Keny 570; 96 ER 1282, 1282-3.

²⁴ Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 319.

²⁵ *R v Borron* (1820) 3 B & Ald 433, 434; 106 ER 721, 721 (Abbott CJ).

When does a breach of the duty to serve in the public interest become a breach of the law?

Justification for the criminalisation of misconduct by politicians

As noted above, the failure on the part of a public official to exercise a public power for a proper purpose in the public interest is most commonly dealt with by courts under administrative law. This is appropriate where the public official acted in good faith and made a mistake in the exercise of his or her power. But as Mahoney JA pointed out, judicial review under administrative law does ‘not deal with the vice in the misuse of public power’.²⁶ He considered that civil remedies are ‘not adequate to prevent – to deter – such misuse’.²⁷ He correctly observed that the ‘obloquy upon the official is seldom great’, with the matter being attributed to the ‘technicalities’ of administrative law.²⁸ If the deliberate misuse of public power is to be deterred, then criminal action must be a genuine threat.

Apart from deterrence, the other main reason for criminalising the corrupt behaviour of Members of Parliament and Ministers is because it undermines faith in the democratic system and the application of the rule of law.²⁹ This point was stressed by Lee J in the sentencing appeal of a former NSW Minister, Rex Jackson. Lee J noted that Jackson had engaged in a ‘consistent course of gross abuse of high office involving the receipt of bribes for favours’.³⁰ He added:

A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex. Democracy can only survive when ordinary men and women have faith in the integrity of those whose responsibility is the preservation of integrity of Parliament in all its workings. It is particularly important that those who have the privilege, the honour and the responsibility of cabinet rank should not, for their personal advantage, abuse their position.³¹

The type of political corruption that undermines public trust in the system of government is not confined to that which involves obtaining a personal pecuniary advantage. Lord Scott, in dealing with a case concerning misconduct at the municipal level in London, noted that there are other forms of corruption that are ‘less easily detectable and therefore more insidious’. These include:

any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption?

²⁶ Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17.

²⁷ Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17, 18.

²⁸ Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17, 22.

²⁹ *Marin and Coye v Attorney General of Belize* [2011] CCG 9, [44] (de la Bastide PCCJ and Saunders JCCJ).

³⁰ *R v Jackson* (1988) 33 A Crim R 413, 436 (Lee J, with whom Finlay J agreed).

³¹ *R v Jackson* (1988) 33 A Crim R 413, 435 (Lee J).

Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government.³²

This connection between public duty and the democratic imperative to maintain public trust has also been recognised by the Supreme Court of Canada, where McLachlin CJ observed:

The crime of breach of trust by a public officer... is both ancient and important. It gives concrete expression to the duty of holders of public office to use their offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public in those who exercise state power.³³

The duty of Members of Parliament and Ministers to serve the public interest with fidelity, if breached, can accordingly give rise to a criminal offence.³⁴ This is most notably the case when bribery³⁵ or fraud is involved. But there is also a common law offence variously known as ‘breach of public trust’ or ‘misconduct in public office’, about which there has been less awareness. The criminalisation of such conduct, even when the same actions may not be criminal when performed by persons who hold positions in the private sector,³⁶ is a consequence of the importance placed by the courts on protecting the system of government from corruption. Lord Mansfield noted in 1783 in *R v Bembridge*, that a breach of trust by a public officer is indictable because it is ‘essential to the existence of the country’.³⁷

The common law offence of misconduct in public office

As early as 1834 in New South Wales, the Supreme Court recognised that malfeasance by a public official may amount to criminal conduct where there is a positive breach of a duty and a corrupt motive.³⁸ At common law, if a public official, being placed in a position of trust and confidence, commits a breach of duty, such as accepting a secret commission, then this amounts to a criminal offence.³⁹ That common law offence of ‘misconduct in public office’ continues to operate in New South Wales. In some other States it has been displaced by statutory provisions.

³² *Porter v Magill* (2002) 2 AC 357, [132] (Lord Scott).

³³ *R v Boulanger* [2006] 2 SCR 49, [1] (McLachlin CJ).

³⁴ Note the finding in *Obeid v R* (2015) 91 NSWLR 226, at [20]-[24] and [55] that Members of Parliament are subject to the ordinary criminal jurisdiction of the courts and that Parliament does not have exclusive jurisdiction with respect to the misconduct of its Members. See also: *R v Chaytor* [2011] 1 AC 684, regarding prosecution of MPs in the UK for the misuse of expenses; and A W Bradley, ‘Parliamentary privilege and the common law of corruption’ [1998] *Public Law* (Autumn) 356.

³⁵ See *R v Jackson* (1988) 33 A Crim R 413 regarding the making of corrupt payments to Rex Jackson to induce him, in his capacity as Minister for Corrective Services, to show favour to certain persons in violation of his official duty. See also: *R v White* (1875) 13 SCR (NSW) 322; and *R v Boston* (1923) 33 CLR 386, both of which concerned members of the NSW Parliament.

³⁶ ‘Every public officer commits a misdemeanour who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person’: Lewis Frederick Sturge, *Stephen’s Digest of the Criminal Law*, (Sweet & Maxwell, 9th ed, 1950), 112-4.

³⁷ *R v Bembridge* (1783) 22 State Tr 1, 156 (Lord Mansfield).

³⁸ *Ex parte Wilson, Windeyer and Slade* [1834] NSWSupC 15.

³⁹ *R v Jones* [1946] VLR 300, 303 (O’Byrne J).

Finn has noted that the common law offence of misconduct in public office has been variously described, including as ‘breach of official trust’ and ‘misbehaviour in a public office’.⁴⁰ It covers a range of conduct, including:

- fraud in office;
- nonfeasance (wilfully neglecting a public duty);
- misfeasance (wilfully misusing or abusing an official power, including doing an otherwise lawful act in a fashion which is wrongful);
- malfeasance (wilfully acting in excess of actual authority).⁴¹

These aspects of misconduct in public office are recognised in s 8(2)(a) of the *Independent Commission Against Corruption Act 1988* (NSW) (*ICAC Act*), which nominates the offence of ‘official misconduct’ as one that can trigger a finding of corrupt conduct, and describes it as including: breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition. As the NSW Court of Criminal Appeal has observed, the ‘object of the offence is to prevent public officers (in the case of misfeasance) from exercising their power in a corrupt and partial manner’.⁴² Those public officers are persons upon whom powers and functions have been conferred by the State, giving rise to a public trust. The NSW Court of Criminal Appeal confirmed in *Obeid v R* that a Member of the NSW Parliament is a public officer for these purposes.⁴³

As this is a common law offence, it has also been developed by courts in other common law jurisdictions, such as the United Kingdom, Canada and Hong Kong.⁴⁴ Drawing upon that jurisprudence, the Victorian Court of Appeal, in *R v Quach*, set out the elements of the offence of ‘misconduct in public office’, noting that it occurs when:

- (1) a public official;⁴⁵
- (2) in the course of or connected to his public office;⁴⁶
- (3) wilfully misconduct[s] himself; by act or omission, for example, by wilfully neglecting or failing to perform his duty;
- (4) without reasonable excuse or justification; and

⁴⁰ Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 307.

⁴¹ Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 310 and 313-325.

⁴² *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [68].

⁴³ *Obeid v R* (2015) 91 NSWLR 226, [121]-[125]. See also *D’Amore v Independent Commission Against Corruption* [2013] NSWCA 187, for the application of ‘misconduct in public office’ to a Member of the NSW Parliament.

⁴⁴ See, eg, in the United Kingdom: *Porter v Magill* (2002) 2 AC 357; and *Attorney-General’s Reference (No 3 of 2003)* [2005] QB 73. In Hong Kong, see: *Shum Kwok Sher v HKSAR* [2002] HKCFA 27; and *Sin Kam Wah & Lam Chuen Ip v HKSAR* [2005] 2 HKLRD 375. In Canada see: *R v Pilarinos and Clark* [2002] BCTC 452; and *R v Boulanger* [2006] 2 SCR 49. Note that in Canada the common law offence has been codified to an extent by s 122 of the Canadian *Criminal Code*.

⁴⁵ This includes Members of Parliament and Ministers. See further: David Lusty, ‘Revival of the common law offence of misconduct in public office’ (2014) 38 *Criminal Law Journal* 337, 344 and the cases mentioned there. Compare *Ex parte Kearney* (1917) 17 SR (NSW) 578, where fettlers and a ganger employed on NSW railways were held not to be public officers.

⁴⁶ In relation to whether an act occurs in the course of one’s office, see further *Herscu v The Queen* (1991) 173 CLR 276, 283 (Mason CJ, Dawson, Toohey and Gaudron JJ) and 287 (Brennan J), where influence wielded by an office-holder, such as a Minister, was regarded as falling within the scope of a codified anti-corruption provision, even though the Minister had no formal power to make the decision.

(5) where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects.⁴⁷

That formulation was accepted by the NSW Court of Criminal Appeal in 2017 in *Obeid v R*⁴⁸ and special leave to appeal to the High Court was refused.

The two critical and often related aspects of the offence, which are relevant to accusations of pork-barrelling, are intention in step 3 of the test and seriousness in step 5.

Intention: From as early as 1758, the British courts distinguished between cases of mere error of judgment and those that involve clear and apparent partiality or corruption.⁴⁹ Finn has noted the many cases in which the courts emphasised that ‘it is not the province of the criminal law to punish an honest official who makes a mistake or error of judgment in the exercise of his office’.⁵⁰ For example, McLachlin CJ noted in *Boulanger*, ‘perfection has never been the standard for criminal culpability in this domain; “mistakes” and “errors of judgment” have always been excluded’ from criminal culpability for misconduct in public office.⁵¹

Punishment is instead directed at those who abuse the public trust by acting from a dishonest or corrupt motive, or with partiality. Malice is not required – it is enough that the official ‘knows that what he is doing is not in accordance with the law’.⁵² Sir Anthony Mason, in his capacity as a non-permanent judge of the Hong Kong Court of Final Appeal, considered that the ‘misconduct must be deliberate rather than accidental in the sense that the official either knew that his conduct was unlawful or wilfully disregarded the risk that his conduct was unlawful’.⁵³ In considering such matters, a jury could take into account the experience of a parliamentarian.

Such consideration was given by the NSW Court of Criminal Appeal in *Obeid v R*, where Bathurst CJ observed that it ‘is inconceivable that a politician of [Mr Obeid’s] standing and experience [i.e. 16 years in Parliament, including four as a Minister] did not know that his duty was to serve the public interest and that he was not elected to use his position to advance his own or his family’s pecuniary interests.’ He considered that it was not enough for the jury to be satisfied that Mr Obeid knew that his actions were morally and ethically wrong, but that it was ‘entitled to conclude that he knew what he was doing was wrong in law, or at least recognised the risk that it was unlawful and proceeded in any event.’⁵⁴

Reliance on legal advice to evince a lack of intention will not always be effective. In *Porter v Magill*, two local councillors acknowledged that they knew that the local council could not use its powers for electoral advantage. They were found to have ‘acted in a way they knew to be unlawful’.⁵⁵ They claimed, however, that they had relied upon legal advice and were therefore

⁴⁷ *R v Quach* (2010) 27 VR 310, [46] (Redlich JA).

⁴⁸ *Obeid v R* [2017] NSWCCA 221, [60]. See also *Obeid v R* (2015) 91 NSWLR 226, [136] and [139] and *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [67].

⁴⁹ *R v Young* (1758) 1 Burr 557, 562; 97 ER 447, 450 (Lord Mansfield).

⁵⁰ Paul Finn, ‘Official Misconduct’ (1978) 2 *Criminal Law Journal* 307, 312.

⁵¹ *R v Boulanger* [2006] 2 SCR 49, [52].

⁵² Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17, 25.

⁵³ *Sin Kam Wah & Ip v HKSAR* [2005] 2 HKLRD 375, [46].

⁵⁴ *Obeid v R* [2017] NSWCCA 221, [196] (Bathurst CJ).

⁵⁵ *Porter v Magill* (2002) 2 AC 357, 471 [31] (Lord Bingham).

not guilty of wilful misconduct. But the legal advice had told them only that their initial proposal to sell social housing properties in marginal wards so as to alter voting patterns was unlawful. The fact that they responded by also selling some property in other wards, to dilute the perception of corruption, while maintaining the same number of sales in marginal properties to achieve the same electoral end, did not result in their exculpation.⁵⁶

Seriousness: To move beyond an administrative failing to a criminal offence, the conduct must be sufficiently serious.⁵⁷ The English Court of Appeal observed that there must be a ‘serious departure from proper standards’, and that a mistake, even a serious one, would not suffice.⁵⁸ It noted that the ‘threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public’s trust in the office holder.’⁵⁹

The same view has been taken in Australia. Olsson J in the South Australian Supreme Court drew together the mental element and the seriousness element by concluding that ‘there must be an element of culpability which is not restricted to corruption or dishonesty, but which is of such degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.’⁶⁰ The point at which condemnation and punishment is merited remains a matter of debate. The WA Inc Royal Commission considered that ‘conduct which demonstrates a conscious use of official power or position for private, partisan or oppressive ends, is so contrary to the very purposes for which power and position are entrusted to officials as to warrant public condemnation in a criminal prosecution’.⁶¹

The factors that should be considered in making this assessment were considered by Sir Anthony Mason in *Shum Kwok Sher v HKSAR*. He concluded that consideration should be given to ‘the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.’⁶²

Definition of ‘corrupt conduct’ in the *ICAC Act*

‘Corrupt conduct’, for the purposes of the *Independent Commission Against Corruption Act 1988* (NSW), is defined in ss 8 and 9. The relevant parts of ss 8 and 9 provide as follows:

8 General nature of corrupt conduct

(1) Corrupt conduct is—

- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

⁵⁶ *Porter v Magill* (2002) 2 AC 357, 471-475 [34]-[40] (Lord Bingham) and 507 [146]-[148] (Lord Scott).

⁵⁷ Gerard Carney, *Members of Parliament: law and ethics* (Prospect Media, 2000) 265.

⁵⁸ *Attorney-General’s Reference (No 3 of 2003)* 2004 EWCA Crim 868, [56].

