ibac independent broad-based anti-corruption commission
Victoria

# Operation Clara

## Special report

February 2023

**Acknowledgement**

IBAC acknowledges the Traditional Custodians of the lands on which we work and pays respect to Elders past, present and emerging. We recognise and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of Victoria.

Published by order, or under the authority, of the Parliament of Victoria February 2023. Parliamentary Paper Number 398, Session 2018-22

ISBN 978-1-922349-38-5 (print)
ISBN 978-1-922349-39-2 (online)

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# Letter of transmittal

To
The Honourable President of the Legislative Council
and
The Honourable Speaker of the Legislative Assembly

**Special report on Operation Clara**

In accordance with section 162(1) of the *Independent Broad-based Anti-corruption Commission Act 2011*, I present IBAC's special report on Operation Clara.

IBAC's findings and recommendations are contained in this report.

Yours sincerely



Stephen Farrow
Acting Commissioner
Independent Broad-based Anti-corruption Commission

# Foreword

Members of Parliament and other public officials are required to make decisions in the public interest. In doing so, they are expected to absorb information, advice and opinions from a diverse range of people and organisations who may be affected by their decisions.

Confidence in democratic government is undermined if there is a lack of transparency in this process and if particular individuals or bodies can gain a disproportionate or improper influence over government decision-making. In October 2022, IBAC published a special report on corruption risks associated with donations and lobbying.

Some of the risks identified in that report are exemplified in this report on Operation Clara.

Operation Clara investigated lobbying activity relating to a $31 billion proposal by the Australian Education City (AEC) consortium to develop a large education, residential and employment district in the western suburbs of Melbourne.

The investigation found that a former Victorian government minister, Theo Theophanous, improperly lobbied in favour of the proposal on behalf of AEC, including by misusing his position as a member of the board of the Metropolitan Planning Authority (which later became the Victorian Planning Authority). He failed to declare a conflict of interest and to comply with a requirement to register a lobbying client. In lieu of direct payment for his lobbying, he obtained benefits from AEC and its associates in the form of donations to his daughter's campaign for election to the Victorian Parliament.

Our earlier special report noted that Victoria has fallen behind many other jurisdictions in the regulation of lobbying and donations. It made a series of recommendations for reform. We welcome the government's announcement that it supports those recommendations in principle and that it will work towards their implementation.

This report on Operation Clara highlights the pressing need for those reforms and makes four additional recommendations.



Stephen Farrow
Acting Commissioner
Independent Broad-based Anti-corruption Commission

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# Glossary of terms

| Term | Expanded abbreviation/Explanation |
|---|---|
| **AEC** | Australian Education City consortium |
| **ALP** | Australian Labor Party |
| **DEDJTR** | Department of Economic Development, Jobs, Transport and Resources |
| **DTF** | Department of Treasury and Finance |
| **East Werribee Employment Precinct** | State Government land subject to the East Werribee Employment Precinct Structure Plan (PSP) which was prepared by the VPA |
| **East Werribee project** | AEC's proposal for an education, residential and employment district in the East Werribee Employment Precinct |
| **Embark Worldwide** | Theo Theophanous' registered lobbyist company |
| **GAA** | Growth Areas Authority |
| **MPA** | Metropolitan Planning Authority – Previously the Growth Areas Authority |
| **VPA** | Victorian Planning Authority – Previously the Metropolitan Planning Authority |

# Summary of the investigation and outcomes

**Operation Clara was an investigation by the Independent Broad-based Anti-corruption Commission (IBAC) into the alleged corrupt conduct of Mr Theo Theophanous in his role on the board of the Victorian Planning Authority (VPA).**

In January 2020, IBAC commenced the investigation under section 60 of the *Independent Broad-based Anti-corruption Commission Act 2011* (IBAC Act), to determine if Mr Theophanous misused his public position on the board of the VPA to favour the Australian Education City (AEC) consortium or attempted to improperly influence any public officers involved in the East Werribee project.

## 1.1 What IBAC did

### 1.1.1 Scope

Operation Clara sought to determine if Mr Theophanous:

- attempted to influence any public officers involved in the East Werribee project
- misused his public position on the board of the VPA to favour the AEC and/or its executive chairman.

IBAC's investigation included:

- interviews with two witnesses
- the seizure of documents and digital exhibits under summons
- the private examination of four witnesses, summonsed to provide evidence under Part 6 of the IBAC Act, between 10 May and 17 June 2021.

### Naming of individuals

IBAC's investigation examined the conduct of Mr Theophanous, and this report includes adverse findings about Mr Theophanous.

The development entity AEC (and its representatives) are not the subject of any adverse comment or opinion.

The AEC has been named in this report to provide relevant context in relation to the lobbying activity in question.

Mr Theophanous' daughter is not the subject of any adverse comment or opinion, however, reference to her 2018 campaign as candidate for the seat of Northcote is unavoidable in this report as her relationship to Mr Theophanous is relevant to donations (including in-kind support) made by the AEC and a special adviser to the AEC to Mr Theophanous's daughter's campaign. IBAC did not find any evidence that Mr Theophanous' daughter had any knowledge of the circumstances of the donation or her father's relationship with AEC.

Because of the significance of those donations, IBAC is satisfied that it is necessary and in the public interest for Mr Theophanous' daughter to be identified in a way that clarifies their relationship and that doing so will not cause unreasonable damage to her reputation, safety, or wellbeing.

This report also refers to several individuals and entities mostly by title or pseudonym, to demonstrate how senior elected officials – including the Treasurer and the Minister for Finance – and departmental officers were targeted in lobbying activities. To the extent that any of those references would identify any individual or entity, IBAC is satisfied that the references are necessary to provide an understanding of the relevant facts and that the references will not cause undue damage to their reputation, safety or wellbeing.

None of these people or entities are the subject or intended subjects of any adverse comment or opinion or inference of impropriety.

## 1.2 What the investigation found

IBAC's investigation found Mr Theophanous:

- Lobbied ministers and departmental officers in favour of AEC's proposed East Werribee project and failed to:
  - declare a conflict of interest in relation to these activities when matters concerning AEC were discussed at VPA board meetings (even after AEC commenced litigation against the state of Victoria and the VPA in relation to the East Werribee project),[1]
  - register AEC as a client on the lobbyists register.[2]
- Endeavoured to use his position as a VPA director to:
  - obtain an invitation for an AEC representative to attend an official VPA function, and
  - advance his private lobbying business by indicating to clients he had access to staff and information within the VPA that would assist with their matters.
- Sought payments from the AEC or associated entities
- In lieu of direct payment for his lobbying activities, obtained other benefits from the AEC and a special adviser to the AEC, namely donations (including in-kind support) to his daughter's 2018 campaign for the State electorate of Northcote.

### The nature of IBAC's findings

At any time, IBAC can publish a special report relating to the performance of its functions. This includes a special report about an investigation into suspected "corrupt conduct".

"Corrupt conduct" is defined in section 4 of the IBAC Act. It includes conduct that involves a breach of public trust such as by the misuse of a public power or position and can include misuse of information gained by a public officer. The misuse can be for private gain, or advantage of that person or another person. The definition requires that the conduct would constitute a relevant criminal offence.

However, IBAC is not a court. It is not responsible for determining whether any person has committed a criminal offence and is prohibited from including in its reports any finding or opinion that a person is guilty of or has committed a criminal or disciplinary offence or that a person should be prosecuted for any such offence.

Unlike a court, IBAC is not bound by the rules of evidence and, in producing a special report, it is not required to apply the criminal standard of proof (proof beyond reasonable doubt).

In a special report, IBAC can make findings of fact and can express comments or opinions about a person's conduct. In doing so, IBAC applies the civil standard of proof (proof on the balance of probabilities) according to what is commonly referred to as the Briginshaw principles. Under those principles, IBAC has regard to the seriousness of the finding, the inherent likelihood or unlikelihood of the fact in question and the gravity of the consequences that may flow from the finding.

IBAC provided draft extracts of this report to individuals and bodies referred to in it to enable them to respond to any adverse comments or opinions relating to them.[1] In some instances where they have disputed draft comments or opinions, IBAC has accepted their submissions in full or in part and modified the report accordingly. In other instances where IBAC has not accepted such submissions, a summary of them is set out at the relevant points in the following chapters, with an explanation as to why IBAC has not accepted them, or in Appendix A.

1 *Victorian Planning Authority Act 2017*, Part 2, Division 4.
2 Victorian Government Professional Lobbyist Code of Conduct, clause 5.1.

### 1.2.1 The entities involved

#### Theo Theophanous

Theo Theophanous is a former Victorian Government minister. First elected as the ALP member for Jika Jika in October 1988, Mr Theophanous held numerous ministerial portfolios before resigning as a minister in December 2008 and leaving politics in March 2010.

Through his company Embark Worldwide Pty Ltd (Embark Worldwide), which was registered in 2009, Mr Theophanous works as a registered lobbyist. At the time of IBAC's investigation, Embark Worldwide had several registered lobbying clients, including property developers, but not AEC.

In July 2014, Mr Theophanous was appointed to the board of the Metropolitan Planning Authority (MPA), which was superseded by the Victorian Planning Authority in 2017, after the commencement of the *Victorian Planning Authority Act 2017* (VPA Act).

#### Metropolitan Planning Authority and Victorian Planning Authority

Established in 2006, under the *Planning and Environment (Growth Areas Authority) Act 2006*, the Growth Areas Authority (GAA) became known as the MPA in 2013.[3] The GAA had several statutory objectives, including to:

- ensure that development in growth areas is coordinated and timely
- promote sustainable land development
- develop communities in growth areas.

In 2014/15, when expressions of interest were sought to develop the East Werribee Employment Precinct, the MPA's functions included making recommendations and reporting to the minister on:

- matters about planning, use, and land development in growth areas
- the minister's functions and powers under the *Planning and Environment (Growth Areas Authority) Act 2006*.

In 2017, the *Planning and Environment (Growth Areas Authority) Act 2006*, was superseded by the VPA Act, and the VPA was formed with the primary object of providing advice and assistance in accordance with planning objectives in Victoria.

In this report, references to the VPA refer to the Victorian Planning Authority and its predecessor agencies, noting the functions of the entity varied as it evolved from the GAA to the MPA, and the VPA.

3 MPA, *Annual Report 2013-14*, p.5.

### The Australian Education City consortium's proposal for East Werribee

In June 2014, the VPA, on behalf of the Victorian Government, sought expressions of interest to develop a 400 ha major development parcel within the East Werribee Employment Precinct. Shortlisted parties were invited to provide formal proposals by March 2015.

In October 2015, the Victorian Government nominated AEC as the preferred bidder for the East Werribee project, subject to further due diligence, investigations, and approvals.

The decision to nominate AEC as preferred bidder was jointly approved by the Minister for Planning and the Minister for Finance. The AEC proposal was for a $31 billion education, residential, and employment district.

The AEC consortium is governed by a board of directors, including AEC representative A. AEC representative B was contracted by the consortium as a special advisor.

The VPA, in conjunction with the Department of Treasury and Finance (DTF), was involved in ongoing discussions and due diligence with AEC prior to the Victorian Government determining whether to enter detailed contractual negotiations with AEC for the major development project. Between May and August 2017, DTF and the VPA engaged with AEC to prepare a 'terms sheet'. The terms sheet was finalised with AEC by the VPA in November 2017, at which time decision-making responsibility sat with the Minister for Finance.

Other Victorian Government departments involved with the East Werribee project at the time included the Department of Premier and Cabinet (DPC), and the Department of Environment, Land, Water and Planning (DELWP), among others.

Analysis of VPA documents showed that, prior to commencing his relationship with AEC in February 2018, Mr Theophanous obtained information about the East Werribee project in his role as a Board member of the VPA and as part of the VPA Risk and Audit Committee. After February 2018, Mr Theophanous continued to receive information about the project through regular Board updates.

The VPA had ongoing but decreasing involvement in the East Werribee project from November 2017 until August 2018. During this time, the East Werribee project was transferred to the then Department of Economic Development, Jobs, Transport and Resources (DEDJTR) and the then Minister for Major Projects. The VPA received confidential information about the East Werribee project and continued to provide advice and assistance to government but had no role in the decision-making process.

In January 2019, structural government changes saw the formation of the Department of Jobs, Precincts and Regions (DJPR), which assumed responsibility for priority precincts from DEDJTR.

In July 2019, the Victorian Government discontinued negotiations with AEC in relation to the East Werribee project.

AEC commenced civil proceedings against the Victorian Government in August 2019, seeking to recover $93 million for its investment in the proposal over five years.[4] In a writ filed in the Supreme Court, AEC challenged a Cabinet committee decision to terminate the tender process that AEC was involved in to develop a new residential, educational, and employment hub on state-owned land. The VPA was identified as one of the four respondents together with DJPR, the Minister for Priority Precincts, and the Assistant Treasurer.

On 20 May 2020, the court dismissed the applications in the AEC summons filed on 19 February 2020, by way of summary judgment and noted that the only proper party to the proceeding was the state, given that the decision maker was a committee of Cabinet. The court also observed that the inclusion of the VPA and the two ministers as defendants appeared to have been based upon mere speculation as to their possible role in advising the committee of Cabinet.[5]

4 Masanauskas, J., 'Consortium sues state government over rejection of Werribee "super city", 29 August 2019, *Herald Sun*, and Lucas, C., 'Victorian ministers named in $93m lawsuit over Werribee 'super city', 29 August 2019, *The Age*.

5 *Australian Education City Pty Ltd v Victorian Planning Authority & Ors* [2020] VSC 177.

### 1.2.2 Timeline of events

| Date | Event |
|---|---|
| July 2014 | Mr Theophanous is appointed to the Board of the MPA (now the VPA) |
| October 2015 | Victorian Government nominates AEC as the preferred bidder for East Werribee project |
| 2015 – 2017 | Victorian Government and VPA undertake due diligence on AEC proposal after which DTF and VPA negotiate with AEC to settle the details of a terms sheet for the East Werribee project |
| November 2017 | Terms sheet is agreed by Victorian Government and AEC |
| February 2018 | Mr Theophanous meets with AEC representatives and prepares a draft agreement between AEC and Embark Worldwide (that lists his son as the consultant), together with associated invoice to AEC for consultancy services |
| July 2018 | Mr Theophanous arranges for AEC to purchase tickets to a fundraising event held in support of the campaign for the seat of Northcote, for which his daughter had been preselected as a candidate |
| September 2018 | VPA formally transferred responsibility for the East Werribee project to DEDJTR |
| | Company X (whose director is AEC representative A) makes a $10,000 donation to the State campaign account for the seat of Northcote where Mr Theophanous' daughter is the candidate |
| October 2018 | Mr Theophanous arranges for AEC to purchase tickets to another fundraising event held in support of the campaign for the seat of Northcote |
| October – November 2018 | AEC representative B provides campaign assistance to the candidate for the seat of Northcote |
| April 2019 | Mr Theophanous arranges for AEC representative A to purchase tickets to a political party fundraising dinner |
| May 2019 | Mr Theophanous sends a further draft advisor agreement to AEC |
| July 2019 | Victorian Government discontinues negotiations with AEC for East Werribee project |
| August 2019 | AEC commences litigation against Victorian Government (including the VPA) in relation to the discontinuation of the East Werribee project |

### 1.2.3 Lobbying activities

The Victorian Government Professional Lobbyist Code of Conduct (Lobbyist Code of Conduct) defines lobbying activity as:

> *… any contact (including telephone contact, electronic mail contact, written mail contact, or face to face meetings) with a Government Representative in an effort to influence Government decision-making, including the making or amendment of legislation, the development or amendment of a Government policy or program, the awarding of a Government contract or grant or the allocation of funding.*[6]

The Lobbyist Code of Conduct specifies that the purpose of the Code is to ensure that contact between lobbyists and government representatives is conducted in accordance with public expectations of transparency, integrity and honesty.[7] It also reminds lobbyists who hold an appointment to a government board that they must comply with the integrity provisions of the *Public Administration Act 2004* (PA Act), and public sector codes of conduct.[8]

IBAC's investigation found Mr Theophanous contacted ministers, ministerial advisors, and departmental officers about the East Werribee project in a manner consistent with the definition of 'lobbying' under the Lobbyist Code of Conduct.

In 2017, AEC sought to raise its profile with the Victorian Government to progress the East Werribee project and engaged several registered lobbyists for this purpose. AEC representative A observed that, at best, those lobbyists were former chiefs of staff to ministers and that some former ministers were required to promote the project.

In February 2018, AEC representative B approached Mr Theophanous as a possible lobbyist for AEC, because he was someone 'more senior' and with some 'cabinet experience'. The AEC executive team determined not to engage Mr Theophanous as a lobbyist unless he could provide a letter from the VPA to indicate that this would not constitute a conflict of interest.

AEC representatives A and B were summonsed to provide evidence to IBAC about this matter. In examinations, both witnesses confirmed that Mr Theophanous did not provide written assurance from the VPA, and that as a result, Mr Theophanous was not formally appointed as an AEC lobbyist. However, they continued to engage with Mr Theophanous to progress the East Werribee project.

In evidence, AEC representative B agreed that the sole purpose of the relationship he formed with Mr Theophanous was to progress his work at AEC and the East Werribee project. AEC representative A stated, 'I treat him like another lobbyist [who] just couldn't be paid'.

While IBAC's investigation did not identify any direct payments from AEC to Mr Theophanous, it did identify donations to his daughter's campaign for the seat of Northcote in 2018, which amount to indirect payments.

A text message from a lobbyist (for company X which was formally engaged by AEC) to Mr Theophanous on 29 November 2018, suggests that Mr Theophanous was considered as one of a team of lobbyists working on behalf of AEC. That message read 'Meeting on Monday with all AEC lobbyists: me, [person V from company Y], you, and [person W from company Z]'.

In evidence, Mr Theophanous confirmed that he attended the meeting and agreed that 'it was a meeting of lobbyists' but denied that he was regarded as a lobbyist by the others. He asserted that he 'was convinced to go there on the basis that [he] could provide some… assistance to their lobbying efforts'.

6 Victorian Government Professional Lobbyist Code of Conduct, clause 3.3.
7 Victorian Government Professional Lobbyist Code of Conduct, clause 1.4.
8 Victorian Government Professional Lobbyist Code of Conduct, clause 4.4.

In evidence, Mr Theophanous refused to concede that his activities in support of the AEC project involved lobbying, stating:

> *… it was an interactive process um, where I, ah, gave them advice, but I've told you that I have given them advice. Um advice is not the same as lobbying.*
>
> *I tried to limit my discussions with [departmental officers] to simply ah telling them that I supported the project, which I did, um and ah telling them that ah if I could help in some way I'd be happy to but that I was ah – ah I was not in a commercial relationship ah with the AEC.*
>
> *I've spoken to both of those minister's [the Treasurer and Minister for Finance] ah about this proposal ah and I believe I did so as an ordinary citizen ah who is interested in those issues about the western suburbs which included AEC.*

IBAC's investigation found that from his initial interaction with AEC representatives A and B in February 2018 until at least August 2019, Mr Theophanous represented himself as someone able to advance their interests due to his role as a VPA director and engaged in lobbying activities for AEC in relation to the East Werribee project. Those lobbying activities included:

- phone calls, text messages, and in-person meetings with Victorian ministers and government representatives involved in the East Werribee project
- advice and assistance drafting written material used by AEC in their dealings with government.

Mr Theophanous' advice to AEC and attempts to influence elected officials and departmental officers are discussed below. The extent to which his interest in the AEC project went well beyond that of an ordinary citizen is set out in section 1.2.5 of this report.

### Providing 'advice' and assistance drafting letters to ministers

The analysis of communications on Mr Theophanous' devices show the first discussions between Mr Theophanous and AEC representatives A and B occurred around 20 February 2018.

The content of those discussions is unknown, however, following a meeting on 23 February 2018, Mr Theophanous indicated to AEC representative A that he had a private dinner planned with the Minister for Finance and urged AEC representative A to ensure the minister's office received a letter from AEC prior to that engagement on 28 February 2018. At that time, the Minister for Finance was responsible for deciding whether the government would approve the AEC proposal.

In a letter addressed to the Minister for Finance, dated 27 February 2018, AEC raised concerns that it had not been asked to address any outstanding issues since the finalisation of the terms sheet in November 2017. AEC requested an opportunity to address any issues the state may have, particularly about the nomination of university partners, a public transport solution, or financial capacity. Text message exchanges show that Mr Theophanous was involved in drafting this letter.

In examinations, Mr Theophanous asserted that the 'advice' he gave AEC in relation to the letter did not amount to lobbying and that he could not recall having a private dinner with the Minister for Finance.

Regardless of whether he met with the Minister for Finance or characterises the meeting as social, Mr Theophanous' involvement in crafting this letter, reporting to AEC that he was meeting the Minister, and then requesting that the Minister receive the letter prior to the meeting, links a plan to progress AEC's interest with a meeting with the Minister in relation to their ministerial responsibilities. This demonstrates one of the ways he engaged in lobbying activities to promote AEC's East Werribee project.

These lobbying activities also conflicted with Mr Theophanous' duties as a VPA director. For instance, on 28 February 2018, the day of the planned dinner meeting with the Minister for Finance, Mr Theophanous attended a VPA Risk and Audit Committee meeting where it was noted that the CEO of the VPA would provide an update to the board on what actions the VPA should take if the government decided not to proceed with the East Werribee sale proposal. Minutes of the 28 February 2018 meeting indicate that Mr Theophanous was in attendance and did not declare a conflict. The update was provided to the board at its meeting on 14 March 2018, which was also attended by Mr Theophanous (who again, did not declare a conflict of interest).

### Attempts to influence ministers in support of AEC

IBAC's investigation found that Mr Theophanous attempted to influence ministers and their advisors in favour of the East Werribee project.

Most of Mr Theophanous' lobbying activities could be characterised as 'talking to key government people' about the AEC's East Werribee project, consistent with the term used in a draft Embark Worldwide invoice for AEC, dated 23 February 2018.[9]

For instance, on 5 March 2018, Mr Theophanous sent text messages to the Minister for Finance and the Treasurer (who is also the Member for Werribee), pointing them to a recent newspaper article favourable to the AEC proposal in East Werribee.[10] Two weeks later, on 21 March 2018, Mr Theophanous sent a text message to AEC representatives A and B stating 'I have had the most important conversation with the Treasurer'. When asked about this comment in examinations, Mr Theophanous stated:

> *[The] Treasurer… is a very close friend… I try to give him advice… as a friend… in the case of this particular proposal… it's difficult for me to recall the exact nature of our conversations, but let's assume that there were conversations around this question in the West… [and] how the West of Melbourne could be developed further.*

A week later, in response to a message in which AEC representative A raised concerns of discrimination about Chinese investment, Mr Theophanous replied, 'I will make sure to reinforce those points you make with Ministers.'

On 19 June 2018, in a text message exchange with Mr Theophanous, AEC representative A queried, 'Any news from [the Treasurer].' Mr Theophanous replied, 'Spoke to him at length and to [the Minister for Finance]. Will talk to [AEC representative B] on Thurs.'

Six months later, text messages indicate that Mr Theophanous continued his engagement with AEC.

On 7 January 2019, Mr Theophanous sent the same text message to AEC representatives A and B stating:

> *I am meeting advisor of Minister [for Priority Precincts] and Treasurer… this week and another Minister that may be able to help. Will keep you informed. Theo.*

On 11 January 2019, Mr Theophanous sent a text message to inform AEC representative B that he and his wife would be spending time with the Treasurer and his family in Bali the following week and that he would speak to the Treasurer then. He ends the text with 'we will get there my friend'.

On 6 March 2019, Mr Theophanous contacted the then minister for Small Business and suggested that he:

> *Tell [the Deputy Secretary DJPR] that you were approached by [AEC representative B] and asked about supporting Australian Education City. You understand there would be many small business and start up opportunities. Ask for briefing.*

On 7 April 2019, Mr Theophanous revised a draft letter at the request of AEC representative B and included a second letter to be sent to the Treasurer, and the then Minister for Priority Precincts. The purpose of the draft letter was essentially to increase senior and relevant minister's awareness of AEC's project.

On 29 June 2019, just prior to the official announcement that the Victorian Government was no longer proceeding with the AEC proposal for East Werribee, Mr Theophanous contacted several current and former senior ALP figures, including the Treasurer, current and former senior ministers, and the then Ministers for: Jobs, Innovation and Trade; Small Business; and Priority Precincts.

Mr Theophanous' message to the Treasurer stated:

> *Mate I have been spoken to by a lot of ppl including [a former senior minister]. I really think that the decision to terminate AEC will have serious consequences for the Govt and despite what U have been told for our relationship with China. A massive law suit may also follow and pretty bad publicity. If there is any way to stall it to allow some serious but limited negotiation or better management of the separation my advice is that we should do so. Please Call so I can brief you. Theo.*

In response, the Treasurer told Mr Theophanous he needed to speak to the responsible ministers, which did not include himself 'for obvious reasons'.

9 See section 1.2.4 for further discussion of draft agreements between Embark Worldwide and AEC.
10 Johnston M. March 2018, 'East Werribee $30bn 'super city' options include driverless trains, rail loop'. *Herald Sun*.

On the same day, Mr Theophanous engaged in a text message exchange with the then Minister for Jobs, Innovation and Trade, in which Mr Theophanous stated:

> *I really think that the decision to terminate AEC will have serious consequences for the Govt our relationship with China and Tim. If there is any way to stall it to allow some serious but limited negotiation we should do so.*

In response, the Minister suggested, 'You should perhaps try calling [the Minister for Priority Precincts]. I'm told he has responsibility for it now.' Mr Theophanous replied, '[the Minister for Priority Precincts] doesn't answer my calls. Maybe you should ask [the then Commissioner for Victoria to China] what he thinks...'

Despite concerns that he would not return his call, Mr Theophanous nevertheless messaged the then Minister for Priority Precincts, stating, 'If you are interested in my take on likely fall out of AEC decision and best way to manage it call me. Theo.' The Minister did not respond.

On 5 July 2019, Mr Theophanous sent separate text messages to the then Minister for Priority Precincts, the Treasurer, and for a senior minister as well as the Secretary DJPR imploring them to delay and consider if there was some 'shandy' that could be offered to AEC if their original proposal could not go ahead. Each message, stated:

> *I think you would have received this letter about AEC. I suggest you delay announcements if in your power as media not good on this. Perhaps allow time to explore if some shandy or government controlled development with AEC in the background is possible. Theo.*

When presented with these text message exchanges in examinations, Mr Theophanous denied that he engaged in lobbying activity in support of AEC. As noted above, he instead asserted that his discussions with these government ministers occurred in his capacity as an ordinary citizen who took an interest in issues concerning the western suburbs.

The communications from Mr Theophanous to ministers and their advisors – suggesting that the decision be reconsidered – occurred after the government had considered AEC's proposal, at a time when the government was about to make an announcement that it was no longer considering AEC. As discussed above, the content of those communications suggests that Mr Theophanous sought to influence decision-makers in a manner that constituted lobbying.[11]

### Attempts to influence departmental officers in support of AEC

IBAC's investigation also found that Mr Theophanous attempted to influence departmental officers in favour of the East Werribee project. In relation to Victorian departmental officers, Mr Theophanous' lobbying activities involved seeking information and making recommendations relating to the East Werribee project.

For instance, on 5 August 2018, Mr Theophanous contacted the then Secretary DEDJTR seeking advice 'about a personal matter'. The then Secretary DEDJTR returned the contact on 6 August 2018.

On 8 August 2018, the then Secretary DEDJTR sent an email to departmental officers involved in the East Werribee project, outlining the contact with Mr Theophanous. That email stated:

> *As discussed yesterday, I was contacted by Theo Theophanous asking to discuss a private matter on Sunday. We spoke on Monday, and the private matter turned out to be an approach by AEC to engage Theo to work on the project now that its management has transferred to [the] Minister [for Major Projects] and DEDJTR.*
>
> *Theo was seeking guidance whether he should take up the offer. I told him I was unable to give him that advice, and that [the] Minister [for Major Projects] has not had the opportunity to be fully briefed and to decide the next steps. My impression was that Theo will decline the invitation.*

Several days later, Mr Theophanous sent the then Secretary DEDJTR a text message that stated:

> *FYI. I decided not to take up that offer. I prefer to wait to see if I can assist the Govt if a governance overseeing committee is established.*

The nature of Mr Theophanous' approaches to the then Secretary – which were initially expressed as 'a personal matter' and subsequent message suggesting Mr Theophanous had declined an offer made by AEC – demonstrate how Mr Theophanous sought to avoid the perception that he was engaged in lobbying activities on behalf of AEC.