⁵⁹ *Attorney-General’s Reference (No 3 of 2003)* 2004 EWCA Crim 868, [56]. See to the same effect: *R v Boulanger* [2006] 2 SCR 49, [52].

⁶⁰ *Question of Law Reserved (No 2 of 1996)* (1996) 67 SASR 63, 78 (Olsson J), drawing on the language of Lord Widgery CJ in *R v Dytham* [1979] QB 722, 727. See also: *Obeid v R* [2017] NSWCCA 221, [222] (Bathurst CJ).

⁶¹ *Report of the Royal Commission into Commercial Activities of Government and Other Matters* (1992), Part II, Ch 4, [4.5.1].

⁶² *Shum Kwok Sher v HKSAR* [2002] 5 HKCFA 27, [86] (Mason NPJ).

- (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
 - (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
 - (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.
- (2) Corrupt conduct is also any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority and which could involve any of the following matters—
- (a) official misconduct (including breach of trust, fraud in office, nonfeasance, misfeasance, malfeasance, oppression, extortion or imposition),
 -
 - (i) election bribery,
 - (j) election funding offences,
 - (k) election fraud,
 - (l) treating,
 -
 - (x) matters of the same or a similar nature to any listed above,
 - (y) any conspiracy or attempt in relation to any of the above.
- (2A) Corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters—
-
 - (c) dishonestly obtaining or assisting in obtaining, or dishonestly benefiting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,
 - (d) defrauding the public revenue,
 -

9 Limitation on nature of corrupt conduct

- (1) Despite section 8, conduct does not amount to corrupt conduct unless it could 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.
-
- (3) For the purposes of this section—
- applicable code of conduct*** means, in relation to—
- (a) a Minister of the Crown—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations, or

(b) a member of the Legislative Council or of the Legislative Assembly (including a Minister of the Crown)—a code of conduct adopted for the purposes of this section by resolution of the House concerned.

criminal offence means a criminal offence under the law of the State or under any other law relevant to the conduct in question.

disciplinary offence includes any misconduct, irregularity, neglect of duty, breach of discipline or other matter that constitutes or may constitute grounds for disciplinary action under any law.

- (4) Subject to subsection (5), conduct of a Minister of the Crown or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.
- (5) Without otherwise limiting the matters that it can under section 74A (1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

In summary, a ‘public official’ (which includes a Minister, a Member of the NSW Parliament, their staff and public servants) may be found to have engaged in ‘corrupt conduct’ if the person:

- adversely affects the honest or impartial exercise of official functions by another public official (eg a Minister influencing a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function such as providing an assessment of the merits of grants, in a dishonest or partial way) (s 8(1)(a)); or
- acts in a dishonest or partial manner in the exercise of official functions (eg a Minister deliberately exercises a power to approve grants in a manner that favours family members, party donors or party interests in electorates, contrary to the guidelines of a grant program that state that the grants are to be made on merit according to criteria) (s 8(1)(b)); or
- acts in a manner that breaches public trust (eg a Minister acts partially by exercising a power to make grants in favour of marginal electorates, when this is contrary to the purpose for which the power was given) (s 8(1)(c)); or
- adversely affects the exercise of official functions by any public official where the conduct involved amounts to ‘official misconduct’, including a breach of trust and misfeasance (eg a Minister advises, instructs or pressures a public servant to exercise official powers in a deliberately partial manner to achieve a party political advantage, where the conduct is sufficiently serious to constitute a crime) (s 8(2)); or
- acts in a manner that impairs public confidence in public administration and which could involve dishonestly obtaining or benefiting from the payment of public funds for private advantage (eg a Minister conducts a merit-based grants scheme in such a way as to favour political and private advantage over merit, undermining public confidence in public administration, and benefitting political donors and family members) (s 8(2A)(c)),

AND

- the conduct could constitute or involve a criminal offence (s 9(1)(a)); or
- the conduct could constitute or involve a substantial breach of a code of conduct applicable to the Minister or Member of Parliament (s 9(1)(d)); or
- the conduct would cause a reasonable person to believe that it would bring the integrity of the office or of Parliament into serious disrepute and the conduct constitutes a breach of a law (which does not need to be a criminal law) (s 9(4) and (5)).

The focus of the definition of ‘corrupt conduct’ in the *ICAC Act*, is therefore on conduct that is dishonest, partial or in breach of the public trust and which adversely affects the performance of official functions.

Partial conduct and breach of public trust

Sometimes conduct will amount to a breach of trust because it is partial, effectively satisfying both ss 8(1)(b) and (c), as occurred in *Greiner v Independent Commissioner Against Corruption*.⁶³ The Commissioner of the ICAC concluded that the actions of Greiner, Moore and Humphry were ‘partial’ because they failed to give all applicants for a position equal or similar consideration and favoured Dr Metherell for the position.⁶⁴ It was not relevant whether Dr Metherell may have been the best candidate for the job. The issue was that there had been partial behaviour in the process of choosing to appoint him.

In *Greiner*, Mahoney JA considered the meaning of ‘partiality’ by reference to the mischief that the *ICAC Act* is directed at addressing. He observed:

It is concerned to prevent the misuse of public power. Public power may be misused in a way which will involve a criminal act: see, eg, s 8(2)(b) (bribery). But the proscription of partiality seeks to deal with matters of a more subtle kind. Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised, for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is this that “partial” and similar terms in the Act are essentially directed.

It is wrong deliberately to use power for a purpose for which it was not given: partiality is a species of this class of public wrong.⁶⁵

Depending upon the circumstances, therefore, partial behaviour may still satisfy the s 8 element of the definition of corrupt conduct, either on its own in s 8(1)(b) or as a breach of public trust under s 8(1)(c), even where it does not involve a breach of the common law criminal offence of misconduct in public office because the requisite intention was not met or the degree of

⁶³ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 135 (Gleeson CJ).

⁶⁴ See the Commissioner’s reasoning, set out in *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136.

⁶⁵ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 160 (Mahoney JA).

seriousness was not satisfied. This means that s 8 addresses partial behaviour both at the criminal level, as also noted in s 8(2)(a), and at a level that amounts to less than criminal conduct, but which still breaches the public trust through the exercise of a public power for an improper purpose. It operates both in circumstances where the partial conduct is that of the public official, such as a Minister, and where the conduct adversely affects⁶⁶ the exercise of official functions by another public official, such as a public servant in an agency or statutory corporation which falls within the Minister's portfolio.

Conduct that satisfies s 9

In addition, at least where the conduct is that of a Member of Parliament,⁶⁷ it must also be conduct that 'could' constitute or involve a criminal offence or a substantial breach of an official code of conduct, or would cause a reasonable person to believe that it would bring the integrity of the office or Parliament into serious disrepute and which constitutes a breach of a law.⁶⁸

The ICAC is not a court and cannot make findings of criminal guilt. Section 74B of the *ICAC Act* provides that the Commission is not authorised to include in its reports any finding that a person is guilty of, or has committed, a criminal offence. Accordingly, where reliance is placed upon s 9(1)(a), the ICAC Commissioner must first make findings of fact and then ask 'whether, if there were evidence of those facts before a properly instructed jury, such a jury could reasonably conclude that a criminal offence had been committed'.⁶⁹ The Commission is not authorised to make a finding of corrupt conduct unless the conduct is 'serious' corrupt conduct (s 74BA).

Where misconduct in public office by a Member of Parliament is involved, s 9 will be satisfied if the findings of fact are such that a properly instructed jury could reasonably conclude that the common law criminal offence of misconduct in public office has been committed. Alternatively, s 9 may also be satisfied if the conduct could constitute or involve a substantial breach of the code of conduct of the House in which the Member sits, or the Ministerial Code of Conduct, if the Member is a Minister.

Legislative Code of Conduct for Members

Each House of the NSW Parliament has adopted a Code of Conduct which forms part of its Standing and Sessional Orders.

The preamble to the Code, which is not part of the substantive Code, recognises the responsibility of Members 'to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and the institution and conventions of Parliament, and using their influence to advance the common good of the people of New South Wales'.

⁶⁶ Note the interpretation of this phrase in: *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, [51] (French CJ, Hayne, Kiefel and Nettle JJ).

⁶⁷ In *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136, Gleeson CJ noted that 'when dealing with a Minister or a Member of Parliament the concept of a disciplinary offence is irrelevant'.

⁶⁸ The word 'law' here means a civil, rather than a criminal, law. See further: *Independent Commission Against Corruption, Report on Investigation into Conduct of the Hon J Richard Face*, June 2004, 45.

⁶⁹ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136 (Gleeson CJ).

Clause 1 of the Code provides that ‘Members shall base their conduct on a consideration of the public interest, avoiding conflict between personal interest and their duties as a Member of Parliament’. Members must not ‘act dishonestly for their own personal gain’. The focus of this clause is on avoiding the misuse of power for personal benefit. It notes the role of political parties as part of the democratic process. The clause asserts that participation in ‘the activities of organised political parties is within the legitimate activities of Members of Parliament’. It leaves unaddressed the misuse of public power for party-political gain, rather than personal gain (although note the discussion below about the circumstances where these may coincide).

Clause 7 deals with conflicts of interest and states that the ‘public interest is always to be favoured over any private interest of the Member’.

Ministerial Code of Conduct

The more relevant code of conduct in relation to issues concerning pork-barrelling is the Ministerial Code of Conduct. It is prescribed as an applicable code of conduct by cl 5 of the *Independent Commission Against Corruption Regulation 2017* (NSW)⁷⁰ and is set out in an Appendix to that Regulation.⁷¹

The preamble to the Ministerial Code, which is not part of the Code itself but may be used to interpret it,⁷² recognises in recital 3 that: ‘Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales’. It therefore recognises the duty to act in the public interest (or ‘common good’), the necessity of maintaining the public trust, and the requirement to act with honesty and integrity in performing duties. Recital 1 also refers to the need to maintain public confidence in the integrity of the Government and that Ministers must ‘pursue, and be seen to pursue, the best interests of the people of New South Wales to the exclusion of any other interest’.

Within the Ministerial Code itself, the most relevant provisions are sections 3, 5 and 6. Section 3 provides that: ‘A Minister must not knowingly breach the law...’ This covers any type of law,⁷³ not just a criminal law. It would therefore not only cover breaches of the common law offence of misconduct in public office, but also breaches of other laws, such as those dealing with public finances or maintaining public records, even where no criminal offence is involved. It may also include administrative law. If this were the case, if a Minister acted for an improper purpose, took into account irrelevant considerations or acted in a biased manner in exercising his or her powers to make grants or approve the construction of infrastructure, knowing this to be outside the scope of the Minister’s powers, the Minister might be found to have engaged in a breach of s 3 of the Ministerial Code.

⁷⁰ Note that the NSW Ministerial Code commenced on 20 September 2014. Prior to that, there was an earlier iteration of a Ministerial Code but it had not been deemed to be an applicable Code for the purposes of the *ICAC Act*.

⁷¹ See also the preamble to the Ministerial Code of Conduct which notes in recital 7 that the Code has been adopted for the purposes of s 9 of the *Independent Commission Against Corruption Act 1988* (NSW) and in recital 9 that a substantial breach of the Ministerial Code may constitute corrupt conduct for the purposes of that Act.

⁷² NSW Ministerial Code of Conduct, s 12(1). See an example of such use in: *Obeid v R* [2017] NSWCCA 221, [144] (Bathurst CJ).

⁷³ It applies to the laws of the State of NSW and any Commonwealth laws applicable in NSW: Ministerial Code of Conduct, s 12(3).

Section 5 of the Ministerial Code provides that: ‘A Minister must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law’. The section recognises that a Minister is entitled to disagree with the advice of a public service agency and make decisions contrary to that advice. The Minister can also direct an agency to implement the Minister’s decision. But the Minister cannot direct the agency to act contrary to the law. Hence, a Minister who directed or requested a public servant to breach the public servant’s legal obligations under the *Government Sector Employment Act 2013* (NSW), the *Government Sector Finance Act 2018* (NSW) or the *State Records Act 1998* (NSW),⁷⁴ or act outside of the public servant’s powers by exercising a decision-making power for an improper purpose or taking into account irrelevant considerations, could be found to have breached s 5 of the Ministerial Code.

Section 6 of the Ministerial Code provides that: ‘A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.’ This key clause is qualified in a number of respects. First, the assessment of the public interest is a subjective one – ‘*what they consider to be the public interest*’. This makes it more difficult to establish that a substantial breach has occurred. A Minister may argue that he or she genuinely considers that the provision of grants or the funding of infrastructure is in the public interest even though it is skewed towards marginal electorates or those held by his or her own party. Second, the reference to improper behaviour is confined to acting for the Minister’s *private* benefit or for the *private benefit of any other person*.

In *Obeid v R*, the NSW Court of Criminal Appeal held that a Code of Conduct adopted for the purpose of s 9 of the *ICAC Act* could not be said to oust or limit a duty on a Member under the common law.⁷⁵ Nor does a Code ‘define the totality of a Member’s obligations’.⁷⁶ Section 9 of the Act contemplates that conduct breaching s 8, such as a breach of public trust might constitute a criminal offence or a breach of an adopted code of conduct, without suggesting that one would exclude the operation of the other. Hence, even if an act did not amount to a breach of the Ministerial Code of Conduct, it might still give rise to a finding of corrupt conduct if it satisfied one of the other requirements in s 9.

PART II – THE EXERCISE OF POWER FOR PARTY POLITICAL ADVANTAGE

While it is clear that a Member of Parliament cannot favour his or her ‘private’ interests over the public interest, there is less clarity about where political party interests fit. If public money is spent in such a way as to prefer political party interests over the public interest, does that breach the duty of a Member of Parliament and could it amount to corruption?

Where political interests coincide with private financial interests

It is ordinarily in the private financial interest of a Member of Parliament that the political party, of which he or she is an endorsed member, be successful at an election. This is because

⁷⁴ See a more detailed list of relevant laws in the Public Service Commission Code of Ethics and Conduct for NSW Government Sector Employees, [1.4]: <https://www.psc.nsw.gov.au/sites/default/files/2020-10/PSC%20Code%20of%20Ethics%20and%20Conduct.pdf>.