11 Victorian Government Professional Lobbyist Code of Conduct, clause 3.3, definition of lobbying.

On 2 September 2018, in a text message exchange with Mr Theophanous, AEC representative A expressed concern that DEDJTR may recommend ending the project and sought Mr Theophanous' assistance, stating:

> *We need to get to [the Minister for Major Projects] sonner [sic] than later otherwise a quick recommendation to end the project from [the then Secretary DEDJTR] could be imminent.*

In response, Mr Theophanous stated:

> *[The then Secretary DEDJTR] told me that he would leave after the elections. It makes no difference to the outcome… Anyway you did meet with [sic] [the Secretary]. A meeting with the Minister and you is not possible during this phase. Talk when you return.*

On 3 September 2018, Mr Theophanous drafted a letter, addressed to the then Secretary DEDJTR and other senior departmental officers at DEDJTR, in which AEC sought a meeting with the department to work through any outstanding issues and outlined the involvement of the VPA and other government agencies to date.

The next day, Mr Theophanous sent a message to AEC representative A telling him to look at a document he sent to AEC representative B. In response, AEC representative A stated 'It is so good unbelievable!', 'THANK YOU!'. The document referred to appears to be the draft letter addressed to the then Secretary DEDJTR and other senior departmental officers at DEDJTR. Review of departmental records show that correspondence sent via email in the name of the AEC CEO was received by the department on 5 September 2018.

On 8 September 2018, Mr Theophanous followed up, asking AEC representative A if the letter had been sent. In response, AEC representative A confirmed that it had and indicated that a meeting had been arranged with the department to go through the financials on 23 September 2018.

In mid-September 2018, Mr Theophanous attempted to contact a departmental officer at DEDJTR, regarding the East Werribee project, later sending the officer a text message stating, '…although I do not have a commercial relationship with AEC, my son has been employed by them on some project.'

In response, the departmental officer stated, 'Let's not talk about AEC until government decides a direction.' Mr Theophanous agreed and later added, 'BTW. I am a registered lobbyist.'

Two days later, Mr Theophanous went back to the departmental officer stating, 'Just to clarify my son is no longer working for AEC.'

This series of messages misleadingly suggests that Mr Theophanous was complying with his obligations as a lobbyist (by declaring himself to be a registered lobbyist while omitting the fact that he had not registered AEC as a client) and did not have a conflict of interest in relation to AEC (by failing to disclose that he was soliciting donations from AEC for his daughter's 2018 state election campaign).

Unlike Mr Theophanous, review of the departmental emails obtained under summons showed that the other AEC lobbyists all declared themselves as lobbyists for AEC in communications with departmental officials in September 2018.

### 1.2.4 Use of position as a director on a public entity board

The PA Act defines a public entity board member as a director,[12] and sets out the obligations of directors in the Victorian Public Sector Commission (VPSC), Code of Conduct for Directors of Victorian Public Entities 2016 (Code of Conduct for Directors), issued under the PA Act.[13] These obligations include requirements that directors:

- not use their position to seek an advantage for themselves or another person
- not use information obtained during their board duties to obtain an advantage for themselves or another person
- act with honesty and integrity
- comply with the board's policy on managing conflicts of interest and duty.[14]

IBAC's investigation found that Mr Theophanous sought to use his public position on the board of the VPA to favour AEC and further his other business interests as a registered lobbyist.

Review of Mr Theophanous' devices showed that on 17 August 2018, he made enquiries with the CEO of the VPA, seeking to invite AEC representative A to a VPA board networking lunch.

In response, the CEO indicated that it would be inappropriate for the VPA to host AEC during government consideration. Mr Theophanous replied, 'I think he is involved with Govt as the project is now with [the Minister for Major Projects] for negotiation and decision. I thought would not be an issue as VPA no longer involved in decision. Let me know.'

This response from Mr Theophanous downplayed his direct knowledge of the process and minimised his personal involvement with the AEC proposal. Moreover, he made this comment shortly after approaching the then Secretary DEDJTR about AEC under the guise of 'a personal matter' on 5 August 2018, and a month after having, on 3 July 2018, sent AEC representative B a WhatsApp message asking him to 'think about how we continue our arrangement'.

Evidence obtained in IBAC's investigation also demonstrates that Mr Theophanous either used his position as a VPA director to advance the interests of his registered lobbying clients, or at least that he represented himself to his registered lobbying clients as someone who was able to advance their interests due to his role as a VPA director. At the time of IBAC's investigation, Mr Theophanous was a registered lobbyist for at least two property developers and declared these clients to the VPA.

Invoices from Embark Worldwide to registered lobbying clients demonstrate that Mr Theophanous sought information from individuals within the VPA to support the interests of those clients or that he gave those clients the impression that he did so. For instance, in an invoice for services to one client, Mr Theophanous indicated that he had met with 'appropriate people within VPA to assist behind the scenes with blockages within the bureaucracy'.

In draft invoices to the same client for the subsequent months, Mr Theophanous repeatedly recorded that his lobbying activities included liaising with specified VPA employees and assuring his client that the VPA were assisting.

12 *Public Administration Act 2004*, s 4.
13 *Public Administration Act 2004*, s 61.
14 The Code of Conduct for Directors of Victorian Public Entities 2016, clauses 3.6, 3.7, 3.11 and 3.12, issued under the *Public Administration Act 2004*, s 61.

### 1.2.5 Financial benefits

IBAC's investigation found that Mr Theophanous was unsuccessful in his attempts to secure a written contract with AEC. However, he sought, but did not receive, payments from AEC to himself or his son. Subsequently, Mr Theophanous also solicited donations from AEC for his daughter's 2018 election campaign for the seat of Northcote.

These two strategies are discussed further below.

#### Draft agreements and invoices between Embark Worldwide and AEC

Records indicate that Mr Theophanous' son was involved with Embark Worldwide as a 'consultant'. However, while he attended some early meetings with AEC representatives and was named in a draft service agreement between Embark Worldwide and AEC, IBAC did not identify any information to show that Mr Theophanous' son engaged in lobbying or consulting work for AEC.

A draft and unsigned agreement, dated 1 February 2018, outlined a six-month arrangement with AEC in which Mr Theophanous' son was listed as the 'nominated consultant' for Embark Worldwide. The draft agreement noted that Mr Theophanous' son would provide written or oral reports to AEC representatives A and B at least twice a month and that the client (AEC) would pay Embark Worldwide a monthly fee of $17,000, plus GST. The draft agreement states that services provided by Embark Worldwide to AEC would include:

- *Strategic (and politically relevant) advice in developing and achieving objectives relevant to the Client.*
- *Arranging and if required attending meetings with relevant persons and organisations.*
- *Assisting the Client in building enhanced acceptance of specified projects.*
- *Maintaining regular contact with and reporting to the Client*.

IBAC's investigation also identified a February 2018 Embark Worldwide invoice to AEC for $18,700, which directed that payment be made to Mr Theophanous' son for 'consultancy services' by Embark Worldwide for the month of February 2018, including 'talking to key government people'.

In examinations, Mr Theophanous said that the draft agreement dated 1 February 2018, was prepared 'as a possibility' for his son to act as a consultant for Embark Worldwide, which was never enacted, and that the February 2018 tax invoice was a 'speculative draft' in response to his son asking to see examples of what a consultancy agreement and a tax invoice would look like.

IBAC's investigation identified lobbying activities that fit the services described in the draft agreement provided by Embark Worldwide to AEC for the six-month period from February 2018. However, these activities were undertaken by Mr Theophanous, not his son.

On 24 May 2019, Mr Theophanous sent a further draft advisor agreement to AEC representative B via email, saying, 'Hi […], I have attached a draft Advisor agreement. Can you have a look and if ok get it signed and sent back to me for signature, I will then send you an invoice.' The agreement listed AEC as the 'client' and Mr Theophanous as the director and principal advisor on behalf of Embark Worldwide and referred to a three-month arrangement, for which the client (AEC) would pay Embark Worldwide a fee of $90,000, plus GST. Services specified in this agreement included:

- *Strategic advice and reports in developing and achieving objectives relevant to the Client.*
- *Assisting the Client in building enhanced acceptance of specified projects.*
- *Maintaining regular contact with and reporting to the Client.*

Arrangements were made for Mr Theophanous to meet AEC representative B, and on 30 May 2019, following an apparent meeting at the Sofitel, AEC representative B sent Mr Theophanous a text message to indicate that he would discuss the matter with his accountant and get back to him.

Several days later, AEC representative B messaged Mr Theophanous stating:

> *Hi Theo, my accountant advises against implementing the plan we discussed. Can we meet up this Sunday / Monday to discuss alternative solution/s?*

Mr Theophanous responded, 'We will discuss this face to face.' The two then decided to meet on 3 June 2019.

In examinations, AEC representative B agreed that when Mr Theophanous was unable to produce a letter from the VPA as required to secure a contract with AEC, Mr Theophanous approached him with a proposal to be paid from another company that was not AEC, however, AEC representative B declined to do so.

When questioned about the agreement he sent AEC representative B in May 2019, Mr Theophanous said that having given some general advice to AEC, he thought he would formalise his services by way of a written agreement, but ultimately changed his mind because he was, '… aware of imminent decisions and I didn't think ah, ultimately that I should be involved in this.'

He also asserted that the agreement referred to 'advisory services' as opposed to 'consultancy services', stating:

> *In my mind if you go under a consultancy agreement you would go and lobby. Um under an adviser ah agreement you would provide strategic advice which may not necessarily include ah actually lobbying.*

While neither of the draft agreements prepared in February 2018 or May 2019 were executed, IBAC is satisfied that these activities demonstrate that Mr Theophanous was seeking to obtain payment for his lobbying activities to promote the East Werribee project.

During this period Mr Theophanous contacted ministers and departmental officers to get information and promote AEC's East Werribee project in a manner consistent with the terms of those draft agreements. Even if Mr Theophanous was motivated by concern for the western suburbs (as he claimed in evidence) the existence of the draft agreements and the similarity between his actions and the services set out in those draft agreements support the conclusion that he was also seeking financial compensation for this lobbying work.

### Donations to the candidate for the seat of Northcote

IBAC's investigation did not identify any direct financial payments from AEC to Mr Theophanous. However, there were other arrangements that provided financial and in-kind benefit to people associated with Mr Theophanous, in particular the 2018 campaign for the seat of Northcote, which was contested by Mr Theophanous' daughter.

In May 2018, Mr Theophanous' daughter was preselected as the candidate for the seat of Northcote. Around the same time, Mr Theophanous was involved in a text message exchange with AEC representative A in relation to a political donation. In the exchange, AEC representative A indicated that he had reservations about the idea of donating money due to perceptions of risk to AEC, stating:

> *Theo I thought about our conversations yesterday I have been asked before by the government whether I have donated any money to any political parties in the past the answer was NO. If I do this now and particularly in the effort to influence the opinion of key decision makers such as the ministers it will be seen very dodgy at this time of the project and this can lead to disqualification of our bid which is not worth the risk. I have asked [AEC representative B] to see you today to see how else we can help without getting everyone in trouble… the last thing I want is to be seen doing something wrong. Hope you understand. Thanks […].*

As discussed above, this exchange occurred not long after Mr Theophanous sent a series of messages to the Minister for Finance and the Treasurer in support of the East Werribee project and advised AEC representatives A and B that he was in conversation with the Treasurer, in March 2018.

In evidence to IBAC, when asked what the arrangement was with Mr Theophanous, AEC representative B stated:

> *It was, um, like, and, um, an informal arrangement where if he, if he could help… he would help … That was the… informal arrangement and that… if he were to help me or, as in this and then in the, um, election, whatever, if I could help, I-I would help …*
>
> *and I said if I can help in the election whatever shape or form, I will, I will do it as a friend, right and also, but can see that, um, I actually make donation to his daughter's campaign.*

AEC representative B conceded in his examination that 'the arrangement wasn't you helping him as a friend at all. It was that you would make donations … in return for lobbying work he did for AEC."

AEC representative A characterised Mr Theophanous' work to promote AEC's proposal as being 'for a future returned favour' and explaining 'in our business community, you invest in someone's relationship for five years, ten years until one day you, you might need some help'.

When asked if he thought Mr Theophanous was prepared to assist AEC for other forms of payment at a future time, AEC representative A stated, 'I think a future favour for the kids, to be, to be precise,' and agreed that some of those future favours came to fruition in the form of donations.

On 19 September 2018, a donation of $10,000 was made to the Northcote State Election Campaign account by Company X. At the time of the payment, AEC representative A was the director of Company X.

IBAC's investigation found that Mr Theophanous arranged for AEC to purchase tickets to fundraising events held in support of the campaign for the seat of Northcote on 31 July 2018 and 9 October 2018. Tickets to these events were sold for between $2000 and $2500 per head.

Further in-kind contributions to the Northcote campaign made by AEC representative B, whose only link to the electorate was Mr Theophanous through AEC, included:

- 250 phone calls to Chinese speaking constituents
- translation of a letter with a Chinese salutation
- people to hand out how to vote cards at prepoll booths in November 2018.

IBAC's investigation did not identify any connections between AEC representative A or B and Mr Theophanous' daughter or the campaign for Northcote, other than Mr Theophanous.

IBAC's investigation did not find any evidence to suggest that the candidate for the seat of Northcote was aware of her father's relationship with AEC.

The following year, in April 2019, Mr Theophanous went on to promote another federal election campaign event to AEC representative A as 'a unique opportunity to speak to the [Victorian] Treasurer directly'.

AEC representative A agreed to purchase two tickets, and Company Y (another company related to AEC) was invoiced a further $5,000 in relation to this event.

# Systemic corruption vulnerabilities

2

## IBAC's Operation Clara has identified broader corruption vulnerabilities associated with directors of public entity boards who engage in lobbying activities.

The key vulnerabilities identified are conflicts of interest involving lobbyists on public entity boards, and a general lack of transparency in lobbying activities.

### 2.1 Privileged access afforded to lobbyists on public entity boards

Public entity boards provide advice and take actions that can influence government decisions and public perceptions of government.[15] This means high standards of integrity are required of directors.[16]

Placing public interest above private interest when serving on a public entity board is emphasised by the focus on conflict of interest provisions for public entity board directors in the PA Act and VPSC guidance.[17]

The importance of ensuring that public entity boards maintain high standards of integrity is also reiterated in the Lobbyist Code of Conduct, which states:

> *A Lobbyist or a Government Affairs Director who holds an appointment to any Government Board or Committee must also ensure that they comply with the integrity provisions of the Public Administration Act 2004, public sector codes of conduct and take guidance from the Public Sector Standards Commissioner's Conflict of Interest Framework.*[18]

Two issues of concern in Operation Clara involved:

1. Mr Theophanous' failure to declare lobbying activities that gave rise to a conflict of interest with his duties as a director on the board of a public entity.
2. The way in which he referred to connections he had with the VPA to justify fees he charged his lobbying clients.

#### 2.1.1 Failure to declare conflicts of interest

A VPA director's obligations to register interests and identify and manage conflicts of interest are set out in the Code of Conduct for Directors, and the VPA Act.

The VPA Act defines:

- A ***general* conflict of interest** as a matter in which 'the person could reasonably be taken, from the perspective of an impartial, fair-minded person, to have a conflict of interest in the matter'.[19]
- A ***specific* conflict of interest** as a matter in which a relevant person 'would gain a benefit or suffer a loss (whether directly or indirectly and whether of a financial or non-financial nature) depending on the outcome of the consideration of the matter'.[20]

Under the VPA Act, directors are required to disclose if they have a conflict of interest. This includes in a matter to be considered by the board at a meeting that they are attending. The minutes of this meeting must record the director's name, the nature of the conflict of interest, as described by the director, and which directors voted on the matter that gave rise to the conflict of interest.[21]

A failure to meet those requirements is a summary offence. IBAC notes that a deliberate failure to properly declare and/or manage a conflict of interest is often difficult to detect, takes time to identify and due to statutory time limits can be difficult to prosecute.

The Code of Conduct for Directors, stipulates that directors must comply with the board's policy on managing conflicts of interest and must not use their position to seek an advantage for themselves, another person, or other things.[22]

15 Victorian Government, *Appointment and Remuneration Guidelines* (updated 2020), p. 31.
16 VPSC, *Integrity guide for new board directors*, p. 3.
17 *Public Administration Act 2004*, s 4 (definition of 'public official') and s 7. VPSC, *Integrity guide for new board directors*, p. 7.
18 Victorian Government Professional Lobbyist Code of Conduct, clause 4.4.
19 *Victorian Planning Authority Act 2017*, s 26.
20 *Victorian Planning Authority Act 2017*, s 27.
21 *Victorian Planning Authority Act 2017*, ss 29(1) and (5). Equivalent provisions apply to board resolutions taken outside a meeting, s 30(3).
22 The Code of Conduct for Directors of Victorian Public Entities 2016, clauses 3.6 and 3.12.

Those obligations are outlined in the VPA's *Conflict of interest policy – Board Members*, and through training for directors.[23]

In Operation Clara, IBAC confirmed that Mr Theophanous received briefings detailing the VPA's procedures for managing conflicts of interest and other obligations of directors under the PA Act and VPA Act.

Mr Theophanous is an experienced public director who demonstrated that he was aware of and understood his obligations by making declarations to the VPA about other lobbying clients, family members, and associations with community groups.

Mr Theophanous repeatedly failed to make a declaration to the board of the VPA in circumstances where the board received information about AEC and/or the East Werribee project.

From the perspective of an impartial, fair-minded person it is arguable that Mr Theophanous could reasonably be taken to have a conflict of interest in the following matters.

- On 28 February 2018, Mr Theophanous attended a VPA Risk and Audit Committee meeting, in which it was noted the VPA CEO would update the board regarding actions the VPA should take if the Victorian Government decided not to proceed with the East Werribee Employment Precinct sale proposal. Minutes of the 28 February 2018 meeting indicate that Mr Theophanous was in attendance and did not declare a conflict of interest. This meeting occurred days after Mr Theophanous met with AEC representatives A and B on 23 February 2018, and in the same month that he drafted an agreement outlining a six-month arrangement with AEC in which his son was listed as the 'nominated consultant' for Embark Worldwide. The update was provided to the board at its meeting on 14 March 2018. Mr Theophanous also attended that meeting and did not declare a conflict of interest.
- In May 2018, Mr Theophanous attended a VPA board meeting at which the board was advised DPC had commissioned a whole-of-project review, which would inform the government's decision on the East Werribee project. In the months prior to this meeting, Mr Theophanous actively lobbied ministers to support AEC's East Werribee project. This included helping to draft a letter to the Minister for Finance regarding AEC's proposal in February 2018, sending messages to the Minister for Finance and the Treasurer that were supportive of AEC's proposal in March 2018, and updating AEC representatives A and B about his contact with ministers. Records show that Mr Theophanous did not declare a conflict of interest in relation to AEC at the May 2018 VPA board meeting.
- At its 13 November 2019 meeting the VPA board received an update on AEC's claim against the state of Victoria (including the VPA) in relation to the East Werribee project, which noted AEC submitted freedom of information applications to several government departments, including the VPA. Records indicate that Mr Theophanous attended this meeting but did not declare a conflict of interest in relation to AEC, despite his continued engagement with AEC and lobbying activities in support of the East Werribee project.

Mr Theophanous' repeated failure to declare his conflicts of interest despite the provisions of the VPA Act, and the Code of Conduct for Directors, suggest that other mechanisms are required to ensure directors are committed to their obligation to serve in the public interest on a public entity board.

23 *VPA Conflict of interest policy – Board Members, July 2017*, sections 4 and 8, 9 and 10.

### 2.1.2 Use of board membership to promote lobbying credentials

Directors on public entity boards are obliged to comply with the Code of Conduct for Directors. Under this Code, directors must:

- not use their position to seek an advantage for themselves or another person
- not use information obtained during their board duties to obtain an advantage for themselves or another person
- act with honesty and integrity.[24]

In Operation Clara, IBAC observed that Mr Theophanous sought to use his position as a director on the VPA's board to promote his private lobbying business.

IBAC identified instances where Mr Theophanous referred to his connection to the VPA and lobbying activities to justify charges, telling one client that he:

> *met with… appropriate people within VPA to assist behind the scenes with blockages within the bureaucracy.*

In another draft invoice, Mr Theophanous' notes indicate that he intended to advise his client that the 'VPA will also assist'.

Regardless of whether that invoice was sent, these examples suggest that Mr Theophanous sought information from within the VPA to support his private interest, or at the very least put himself forward as someone who had privileged access to information and people of authority in the VPA.

IBAC also observed that Mr Theophanous attempted to gain access to VPA events for his lobbying clients. For instance, in August 2018, Mr Theophanous wanted to invite AEC representative A to a board networking lunch but was advised by the VPA CEO that it would not be appropriate due to the government's consideration of the East Werribee proposal.

### 2.1.3 Proposed reforms

Effective conflict of interest processes are essential to help public entity boards demonstrate that their directors are impartial and focused on advancing the public interest.

Conflict of interest provisions are insufficient in reassuring the public that lobbyists can be trusted to focus on advancing the public interest when serving on a public entity board. This is because of the ease with which privileged access can be inferred and the conflict of interest requirements disregarded by a lobbyist serving as a director on a public entity board.

Operation Clara suggests that lobbying and public entity board duties are, at least to some extent, incompatible.

The board of a public entity must act and be seen to act in the public interest. The first step in achieving this is to appoint directors who can demonstrate that they do not have ongoing connections to lobbying interests relevant to the functions of the board to which they have been appointed.

All measures should be considered to ensure directors serving on public entity boards have a clear and consistent understanding of their conflict of interest obligations, and the mechanisms which are in place, and utilised, if a breach occurs. This includes situations where a conflict of interest arises *after* the appointment of a director to a public entity board.

24 The Code of Conduct for Directors of Victorian Public Entities 2016, clauses 3.6, 3.7, 3.11 and 3.12.

### Consider lobbying when making public entity board appointments

In Victoria, the *Appointment and Remuneration Guidelines* (Guidelines) outline the standard process and principles for appointing directors to non-departmental entities, including public entity boards.[25]

Chapter 6 of the Guidelines discuss the mandatory probity checks and declarations required for all appointments and explains that the private interest declaration process identifies conflicts of interest which could present a significant risk to the operation of the board or entity.[26]

To facilitate the declaration requirements set out in Chapter 6, the Guidelines include a 'declaration of private interest template', which identifies areas a potential appointee may have an interest to declare, including:

- significant sources of income
- positions or offices they occupy
- shareholdings
- trusts
- real estate.[27]

While the template prompts declarants to consider any agreements, contracts, or other interests they may have there are no direct references to lobbying activities in the template or elsewhere in the guidelines.

Several other Australian jurisdictions either prohibit or limit the extent to which registered lobbyists can be appointed to the board of a public entity.

For example, in Queensland, registered lobbyists are prohibited from serving on *any* government body. The Queensland Government guide *Welcome Aboard: A Guide for Members of Queensland Government Boards, Committees and Statutory Authorities*, states:

> *Individuals registered as a lobbyist on the Register of Lobbyists who are considered for appointment to a Government Board will be required to be removed from the Register of Lobbyists in order for the appointment to proceed.*[28]

The Queensland guide notes that this prohibition was introduced in 2009, with the clear intention to remove any suggestion of a conflict of interest between lobbyists and the governance of public entities and programs.[29]

In NSW, the *Appointment Standards: Boards and Committees in the NSW Public Sector* – issued by the NSW Public Service Commission – provides:

> *Lobbyists and their employees (as defined in the Lobbyist Code of Conduct) are ineligible for appointment to any NSW Government board or committee that has functions which relate to any matter, on which the lobbyist has represented the interests of third parties in the last twelve months.*[30]

*The NSW Government Boards and Committees Guidelines* – issued by the Department of Premier and Cabinet – repeats the NSW Public Service Commission's prohibition on appointing a lobbyist to a government board that has functions relevant to matters on which the lobbyist has represented clients. It also warns all lobbyists who *are* appointed to government boards against undertaking lobbying activity relevant to the functions of the board on which they serve, noting that a breach of this requirement can result in the lobbyist's removal from the register.[31]

The NSW and Queensland governments' approaches suggest that limiting the extent to which lobbyists can serve as directors is an appropriate mechanism to help public entity boards demonstrate their commitment to serve the public interest, which forms a key element of a board's governance credentials.

Careful consideration of lobbying activity as part of the appointment process, would enhance the existing conflict of interest assessment requirements under the Guidelines.

In determining the extent to which lobbyists should be ineligible for appointment to public entity boards, IBAC notes that at the time of the conduct under investigation, Mr Theophanous was the only registered lobbyist on the board of the VPA. This suggests that limiting the involvement of lobbyists on public entity boards will not necessarily adversely affect the expertise on boards.

25 Victorian Government, *Appointment and Remuneration Guidelines* (2021).
26 Victorian Government, *Appointment and Remuneration Guidelines* (2021), p.15.
27 Victorian Government, *Appointment and Remuneration Guidelines* (2021), Appendix 1 Declaration of Private Interests Template.
28 Queensland Government, *Welcome Aboard*: A Guide for Members of Queensland Government Boards, Committees and Statutory Authorities (2010), pg. 17.
29 Queensland Government, *Welcome Aboard*: A Guide for Members of Queensland Government Boards, Committees and Statutory Authorities (2010), pg. 17.
30 NSW Public Service Commission, *Appointment Standards Boards and Committees in the NSW Public Sector* (2013), p. 6.
31 NSW DPC, *Government Boards and Committees Guidelines*, September 2015, p.17-18.

A vetting process that focuses on lobbying activities undertaken by the nominee in the period prior to nomination has several advantages:

1. This approach recognises the unacceptable high risk that an appointment presents for a board's integrity if a lobbyist, working (lobbying) in a related field, is appointed to the board. This approach also ensures the risk is not left to a board's governance processes to manage.
2. This approach serves to mitigate the risk of unmanageable conflicts by requiring a minimum 12-month break ('cooling-off') from those connections which give rise to a conflict of interest before being considered for appointment to a board. This ensures that a lobbyist cannot quickly divest themselves of their lobbying interests to take up a board appointment.

Small enhancements to the vetting process for public entity board directors in Victoria could help foster greater public confidence in the integrity of public entities. These enhancements could also protect boards from criticism that its members may be conflicted due to their prior lobbying activities.

## Recommendation 1

IBAC recommends that the Department of Premier and Cabinet amend the *Appointment and Remuneration Guidelines* to specify:

a. a lobbyist (as defined in the Lobbyist Code of Conduct) is ineligible for appointment to a public entity board that has functions which relate to any matter, on which the lobbyist has represented the interests of third parties in a specified period (with reference to the NSW provisions)

b. the declaration of private interests template require that the declarant indicate if they are on the lobbyists register and, if so, provide details of the clients and industries in which they have operated in the 12 months prior to nomination.

### Ban public entity board directors from engaging in lobbying on matters relevant to the functions of the board on which they serve

Registered lobbying activities should be considered on appointment. This will help to identify individuals whose private interests may give rise to a heightened risk of a conflict of interest with their public duties in the event of their appointment to a public entity board. However, this process does not preclude public entity directors from engaging in lobbying activities following their appointment.

Once appointed to a public entity board, the Code of Conduct for Directors provides that a director on a public entity board must comply with the board's policy on managing conflicts of interest and duty.[32] Contravention of this Code can result in the removal or suspension of a director under the PA Act.