⁷⁵ *Obeid v R* [2017] NSWCCA 221, [78] (Bathurst CJ).

⁷⁶ *Obeid v R* [2017] NSWCCA 221, [269] (Bathurst CJ).

the Member's job, and therefore his or her salary, allowances and superannuation,⁷⁷ is conditional upon success at the election, which is primarily dependent upon the success of a political party in attracting public support. Further, if the political party is so successful that its members can form a government after the election, then the financial circumstances of the Member of Parliament may be significantly improved as it opens up the possibility of becoming a Minister or Premier. The difference between the salary of a backbencher in Opposition and a Government Minister is significant.⁷⁸ The success of a political party at an election has the potential to double a Member's remuneration if it means he or she becomes a Minister, or wipe it out altogether if the Member loses his or her seat.

Hence, acting in a manner that favours the interests of a political party advances the personal financial interests of a Member of Parliament, including a Minister. While this may be an indirect interest, so too is holding a beneficial interest in a family trust which has an agreement with the public service.⁷⁹ The same principle of avoiding a conflict between a Member's private financial interests and his or her public duty may be activated. Hence, there is an argument that exercising an official power to engage in pork-barrelling for the purpose of achieving electoral success for a political party involves acting in a Minister's private financial interests. For there to be a finding of corrupt conduct or for there to be misconduct in public office, all the other factors discussed above would still have to be satisfied.

Can the interests of a political party be treated as those of any 'other person'?

Where a code of conduct or a law prohibits a Member from acting in the private interest of any 'other person', does that include acting in the interests of a political party? From a legal point of view, most political parties (including all the major political parties) are unincorporated associations and therefore not legal persons.⁸⁰ But as s 11 of the NSW Ministerial Code defines 'person' as including an unincorporated association, it would extend to the inclusion of a political party.

Section 6 of the NSW Ministerial Code of Conduct provides that a Minister 'must not act improperly for their private benefit or for the private benefit of any other person.' 'Private benefit' is defined in s 11 to exclude a benefit that 'comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing'. This appears to be directed specifically at 'pork-barrelling' and excluding it from the reference to private benefit in s 6. There may be a difference, however, between actions that involve a mere 'hope or expectation' of enhanced political standing, and more closely directed pork-barrelling, such as that which directly benefits party donors. Further, the requirement in s 6 to act only in what the Minister considers to be in the public interest would still stand.

⁷⁷ Note also that there may be benefits that attach to the longevity of a Member's or Minister's service in Parliament, which can also amount to a significant private benefit. See *Cunningham v The Commonwealth* (2016) 259 CLR 536.

⁷⁸ As at July 2021 the total remuneration of the NSW Premier (including allowances other than electoral allowances) was \$407,980, of a non-senior Minister was \$309,621 and of an ordinary backbencher was \$169,192.

⁷⁹ As noted above, the High Court treated such an interest as being one that gives rise to disqualification under s 44 of the Commonwealth Constitution: *Re Day [No 2]* (2017) 263 CLR 201.

⁸⁰ See *Cameron v Hogan* (1934) 51 CLR 358; and *Camenzuli v Morrison* [2022] NSWCA 51. See further: Graeme Orr, *The Law of Politics – Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 118-122.

Other provisions of the Ministerial Code may also apply, as would a breach of the criminal law, and in some cases a breach of non-criminal law. The mere fact that such conduct is excluded from breaching a provision in a Code of Conduct does not mean it is also excluded from amounting to a breach of the criminal law.⁸¹

When does favouring political party interests amount to misconduct in public office?

In practice, the offence of misconduct in public office has most commonly been prosecuted where the public office holder acted for personal gain, or to benefit a friend or family member. This is the case in Canada, where Premiers have been prosecuted for taking actions that influenced the approval of a casino proposal⁸² or promoted a financial interest in the sale of a property.⁸³ The Canadian Supreme Court has accepted, however, that while ‘receipt of a significant personal benefit may provide evidence that the accused acted in his or her own interest rather than that of the public’, ‘the offence may be made out where no personal benefit is involved’.⁸⁴

The most pertinent discussion of how taking actions for a party-political benefit may amount to misconduct is to be found in the British case of *Porter v Magill*. In this case, the leaders of the Conservative Party on the Westminster City Council, Dame Shirley Porter and Mr David Weeks, established a ‘Building Stable Communities’ policy which involved selling council social housing properties in eight marginal council wards, to increase the Conservative Party vote in those wards at the next election. They believed that home-owners, rather than social housing tenants, were more likely to vote for Conservative Party candidates and they sought to ‘push Labour voters out of marginal wards’.⁸⁵ To this end, they offered grants of £15,000 to tenants to move out of social housing properties, which they then renovated and sold at a discount. It became known as the ‘homes for votes’ scandal. The auditor of the Council’s accounts found that Porter and Weeks had engaged in ‘wilful misconduct’ and were obliged, under statute,⁸⁶ to compensate the Council for the £31.6 million resulting financial loss.⁸⁷

Lord Bingham of Cornhill, with whom the rest of the House of Lords agreed, set out a number of basic underlying principles. They were:⁸⁸

1. Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise.
2. Such powers are exercised by or on the delegation of councillors. It is misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred.

⁸¹ *Obeid v R* [2017] NSWCCA 221, [144] (Bathurst CJ), drawing upon the preambular statements in the Legislative Council’s Code of Conduct.

⁸² *R v Pilarinos and Clark* [2002] BCSC 452; 219 DLR (4th) 165 – the former Premier was acquitted.

⁸³ *R v Vander Zalm* [1992] BCJ No 1390 – the former Premier was also acquitted. He was found to have acted in a manner that was ‘foolish, ill-advised and in apparent or real conflict of interest or breach of ethics’, but there was insufficient evidence to establish guilt beyond a reasonable doubt.

⁸⁴ *R v Boulanger* [2006] 2 SCR 49, [57].

⁸⁵ *Porter v Magill* (2002) 2 AC 357, [7] (Lord Bingham).

⁸⁶ *Local Government Finance Act 1982* (UK), s 20.

⁸⁷ The amount owed increased to £42 million once interest and costs were included. Porter settled for the repayment of £12.3 million. The Council concluded that the costs of litigation to reclaim the rest of the amount owed would be disproportionate to any amount it was likely to receive. Weeks, who unlike Porter had not inherited a significant fortune, settled for £44,000.

⁸⁸ *Porter v Magill* (2002) 2 AC 357, 463-465 [19] (Lord Bingham).

3. If the councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct.
4. If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council.⁸⁹
5. Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party.

The fifth point was contested by Porter and Weeks who stressed the realities of party politics. They argued that councillors who are elected as members of a political party cannot be expected to ignore party political advantage when making decisions. They contended that as ‘long as they had reasons for taking action other than purely partisan political reasons their conduct could not be impugned’.⁹⁰ They relied upon having ‘mixed motives’. In the Court of Appeal, Schiemann LJ had recognised that actions may be taken for mixed motives, particularly when they are group decisions. He observed that:

It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved.⁹¹

The distinction to which Schiemann LJ appears to be alluding is between policies which a party pursues in the belief that the policies are in the public interest, and actions taken to buy votes in order to win an election so that its policies might be pursued. A policy that is, in the view of a party, in the public interest may also be popular and win the party votes. But that is a different matter from actions taken, not in the public interest, but simply for the purpose of winning votes in an election by handing out prizes, such as giving grants, building facilities or selling off housing at a discount in an electorate, where there is no genuine public interest assessment.

On appeal, Lord Bingham, after considering the various authorities on the role of political purposes, observed:

Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of

⁸⁹ In this case the rule was given effect by a statutory provision, s 20 of the *Local Government Finance Act 1982* (UK), but Lord Bingham noted at [19] (p 464) that it is not a new rule, and that it had been recognised both by prior statutes and the common law.

⁹⁰ *Porter v Magill* (2002) 2 AC 357, 465 [19] (Lord Bingham).

⁹¹ *Porter v Magill* [2002] 2 AC 357, 391 (Schiemann LJ).

the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council.⁹²

Lord Bingham therefore focused more narrowly on the particular public purpose for which the power was conferred. As this was a statutory power to sell property, consideration had to be given to the intended public purpose of the exercise of the power. That would not include a purpose of altering the political make-up of the electorate by moving out social housing tenants and moving in affluent home-owners in order to ensure that marginal electorates become safe electorates at the next election. Hence, the action taken by the Council was not for a ‘public purpose’ in pursuit of a policy and nor was it for a purpose permitted by the conferral of the power.

Lord Scott added the observation that ‘there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage’.⁹³

Lord Bingham noted that there was nothing in the prior authorities ‘to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage’.⁹⁴ He recognised ‘the unpalatable truth that this was a deliberate, blatant and dishonest misuse of public power... not for the purpose of financial gain but for that of electoral advantage’. He added that in ‘that sense it was corrupt’ and he thought that the auditor was ‘right to stigmatise it as disgraceful’.⁹⁵

Since then, this decision has been applied in relation to decisions taken for the purposes of electoral advantage rather than the proper purpose of the power. In a case concerning whether a decision to pull a controversial advertisement from public transport in London was taken to gain a political advantage during a mayoral election, the Court of Appeal accepted that:

It is common ground that a public body cannot exercise a statutory power for an improper purpose... It is not disputed... that, if the decision to disallow the advertisement had been taken for the purpose of advancing the Mayor’s election campaign and not for the purpose of fulfilling the objects of the [Greater London Authority Act 1999] and implementing the Policy, it would have been an unlawful decision.⁹⁶

The role of politics in official decision-making has also been raised in Australia in the *Obeid* and *Greiner* cases. In *Obeid v R*, Mr Obeid contended that the duty imposed upon Members of Parliament to act *only* according to what they believe to be in the public interest, was too broad and would catch examples of common conduct, such as acting in support of party policy regardless of whether the Member believed it to be in the public interest, and ‘engaging in

⁹² *Porter v Magill* (2002) 2 AC 357, 466 [21] (Lord Bingham).

⁹³ *Porter v Magill* (2002) 2 AC 357, 506 [144] (Lord Scott).

⁹⁴ *Porter v Magill* (2002) 2 AC 357, 467 [22] (Lord Bingham).

⁹⁵ *Porter v Magill* (2002) 2 AC 357, 478, [48] (Lord Bingham).

⁹⁶ *R (on the application of Core Issues Trust Ltd) v Transport for London* [2014] EWCA Civ 34, [34]. See further, on the findings of fact, *R (on the application of Core Issues Trust Ltd) v Transport for London, The Mayor of London* [2014] EWHC 2628 (Admin).

fundraising activities'.⁹⁷ He also contended that it would catch action that a Member believed was in the public interest where the Member was also motivated by a personal, but benign, motive.⁹⁸ Bathurst CJ noted that these examples were 'far removed from the present case'⁹⁹ and considered that he did not need to address whether acting in a political party's interests, rather than the public interest, could constitute misconduct in public office. But in distinguishing these examples raised by Mr Obeid, Bathurst CJ noted that they involved 'conflicting public duties which do not lead to criminal sanctions' and that even if it could be shown that a public official acted contrary to the public interest, the elements of wilfulness and seriousness of the conduct would still have to be made out.¹⁰⁰

In the *Greiner* case, the challenged finding of corrupt conduct against Greiner related to actions which the ICAC Commissioner found had mixed motives, including personal benefit and political benefit. The ICAC Commissioner explained:

A member of Parliament was given a job for extraneous reasons. One of them was Metherell's friendship with Moore. Another was political advantage. It accrued to the Liberal Party, but also to Greiner and Moore, whose prospects of remaining in Government were enhanced by the deal. Ministers are better off than ordinary members of Parliament, not just in material terms although that is true, but also because they have greater opportunities to exercise power and discharge functions. Except when something goes wrong it is more satisfying being a Minister than not. Greiner and Moore were entrusted by the public with powers which were to be used impartially. But that did not happen.¹⁰¹

The Commissioner later concluded with respect to the Premier that:

Greiner sanctioned the appointment of a man who had become a political opponent, without interview. He did that with a view to a change in the composition of the Legislative Assembly which would favour the Government, Greiner's party and Greiner personally.¹⁰²

The NSW Court of Appeal accepted that s 8 of the *ICAC Act* had been breached. Gleeson CJ observed that for Mr Greiner and Mr Moore, 'there was a conflict between duty and interest'.¹⁰³ They were not able, in the political circumstances, to give proper consideration to Dr Metherell's comparative merit to fill the position. Section 26 of the *Public Sector Management Act* required that appointment to such positions be made upon merit. Gleeson CJ noted that the actions of Greiner and Moore, as Ministers, put the public servant in whom the power of appointment was vested, Mr Humphrey, 'in a position of extreme difficulty in fulfilling his responsibilities' and that at the very least this brought the case within s 8(1)(a).¹⁰⁴

⁹⁷ *Obeid v R* [2017] NSWCCA 221, [51] (Bathurst CJ).

⁹⁸ *Obeid v R* [2017] NSWCCA 221, [51] (Bathurst CJ). Note, that on the point of mixed motives, Bathurst CJ stated that the case had been run on the basis, favourable to Mr Obeid, that the jury had to be satisfied that his sole purpose was an improper purpose. His Honour therefore found at [96] that it was unnecessary to consider whether the offence would be made out if the improper purpose were the dominant or causative purpose, rather than the sole purpose.

⁹⁹ *Obeid v R* [2017] NSWCCA 221, [51] (Bathurst CJ).

¹⁰⁰ *Obeid v R* [2017] NSWCCA 221, [80] (Bathurst CJ).

¹⁰¹ See the extract at: *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 136-7.

¹⁰² See also the extract at: *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 139.

¹⁰³ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145 (Gleeson CJ).

¹⁰⁴ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 145 (Gleeson CJ).