In the Code of Conduct for Directors, the *Appointment and Remuneration Guidelines*, do not mention:

- lobbying in terms of declaring or managing conflicts of interest
- the model conflict of interest policy for boards of Victorian public entities
- the accompanying resources that have been developed to help directors understand and comply with their duties and responsibilities on public entity boards.

While lobbying activities do not appear to be considered during the board appointment process in South Australia, once appointed, members are prohibited from engaging in lobbying activity, registering as a lobbyist, or maintaining their registration as a lobbyist during the period of their board membership.[33]

The ACT Lobbying Code of Conduct provides that:

> *A lobbyist who is appointed to a Government board, committee or other entity must not represent the interests of a third party to a public official in relation to any matter that relates to the functions of [that] entity and must, where they have made such representations prior to that appointment, ensure that they comply with all honesty, integrity and conflict of interest provisions and procedures applicable to appointees to that entity.*[34]

32 The Code of Conduct for Directors of Victorian Public Entities 2016, clauses 3.6, 3.7, 3.11 and 3.12.
33 *Lobbyists Act 2015* (SA), s.13(1)(c)
34 ACT Standing Orders, Legislative Assembly, 2 June 2022, Lobbyists Register – ACT Lobbying Code of Conduct, Continuing Resolution 8AB, clause (3)(n).

The South Australian and ACT governments' approaches suggest that prohibitions on lobbying by public entity board directors can help prevent conflicts of interest similar to those observed in Operation Clara; Mr Theophanous was able to serve as a director on the VPA board while representing the interests of a number of private developers, which can increase the risk of conflicts of interest (both real and perceived), which can in turn undermine the integrity of the board.

Like the NSW appointment process, the ACT approach of restricting the lobbying activities of government board members appears to strike a reasonable balance between maintaining the integrity of a board and limiting a board member's ability to engage in unrelated lobbying activities.

IBAC considers that for the duration of their appointment, public entity board directors should not engage in lobbying activities – paid or unpaid – in relation to any matter that relates to the functions of the public entity, and that this requirement should be reiterated in the codes of conduct for both lobbyists and public entity board directors.

## Recommendation 2

IBAC recommends that the Department of Premier and Cabinet revise the Lobbyist Code of Conduct to:

a. prohibit public entity board directors from engaging in lobbying activities on any matter that relates to the functions of the public entity
b. require that public entity board directors comply with integrity requirements, including conflict of interest provisions in relation to representations they have made prior to their appointment (with reference to the ACT provisions).

## Recommendation 3

IBAC recommends that the Victorian Public Sector Commission revise the Code of Conduct for Directors to:

a. prohibit public entity board directors from engaging in lobbying activities on any matter that relates to the functions of the public entity
b. require that public entity board directors comply with integrity requirements, including conflict of interest provisions in relation to representations they have made prior to their appointment (with reference to the ACT provisions).

### Extend time-limit to commence proceedings for failure to declare a conflict of interest

IBAC notes that a *deliberate* failure to properly declare and/or manage a conflict of interest is often difficult to detect, takes time to identify and prosecute. To serve as an effective deterrent and penalty, IBAC considers that the standard 12-month limit on the time to charge for a breach of the conflict of interest provisions under the VPA Act should be extended.

An extension in time to commence proceedings of up to three years would be consistent with similar provisions under the *Local Government Act 2020* (LG Act), which specifies that proceedings for a summary offence may be commenced within the period of three years after the alleged offence.[35] The LG Act also provides that failure of a person to disclose a material conflict of interest, or exclude themselves from the decision-making process, is a summary offence. [36]

## Recommendation 4

IBAC recommends that the Minister for Planning amend the VPA Act to specify that proceedings for a summary offence may be commenced within the period of three years after the alleged offence.

35 *Local Government Act 2020*, s 313 (3).
36 *Local Government Act 2020*, s 130 specifies that a maximum penalty of 120PU applies in relation to a breach of the conflict of interest provisions that apply to relevant persons.

## 2.2 Lack of transparency in lobbying activities

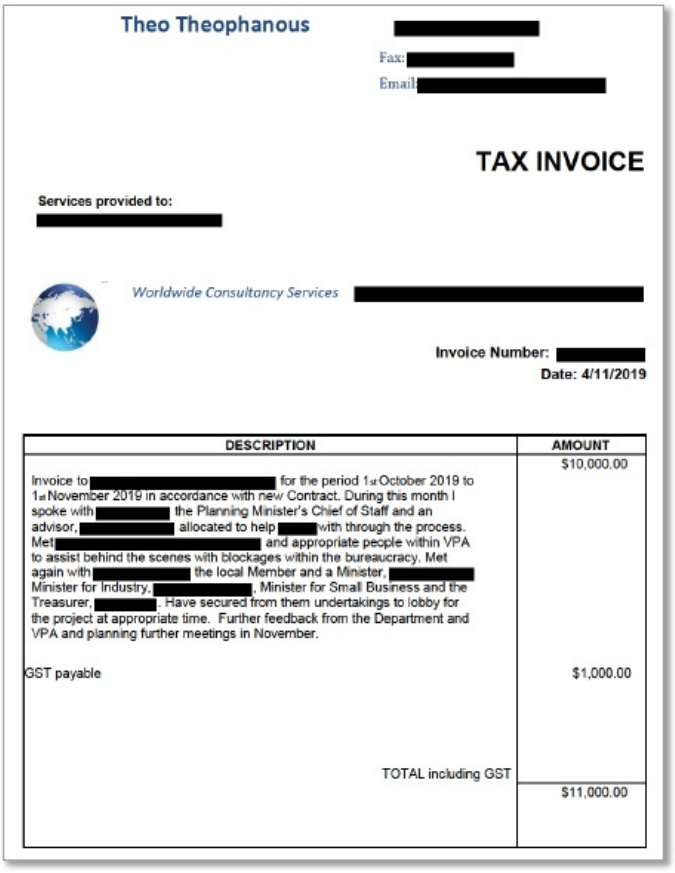
Lobbying plays a legitimate role in helping to communicate the views of different sections of the community to decision makers in a democracy. However, when access to government representatives is not transparent, there is an increased risk that the decision-making process may become distorted or corrupted.

In Operation Clara, IBAC's investigation pointed to several transparency concerns, including Mr Theophanous' use of ministers as proxy lobbyists, and his failure to register and disclose his lobbying interests when engaging with government representatives.

### 2.2.1 Targeting of members of parliament to act as proxy lobbyists

Under the Lobbyist Code of Conduct, members of parliament and ministers are not currently defined as lobbyists and lobbying activity that occurs between government representatives is not governed by the Lobbyist Code of Conduct.

IBAC's investigation suggests that Mr Theophanous targeted members of parliament to advocate his causes with the Minister for Planning in support of his clients' interests. In November 2019, Mr Theophanous prepared an invoice, advising his client that he had met again with the Minister for Suburban Development (who was also the relevant Local Member for this development), and other ministers whom he represented to his client as willing 'to lobby for the project at appropriate time', as shown in the extract below.



Theo Theophanous

[redacted]

Fax: [redacted]

Email: [redacted]

**TAX INVOICE**

**Services provided to:**

[redacted]

*Worldwide Consultancy Services* [redacted]

**Invoice Number:** [redacted]

**Date: 4/11/2019**

| DESCRIPTION | AMOUNT |
|---|---|
| Invoice to [redacted] for the period 1st October 2019 to 1st November 2019 in accordance with new Contract. During this month I spoke with [redacted] the Planning Minister's Chief of Staff and an advisor, [redacted] allocated to help [redacted] with through the process. Met [redacted] and appropriate people within VPA to assist behind the scenes with blockages within the bureaucracy. Met again with [redacted] the local Member and a Minister, [redacted] Minister for Industry, [redacted], Minister for Small Business and the Treasurer, [redacted]. Have secured from them undertakings to lobby for the project at appropriate time. Further feedback from the Department and VPA and planning further meetings in November. | $10,000.00 |
| GST payable | $1,000.00 |
| TOTAL including GST | $11,000.00 |

The following month in December 2018, Mr Theophanous reported to his client:

> *[The Treasurer], [Minster for Jobs, Innovation and Trade], [Minister for Small Business] and [Minister for Suburban Development] are all set to support the project and speak to the Planning Minister. VPA will also assist. At this point we are concentrating on getting hearings with DWELP (sic) and on getting the advice put up to the Minister asap.*

And in January 2020, Mr Theophanous reported to his client:

> *I have again spoken to [the Treasurer], [Minister for Jobs, Innovation and Trade], [Minister for Small Business] and [Minister for Suburban Development] and they are all willing to speak to the Planning Minister… I have also used December period to speak to a number of backbenchers about the project who are also willing to offer support.*

Irrespective of whether the individuals identified in Mr Theophanous' invoice approached the Minister for Planning or departmental officers, these records show how lobbyists can, and do, use members of parliament as proxy lobbyists to obscure their involvement and give the impression that a matter has broader support than it has.

In circumstances where an MP or minister acts on the promptings of a lobbyist, the decision-making minister would have no way of knowing to what extent the minister was lobbied.

Operation Clara demonstrates the need for all members of parliament to declare who has lobbied them when approaching a decision-making minister and is consistent with IBAC's observations in other matters.

As discussed in IBAC's *Special report on corruption risks associated with donations and lobbying*, the definition of 'government representative' should be broadened to include all public officers who may be subject to lobbying activity, including members of parliament and ministers who initiate meetings with a minister or their advisor.

### 2.2.2 Ineffective registration and disclosure requirements

The Lobbyist Code of Conduct states that a register of lobbyists should contain details of the names of persons for whom the Lobbyist has provided paid or unpaid services as a Lobbyist during the previous twelve months.[37] This Code also defines lobbying activity as any contact with a Government Representative in an effort to influence Government decision-making.[38]

These provisions suggest that Mr Theophanous was obliged to record details of the contact he made with government representatives in an effort to influence government decision-making in support of AEC's East Werribee project, regardless of whether he was paid.

In Operation Clara, IBAC observed that Mr Theophanous engaged in a range of lobbying activities, some of which he registered (such as his representations on behalf of property development companies) and some which he did not (namely his representations on behalf of AEC). He then went on to present himself as a registered lobbyist when engaging with departmental officers on the issue of AEC's East Werribee project but failed to state that he was not a registered lobbyist for AEC, as discussed in 1.2.3.

IBAC considers that Mr Theophanous' failure to register AEC as a lobbying client lacked accountability and transparency, while his efforts to assert that he was not required to register AEC point to a need for clearer guidance and enforcement of the registration requirements.

37 Victorian Government Professional Lobbyist Code of Conduct, clause 5.1(d).
38 Victorian Government Professional Lobbyist Code of Conduct, clause 3.3.

The Lobbyist Code of Conduct also specifies that when making an initial contact with a government representative about a particular issue on behalf of a third party for whom the lobbyist has provided paid or unpaid services, the lobbyist must inform the government representative:

a. that they are a lobbyist or employee, contractor or person otherwise engaged by the lobbyist
b. whether they are currently listed on the register of lobbyists
c. that they are making the contact on behalf of a third party or parties
d. the name of the third party or parties
e. the nature of the third party's issue
f. whether they also act for any other third party which is currently involved in a government tender process. [39]

The intent of this provision is to ensure transparency by making sure that the person who is being lobbied is provided with details of the lobbyist's interest in the matter and any other associated matters.

Mr Theophanous' attempts to validate his contact with government officials in relation to the East Werribee project (by stating that he was a registered lobbyist, but failing to disclose the fact that he had not registered AEC as a client, and other efforts to obscure his personal involvement with AEC in discussions with government representatives) suggest that lobbyist disclosure requirements alone are insufficient to address the corruption risks associated with unregulated lobbying.

Mr Theophanous did not disclose his attempts to obtain payment or donations for his daughter's 2018 election campaign when engaging with ministers and departmental officers. He asserted in evidence that it was reasonable to contact these government officials about AEC's East Werribee project without disclosing this association, stating:

> *no arrangement was put in place, so why would I b-be discussing with the treasurer what I was seeking? I mean, I could be seeking all sorts of relationships with, you know, - I-I was running a consultancy business.*

Moreover, when Mr Theophanous *did* discuss his association with AEC, he downplayed the connection, for instance:

- Suggesting to the then Secretary DEDJTR that he had declined to take up a position with AEC in August 2018, shortly before helping AEC to draft a letter to the secretary and other senior DEDJTR officers in September 2018.
- Stating to the CEO VPA, *'I think he (AEC representative B) is involved with Govt as the project is now with [the Minister for Major Projects] for negotiation and decision,'* when the CEO VPA advised that it would not be appropriate of the VPA to host AEC while government consideration of the East Werribee project was ongoing, in response to Mr Theophanous' request to invite AEC representative A to a VPA board networking lunch.
- Telling a departmental officer, '…although I do not have a commercial relationship with AEC, my son has been employed by them on some project,' and later, 'I am a registered lobbyist,' which could reasonably be interpreted as advice from Mr Theophanous that he was a registered lobbyist *for* AEC and was additionally declaring a potential conflict of interest concerning his son.

39 Victorian Government Professional Lobbyist Code of Conduct, clause 4.2.

### 2.2.3 Proposed reforms to improve transparency

The need for greater accountability and oversight of lobbying activities is detailed in IBAC's *Special report on corruption risks associated with donations and lobbying*. This report suggests:

- 'lobbying' should be defined in a way that includes all contacts with government representatives that are made in relation to government or parliamentary functions, regardless of whether payment is received
- transparency between lobbyists and public officials should be enhanced by requiring that lobbyists register details of their contacts with government representatives (in addition to details of their clients) and that this information be published on a register.

Reviews of other jurisdictions suggests that there is a need to address the tendency for lobbyists to strategically restructure their businesses to offer 'consultancy services' rather than direct lobbying, to avoid regulation.[40]

IBAC has made recommendations in that report that seek to increase the transparency of dealings between lobbyists and public officials to allow for better scrutiny of lobbying activities in Victoria.

40 Integrity Commission Tasmania, *Research Report: Reforming Oversight of Lobbying in Tasmania*, May 2022, p.24, with reference to Queensland Integrity Commissioner, *Annual Report 2015–16*, 29 July 2016.

# Conclusions and recommendations 3

**Operation Clara highlights the inherent difficulty in lobbyists undertaking roles as directors on the boards of public entities. The role of a lobbyist is to influence government decisions in favour of a particular private interest. In contrast, the role of a director on a public entity board is to impartially govern and make recommendations in a manner that advances the public interest.**

Operation Clara suggests the conflict of interest provisions are inadequate to address this risk in circumstances where a person has lobbying clients (such as developers) whose interests could be affected by the functions of the board on which the lobbyist serves (such as the Victorian Planning Authority).

Careful consideration must be given to lobbying as part of the appointment process to a public entity board. This will allow sufficient time to identify and act on a conflict of interest breach and ensure that directors are provided with clear guidance on lobbying activities, including the declaration and management of conflicts of interest, which should be reflected in the VPSC's guidance for public entity directors.

## 3.1 Recommendations

Pursuant to section 159(1) of the IBAC Act, IBAC makes the following recommendations:

### Recommendation 1

The Department of Premier and Cabinet amend the *Appointment and Remuneration Guidelines* to specify:

a. a lobbyist (as defined in the Lobbyist Code of Conduct) is ineligible for appointment to a public entity board that has functions which relate to any matter, on which the lobbyist has represented the interests of third parties in a specified period (with reference to the NSW provisions)

b. the declaration of private interests template require that the declarant indicate if they are on the Register of lobbyists and, if so, provide details of the clients and industries in which they have operated in the 12 months prior to nomination.

### Recommendation 2

The Department of Premier and Cabinet revise the Lobbyist Code of Conduct to:

a. prohibit public entity board directors from engaging in lobbying activities on any matter that relates to the functions of the public entity

b. require that public entity board directors comply with integrity requirements, including conflict of interest provisions in relation to representations they have made prior to their appointment (with reference to the ACT provisions).

### Recommendation 3

The Victorian Public Sector Commission revise the Code of Conduct for Directors to:

a. prohibit public entity board directors from engaging in lobbying activities on any matter that relates to the functions of the public entity

b. require that public entity board directors comply with integrity requirements, including conflict of interest provisions in relation to representations they have made prior to their appointment (with reference to the ACT provisions).

### Recommendation 4

The Minister for Planning amend the VPA Act to specify that proceedings for a summary offence may be commenced within the period of three years after the alleged offence.

# Appendix: Theo Theophanous natural justice response

**Where IBAC has made an adverse comment or opinion, or a comment or opinion that may be considered to be adverse, about any person or public body identified in a special report, that person or public body is given a reasonable opportunity to respond to those comments or opinions by being shown a draft version of the report through a process called 'natural justice'.**

The following appendix shows the natural justice responses from Theo Theophanous and from his legal representative.

[redacted]

**08/01/2023**

## Submission From Theo Theophanous re IBAC's Draft Special Report

### Introduction

This submission is a response to IBAC's special report for publication with that report if it is published. It presents argument and new evidence that I believe would lead a fair-minded person to conclude that it is not open to IBAC to reach its adverse findings – findings that I absolutely and categorically reject.

IBAC's investigation is based on testimony from two unidentified witnesses whose personal or political agendas are unknown. They are referred to in the report, but their testimony is not quoted at all.

It appears, based on testimony from these unidentified witnesses, that IBAC thought I may have been involved in corruptly receiving undeclared personal benefit from my involvement with AEC. IBAC found two draft consultancy agreements on my computer, but IBAC also found that none of these were enacted and that no payments whatsoever were made to me.

Despite not finding any corruption in terms of any personal benefit, IBAC persisted with its investigation and produced its special report which includes two main findings: (i) that I failed to disclose alleged "unpaid lobbying", and (ii) that donations were made to [redacted] by AEC which are alleged to be "payments in kind" to me.

In this submission I present detailed argument and evidence that IBAC overlooked or ignored in reaching these findings.

The first finding of IBAC is that I had been involved in "unpaid lobbying" which the IBAC claim should have been registered on my lobbyist register and declared at VPA meetings. I consider this to be a debatable allegation at best. It is certainly not of such magnitude that it could not have been dealt with by the IBAC providing me with some guidance such that I would register the company that I was said to have been conducting "unpaid lobbying" for on my lobbyist register and perhaps declared any meetings with them to the VPA.

My alternate explanation for my actions centre around my enthusiastic support for the AEC project as one that, properly delivered, would have provided jobs, investment, and educational opportunities in the Western suburbs. I did not see this expressed support as "unpaid lobbying" but as advice to senior ministers and bureaucrats in the public interest. Importantly, a section in the VPA's own code of conduct (not quoted by IBAC) allows for such expressions of support without being deemed as conflicts of interest. As will be shown, IBAC did not explore the veracity of my alternate explanation.

My lawyer has pointed out in a separate submission, that there is a well-established standard in relation to such findings by integrity bodies. This is the *Briginshaw* test which directs decision makers to proceed cautiously where serious allegations are made. The evidence should be of high probative value.

There is no evidence from ministers, ministerial advisors or departmental officers referred to in the Report to substantiate the "unpaid lobbying" claim. The failure to provide or even seek to provide, contextual counter arguments by reference to any of those relevant ministers/advisors, is not consistent with the *Briginshaw* test and constitutes a denial of natural justice.

IBAC did not find any evidence of inappropriate information from the VPA being passed on by me to AEC. Instead, the focus in the special report is on whether I should have disclosed all interactions to the VPA. But, as will be shown below the VPA was disengaged from the project during the period.

The second major finding by the IBAC relates to "payments in kind" for alleged lobbying activities. These are said to be in the form of donations to [redacted] State and Federal Campaigns by AEC. This claim also remains untested from a probative standpoint. Again, as my lawyer has pointed out, IBAC has not put this serious allegation to representatives of the company itself. Yet such an allegation would require that such representatives accept, unequivocally and

directly, that they considered their donations to [redacted] to be "payments in kind" to me and not donations to [redacted]. In the absence of evidence that an arrangement of this type existed the "payment in kind" claim as is stands is farfetched, unsubstantiated, and speculative.

There have been substantial impacts on mine and my family's health from this two-year investigation. Should IBAC decide to publish its report I would ask readers to consider the substantive arguments as outlined in this submission.

**The Special Report - analysis**

The best way to read the IBAC report is to begin with the "Proposed Reforms" "Conclusions". The report is crafted around supporting these which were in large measure already articulated in IBAC's special report on Lobbying. The special report's proposed reforms to improve efficiency are:

"The need for greater accountability and oversight of lobbying activities is detailed in IBAC's Special report on corruption risks associated with donations and lobbying. Of relevance to the issue of defining lobbying activity and registering those details, that report suggest that

• 'lobbying' should be defined in a way that includes all contacts with government representatives that are made in relation to government/or parliamentary functions, regardless whether payment is received, and

• transparency between lobbyists and public officials should be enhanced by requiring that lobbyists register details of their contacts with government representatives (in addition to details of their clients) and requiring that that information be published on a register."

IBAC's conclusion states.

Operation Clara highlights the inherent difficulty involved in lobbyists undertaking roles as directors on the boards of public entities. Operation Clara suggests that conflict of interest provisions are inadequate to address this risk in circumstances where a person has lobbying clients (such as developers) whose interests could be affected by the functions of the board on which the lobbyist serves (such as the Victorian Planning Authority). Careful consideration must therefore be given to lobbying as part of the appointment process…

This generalised conclusion about the dangers of lobbying while also being a board member and the proposed reforms support IBAC's earlier substantial

report into lobbying. My legal Counsel has put argument that this current special report into a single individual does not add to this broader argument in the public interest and is unnecessary to it. IBAC adequately deals with the lobbying issue in its already published report. In any case, it is not sustainable to draw such general conclusions from findings in a single case, particularly (as will be shown) when those findings cannot be justified on the evidence.

**The evidence does not support IBAC's major finding.**

The two findings in the section titled: "What the Investigation found?" are not supported by the evidence. The first major finding states:

IBAC's investigation found Mr Theophanous: • Lobbied ministers and departmental officers in favour of AEC's proposed East Werribee project and failed to: o declare a conflict of interest in relation to these activities when matters concerning AEC were discussed at VPA board meetings (even after AEC commenced litigation against the State of Victoria and the VPA in relation to the East Werribee project), or o register AEC as a client on the Lobbyists register.

To sustain this finding two conditions would have to be satisfied.

1. That the VPA was engaged somehow on the AEC project during the period.
2. That Theophanous was indeed lobbying and acting as a lobbyist for AEC.

**On the first condition:**

Evidence was presented to IBAC that VPA had been effectively disengaged from AEC during the period characterised as "lobbying". I met AEC for the first time in February 2018. The VPA had ceased to be engaged with the AEC project from 2017. This was confirmed in a minute at the April 2018 board meeting, not quoted in IBAC's report. It reads: "As outlined previously, the later phase of the negotiations process during 2017, together with the Government's consideration and Cabinet submissions, are being led by DTF and coordinating with DEDJTR. We are waiting on a government decision, and it is not known as to any timing of the decision. The VPA's role to assist DTF in the negotiations process has now ended."

IBAC nevertheless makes much of my not declaring a conflict at meetings of the VPA in February and March 2018. IBAC's interpretation of what was

discussed at these board meetings is that the CEO provided information about what VPA might do "If the Government decided not to proceed".

There are two points to be made. First, this quote actually demonstrates that it was **the Government and not VPA** that was to make the decision whether to proceed . Second, the minutes of these meetings show that the limited discussion that did occur related to speculation about an opportunity that might arise for VPA if the government decided the AEC proposal would not go ahead. The discussion was not relevant to the AEC proposal itself which was in the hands of central agencies of government and not the VPA.

The evidence thus clearly shows that during the period I am accused of lobbying - February 2018 until the AEC proposal was rejected by the Government in July 2019 – the VPA was disengaged from decisions on the AEC project and that, consequently, no information was provided by the CEO at VPA board meetings that could potentially assist AEC. The infrequent cursory reports as shown in the minutes merely reinforce that the matter was being dealt with by central agencies and that it was those agencies, **and not VPA**, that would decide.

The first condition is therefore not met as the VPA was disengaged as a decisionmaker during the period. This also meant that I was free to engage with AEC during this period without being obliged to report to the VPA.

**On the second condition:**

Since leaving Parliament and my Ministerial duties I have continued to interface with Ministers and bureaucrats on a wide range of topics as a trusted confidante and party elder. I tried to explain this background to IBAC and presented evidence to them that I was **not** lobbying for the project but expressing support for it. It is a fine but important distinction. My support was as an interested public figure, and citizen. I strongly believed that the project, appropriately delivered, would contribute to much-needed investment, employment, and educational stimulus in an economically depressed area.

In my view, our democracy needs free-flowing community minded discussion between senior people who trust and respect each other's opinions. Rigid accountability structures do not necessarily allow for this and can adversely impact on effectiveness. This has also been noted by Victoria's Auditor General who has stated that: **"effectiveness is a crucial aspect of integrity and the**

**timidity that results from overly rigid accountability requirements can mean that the public interest is not well served".**

IBAC extensively quotes the VPA code of conduct to highlight my obligations. But the VPA code also allows for exceptions. It allows members to express support for a project in the way that I did without giving rise to a conflict of interest or it being labelled "lobbying". The section of the VPA code, which is not quoted in the IBAC report, expresses this in the following way:

*CIRCUMSTANCES IN WHICH A PERSON DOES NOT HAVE A CONFLICT OF INTEREST For the purposes of this Division, a person does not have a specific conflict of interest or general conflict of interest in a matter in the following circumstances … the conflict of interest only arises because of an interest held by the person or another person— (i) in common as a resident, ratepayer, taxpayer or voter and does not exceed the interests generally held by other residents, ratepayers, taxpayers or voters; or (ii) in common with another large class of persons and does not exceed the interests generally held by members of the class of persons.*

This section rightly allows individuals to support a project as a taxpayer, voter and interested public figure without such support being labelled as "lobbying". The fact that I had access to senior people where I expressed my support for the AEC project does not eliminate my right to do so as set out in the code.

**On actions post the commencement of legal action by AEC**

IBAC's major finding also refers to the period after litigation was commenced by AEC, following the rejection by government of AEC's proposal.

The CEO of the VPA informed the board in September 2019 that AEC had initiated legal action against the government and that although VPA was listed as party in the litigation **the entire legal process would be dealt with by central agencies.** Board meetings reinforce this:

September 2019 "DJPR is leading this defence for Government"

October 2019 "DJPR are leading this defence"

December 2019 "DJPR are leading this defence"

At no point was the nature of the legal defence discussed at board level. This would have been inappropriate, as it is against established protocol. Even if VPA was consulted by the central agencies about the legal defence (they were not) it would have been inappropriate to discuss this with the board.

Based on the report from the CEO that DJPR was dealing with the legal issue, and because, at this point my communication with AEC about their project had come to an end following the government decision, I decided that it was not required to disclose my prior communications with AEC to the VPA.

My communication with AEC did subsequently recommence but this was within a completely different context. With the knowledge of senior people in the bureaucracy and Ministers, including the Treasurer, I had some highly sensitive communications with AEC with the goal of assisting the Government by encouraging AEC to withdraw its legal case. I could not bring the VPA into this loop at that time for obvious confidentiality reasons. Nor was I ever asked to do so by any Minister or bureaucrat. I believe that Ministers and the Treasurer would have confirmed the positive role that I played if they had been asked by IBAC. As noted, this constitutes a probity failure under *Briginshaw*.

It's also important to note that there was at least one VPA meeting at which I disclosed to the board that I had met with AEC. IBAC chose not to mention this as a point of balance, despite being made aware of it:

At the July 2021 meeting in closed session, I informed the VPA that I had met with [redacted] at his request where he asked me to ask the Treasurer whether if AEC were to drop the legal case and apply for a different project for consideration by Government would he, [redacted], be treated fairly. When I passed this request on to the Treasurer, he advised me to inform [redacted] that it was up to [redacted] and his legal team as to how they dealt with the legal case and that any proposal for another project from [redacted] would be treated on its merits. I passed the Treasurers' response back to [redacted] via telephone in May 2021. The account above is clearly not lobbying and places in context the nature of interactions that I had. The VPA board accepted my account of those interactions and no further action was taken.