Mahoney JA observed that where power derives from an office, including the office of a Minister, the power may only be exercised to achieve its proper public purpose. He added:

If a Minister or officer exercises a public power merely to, for example, comply with the wishes of a political party, an employer or a trade union official, that exercise of power, though apparently within the terms of the legislation or office, is wrong and may constitute a crime.¹⁰⁵

Mahoney JA noted the argument made on behalf of Greiner and Moore that there was no partiality because they acted for a political reason. It was argued that ‘it is acceptable to give preference in such a way if the reason why it is given is to achieve a political advantage such as, as in this case, to bring about an advantageous by-election or to repay a political debt’.¹⁰⁶ It was further argued that ‘public life involves the exercise of power so as to further political ends’ and that achieving those ends by an appointment of Dr Metherell to the public service was therefore not partial in the terms of the *ICAC Act*.¹⁰⁷

Mahoney JA rejected this reasoning. While he acknowledged that Parliament may enact legislation to achieve political ends and that political factors may sometimes fall within proper purposes in the exercise of executive power (eg where a decision-maker is obliged to take into account government policy), he stressed that the ends for which executive power may be exercised are ‘limited by the law’.¹⁰⁸ He considered that public power to appoint to a public office ‘must be exercised for a public purpose, not for a private or a political purpose’ and that a decision about where a public facility is to be built must be based upon what is the proper place for it, rather than where it is most likely to assist the re-election of a party member.¹⁰⁹ He also later noted that if an official is given power to allocate money to encourage cultural activities, and distributes it to ‘persons or bodies apt to support a particular political party – or to procure that they do so’, this too would involve the misuse of a public power.¹¹⁰

In the *Greiner* case, the appointment of Dr Metherell involved partiality because it was not done for a purpose permitted by the Act, which required appointment on the basis of merit, but for an extraneous political purpose. In contrast, taking political considerations into account in appointing the staff of Members of Parliament or ministerial advisers may be appropriate because there is no statutory limit on the purpose of the appointment. Mahoney JA, writing extra-judicially, summarised the position as follows:

There are cases in which it is lawful for an official to use the legal power vested in him to achieve a political (a party political) advantage, for himself or for his party or those associated with him. Thus, some employees or officers may be appointed by a Minister for political reasons. I mean by this that the official is not bound by statute law as to the purpose to be achieved by the appointment; he may take into account political matters in making the appointment.... [I]t is proper to recognise that in some cases the exercise of public power may legitimately have a political purpose or be influenced by

¹⁰⁵ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 161 (Mahoney JA).

¹⁰⁶ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 163 (Mahoney JA).

¹⁰⁷ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 163 (Mahoney JA).

¹⁰⁸ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 163-4 (Mahoney JA).

¹⁰⁹ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 164 (Mahoney JA).

¹¹⁰ Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17, 20.

pure politics. The present offence [i.e. misconduct in public office] does not, I think, apply in such a case.¹¹¹

Difficulties arise where there are mixed motives. It may be the case that a decision-maker acts in a partial manner in distributing grants but also acts for a permissible purpose in the public interest. The NSW Court of Criminal Appeal took the view that in such circumstances, a criminal offence is only made out if the power would not have been exercised but for the presence of the illegitimate purpose.¹¹²

A blind-eye has been turned by political parties to these issues when it comes to pork-barrelling. The aspirational view has instead been taken that public money can be used with impunity for a party in government to buy favour in the electorates it holds and in marginal electorates, without any consideration of the proper purposes for the use of public money, whether proposals meet the criteria of merit, need and capacity to complete, and whether they are in the public interest. Richard Denniss has argued that politicians want to be accused of engaging in pork-barrelling because this is how they show their electorate that they are valuable and have achieved things for it. He pointed to the absence of a deterrent, stating:

[T]here is no mention of corruption in our Constitution, no federal anti-corruption body to investigate it and literally no law to stop a minister from drawing up a spreadsheet of key marginal seats, thinking up a program to pour public funds into those seats and appearing with candidates wielding novelty cheques to promote their largesse with our money....

Under existing Australian law, and in the absence of shame, there are literally no costs to a minister or government that just hands over public money to projects in their marginal seats because it helps them and their party. None.¹¹³

But this does not appear to be the case. There are relevant laws, such as the criminal offence of misconduct in public office, and there is certainly the potential for prosecution to be considered when misconduct is wilful and serious.

Partiality and the making of government grants

In what circumstances might the exercise of powers to confer grants involve the ‘partial’ exercise of a Minister’s or public servant’s official functions, for the purposes of s 8(1)(b)? In the *Greiner* case, Mahoney JA gave a detailed analysis of the meaning of partiality for the purposes of s 8(1)(b), breaking it down to its elements.

First, he considered that it arose in a context where there were competing claims, such as two or more applicants applying for government grants.¹¹⁴ Second, a preference or advantage is given to one of them, which has not been given to another. The advantage might lie in the award of a grant to one applicant over another, or it might lie merely in giving an applicant an advantage in the process, such as waiving an eligibility requirement or admitting a late

¹¹¹ Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17, 25.

¹¹² *Maitland v R; Macdonald v R* (2019) 99 NSWLR 376, [84].

¹¹³ Richard Denniss, ‘Roll out the pork barrels’, *The Monthly*, 1 September 2021, <https://australiainstitute.org.au/post/roll-out-the-pork-barrels/>.

¹¹⁴ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 161 (Mahoney JA).

application when others were not admitted. Third, the advantage must be given in circumstances where there was a duty, or at least an expectation, that applicants would be treated equally. ‘Ordinarily, there will be no partiality if there be no duty to be impartial’.¹¹⁵ Fourth, the applicant was advantaged for an unacceptable reason. ‘Preference is not, as such, partiality’.¹¹⁶ An applicant may be preferred for valid reasons which the rules of the contest allow. Partiality involves giving a preference or advantage for an improper reason that is outside the rules. Fifth, the official giving the preference or advantage must be conscious of the fact that it was done for an unacceptable reason.¹¹⁷ Indications of recognition of wrongdoing may include concealing the evidence, such as by shredding documents, or failing to keep records setting out reasons or refusing to produce (or disclaiming knowledge of) spreadsheets which show that the electorate where the grant applicant was based was a factor influencing the outcome.

On this basis, if a grant scheme were established with grants to be determined on a merit basis, with rules published setting out the eligibility conditions, the criteria for merit-ranking and a closing date, and if a public official, such as a Minister, instead awarded grants to applicants because of matters outside the merit criteria, such as their location in a particular parliamentary seat, or required certain late applications to be accepted or ineligible applications to be assessed and approved for political reasons, or if the decision-maker rejected the ranking of projects based upon merit and substituted rankings based upon party-political considerations, then that would constitute partial conduct as it would involve giving a preference or advantage for an improper purpose when there is a duty to act in the public interest. It would therefore be likely to satisfy s 8(1)(b) of the *ICAC Act*, as a ‘dishonest or partial exercise of any of his or her functions’ and possibly s 8(1)(c), because exercising an official power for an improper purpose amounts to a breach of public trust.

In addition, if the power to allocate grants was vested in another public official, such as a public servant, and the Minister acted to influence that public servant, affecting the impartial exercise of an official function by advising or instructing that lowly ranked applications be awarded grants over applications of higher merit so as to achieve a political benefit, then s 8(1)(a) may also be satisfied. If a Minister has no formal power to make a decision, as the power is conferred upon a statutory authority or an official or even another Minister, but the first Minister either directly, or through his or her office, seeks to influence the decision-maker to make a decision that is partial, then that too could amount to misconduct in public office. As Brennan J noted in *Herscu v The Queen*, corruption may occur when the holder of a public office uses ‘the influence of his office to secure an object’ that is within the legal power of others.¹¹⁸

But before a finding of ‘corrupt conduct’ can be made under the *ICAC Act*, the terms of s 9 must also be met. This could be satisfied by a finding that the conduct ‘could constitute or involve’ a criminal offence, under s 9(1)(a), such as the offence of misconduct in public office. As noted above, this would require particular consideration of whether the public official has wilfully misconducted himself or herself, without reasonable excuse or justification, where such misconduct is serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which

¹¹⁵ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 162 (Mahoney JA).

¹¹⁶ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 162 (Mahoney JA).

¹¹⁷ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 162 (Mahoney JA).

¹¹⁸ *Herscu v The Queen* (1991) 173 CLR 276, 287 (Brennan J). See also Mason CJ, Dawson, Toohey and Gaudron JJ at 283.

they serve and the nature and extent of the departure from those objects. This constitutes a higher hurdle than satisfaction of the terms of s 8.

Alternatively, the conduct would also satisfy the terms of s 9 if it could constitute or involve a substantial breach of the Ministerial Code of Conduct. This might be enlivened, for example, if the Minister knowingly breached the law or knowingly directed, pressured or requested a public servant or agency to breach the law. This gives rise to questions concerning the establishment of intent and knowledge as well as an assessment of what amounts to a ‘substantial’ breach. Further, the ICAC can only make a finding of corrupt conduct if it is ‘serious corrupt conduct’.¹¹⁹

Some might argue that pork-barrelling is increasingly common and as it has not so far resulted in prosecution for misconduct in public office or a finding of corrupt conduct by the Independent Commission Against Corruption, this is a strong indication that it is not regarded as unlawful or corrupt. They might argue that it is simply part of ‘politics as usual’, and while it might be frowned upon, it is a perfectly legitimate exercise of power. However, as the discussion of the cases above has shown, such an argument is unlikely to withstand scrutiny. There would certainly be circumstances in which a form of pork-barrelling could constitute misconduct in public office or otherwise satisfy the requirements of ss 8 and 9. The mere fact that it has not yet been tackled at this level, does not mean that it will not be dealt with in this manner in the future.

Priestley JA noted in the *Greiner* case:

The law has always set high standards for official conduct. The fact that departures from the standards may have been unhappily frequent, difficult to detect and more difficult to prove, has not meant that the standards are low, but that they have been difficult to enforce. It was to deal with this situation that the Act was designed and the [ICAC] was given its formidable powers of investigation.¹²⁰

PART III – PORK-BARRELLING AND THE NEED FOR REFORM

One of the ICAC’s significant roles is to act to pre-empt corruption, by educating and seeking to implement measures to prevent corruption occurring. Section 13(1)(f) describes one of the ICAC’s principal functions as:

to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions that the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct and to promote the integrity and good repute of public administration.

This Part addresses recent allegations of pork-barrelling at the Commonwealth and State levels, the existing legal mechanisms that are intended to protect the public interest and restrain or prevent the misuse of public money in this way, and what reforms could be made to improve these legal mechanisms, which the ICAC could recommend in fulfilment of its function under s 13(1)(f) of its Act.

¹¹⁹ *Independent Commission Against Corruption Act 1988* (NSW), s 74BA(1).

¹²⁰ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, 180 (Priestley JA).

Allegations of pork-barrelling at the Commonwealth level

Cases of pork-barrelling have occurred under both sides of politics and over a long time. They are most notable in the field of grants to community organisations under programs concerning sport and cultural activities, regional programs and under the meaningless but all-encompassing description of ‘building stronger communities’.¹²¹ Much of the spending is unlawful, as it falls outside the Commonwealth’s constitutional powers.¹²² It is also commonly an inefficient and ineffective use of public money, as it is distributed for the purposes of gaining political favour rather than dealing with genuine needs. The amounts involved are large, running annually to billions of dollars.¹²³

The exposure and criticism of that conduct, particularly in reports by the Auditor-General and parliamentary inquiries, occurs at regular intervals, but lessons are not learned as the same conduct keeps being repeated, despite its condemnation.

Amongst the more memorable examples at the federal level was Minister Ros Kelly’s use of a whiteboard to determine the distribution of sports grants under the Hawke Labor Government in 1993,¹²⁴ leaving no record of the decision-making process, and the Howard Coalition Government’s distribution of grants under the Regional Partnership Program between 2003 and 2007.¹²⁵ Both were severely criticised by the Australian National Audit Office (‘ANAO’).

In relation to the sports grants, which became known as the first ‘sports-rorts affair’, the ANAO noted that while the Department administered the program, the assessment and selection of projects to be funded was made personally by the Minister.¹²⁶ No records were maintained to preserve the reasons for each decision. The distribution of the grants favoured Labor seats over Coalition seats, and gave grants of higher value to marginal seats. The ANAO conceded that it could not demonstrate political bias, as the money might have gone to fund areas where there was the greatest need for facilities. The lack of documentation also meant that the ANAO could not assess whether the approved grants were those most likely to achieve the program aims, or the community’s highest needs, or that the program was providing value for money.¹²⁷

¹²¹ See, eg, the ‘Strengthening Communities’ program and the ‘Stronger Communities’ program, *Financial Framework (Supplementary Power) Regulation 1997*, schedule 1AB, part 4, item 46 and item 91.

¹²² See further: Anne Twomey, ‘Constitutional Risk’, *Disrespect for the Rule of Law and Democratic Decay* (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 293, 297-306.

¹²³ The Senate Standing Committee for the Scrutiny of Delegated Legislation keeps a tally of some of these programs:

[https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure#:~:text=The%20Financial%20Framework%20\(Supplementary%20Powers,instruments%20made%20under%20those%20Acts](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Scrutiny_of_Commonwealth_expenditure#:~:text=The%20Financial%20Framework%20(Supplementary%20Powers,instruments%20made%20under%20those%20Acts).

¹²⁴ ANAO, *Efficiency Audit of the Community, Cultural, Recreational and Sporting Facilities Program*, (Audit Report No 9, 1993-4). See further: Clive Gaunt, ‘Sports Grants and the Political Pork Barrel: An Investigation of Political Bias in the Administration of Australian Sports Grants’ (1999) 34(1) *Australian Journal of Political Science* 63; and David Denmark, ‘Partisan Pork Barrel in Parliamentary Systems: Australian Constituency-Level Grants’ (2000) 62(3) *The Journal of Politics* 896.

¹²⁵ ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1).

¹²⁶ ANAO, *Efficiency Audit of the Community, Cultural, Recreational and Sporting Facilities Program*, (Audit Report No 9, 1993-4) 9.

¹²⁷ ANAO, *Efficiency Audit of the Community, Cultural, Recreational and Sporting Facilities Program*, (Audit Report No 9, 1993-4) 17; and House of Representatives Standing Committee on Environment, Recreation and the Arts, ‘The Community Cultural, Recreational and Sporting Facilities Program’, February 1994, p 16, quoting from evidence from the Auditor-General.