My decisions in relation to disclosure to the VPA were carefully considered and judged against other public interest goals. I am proud of the role I played in mitigating the impact on the government and by extension also the VPA following the rejection of the AEC project.

**IBAC's Second finding is not sustainable**

IBAC's second finding is that Theophanous:

• Endeavoured to use his position as a VPA director to: o obtain an invitation for [redacted], AEC's executive chairman, to attend an official VPA function, and

o advance his private lobbying business by indicating to clients he had access to staff and information within the VPA that would assist with their matters.• Sought payments and obtained other benefits from AEC, namely donations to [redacted] in lieu of direct payment from AEC for his lobbying activities.

This finding contains three separate claims.

The first is that it was inappropriate for me to suggest [redacted] be invited to one of the informal discussions over a light lunch organised by VPA. I nominated a number of people that could be invited to this lunch including [redacted]. This process was completely transparent and subject to approval by the CEO. Ultimately, in discussion with the CEO it was agreed that it may not be prudent to invite [redacted] because the Government (not VPA) was still deciding the AEC issue. The process was completely transparent and open.

The second claim is that I sought to advance my lobbying business by indicating to clients that I had access to staff and information that would assist with their matters. IBAC presents a single example of this in the report by producing an Invoice which states that I had spoken with "appropriate people within VPA to assist behind the scenes with blockages with the bureaucracy". Importantly, this Invoice is to a client that was registered on my lobbyist register and was disclosed to the VPA. The client is completely unrelated to AEC. The statement contained in the invoice was a general statement relating to the frustration of VPA at the blockages by the planning department of many worthwhile projects and my assessment that VPA was trying to get the bureaucracy to address these blockages. The VPA's frustration at the planning blockages and their attempts to unblock them was common knowledge in the industry at that time.

It seems strange to me, given that the client in this case was properly registered and recorded and that legitimate lobbying was permitted, that IBAC goes on to make the following extraordinary claim:

Irrespective of whether the individuals identified in Mr Theophanous' invoice actually approached the Minister for Planning or departmental officers these records show how lobbyists can, and do, use members of parliament as proxy lobbyists to obscure their involvement and give the impression that a matter has broader support than it actually has. In circumstances where an MP or minister acts on the promptings of a lobbyist, the relevant, decision making minister would have no way of knowing the extent to which those approaches were prompted or coordinated by the lobbyist.

The notion that Members of Parliament and Ministers act as "proxy lobbyists" is challenging to our democracy which is based on the principle that Ministers

and MPs are able to have free and open dialogue both with the public and with other Ministers. It would not be in the interests of good government to seek to excessively regulate this.

The third point that IBAC makes in this second finding is that donations to [redacted] by AEC should be viewed as "payments in lieu" or "payments in kind".

It's important to understand the sheer unbelievability of what IBAC proposes: IBAC proposes that having met AEC in February 2018, and despite a draft commercial consulting agreement with them having fallen through, I nevertheless, set about lobbying for AEC, in the hope that nine months later when the November 2018 election came around, they would make donations to the [redacted] and a few months after that to a [redacted] campaign.

IBAC calls these donations to the [redacted] "payments in kind" to me. This is not sustainable, and no evidence is presented by IBAC to show that such an arrangement was ever discussed or proposed. As my lawyer has noted, it was not led in evidence by AEC and IBAC did not put to AEC that AEC considered the donations unequivocally and directly as payments for my support for the AEC project as would be required under the *Briginshaw* natural justice and probity test. They could just as easily be characterised as support for [redacted] or building good will or a myriad of other explanations. This kind of serious allegation cannot be just based on conjecture or assumptions.

From a reporting perspective political donations are covered by the requirements to report that are in place by the VEC and AEC. There is no expectation that an additional reporting process should occur to cover anyone that asks for a donation on behalf of a political party. The situation would be, to say the least, quite challenging from a reporting perspective.

**No commercial relationship ever materialised with AEC.**

Much was made during questioning of my consideration, at various times, of the idea of officially representing AEC in a commercial relationship with them. As stated, the evidence shows that these occurred during the period when VPA was disengaged. Importantly, **none of these proposals were proceeded with**.

IBAC's publication of these draft agreements which they found on my computer is damaging to my reputation and unnecessary. They are drafts, "Commercial in Confidence" and were not proceeded with. IBAC could make a general point that they had found draft consultancy agreements with the AEC on my computer that were not enacted without using its extraordinary powers to publish them. I strongly urge their removal from any potential publication as

a matter of commercial confidentiality relating to my consultancy business and natural justice.

**Untested claims in the report.**

The below comment in the report is false. It states that

the AEC executive team determined not to engage Mr Theophanous as a lobbyist unless he could provide a letter from the VPA to indicate that this would not constitute a conflict of interest.

This statement relates to an amateurish attempt by someone at AEC to cover themselves. IBAC should not accept it without question. It remains untested and I refute it absolutely. The dialogue with AEC representatives that relates to this statement is also not able to be put in any kind of context due to the refusal of IBAC to provide the transcript. This goes to procedural fairness as well as natural justice. The comment from the AEC executive team is not substantiated and clearly self-serving. The comment should be removed.

**Motives behind donations and assistance to [redacted]?**

The motives of companies and individuals in buying tickets to fundraisers where the Premier or Treasurer were speakers, is not easily gauged. Who knows what these are? Surely these motives are matters for those individuals and companies that attend. What is important is that processes are in place to ensure that attendees are not allowed to lobby at these functions and understand clearly that obligation. All the attendees that I encouraged to attend fundraisers, of which AEC was only one, were made aware of this expectation. As noted, it is not open to IBAC to speculate as to these motives in its findings without evidence in support.

IBAC also references that [redacted] assisted in [redacted] campaigning because he was a friend. Again, this is a situation where being unable to see the full transcript does not allow these comments to be put in context. [redacted] may well have helped with translations and phone calls to constituents, but he joins hundreds of other volunteers that act similarly when they support a political party. [redacted] told me that he was very committed to the Left side of politics from his time working in politics in Malaysia. This, I suggest, better explains his motives and actions in support of [redacted]. Again, this remains untested as an alternate explanation.

I have helped with fundraising for the [redacted] in many campaigns by inviting people I know in business and the community to donate. This is not illegal or banned, or immoral, or lobbying, or payments in kind. It is simply fundraising.

**Not all unregulated interaction is lobbying.**

The special report makes much of the letter that I assisted AEC with. I was asked to help by [redacted] and I could see no good reason not to as I supported the project. IBAC states that:

Theophanous' involvement in crafting this letter demonstrates one of the ways Mr Theophanous engaged in lobbying activities to promote … the project.

But why is helping to draft a letter to get a project worth billions of dollars to the state with thousands of jobs and employment opportunities that one believes should proceed necessarily lobbying? I am not sure that assisting someone to draft a letter falls under the definition of lobbying anyway, as it is not direct contact with government.

The special report's presentation of examples of lobbying activities are hard to justify as such. According to the special report, pointing Ministers to an article in support of the AEC project is lobbying, passing on [redacted] concerns about discrimination is also lobbying, conversations with trusted persons such as the Treasurer, that too is lobbying. And words of support to [redacted] who was very depressed at the time along the lines that "we will get there my friend", that too is lobbying. Surely, my alternative explanations as outlined above are equally salient and should have been tested with the individuals concerned as a matter of probity and natural justice under *Briginshaw*.

Much is made of my contact with Ministers and especially the Treasurer in the lead up to the Government making its final decision and a text is produced which states:

Mate I have been spoken to by a lot of ppl including [redacted] I really think that the decision to terminate AEC will have serious consequences for the Govt and despite what U have been told for our relationship with China. A massive law suit may also follow and pretty bad publicity. If there is any way to stall it to allow some serious but limited negotiation or better management of the separation my advice is that we should do so.

This is clearly friendly advice of possible consequences for the government suggesting both a way forward and offering to help the government manage

the situation if a decision is made not to proceed. It shows that my primary motivation was protecting the interests of the government. **It is clearly not lobbying.**

The other example of my message to the Minister for Priority Projects is also not lobbying and clearly designed to assist the government with advice. It states 'If you are interested in my take on likely fall out of AEC decision and best way to manage it call me. Theo'

I put it to readers of the above examples that I was simply trying to advise senior people in government that I had relationships with about the best way to deal with the fallout of their potential decision and to suggest ways forward. This is their clear unambiguous meaning.

IBAC also makes this finding:

IBAC's investigation found Mr Theophanous contacted ministers, ministerial advisors, and departmental officers about the East Werribee project proposed by AEC in a manner consistent with the definition of lobbying under the Lobbyist Code of Conduct.

The example IBAC uses to support this claim is nonsensical:

It is in reference to a meeting on 5th August 2018 I had with the Secretary of DEDJTR to discuss the desirability of entering into a commercial relationship with AEC. IBAC portrays this as an attempt by me "to avoid the perception that I was engaged in lobbying activities on behalf of AEC" under the guise of wanting to discuss "a personal matter".

The minute from the Secretary actually states that the private matter I wanted to discuss with him was an approach by AEC to engage me on the project. I subsequently texted the Secretary to tell him that I had declined the offer. It really does take a leap of imagination to treat this in any other way from the way it is presented - as seeking guidance.

**Fair minded people would credit me for seeking advice from a senior bureaucrat about whether to engage commercially with AEC.**

Not only that, in the minute from the then Secretary he confirms that the projects "management has transferred to [the] Minister for Major Projects and DEDJTR" thus confirming once again that VPA was not engaged with AEC.

## Conclusion

I submit that fair minded and reasonable persons reading this IBAC report and my response to it would conclude that IBAC's findings remain untested in evidence and therefore unsubstantiated and that no public good is served by the publishing the report which will damage reputations of innocent persons.

The investigation, according to IBAC was into "alleged corrupt conduct of Mr Theophanous". These allegations presumably came from two unidentified witnesses referred to in the report but never actually quoted in any evidence. Neither I, nor the community, will ever know if these witnesses have personal or political agendas.

IBAC did not uncover any corruption in terms of private financial benefit. Nevertheless, IBAC continued to expend substantial resources over a two-year period in pursuit of a single individual in an attempt to prove that there was "unpaid lobbying" that should have been disclosed and that political donations were made to the [redacted] that were in fact "payments in kind".

The special report does not meet obligations of IBAC to ensure natural justice or procedural fairness. It does not ask ministers and advisors that were said to have been targets of "unpaid lobbying" their view of the interactions as would be necessary under the well-established *Briginshaw* test.

Nor does it seek to establish in examination whether AEC representatives unequivocally and directly, considered their donations to [redacted] to be "payments in kind" or whether they saw them simply as donations to [redacted]. This also does not comply with *Briginshaw*.

IBAC has dealt with lobbying in its recent substantial report. If published, this special report is unnecessary and will damage reputations. Nor does it meet probity requirements necessary to ensure natural justice or procedural fairness. It risks reputational damage of the innocent.

I urge IBAC to not publish the report and pursue other avenues for promoting lobbying reform. But I am ready to publicly defend and debate my submission should the report be published. This will include highlighting the injustices as outlined in my submission and the potential impacts of overly stringent regulation on innovation and efficiency on our public sector.

Theo Theophanous

**NATURAL JUSTICE REPLY TO IBAC SPECIAL REPORT (OPERATION CLARA) ON BEHALF OF THEO THEOPHANOUS**

## OVERVIEW

1. A draft report has been provided to Mr Theophanous and his legal representatives, titled 'Operation Clara – Special Report – Natural Justice Draft' (the **draft Report**), pursuant to the natural justice process in s.162(3) of the *Independent Broad-based Anti-corruption Commission Act 2011* (the **Act**). This document has been prepared on behalf of Mr Theophanous in response.

2. The draft Report centres almost exclusively on the alleged actions of Mr Theophanous.[1] However, ultimately, the 'recommendations' which arise from the report are broad in nature, and covered in only two paragraphs of the report, focused on suggestions additional transparency required in lobbying and those with roles on public boards.[2]

3. It is relevant to note that in October 2022, a special report titled 'Special report on corruption risks associated with donations and lobbying' (the **2022 Special Report**) was published by the Independent Broad-based Anti-corruption Commission (**the IBAC**). There, significant recommendations were made in relation to lobbying activities,[3] including significant recommendations that broadly cover similar ground to those recommendations and activities as noted within the present draft Report.

4. Private witness examinations and interviews were conducted between 10 May and 17 June 2021,[4] however, a draft report was not provided to Mr Theophanous until 20

[1] Indeed, the report notes that an investigation was commenced pursuant to the powers in s.60(1)(b) of the Act, which refers to the power to investigate pursuant to a notification under s.57(1). It is unclear from the face of the report how such a notification came to be.
[2] Draft report, page 28.
[3] See particularly, Recommendation 3.
[4] Draft Report page 4 [51].

September 2022. There appears to be little by way of public information in relation to the Operation.[5]

5. In short compass, there are three related propositions contained within these submissions:

   a. That the tabling of a Special Report is not necessary in this investigation, and the report ought not be published;

   b. If such a report *is* to be tabled and/or published, consideration ought be given to anonymising the report and/or using the report as a case study, rather than as a report property; and finally

   c. There are a number of adverse findings against Mr Theophanous that cannot stand, even if the report is published.

**A SPECIAL REPORT IS NOT NECESSARY AND OUGHT NOT BE PUBLISHED**

6. The draft report here is proposed to be published and transmitted pursuant to s.162 of the Act. However, the publication of a report is not a necessary corollary of an investigation having been completed. Section 164(1)(f) of the Act provides that the IBAC may determine to take no action following an investigation, while s.164(1)(b) provides that a recommendation in accordance with s.159 may be provided. There are a range of options under s.164(1).