In short, the lack of documentation destroyed accountability and had the potential to hide improper behaviour.

A parliamentary committee, with a government majority, in its inquiry into the matter concluded:

The Auditor-General did not allege ministerial fraud or misappropriation, however, the Minister's failure to document her administration left open the question of whether her management was competent and her decisions fair...

Proper administrative procedures, particularly in relation to documentation, are a prerequisite for proper accountability. They are also essential for the administration and evaluation of the program....

The Auditor-General suggested that, at a minimum:

- administrative decisions should be fair and open;
- decisions should be based on principle and supported by documented reasons; and
- those involved in the decision making should be accountable for their decisions.

It is clear from the evidence that, in relation to supporting decisions with documented reasons, the Minister's management of the program was deficient.¹²⁸

Minister Kelly resigned shortly after the parliamentary committee's report was released.

In the case of the Regional Partnership Program under the Howard Government, the ANAO described the expected standard of ministerial decision-making as follows:

Ministers are expected to discharge their responsibilities in accordance with wide considerations of public interest and without regard to considerations of a party political nature. Where they are approving the making of a grant, Ministers are approving the expenditure of public money. This role brings with it particular accountability obligations, including statutory requirements which govern the circumstances in which Ministers may provide such approvals. In particular, the financial framework requires that a grant not be approved by Ministers unless reasonable inquiries have been undertaken that demonstrate that the proposed expenditure will make efficient and effective use of public money.¹²⁹

The ANAO noted that guidelines for the Regional Partnership Programme were published, setting out the basis upon which applications would be assessed and funding decisions made. It observed that applicants could have reasonably expected that decisions would be made on that basis. But in fact, 'departures from the published guidelines were a feature of the Programme'. This included instances of funding being approved before an application was made, funding decisions not being informed by assessment about the published guidelines and

¹²⁸ House of Representatives Standing Committee on Environment, Recreation and the Arts, 'The Community Cultural, Recreational and Sporting Facilities Program', February 1994, p 36.

¹²⁹ ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1) [29].

criteria and projects being approved even though criteria had not been met.¹³⁰ In addition, the ANAO's 'analysis revealed that Ministers were more likely to approve funding for "not recommended" projects that had been submitted by applicants in electorates held by the Liberal and National parties and more likely to not approve funding for "recommended" projects that had been submitted by applicants in electorates held by the Labor party'.¹³¹

The ANAO noted that resulting perceptions that funding decisions were not merit-based were elevated by the fact that the basis for ministerial decisions was not recorded.¹³² The ANAO found that departure from the guidelines and the proper decision-making process led to funding for projects that did not proceed as planned or did not result in the anticipated community benefits.¹³³

Since these criticisms were made the degree and brazenness of such conduct has only increased.¹³⁴ The ANAO has produced critical performance audits of programs including the Community Sport Infrastructure Program,¹³⁵ the Urban Congestion Fund with respect to commuter car parks¹³⁶ and the Safer Communities Fund.¹³⁷ For example, in relation to the Community Sport Infrastructure Program, the ANAO found that while the Australian Sports Commission had assessed the grant projects on the basis of merit, the office of the Minister for Sport had run a parallel process which was based on factors other than those identified in the Program Guidelines, 'such as project locations including Coalition "marginal" electorates and "targeted" electorates'.¹³⁸

The ANAO added that there was 'evidence of distribution bias in the award of grant funding'. It concluded:

The award of funding reflected the approach documented by the Minister's Office of focusing on "marginal" electorates held by the Coalition as well as those electorates held by other parties or independent members that were to be "targeted" by the Coalition at the 2019 Election. Applications from projects located in those electorates were more successful in being awarded funding than if funding was allocated on the basis of merit assessed against the published program guidelines.¹³⁹

¹³⁰ ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1) [33].

¹³¹ ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1) [40].

¹³² ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1) [34].

¹³³ ANAO, *Performance Audit of the Regional Partnerships Programme*, (ANAO, Audit Report No 14, 2007-8, Vol 1) [34].

¹³⁴ See, eg: Hannah Melville-Rea, Robyn Seth-Purdie and Bill Browne, 'Grants with ministerial discretion – Distribution analysis', *The Australia Institute*, November 2021: <https://australiainstitute.org.au/wp-content/uploads/2021/11/P1111-Grants-with-Ministerial-Discretion-Web.pdf>.

¹³⁵ ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20).

¹³⁶ ANAO, *Administration of Commuter Car Park Projects within the Urban Congestion Fund* (ANAO Audit Report No 47, 2020-21).

¹³⁷ ANAO, *Award of Funding under the Safer Communities Fund* (ANAO Audit Report No 16, 2021-22).

¹³⁸ ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20) [18]. Breaches of the guidelines included the funding of projects which had already commenced works, and in some cases completed the works, and the funding or alteration of applications made after the submission deadline.

¹³⁹ ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20) [24].

It also concluded that there was no evident legal authority for the Minister to be the decision-maker in making the grants.¹⁴⁰

Financial accountability mechanisms at the Commonwealth level

Overall, the Commonwealth has superior legal mechanisms in place to ensure financial accountability and probity with respect to grants, than New South Wales.

Legal regulation of Commonwealth grant-making

First, as a consequence of the High Court’s judgment in *Williams v Commonwealth*,¹⁴¹ the Commonwealth must legislate to authorise the expenditure of money on grants. This means that in addition to the appropriation, there is a legislative authorisation for the expenditure of public funds on grants, which must fall within a head of constitutional power. The purpose of the grant scheme can therefore be identified with greater clarity through statutory interpretation of the authorising provision.

Second, s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) (the ‘PGPA Act’) provides:

- (1) A Minister must not approve a proposed expenditure of relevant money unless the Minister is satisfied, after making reasonable inquiries, that the expenditure would be a proper use of relevant money.
- (2) If a Minister approves a proposed expenditure of relevant money, the Minister must:
 - (a) record the terms of the approval in writing as soon as practicable after giving the approval; and
 - (b) comply with any other requirements prescribed by the rules in relation to approvals of proposed expenditure.

‘Proper’ is defined in s 8 as meaning ‘efficient, effective, economical and ethical’ and ‘relevant money’ is money held by the Commonwealth or a corporate Commonwealth entity.

The consequence of this provision is that Ministers are under a legal obligation not to approve grants unless satisfied, after making reasonable inquiries, that the expenditure is an efficient, effective, economical and ethical use of the money. To be ‘satisfied’, a Minister must ‘in fact form a state of mind that can be described as one of satisfaction’ and must ‘form the requisite state of mind reasonably and on a correct understanding of the Act’.¹⁴² Further, as Gageler J has noted:

¹⁴⁰ ANAO, *Award of Funding under the Community Sport Infrastructure Program* (ANAO Audit Report No 23, 2019-20) [10], [13] and [2.19]. For a more detailed analysis of the problems with the decision-making process under this program, see: Anne Twomey, “Constitutional Risk”, *Disrespect for the Rule of Law and Democratic Decay* (2021) 7(1) *Canadian Journal of Comparative and Contemporary Law* 293.

¹⁴¹ *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

¹⁴² *Palmer v Western Australia* [2021] HCA 5, [158] (Gageler J).

To fulfil the condition of reasonableness, the state of mind formed by the Minister must be one that is open to be formed by a reasonable person in the position of the Minister on the basis of the information available to the Minister and must be one that is in fact formed by the Minister through an intelligible process of reasoning on the basis of that available information.¹⁴³

This places a significant burden on the Minister, which can be tested at law. While there are no sanctions in the *PGPA Act* for breaching this provision,¹⁴⁴ any breach would be a breach of the law for the purposes of the Statement of Ministerial Standards and would be relevant to any challenge under administrative law.

Third, the *Commonwealth Grants Rules and Guidelines 2017* (the ‘CGRGs’) were given effect as a statutory instrument under s 105C(1) of the *PGPA Act*. This means that they have the force of law. They are comprised of two parts – mandatory requirements in Part 1 and guidance on key principles in Part 2. Within the mandatory requirements in Part 1 are rules applying to Ministers and public servants in their administration of grants.

Paragraph 3.3 requires Ministers to comply with relevant legislative requirements in the *PGPA Act* and with the CGRGs, while officials are required to advise Ministers about these obligations. Paragraph 3.11 repeats the *PGPA Act* requirement that Ministers must not approve expenditure unless satisfied, after reasonable inquiries, that the expenditure would be ‘proper’, but adds that the ‘terms of the approval *must* be recorded in writing as soon as practicable after the approval is given’. Paragraph 4.4 requires officials to develop grant guidelines for all new grants and paragraph 4.6 requires them to advise Ministers about the selection criteria and process and the merits of the grants relative to the guidelines and the need to achieve value for money.

Paragraph 4.10 states that a Minister must not approve a grant without first receiving written advice from officials on its merits. The Minister must record, in writing, ‘the basis for the approval relative to the grant opportunity guidelines and the key principle of achieving value with relevant money’. The same obligation applies to any official who approves a grant. Where a Minister approves grants within his or her own electorate, paragraph 4.11 requires the Minister to write to the Finance Minister advising of the details.

Paragraph 4.12 provides that while Ministers may approve grants that are not recommended by relevant officials, they must report annually to the Finance Minister by 31 March about all instances where they have approved a grant which the officials recommended be rejected. The report must contain a brief statement of reasons for the approval of each grant.

These provisions are aimed at ensuring that there is documentation, transparency and the provision of reasoning to support grant decisions, particularly when the Minister acts contrary to the recommendations of officials.

Flawed processes regarding election promises

While these legal requirements are all appropriate, clear and laudable, there are loopholes which permit their avoidance. A large loophole concerns ‘election promises’. Prior to

¹⁴³ *Palmer v Western Australia* [2021] HCA 5, [158] (Gageler J).

¹⁴⁴ Compare the liability of Ministers and officials to repay money lost under ss 67-69, including as a result of misconduct.

elections and by-elections, promises are frequently made to fund infrastructure or make grants within electorates without any assessment having been made about the value of the project, its feasibility and the capacity of the recipient to deliver the project and make best use of it. There are no guidelines, eligibility criteria, applications or assessments of merit before commitments are made to provide the funding. The consequence is that the resulting infrastructure and grants lead to poor outcomes which do not provide value for the community and that more needy areas miss out.

Politicians could, of course, recognize a public interest in spending on a particular subject, announce an election policy to expend \$X on that subject and state that the money will be spent on a fair basis according to merit and need, once applications have been made and assessments completed after the election. This would allow them to be elected on the basis of policies, rather than electoral bribes. However, many politicians appear to prefer to be seen to be handing out gifts to their electorate, even if it is unfair, inefficient, ineffective and a misuse of public funds for party gain. They justify this to themselves as being an aspect of ‘democracy’, but this degrades the meaning of the term.

The *PGPA Act* and the CGRGs do not include any exemptions for election promises. Ministers are still obliged not to approve a grant unless it is a ‘proper’ (i.e. an efficient, effective, economical and ethical) use of public money. But in practice, blind eyes are turned to such matters where an election commitment has already been given. The CGRGs recognise a species of ‘ad hoc grants’, which are described as ‘one-off or ad hoc grants’ that do not have planned selection processes, but are ‘designed to meet a specific need, often due to urgency or other circumstances’. It is into this category that election promises are commonly shoe-horned.

For example, on 30 March 2019, the Female Facilities and Water Safety Stream program (‘FFWSS’) was announced, allocating \$150 million over four years, of which \$20 million was budgeted to be spent in 2019-20.¹⁴⁵ Parliament was dissolved shortly afterwards on 11 April 2019. During the ensuing election campaign, 41 promises were made by the Coalition Government for funding under the program, almost exhausting the entire four year allocation, despite there being no guidelines, no eligibility criteria, no merit selection and not even any applications for the grants. Eighty per cent of the funding was allocated to the construction or renovation of swimming pools, all in seats held by the Coalition Government at the time,¹⁴⁶ with only twenty per cent of the fund being allocated to female change rooms. Many bodies awarded funding did not know about it until they read the publicity, and problems arose when the relevant land was not available for use for a pool¹⁴⁷ or the relevant body was not in a position to fund its ongoing maintenance.¹⁴⁸

Guidelines were only issued for the FFWSS program after the award of the grants was confirmed. These Guidelines were addressed to the delivery of the grants, rather than eligibility and merit selection.¹⁴⁹ The role of public servants was limited to confirming with Ministers’

¹⁴⁵ Commonwealth, Budget Paper No 2, 2019-20, pp 92-3.

¹⁴⁶ One marginal Coalition seat was lost at the election. The rest were retained.

¹⁴⁷ Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 27 August 2020, p 17.

¹⁴⁸ Jack Snape and Andrew Probyn, ‘Government’s \$150 million female sports program funnelled into swimming pools for marginal Coalition seats’, *ABC News*, 7 February 2020: <https://www.abc.net.au/news/2020-02-07/government-cash-splash-swimming-pools/11924850>.

¹⁴⁹ Letter by Senator Richard Colbeck to Senator Scott Ryan, President of the Senate, 24 February 2020, in response to an order for the production of documents.

offices the identity of the recipients of the grants and then overseeing delivery.¹⁵⁰ The Guidelines addressed the selection process by simply stating ‘You are not eligible to apply if you have not been identified by the Australian Government to receive funding under this grant opportunity’ and that general applications will not be accepted.¹⁵¹ The Department took the view that the design and selection process had been overtaken by the making of election promises, and that they should be treated differently as ad hoc grants.¹⁵²

According to para 9.3 of the CGRGs, at a ‘minimum, guidelines for one-off or ad hoc grant opportunities should include the purpose or description of the grant, the objectives, the selection process, and reporting and acquittal requirements and the proposed evaluation mechanisms’. In the case of the FFWSS program, there was no selection process other than the making of election promises and the objective appeared to be a partisan one of winning the election.

While the CGRGs do not expressly permit such deviations from the basic grant requirements, they have been interpreted, as a matter of convenience, as so doing when it comes to election promises. The result is poorly planned infrastructure, grant outcomes which do not adequately serve the public interest, and the misuse of public money for political party purposes.