7. The function of a special report is to transmit to each House of Parliament a report on 'any matter relating to the performance of its duties and functions.'[6] The IBAC's functions are set out in s.15 of the Act, and include, relevantly, to 'identify, expose and investigate

[5] This can perhaps be contrasted with other significant Operations, whereby public hearings have been held.
[6] *IBAC Act 2011* s.162(1).

corrupt conduct'.[7] The IBAC' also has 'education and prevention functions' for the purposes of achieving the objects of the Act,[8] which provides the IBAC with the following functions:[9]

> (a) to examine systems and practices in the public sector and public sector legislation;
>
> (b) to provide information to, consult with and make recommendations to, the public sector;
>
> (c) to assist the public sector to increase capacity to prevent corrupt conduct and police personnel misconduct by providing advice, training and education services;
>
> (d) to provide information and education services to the community about the detrimental effects of corruption on public administration and ways in which to assist in preventing corrupt conduct;
>
> (e) to provide information and education services to members of police personnel and the community about police personnel conduct, including the detrimental effects of police personnel misconduct and ways in which to assist in preventing police personnel misconduct;
>
> (f) to publish information on ways to prevent corrupt conduct and police personnel misconduct.

8. While a report can be published on any matter relating to the performance of the IBAC's duties and functions, this does not mean that a report must be published in order to carry out the IBAC's functions. It also does not mean that the naming and shaming of individuals is required in order to meet the objectives and functions of the IBAC.

9. For the following reasons, it is submitted that there is little public interest in the publication of the report in relation to the furtherance of the IBAC's functions and objectives under the Act, in circumstances where the report focuses entirely on the actions of a single individual, yet proposes to make only limited, and general, recommendations. Given the focus of the report on the conduct of Mr Theophanous alone, it cannot be said that there is any public interest, in publication of the report in its current form. This is so for the following reasons.

[7] Ibid s.15(2)(a).
[8] Ibid s.15(5).
[9] Ibid s.15(6).

***The IBAC's education and prevention functions have already been served in the October 2022 Special Report***

10. The 2022 Special Report into 'Corruption risks associated with donations and lobbying' covers significantly the same ground as is proposed to be covered in this draft report. The findings and materials covered in the draft report, it is argued, are simply a case study which is referable to the same systemic issues as investigated in the 2022 Special Report. The difficulties associated with public board appointments and lobbying, is merely a subset of the broader issues associated with lobbying generally.

11. Indeed, that the draft Report is largely redundant in the face of the 2022 Special Report is made clear by the reference at Part 2.2.3 of the draft Report, which specifically references the 2022 report which identifies the need for greater transparency in lobbying generally.[10]

12. Relevantly, there are significant overlaps between the findings, purposes and recommendations of the 2022 Special report and the draft Report:

| **2022 Special Report** | **Draft Report** |
|---|---|
| 'Lobbying regulations must be transparent and hold both lobbyists and decision-makers to account to protect the public interest.'[11] | '… IBAC identified broader corruption vulnerabilities associated with directors of public entity boards who engage in lobbying activities. In particular, conflicts of interest involving lobbyists on public entity boards, and a lack of transparency in lobbying activities more generally.'[12] |

[10] See draft Report page 27.
[11] 2022 Special Report, page 7.
[12] Draft Report, page 18.

| | |
|---|---|
| | 'IBAC considers that Mr Theophanous' failure to register AEC as a lobbying client lacked accountability and transparency, while his efforts to assert that he was not required to register AEC point to a need for clearer guidance and enforcement of the registration requirements.'[13] |
| 'IBAC has observed that Victoria's current system of lobbying regulation, which defines 'lobbying activity' and 'lobbyist' very narrowly, is too limited in its scope.'[14] | 'Under the Lobbyist Code of Conduct, members of parliament and ministers are not currently defined as lobbyists. As a result, lobbying activity that occurs between government representatives is not governed by the Lobbyist Code of Conduct.'[15] |
| It would be beneficial to broadly review the effectiveness of Victorian provisions around cooling-off periods. An important issue to consider is the possible extension of cooling-off periods to former MPs to | Second, the 'cooling-off' effect of this approach serves to mitigate the risk of unmanageable conflicts … [17] |

[13] Draft report, page 26.
[14] 2022 Special Report, page 33.
[15] Draft Report, page 24.
[17] Draft Report, page 22.

| | |
|---|---|
| recognise the relationships and knowledge they are likely to have developed in their official positions. Consideration could also be given to whether a cooling-off period should apply to former councillors.[16] | |

13. The proposed reforms section of the draft Report, simply identifies *difficulties* and *areas of concern*, which are founded in part by Mr Theophanous' alleged activities, as well as broader systemic issues. This again, points to the case study nature of the report, which really is a sub-specie of the broader 2022 Special Report.

14. Given the similarity in the investigative scope, it is submitted that:

    a. No special report ought be published; and/or

    b. That if the IBAC considers any report or findings to be made in relation to the investigation, that a case study approach be adopted, that is, which anonymises all participants.

***No recommendations***

15. The 'recommendations' provided for in the Operation Clara report notes that the Operation 'highlights the inherent difficulty involved in lobbyists undertaking roles as directors on the boards of public entities.'[18] That is, the draft Report specifically references the *present* difficulties that exists in public sector board directors and the

[16] 2022 Special Report, page 49.
[18] Draft Report, page 28.

interplay with lobbyists. The draft report then goes on the suggest that present conflict of interest provisions are 'inadequate to address this risk'.[19]

16. The 'recommendations' in the draft report can be contrasted with the detailed, fulsome, and practical recommendations in the 2022 Special Report.

17. In many ways, the failure to make any significant recommendations, highlights that the publication of the material in the report in the form of a 'Special Report' is not necessary in all of the circumstances. The material contained within the draft Report goes no further than providing a case study by which reference to the implementation of the 2022 Special Report can be guided.

18. The proposed reforms address issues that arguably arise from, what could be at best described as 'grey areas', in relation to Mr Theophanous' behaviour. The report takes some of the alleged activities of Mr Theophanous, but purports to apply these to broader, systemic issues. Again, this demonstrates the case study nature of the draft Report, as well as the danger that would attach to the inclusion of a fully identifiable report. That is, Mr Theophanous is the sole focus of the report, yet, the draft Report purports to highlight *broader* issues in relation to public boards and lobbying. It is unfair to Mr Theophanous, to have a report which solely focuses on him, yet seeks to make proposals for reform which far beyond what could be said to arise from the investigation into him.

***Health concerns***

19. As has been highlighted in the two requests for extensions to provide a response, Mr Theophanous has suffered grave mental health concerns, which arose as a result of a number of 'stressors' in his life, including Operation Clara.

[19] Ibid.

20. While Mr Theophanous has commenced a medication regime, it is plainly open to consider the significant stressors which would be present in Mr Theophanous should this draft report be published and tabled. He is a public figure, who has experienced significant scrutiny in the draft report. The impact on Mr Theophanous since his time of examination in 2021 has been significant. It remains unclear why it took well over 12 months to provide a draft report following the conclusion of the examinations. That period of time has been of significant mental strain to Mr Theophanous, as highlighted in the reports of [redacted], as well as correspondence of Mr Theophanous directly.

21. The publication of a report with significant adverse findings as against Mr Theophanous, which would have reputational impacts upon him and others named in the report, it is submitted, strengthens the position in relation to the lack of public interest in publishing the report in its present form.

**RESPONSE TO SPECIFIC ALLEGATIONS AND FINDINGS**

22. In addition to the position that the draft Report ought not, and need not, be published and tabled as a Special Report, Mr Theophanous provides the following response to specific allegations in the draft Report.

***Adverse findings in relation to donations to [redacted] political campaign***

23. There is an adverse finding made in the report against Mr Theophanous in that the report alleges *positively* that Mr Theophanous 'sought payments and obtained other benefits from AEC, namely donations to his daughter [redacted] 2018 campaign for the State electorate of [redacted] in lieu of direct payment from AEC for his lobbying activities.

24. It must be noted that the IBAC found that Mr Theophanous did not receive payments from AEC.[20] However, the draft Report appears to suggest that there were 'financial benefits' that were provided to people other than Mr Theophanous, that is, to an [redacted] campaign. To make an adverse finding against Mr Theophanous, for payments not made to him, it is submitted, is not a finding that is reasonably open on the evidence.

25. Relevantly:

    a. [redacted] was only pre-selected in May 2018.[21] The draft Report itself identifies that any discussions between AEC and Mr Theophanous commenced *well* prior to May 2018. To suggest that there was a period of some *months* whereby there was some expectation of *future* (and yet, not able to be determined as to whether such future would even eventuate, given that [redacted] was not pre-selected at the time) payments in kind, it is respectfully submitted, is not open.

    b. The draft Report refers to a text message 'around the same time' as May 2018,[22] yet does not provide the date on which such text message was received. Despite requests for the transcripts of other participants, and other relevant material, such a request was denied by IBAC. While it is true, that natural justice does not require, necessarily, in every case, that a person against whom an adverse finding is made to be provided with transcripts and other material,[23] to draw an adverse finding which is *already* clouded with the requirement to draw inferences from a number of circumstantial pieces of evidence, and no direct

[20] Draft Report page 14.
[21] Draft Report page 16.
[22] Draft Report page 16, line 495.
[23] See, eg *AB (a pseudonym) v IBAC* [2022] VSCA 283; but see also *Woodman v IBAC* [2022] VSC 684.

evidence, it is submitted that it is a denial of natural justice to Mr Theophanous to make an allegation which hinges on the alleged, yet vague, 'timing' of a particular message. This is particularly so in circumstances where the context of the text message could not be said to be so unequivocal as to suggest that the only available inference was one which requested payment in kind for his lobbying services.

c. The evidence of [redacted] at page 16, again, which we do not have the benefit of transcript to contextualise it, is equally difficult to equate to the precise type of 'payment in kind' as referred to in the making of an adverse finding against Mr Theophanous. The evidence is vague and general, and there is an absence of suggestion that [redacted] understood any connection between [redacted] campaign, and Mr Theophanous' work. No adverse finding has been made against [redacted], and it is certainly not suggested that he was untruthful in his evidence. The absence of an allegation by [redacted] that he understood his donations to be a payment in kind to Mr Theophanous through the medium of [redacted] campaign, is significant.

26. There is no allegation or positive finding by the IBAC that:

a. [redacted] understood there to be a payment in kind arrangement that would operate to the benefit of Mr Theophanous through using donations to his daughter's campaign;

b. [redacted] understood there to be a payment in kind arrangement that would operate to the benefit of Mr Theophanous through using donations to his daughter's campaign;

27. Presumably, if the IBAC had formed such a view, it would have been put to [redacted] and [redacted] in their evidence. Further, presumably, if [redacted] and [redacted] accepted, unequivocally and directly, that they considered their payments and attendance at those dinners as payment in kind to Mr Theophanous, equally, that would have appeared in the report.

28. The relevant standard in relation to findings made by the IBAC is the *Briginshaw* test.[24] The *Briginshaw* test directs decision makers to proceed cautiously in a civil case where serious allegations have been made. Where a finding is likely to produce grave consequences, the evidence should be of high probative value.[25] Here, the evidence is tenuous and stretched, at best. The allegation that Mr Theophanous directed in kind payments through his politician daughter, is a significant one, which carries grave consequences, not only for him, but also those other named persons.

29. It is submitted that when one has regard to the serious nature of the allegations, there is simply insufficient evidence to draw the inference that is sought to be drawn by the IBAC. In the circumstances, such a finding is not open on the evidence when one has regard to the high standard that the *Briginshaw* test imposes in these circumstances.

***Denial of natural justice – unsubstantiated and untested allegations***

30. There were four examinations, and two interviews conducted. While the four examinees are apparent, the two interviews remain anonymous. What is striking throughout the draft Report, is that there appears to be <u>no</u> evidence from any other player referred to throughout the report. There is no serious testing of the credibility of witnesses, <u>nor</u>, is

[24] See Draft Report page 2; *Briginshaw v Briginshaw* (1938) 60 CLR 336.
[25] *Briginshaw v Briginshaw* (1938) 60 CLR 336, 350 (Rich J); 361-2 (Dixon J).

there any significant testing of the IBAC's conclusions. There has been an exceptionally narrow lens adopted.

31. For example:

a. The draft Report makes a finding that 'Mr Theophanous contacted ministers, ministerial advisors, and departmental officers about the East Werribee project proposed by AEC in a manner consistent with the definition of lobbying under the Lobbyist Code of Conduct.'[26] There is no evidence from ministers, ministerial advisors or departmental officers referred to in the Report. It is not apparent whether discussions were ever sought to be had with such officers. The definition of lobbying, while not necessarily importing a requirement that the relevant minister *actually* be influenced (noting that the definition requires an 'effort' to influence), plainly, the contents of any discussions, the context of such discussions, and the actual subjective mindset of the relevant ministers, ministerial advisors and departmental officers is relevant. The failure to examine/interview/or even provide <u>any</u> identification of precisely who was said to be the subject of such contact, constitutes a denial of natural justice, and demonstrates the difficulties which attach to publication of the report.

b. The difficulties are further highlighted at page 9 of the draft Report, which refers to a purported dinner with the Minister for Finance. The draft Report is equivocal as to whether any such dinner *actually* eventuated.[27] Plainly, enquiries could have been made with the relevant Minister, their schedules, their advisors. None of that was done, and none is referenced in the draft Report.

[26] Draft report, page 8.
[27] As is conceded in the report at page 9.

c. Page 10 of the draft Report makes findings in relation to contacts with a number of Ministers, including Treasurer and Minister for Finance. There has been no objective testing, on the face of the material presented, as to obtain or clarify, any context of the purported 'influence' sought to be wielded by Mr Theophanous.

32. The failure to provide or even seek to provide, contextual counter arguments by reference to any of those relevant ministers/advisors, constitutes a denial of natural justice. Much criticism is made of Mr Theophanous in the report, whereby his version of events given has been discounted. However, there is no alternative version given by other relevant persons, such as those ministers/advisors, by which such a finding could be made. There has been a considerable lack of vigour in relation to the testing of IBAC's assertions. Such ought be relevant in consideration of whether a report ought be published at all and/or whether a different form of outcome is more appropriate.

**CONCLUSION**

33. The content of the draft Report does not rise beyond a case study analysis which forms part of the IBAC's broader work into lobbying and donations, which has already substantially been covered in the 2022 Special Report. The publication of the report does not advance the IBAC's duties and functions, in circumstances where the focus on contested interpretations and inferences to be drawn from a single individual's behaviours are being measured and applied to issues that have already been canvassed in the 2022 Special Report.



**DATED**: 23 DECEMBER 2022

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