The use of ‘Cabinet confidentiality’ to defeat transparency

In the case of the ‘Building Better Regions Fund’,¹⁵³ a ministerial panel was established to determine funding approvals. It was then claimed that Cabinet confidentiality applied in relation to the decisions of this body, so that any reasons for its allocation of funding were redacted from documents before they were publicly released, removing any transparency or accountability. In relation to Round 3 of the program we know that of the 330 projects approved, 112 were chosen by the ministerial panel against the merit-based recommendations of the Department. The list of these projects, their location and the reasons for overturning the merit-based recommendations of the Department were all redacted from the relevant letter to the Finance Minister.¹⁵⁴ The same redactions occurred in relation to Round 4 of the program, where 49 of the 163 projects were approved despite not being recommended for funding by the Department.¹⁵⁵

Failure to produce genuine reasons for overriding merit recommendations

Further, where requirements are imposed, they are often ignored or compliance is perfunctory in nature. There is no adequate oversight of ministerial actions (except when Performance

¹⁵⁰ See the heavily redacted email, 3 October 2019, produced on 24 February 2020 in response to an order by the Senate for the production of documents, p 171.

¹⁵¹ Female Facilities and Water Safety Stream Program Grant Opportunity Guidelines, 28 February 2020, [2].

¹⁵² Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 27 August 2020, pp 7-8.

¹⁵³ Note that this program is currently the subject of an ANAO performance audit, which is due to report in June 2022. Allegations have been made of pork-barrelling under this program, but have not been formally established. See: Katina Curtis and Shane Wright, ‘Tapping the pork barrel: How the government grants data was compiled’, *The Age*, 15 December 2021; Andrew Tillet, ‘Pork-barrelling in Coalition seats “worrying”’: study’, *Australian Financial Review*, 29 November 2021; and Vince O’Grady, ‘How an Empowering Idea for the Regions Turned into Pork Barrelling Rort for Political Gain’: <https://www.thevogfiles.com/building-better-regions-fund-analysis.html>.

¹⁵⁴ Letter by Michael McCormack MP to the Finance Minister, 3 April 2019.

¹⁵⁵ Letter by Michael McCormack MP to the Finance Minister, 16 August 2020.

Audits are undertaken by the ANAO), there is no scrutiny of poor and inadequate reasons and there are no penalties for breaches.

For example, the brief to the Minister for Sport in relation to funding under the Community Sport Infrastructure Program stated that the Minister must ‘provide reasons for rejecting or changing the recommended grant applicants’. The brief was returned with ‘agreed’ marked on it, but changes were made to the recommended recipients of the grants and no reasons were provided for making those changes.¹⁵⁶

The requirement to write a letter to the Minister for Finance giving reasons for overturning the merit advice of public servants is often respected only in form, not substance. Sometimes the excuse is given that the decision was made by a former Minister, so no reason is known.¹⁵⁷ In one case, the Minister wrote that he was enclosing the details of the grants and ‘the reasons for my decisions’, only to attach a table which in relation to one grant said ‘no reason provided’.¹⁵⁸ On occasion, the reasons focus on matters other than merit, need and value, such as the statement that the grant distribution ‘ensures geographical coverage of grants across Australia’.¹⁵⁹ Most commonly the reasons simply describe what the program is intended to do. Almost none explain why the recommendation of the public servants was wrong and needs to be overturned.¹⁶⁰

Failure to make grants within the scope of the power and purpose of the grant program

While at the Commonwealth level, the constitutional requirement for legislative authorisation of expenditure means that there is legislation that identifies the purpose or object of grants, this is sometimes ignored in actually making the grants.

For example, the FFWSS program was funded under a budget allocation for the purposes of ‘Regional Development’. The Department of Infrastructure recorded that its purpose was supporting ‘women’s participation in sporting activities in our regions and strengthening regional sustainability, capacity and diversity’.¹⁶¹ Yet most of the funding commitments were neither directed at regions, nor women’s participation in sport. Notoriously, a considerable amount was allocated to the renovation of a swimming pool in North Sydney,¹⁶² which was

¹⁵⁶ See the copy of the brief in: Senate, Select Committee on Administration of Sports Grants, Answers to Questions on Notice received from Sport Australia, 17 July 2020, p 1459. Note that the Minister argued that the CGRGs did not apply because the Australian Sports Commission was a corporate Commonwealth entity. But the Australian Sports Commission had its own Grant Management Framework based upon the CGRGs, which also required the giving of reasons. The Minister’s office was reminded of this on 5 and 9 December 2018 and in the final brief, but failed to comply.

¹⁵⁷ See, eg, the letter by Senator Marise Payne to the Finance Minister, 7 April 2020 with respect to decisions made by the Minister for Women. One might wonder why the former Minister for Women did not provide reasons at the time the decisions were made or why such reasons could not be found and reported.

¹⁵⁸ Letter by Ken Wyatt MP to the Finance Minister, 29 March 2019.

¹⁵⁹ Letter by Paul Fletcher MP to the Finance Minister, 31 March 2018 with respect to grants by the Minister for Social Services.

¹⁶⁰ Rare examples of genuine, properly explained reasons being given include: Letter by Greg Hunt MP to the Finance Minister, 28 March 2018 regarding grants by the Minister for Health; and Letter by Senator Bridget McKenzie to the Finance Minister, 31 March 2019, regarding a grant that the Department of Communications and the Arts had recommended be rejected.

¹⁶¹ Senate, Select Committee on Administration of Sports Grants, *Committee Hansard*, 22 July 2020, p 27. The Department confirmed that it was a regional development program: Senate, Rural and Regional Affairs and Transport Legislation Committee, *Estimates Hansard*, 2 March 2020, p 54.

¹⁶² Other grants were also made to swimming pools in State capitals, such as \$20 million for a pool in South Perth and \$5 million for a pool in Kogarah in suburban Sydney.

hardly a regional area. The ANAO has previously been critical of the Commonwealth Government for making grants intended for ‘regional’ purposes to projects in cities.¹⁶³

It is also not uncommon for particular grants to be given outside the scope of the constitutional power relied upon to authorise the expenditure. This results in a great deal of unlawful Commonwealth expenditure of public funds.¹⁶⁴

Overall, while the Commonwealth legal model for regulating the making of grants is a good one, aspects of it need improvement, including cutting off avoidance mechanisms, ensuring supervision of the system and providing mechanisms for enforcement and punishment for breaches of it.

Allegations of pork-barrelling at the State level

Allegations of pork-barrelling have also occurred at the State level. In recent times, they have been directed at sports grants,¹⁶⁵ arts grants¹⁶⁶ and bushfire relief funds,¹⁶⁷ amongst other funding programs.

In November 2020, the then Premier, Gladys Berejiklian, admitted that the payment of grants to local councils from the Stronger Communities Fund in the period prior to the previous election amounted to pork-barrelling, but claimed it was ‘not an illegal practice’.¹⁶⁸ The Premier also later justified ‘throwing money at seats to keep them’, arguing that this was part of ‘democracy’. In response to questions about why grants were made contrary to the advice of public servants she observed that Departments were not expert at ‘winning byelections’.¹⁶⁹ It seems, however, politicians are not expert at it either¹⁷⁰ and that pork-barrelling is not terribly effective, despite the strong, but misguided, belief of politicians that they can use public money to buy electoral success.¹⁷¹

¹⁶³ Australian National Audit Office, *Design and Implementation of Round Two of the National Stronger Regions Fund*, Report No 30, 2016-17, 32-3.

¹⁶⁴ For a detailed analysis, see: Anne Twomey, ‘Executive Power Following the *Williams Cases*’, in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law – Tributes to Professor Leslie Zines* (Federation Press, 2020) 33.

¹⁶⁵ Paige Cockburn and Michelle Brown, ‘NSW Government faces pressure over sports cash splash in Liberal-held seats’, ABC News, 18 January 2020: <https://www.abc.net.au/news/2020-01-18/nsw-sports-funding-attracts-accusations-of-pork-barrelling/11879518>.

¹⁶⁶ Michaela Boland and Greg Miskelly, ‘NSW Deputy Premier John Barilaro, Don Harwin accused of “pork-barrelling” in Coalition seats before state election’, ABC News, 25 May 2020: <https://www.abc.net.au/news/2020-05-25/nsw-ministers-accused-of-favouritism-in-arts-spending/12271392>.

¹⁶⁷ Lucy Cormack, ‘New Allegations of pork barrelling over a \$177 million bushfire relief fund’ *Sydney Morning Herald*, 30 January 2021: <https://www.smh.com.au/politics/nsw/new-allegations-of-pork-barrelling-over-a-177-million-bushfire-relief-fund-20210129-p56xuj.html>.

¹⁶⁸ Anne Davies, ‘Berejiklian concedes \$140m grant scheme was pork-barrelling but says “it’s not unique to our government”’ *The Guardian*, 26 November 2020: <https://www.theguardian.com/australia-news/2020/nov/26/berejiklian-admits-140m-grant-scheme-was-pork-barrelling-as-approval-documents-revealed>.

¹⁶⁹ Christopher Knaus, ‘Gladys Berejiklian says pork barrelling would not “be a surprise to anybody” – but it’s not democracy either’, *The Guardian*, 1 November 2021: <https://www.theguardian.com/australia-news/2021/nov/02/gladys-berejiklian-says-pork-barrelling-would-not-be-a-surprise-to-anybody-but-its-not-democracy-either>.

¹⁷⁰ Bruce MacKenzie, ‘Does pork-barrelling actually change the way people vote?’, *ABC News*, 11 February 2022: <https://www.abc.net.au/news/2022-02-11/pork-barrelling-in-nsw-hasnt-always-worked/100823744>.

¹⁷¹ See the detailed study: Andrew Leigh and Ian McAllister, ‘Political Gold: The Australian Sports Grants Scandal’ (2021) *Political Studies* (‘online first’).

In February 2022, the NSW Auditor-General produced a performance audit concerning the ‘Integrity of grant program administration’. It focused on two grant programs – the Stronger Communities Fund and the Regional Cultural Fund.

Round two of the Stronger Communities Fund, which distributed \$233 million in grants, was, by any measure, appallingly managed. In the absence of legislation that could clarify the matter, it appears that the responsible Minister was the Minister for Local Government and the expenditure of the fund was administered by the Office of Local Government (‘OLG’) within the Department of Planning and Environment under a financial delegation.¹⁷² In fact, the Minister for Local Government only approved the funding of projects for two of the 24 councils that received funding.¹⁷³

The projects for the other 22 councils appear to have been approved by the Premier and Deputy Premier, without any formal authorisation,¹⁷⁴ and notified to OLG through emails by staff members. Many millions in public money was paid out without the approval of the responsible minister and upon the say-so of staff in the offices of Ministers who were not responsible for the Fund.¹⁷⁵ Any documentation recording the process in the Premier’s Office was destroyed, both in hard copy and in electronic copy, in breach of the *State Records Act*.¹⁷⁶ In the Deputy Premier’s office, no documentation was created at all in relation to approval of grants. The Deputy Premier was advised orally of proposed projects and his approval was then conveyed by a staff member to the OLG by email.¹⁷⁷ The Auditor-General’s Office concluded that it could not rule out that ‘the lack of formal documented approval from the former Premier and Deputy Premier, was a purposeful attempt to avoid transparency and accountability over [their] involvement ... in approving grant allocations. Deficient record-keeping and program

¹⁷² Note that the OLG considered that its role was limited to administrative execution of funding agreements and that it was not responsible for making the decisions on funding: NSW Legislative Council, Public Accountability Committee, *Integrity, efficacy and value for money of NSW Government grant programs*, Report 8, March 2021, [4.54]-[4.58].

¹⁷³ Note that there ‘is no evidence of a merit assessment or documented rationale for why particular projects at those councils were chosen for funding’: Audit Office of NSW, ‘Integrity of grant program administration’, Performance Audit, 8 February 2022, p 9.

¹⁷⁴ Audit Office of NSW, ‘Integrity of grant program administration’, Performance Audit, 8 February 2022, p 16.

¹⁷⁵ Audit Office of NSW, ‘Integrity of grant program administration’, Performance Audit, 8 February 2022, p 16. Note the assertion that the Premier was simply providing ‘advice’ on the proposed allocation of funds and that the decision was made by the Chief Executive Officer of the OLG under delegation from the Minister for Local Government: State Archives and Records, ‘Alleged non-compliant disposal of records relating to the Stronger Communities Fund’, Final Report, 21 January 2021, p 8. Note, in contrast the contents of the destroyed ‘Working advice notes’ (which were electronically recovered), which expressly sought the Premier’s ‘approval of funding’. Nonetheless, the Premier and Deputy Premier denied that they were approving the grants, and no one would take responsibility for having done so: NSW Legislative Council, Public Accountability Committee, *Integrity, efficacy and value for money of NSW Government grant programs*, Report 8, March 2021, Appendix 3 and [4.69]-[4.78]. The question of whether a Minister is actually approving a grant or merely advising on it also arose in relation to the Commonwealth Community Sport Infrastructure Program. It seems that clarity about responsibility for the making of grants is absent at both the Commonwealth and State levels.

¹⁷⁶ Audit Office of NSW, ‘Integrity of grant program administration’, Performance Audit, 8 February 2022, p 16; and State Archives and Records, ‘Alleged non-compliant disposal of records relating to the Stronger Communities Fund’, Final Report, 21 January 2021, p 14.

¹⁷⁷ NSW Legislative Council, Public Accountability Committee, *Integrity, efficacy and value for money of NSW Government grant programs*, Report 8, March 2021, [4.25].

guidelines have meant in practice that no person involved in the grant allocation process is specifically accountable for decisions about the grant allocations'.¹⁷⁸

The guidelines for the grant program did not say how projects would be selected and did not provide for assessment of projects against criteria. The guidelines were not published.¹⁷⁹ The Auditor-General's Office reported that 'we cannot rule out that deficiencies in the guidelines were an attempt to avoid accountability for and transparency over the government's decision to use round two of the Stronger Communities Fund to assist councils that supported the merger process rather than to achieve the objectives of the program.'¹⁸⁰

Ninety-six percent of available funding was allocated to projects within coalition-held state electorates. A briefing note by the Premier's staff revealed that a key consideration in providing funding was to ensure they did not 'provide funds to unfriendly merged councils'.¹⁸¹ Another briefing note to the Premier by her staff recorded:

We have continued to work on how we allocate this funding to get the cash out the door in the most politically advantageous way.¹⁸²

This, combined with the Premier's admission of pork-barrelling, suggest that the grants were largely made for party-political purposes rather than in the public interest.

The Regional Cultural Fund was better managed, but its integrity was still compromised. There was a proper robust and transparent process for the assessment of projects and the making of recommendations to the Minister for the Arts. Those recommendations, however, were overturned by the Minister in more than one in five cases, in consultation with the Deputy Premier, without the reasons for doing so being documented.¹⁸³ Thirty-four recommended projects were not funded (including seven of the top ten ranked applications), while 22 applications that were not recommended were funded.¹⁸⁴ Most of the Minister's acts in overturning recommendations occurred in the second round of the program, the results of which were announced one month prior to the 2019 State election.¹⁸⁵

Overall, applications from Coalition-held electorates received 87% of total funding (being \$85.5 million in grants) and applications from organisations in electorates held by the ALP received less than 1% of funding (being \$602,970). Other grants went to marginal electorates

¹⁷⁸ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 13.

¹⁷⁹ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, pp 7-8.

¹⁸⁰ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 8.

¹⁸¹ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 7.

¹⁸² Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 14.

¹⁸³ Note, however, the subsequent comment by the Minister in an interview that he reallocated money to good projects in smaller volunteer-run museums in the regions and that 'I think if I'd explained it, if I'd given written reasons for why I did it, a lot of the criticism would have been avoided, but I was advised not to by ... Create NSW': Linda Morris, "Only a fool would write off the PM" – Lunch with Don Harwin', *Sydney Morning Herald*, 9 April 2022, News Review, p 25.

¹⁸⁴ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 20.

¹⁸⁵ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 20.

held by the Shooters, Fishers and Farmers Party and The Greens.¹⁸⁶ The Audit Office noted that in one case an application from Coffs Harbour was approved despite the fact that the application had not been recommended and did not meet any of the four assessment criteria. It was approved after a request to do so was made by the former Deputy Premier. The grant was for \$2.7 million, which was one of the largest grants given to any organisation.¹⁸⁷

The Auditor-General concluded that the failure to provide reasons compromised the ability of the relevant government agency, 'Create NSW', to 'demonstrate integrity and value for money' in the approval process and created 'a clear perception that factors other than the merits of the projects influenced funding decisions'.¹⁸⁸

In November 2021, the Premier, Dominic Perrottet, stated that 'taxpayers expect the distribution of public funds will be fair – I share that expectation.'¹⁸⁹ He announced a review of how grants should be administered and assessed, to be conducted by the Department of Premier and Cabinet and the NSW Productivity Commissioner, which reported in April 2022. The terms of reference for the review stated that its purpose was to 'deliver value for money for the NSW taxpayer by ensuring that the administration, assessment and assurance of grants programs in NSW is in line with best practice'. Its objectives included delivering value for public money in achieving the stated purposes of grants and to 'adopt key principles of transparency, accountability and probity'.¹⁹⁰ The Report of the Review is discussed below.¹⁹¹

Financial accountability mechanisms at the State level

New South Wales is deficient in its legal framework to ensure financial accountability and probity with respect to the making of grants.

There are rather vague 'core values' of the government sector set out in s 7 the *Government Sector Employment Act 2013* (NSW). These include placing 'the public interest over personal interest', upholding the law, providing non-partisan advice and providing services fairly. The most significant, for the purposes of this paper, is the 'value' of being 'fiscally responsible and [focusing] on efficient, effective and prudent use of resources'. There does not appear to be any legal obligation in the Act to give effect to these inaptly described 'values'. However, the 'Code of Ethics and Conduct' for NSW government sector employees provides that breaching these values can lead to disciplinary action.¹⁹² It also states:

¹⁸⁶ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 20.

¹⁸⁷ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 22.

¹⁸⁸ Audit Office of NSW, 'Integrity of grant program administration', Performance Audit, 8 February 2022, p 3.

¹⁸⁹ Alexandra Smith, 'NSW to review how grants are handed out amid pork-barrelling concerns', *Sydney Morning Herald*, 3 November 2021: <https://www.smh.com.au/politics/nsw/nsw-to-review-how-grants-are-handed-out-amid-pork-barrelling-concerns-20211102-p595cr.html>.

¹⁹⁰ See: NSW, Department of Premier & Cabinet, 'Review of Grants Administration in NSW – Terms of Reference': <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/files/Updates/Terms-of-Reference-Review-of-Grants-Administration-in-NSW.pdf>.

¹⁹¹ NSW Government, 'Review of grants administration in NSW' Final Report, April 2022: <https://www.dpc.nsw.gov.au/publications/reviews/review-of-grants-administration-in-nsw/>.

¹⁹² A breach could therefore trigger the application of 9(1)(b) of the *ICAC Act*, if conduct satisfying s 8 had occurred.

You must use public resources in an efficient, effective and prudent way. Never use public resources – money, property, equipment or consumables – for your personal benefit, or for an unauthorised purpose.¹⁹³

The *Government Sector Finance Act 2018* (NSW) is also directed at ‘values’. It provides in s 3.7 that a ‘government officer’ should be guided by values and associated principles when exercising functions in connection with financial management. These include the value of ‘accountability’ and the associated principle that the ‘government officer should take reasonable care so that the officer’s use of government resources or related money is efficient, effective and prudent’. It is directed at how the officer uses those resources, rather than whether government funds are spent efficiently, effectively and prudently in the public interest. There does not appear to be an equivalent requirement to that in s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) that a Minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money.

The State equivalent of the CGRGs is the ‘Good Practice Guide to Grants Administration’. It is, however, no more than a guide. Unlike the CGRGs, it is not set out in a statutory rule and it has no legal standing. It is contained in a Circular issued by the Department of Premier and Cabinet,¹⁹⁴ and applies only to Departments, agencies and statutory authorities. It is not directed at binding Ministers or ministerial advisers.¹⁹⁵

The Guide is primarily addressed at procedure rather than ensuring probity in the expenditure of money. Public servants are told that grants should be ‘compatible with department objectives’ and allocations to recipients should be ‘consistent with government priorities’.¹⁹⁶ What if the priority is to use money in a manner that is not consistent with the public interest but is for the purposes of benefitting a political party, its donors or its members?

There is recognition, but no requirement in the Guide, that programs should be ‘based on evidence of need’ and that eligibility and selection criteria should be consistent with program objectives.¹⁹⁷ The Guide describes it as ‘good practice’ for recommendations and decisions to be fully documented, as this will make the decision easier to audit.¹⁹⁸ The Premier’s office failed to engage in this good practice with respect to the Stronger Communities Fund.

¹⁹³ Public Service Commission Code of Ethics and Conduct for NSW Government Sector Employees, [3.8]: <https://www.psc.nsw.gov.au/sites/default/files/2020-10/PSC%20Code%20of%20Ethics%20and%20Conduct.pdf>.

¹⁹⁴ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16): <https://arp.nsw.gov.au/c2010-16-good-practice-grants-administration/>.

¹⁹⁵ Note that while ministerial advisers are required by the NSW Office Holder’s Staff Code of Conduct to comply with laws, applicable codes of conduct and ‘Premier’s Memoranda’, this does not appear to extend to Circulars: Ministers’ Office Handbook, Attachment B, (June 2020) p 54: <https://publications.dpc.nsw.gov.au/assets/dpc-publications/ministerial-handbook/Ministers-Office-Handbook-published-24-06-2020.pdf>.

¹⁹⁶ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16) p 3: <https://arp.nsw.gov.au/c2010-16-good-practice-grants-administration/>.

¹⁹⁷ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16) pp 3 and 8.

¹⁹⁸ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16) p 11.

The Guide states that the grants assessment ‘should be as transparent as possible’.¹⁹⁹ To this end, it states that grants programs ‘must have criteria against which applications are assessed’. The full criteria ‘should be published’ and ‘decisions must be made on the basis of the published criteria’.²⁰⁰ Again, this was not followed in relation to the Stronger Communities Fund.

Finally, in a table summarising the various steps in the grants process, the Guide states that the Minister’s approval is to be based upon whether the financial assistance is in line with the goals of the program, whether the costs and other aspects appear reasonable and there are sufficient funds available. The assessment must be ‘fully justified and documented’ and any ‘variance to [a] recommendation’ must be recorded with reasons. In addition, the reasons for any variation are to be disclosed upon the Department’s website.²⁰¹ This was not followed by the Minister in relation to the Regional Cultural Fund.

It appears that even if public servants make an effort to comply with the Good Practice Guide to Grants Administration, neither Ministers nor their offices feel any obligation to do so, which is a serious flaw in the system. In addition, pressure from ministerial offices may cause public servants to dispense with ‘good practices’ when it comes to documentation, written justifications and transparency.

Finally, the *State Records Act 1998* (NSW) also contains provisions that protect State records. It requires in s 21 that a person must not damage or alter a State record. Breaching the provision is an offence with a maximum penalty of 50 penalty units. Section 12 requires each public office (which includes political office holders, such as ministers, as well as departments) to make and keep full and accurate records of activities of the office and s 11 requires each public office to ensure the safe custody and proper preservation of State records under its control. Section 10 states that the chief executive of each public office has a duty to ensure that the public office complies with the requirements of the Act.

In relation to the Stronger Communities Fund, the State Archives and Records Authority of NSW found that ‘the Office of the Premier breached section 21(1) of the *State Records Act* with the unauthorised disposal of the working advice notes’.²⁰² These notes were briefs to the Premier which summarised facts, contained comments and recommended actions, which were then noted as ‘approved’ or ‘not approved’. Nonetheless, the Authority decided not to seek the prosecution of the breach on the basis that this would not be ‘consistent with the Authority’s regulatory model, which emphasises education and information to assist voluntary compliance by public offices with obligations of the *State Records Act*.’²⁰³ It also contended that any prosecution may have been out of time, expensive and difficult to prove. However, failure to take action means that there is no effective deterrent to the destruction of records and the failure to keep records in circumstances where records might indicate action had been taken for improper purposes.

¹⁹⁹ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16) p 12.

²⁰⁰ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16) p 12.

²⁰¹ NSW, Dept of Premier & Cabinet, ‘Good Practice Guide to Grants Administration’, (Circular C2010-16) p 13.

²⁰² State Archives and Records, ‘Alleged non-compliant disposal of records relating to the Stronger Communities Fund’, Final Report, 21 January 2021, p 14.

²⁰³ State Archives and Records, ‘Alleged non-compliant disposal of records relating to the Stronger Communities Fund’, Final Report, 21 January 2021, p 20.

Report of the Review of Grants Administration in NSW

The April 2022 ‘Review of Grants Administration in NSW’ recommended that a revised ‘Grants Administration Guide’ be issued to replace the existing ‘Good Practice Guide to Grants Administration’.²⁰⁴ It would extend beyond public servants to apply to Ministers and ministerial staff and include some mandatory requirements.²⁰⁵

Documentation and transparency

The Review makes important recommendations about identifying and documenting roles and responsibilities in grant-making, including basic matters such as identifying who has the power to make the decision, along with clear selection criteria, published guidelines²⁰⁶ and the assessment of grant applications against the selection criteria.²⁰⁷ Given the failures in the administration of the Stronger Communities Fund, this is clearly necessary. However, as discussed below, for these recommendations to be effective, measures will have to be taken to ensure that there are no easy avoidance mechanisms, such as classifying grants as ‘election promises’ so they can evade going through a proper assessment and selection process.

The Review accepts that input from MPs ‘may be relevant’ to grant applications, but not determinative, and that assessments should be based on merit.²⁰⁸ It appropriately recommends that the input from Members of Parliament should be documented and that any changes in the ranking of applicants as a consequence should also be documented ‘in the brief to the designated decision maker’.²⁰⁹ It also recommends the documentation of any input by the Minister or ministerial staff in the assessment of grant applications and changes to their ranking.²¹⁰ In implementing these recommendations, the Government should go further and require that all such documentation should immediately be made public on the designated grants website.²¹¹ Hiding it in an unpublished brief is not sufficient to achieve the relevant level of transparency and accountability.

The Review also makes important recommendations that a Minister must not approve or reject a grant application without first receiving written advice assessing the merits of the grant.²¹² Approvals of grants must be documented, including the basis for the approval, having regard to the grant guidelines and the imperative to achieve value for money. When a Minister or other decision-maker departs from the assessment recommendations, they must record the

²⁰⁴ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 20.

²⁰⁵ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 22 and p 24.

²⁰⁶ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 29 and proposed Guide, [6.16] and [6.17].

²⁰⁷ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 33.

²⁰⁸ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 34.

²⁰⁹ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 34 and proposed Guide, [6.3.3].

²¹⁰ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, pp 35-6 and proposed Guide, [6.3.1].

²¹¹ The Review recommends that grants information be made publicly available on a central website, including records of ministerial grant award decisions that vary from the recommendations of officials, and the reasons for those decisions. But it does not specify the inclusion on the web-site of documentation of the involvement of MPs and Ministers in the assessment process. NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, pp 39-40 and proposed Guide [6.5].

²¹² NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, proposed Guide, [6.3.2].

reasons for that departure.²¹³ A decision maker must not approve a grant that has been assessed as ineligible unless a decision is made to waive eligibility criteria where this would not lead to perverse or unfair outcomes, be contrary to the policy intent or damage the reputation and integrity of the grant program, and reasons for the waiver are documented.²¹⁴ This is all appropriate and addresses some of the problems that arose in relation to the Stronger Communities Fund.

The examples above, however, of the weak documentation provided at the Commonwealth level suggest that greater rigour is required for there to be genuine transparency. For example, if the decision-maker departs from recommendations, then he or she should be required to identify what further information was relied upon to reach a different conclusion and explain why the original advice was wrong. Just saying something to the effect that ‘this is a good project and will help the community’ ought not to be regarded as sufficient. Further, there needs to be scrutiny of such documentation, preferably by a parliamentary committee, so that inadequate responses can be questioned and criticised.

The Review also recommended the establishment of a central web portal where grants administration disclosures would be uploaded in a timely manner.²¹⁵ This would make a significant improvement in the current transparency measures.

Legal status and enforceability of revised Guide

The Review recommended that its proposed Guide not be given a legal status, unlike the Commonwealth’s CGRGs which are in a legislative instrument. Instead, in the name of ‘flexibility’, it recommended that its proposed Guide be issued under the cover of a Premier’s Memorandum.²¹⁶ This is apparently so that it can be ‘readily updated in line with evolving best practice’.

While flexibility can be a virtue, it is in ‘flexibility’ that most avoidance of the rules occurs. This is obvious from the discussion of scandals above, including the abysmal failure to give effect to the existing NSW Guide, despite its inclusion in a Department of Premier and Cabinet Circular, and the rampant avoidance of Commonwealth grant rules. In particular, the type of ‘flexibility’ which permits grants made as election promises to avoid measures of transparency, accountability and impartiality, would undermine both the purpose of the Guide and trust in government. Accordingly, if there is to be flexibility in altering the Guide (remembering that the current Guide has not been altered since 2010, suggesting that the evolution of best practice does not appear to be very fast), it should be done by way of a legislative instrument, such as a regulation. This would give the mandatory aspects of the Guide a legal status and would enhance accountability by enabling any future changes to be scrutinised by the Houses and the relevant parliamentary committee and disallowed if they did not constitute the ‘evolving best practice’ that is desired.

²¹³ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 36 and proposed Guide [6.3].

²¹⁴ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, proposed Guide [6.3.2].

²¹⁵ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 41.

²¹⁶ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 23.

The argument that the Guide is not amenable to being given the status of a legislative instrument because some measures in it are mandatory and others are principle-based²¹⁷ is a very weak one. Such a distinction is perfectly functional in the Commonwealth's CGRGs, of which one part is mandatory and the other is clearly stated to be non-binding guidelines. No adequate answer was given in the Review's Report as to why the same approach could not be taken in New South Wales. While there has been avoidance of some of the mandatory aspects of the CGRGs, as noted above, the aim should be to adopt the beneficial aspects of the CGRGs, such as their legal status as a legislative instrument, while avoiding the detriments, by enhancing enforceability and cutting off avoidance mechanisms.

The difference between a Premier's Memorandum and a legislative instrument is that the latter is a 'law', whereas the former is not. This is relevant, for example, to the application of ss 9(4) and 9(5) of the *ICAC Act*, where the conduct of a Minister satisfies s 8 and would cause a reasonable person to believe that it would bring the integrity of the office or Parliament into serious disrepute. A finding of corrupt conduct can only be made in such a circumstance if the relevant conduct 'constitutes a breach of a law'. The difference is therefore not just one of flexibility, but one which could potentially protect a Minister, who had brought his or her office or Parliament into serious disrepute, from a finding of corrupt conduct if that conduct breached a Premier's Memorandum rather than a 'law'. Another example is cl 5 of the Ministerial Code of Conduct which requires that a Minister not direct or request a public service agency to act 'contrary to the law'.²¹⁸ The status of the Guide as 'law' is therefore important due to the application of other statutory provisions and codes to 'laws' but not Premier's Memoranda.

There are also questions about the extent to which a Premier's Memorandum binds persons and is enforceable. The Review and its proposed Guide assert that a Premier's Memorandum 'is binding on officials, Ministers and ministerial staff'.²¹⁹ Yet it appears that the only consequence of failure to comply with a Premier's Memorandum might be disciplinary action,²²⁰ and only if the relevant official or minister decides to take such action, which is unlikely where the failure to comply occurred for the purpose of favouring the political interests of the minister and his or her political party, and occurred at the behest or suggestion of the Minister or his or her staff.

The Review states that 'Premier's Memoranda are also binding on ministers, with any sanctions for a breach to be determined by the Premier'.²²¹ There does not appear to be any legal basis for this assertion, beyond the convention that the Premier advises the Governor on the appointment and removal of ministers and that they must therefore hold the Premier's confidence. This kind of enforcement is ineffective if it is the Premier who has decided to act in a way inconsistent with the Guide, or other ministers act in a manner that aids the Government or the political party or parties to which the ministers belong. In short, inserting the proposed Guide in a Premier's Memorandum does not make it 'enforceable' in the same

²¹⁷ NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.

²¹⁸ See, to the same effect, the requirements of the NSW Office Holder's Staff Code of Conduct which provides that Officer Holder staff must not encourage or induce a public official to breach the 'law'.

²¹⁹ NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 24 and [1.3] of the Guide.

²²⁰ Cl 1.3 of the proposed Guide asserts that failure by a government sector employee to comply may result in disciplinary action under the *Government Sector Employment Act 2013* (NSW), although there is no reference to any specific provision to this effect. Failure to comply with the 'values' in s 7 of the Act may result in disciplinary action, according to the 'The Code of Ethics and Conduct for NSW government sector employees', but Premier's Memoranda do not appear to be captured by this.

²²¹ NSW Government, 'Review of grants administration in NSW' Final Report, April 2022, p 25.

way as a law and leaves any action against Ministers on enforcement to be exercised on political grounds by the Premier.

The Review also claimed that the ‘integrity framework in NSW’ is ‘comprehensive and robust’ and that any ‘significant breach of the requirements under the draft Guide would likely be unlawful conduct under that framework’.²²² It is hard to see how this is so. As noted above, that framework largely consists of principles rather than legal obligations and that at most a breach of a principle might result in disciplinary action, but would not ordinarily be unlawful, unless it amounted to a criminal offence, such as misconduct in public office. A breach of the CGRGs, however, amounts to a breach of a law and even though no direct penalties apply, there are numerous statutory obligations on public servants and Ministers to comply with the law. The conclusion in the Review that ‘issuing the draft Guide under a Premier’s Memorandum is no different in effect from the approach taken in the Commonwealth’²²³ would therefore appear to be inaccurate.

In an attempt to ameliorate some of these problems, the Review suggests that there could be a separate legislative requirement that there be compliance with the Guide.²²⁴ It suggests that this could be included in the *Government Sector Finance Act 2018* (NSW) or the *Government Sector Employment Act 2013* (NSW), leaving open the possibility that any such obligation would be confined to public servants, rather than extended to Ministers and ministerial advisers. As the actions of Ministers and ministerial advisers more commonly give rise to scandals and allegations of corruption with respect to grants than the actions of public servants, there is a clear need to ensure that all are bound by law to comply with the mandatory aspects of the Guide. Anything less would not address the problems that caused the initiation of the report.

The failure to deal with party interests and election promises

One of the problems with the report of the Review is that it fails to address the elephant in the room. It studiously avoids the issue of grants being made to advantage a political party. As with the various ‘frameworks’ of principles applicable to the public service, all obligations to act in the public interest are balanced against an obligation not to act in one’s ‘personal interest’. Political party interest is left festering, unaddressed, between public and personal interests.

For example, the Review proposed that the Guide give effect to principles including placing ‘the public interest over personal interest’.²²⁵ It says that decision makers should not make a grant decision that confers a private benefit on their family members.²²⁶ But the problem which caused this Review to be initiated was instead the failure to place the public interest over political party interests and the conflict of interest of ministerial decision makers when making decisions that favour party interests, supporters and donors. While, as noted above, political party interests may in some cases be regarded as falling within personal interests (eg to the extent that they are likely to affect the remuneration and employment of politicians and their staff), any genuine attempt to deal with the concerns that caused the initiation of this Review

²²² NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 25.

²²³ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 25.

²²⁴ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 25.

²²⁵ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 28.

²²⁶ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 30.

must address the fact that public money should only be spent in the public interest and not for the predominant purpose of benefiting a political party.

Another example is that the Review accepts that there may be circumstances in which non-competitive processes may be justified.²²⁷ Some of these, such as grants directed at providing immediate aid after a natural disaster, may clearly be justified. But the category of ‘one-off or ad hoc grants’ directed by ministerial decision,²²⁸ as has been shown at the Commonwealth level, is the gateway for abuse where grants are made in a biased fashion for political purposes. The proposed Guide requires that such grants must still have guidelines, although they may remain unpublished,²²⁹ and that the Minister must receive advice on the merits before making such a grant and document the basis for the approval.²³⁰ It would be wise, however, to ensure that strict scrutiny is applied to such grants, including by a parliamentary committee. There should also be public reporting of any input from Ministers and MPs and the justification for any departure from merit recommendations. Such grants should not be justified simply by declaring that they are ‘election promises’ and asserting that they may therefore be made without merit assessments.

Options for reform

A significant difficulty in bringing prosecutions for misconduct in public office is the burden of establishing an improper purpose. There will commonly be insufficient evidence to found a prosecution. This is why it is essential that there be properly funded investigatory bodies, such as the Audit Office and the Independent Commission Against Corruption, which can access the relevant communications and establish a case.²³¹ This is one area where New South Wales, unlike the Commonwealth, is well-served. Areas, in which reform should be considered, however, include the following.

Clarity: There should be a legal requirement that grant schemes be specifically authorised by legislation, or subordinate legislation, which identifies the purpose of the grant and the person or body that is the decision-maker. The allegations of the misuse of grant schemes frequently involve uncertainty as to who is the actual decision-maker (with other Ministers effectively deciding outcomes) and a lack of clarity as to the purpose of the grant scheme. Giving such matters a legislative basis would improve transparency and accountability.

Legal obligation on Ministers only to approve proper expenditure: An equivalent of s 71 of the *Public Governance, Performance and Accountability Act 2013* (Cth) should be enacted at the State level. There needs to be a legal obligation on Ministers to be satisfied, based upon evidence, that expenditure of funds is efficient, effective, economical and ethical. To this, I would add that they must not behave in a partial manner and must act in the public interest. There should be a legal requirement that no money may be expended without a formal authorisation, signed and dated by the person who has the legal authority to approve the expenditure.

²²⁷ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, p 32.

²²⁸ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, proposed Guide, [6.1.3].

²²⁹ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, proposed Guide, [6.17] and [6.2].

²³⁰ NSW Government, ‘Review of grants administration in NSW’ Final Report, April 2022, proposed Guide, [6.3.5].

²³¹ Dennis Mahoney, ‘The Criminal Liability of Public Officers for the Exercise of Public Power’ (1996) 3 *The Judicial Review* 17, 26.

Legal obligations on public servants in grant management: In addition to the ‘values’ referred to in the *Government Sector Employment Act 2013* and the *Government Sector Finance Act 2018*, there should be clear legal obligations on public servants to comply with rules concerning the management of grant schemes, such as those requiring that grants be assessed on the basis of merit and those requiring public servants to advise Ministers on their obligations to provide reasons. Where public servants are decision-makers, they should be legally obliged to act in a manner that is impartial, efficient, effective, economical, ethical and in the public interest. Again, there should be a legal requirement that no money may be expended without a formal authorisation, signed and dated by the person who has the legal authority to approve the expenditure.

Grant rules: The existing guidelines need to be replaced by rules which have a legal status – eg by setting out the rules in a statutory instrument. These rules should specify requirements for grant guidelines, eligibility criteria and fair selection processes based upon merit and published criteria. They should specify that Ministers may not approve grants until they have received advice assessing grant applications against criteria and ranking them according to merit. They should require Ministers to act fairly (eg not favouring particular applicants by accepting their late applications, not advising them how to alter their applications so that they are successful, not altering the selection criteria after submissions have closed, and not agreeing to make a grant to a body before it has applied for it or before the scheme has even opened).

If a Minister decides to act contrary to the advice of public servants, which a Minister may legitimately do, the Minister should be obliged to give written reasons which explain why the altered outcome is more meritorious than that recommended, assessing this by reference to the criteria in the grant guidelines, and specify the additional evidence relied upon by the Minister to reach that conclusion. The Grant Rules should require the Minister to publish such reasons on the relevant grant website, with no redactions for Cabinet confidentiality, before such funds can be paid to the recipient. This would drastically improve the transparency of grant schemes and would provide a basis for genuine scrutiny of such decisions.

The Grant Rules should also formalise the role of the local Member of Parliament in relation to grants in his or her electorate, including when the local Member is a Minister. Members should be permitted to advocate in favour of projects within their electorate and to provide supporting evidence, but such advocacy and evidence should be only one input into the assessment which is made in a fair, unbiased process, of the merits of applications against the criteria in the grant guidelines. All such inputs should be published, as well as whether they had any effect upon the distribution of grants.

Oversight: There needs to be a body that maintains oversight of such schemes to ensure that there is compliance with the grant rules and that adequate reasons are provided and published. This could be a standing parliamentary committee or an integrity agency. Penalties for non-compliance could include critical publicity, directions to public service agencies to ensure their compliance, and parliamentary censure of Ministers who fail to meet the required standards.

Penalties and compensation: Consideration might also be given to what kind of penalties might be applied to serious breaches of mandatory grant rules or of any legal obligation regarding the approval of expenditure. It may be that the existing offence of misconduct in public office and the risk of a finding of corrupt conduct by the ICAC amount to sufficient deterrence – if Ministers and public servants were better educated about such matters. But

there may be cause to establish offences directed specifically at the misuse of public money in order to stamp it out.

Another option, as seen in the UK case of *Porter v Magill*, is to provide that where wilful misconduct occurs, the relevant decision-maker is required to compensate the public for the consequential loss. In *Porter v Magill*, Lord Scott noted that the procedure of auditing, identifying wilful misconduct and issuing a certificate specifying the amount of the loss, provided ‘powerful and valuable protection to the public’.²³² He lamented the fact that while such a statutory procedure was available at the time this particular scandal occurred, it had since been repealed. He concluded that: ‘Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law’.²³³ A specific provision directed at identifying the loss and requiring its repayment, might be considered in New South Wales.

²³² *Porter v Magill* (2002) 2 AC 357, 504 [139] (Lord Scott).

²³³ *Porter v Magill* (2002) 2 AC 357, 504 [140] (Lord Scott).