BUDGET ESTIMATES 2024-2025

ICAC ANSWERS TO SUPPLEMENTARY QUESTIONS

Questions from Hon Mark Latham MLC

Q1 **Given that nobody in the NSW Parliament believes that Tim Crakanthorp is a corrupt individual and ICAC thought his matter was so minor as to not warrant a public inquiry, isn't this another example of ICAC needing to create wrongdoing to justify its own role?**

A1 The Commission did not "create wrongdoing" in this matter. The Commission established the facts of what had occurred and considered those facts in conjunction with the applicable objective standards established and recognised by law, in this case being the NSW Ministerial Code of Conduct, including the Schedule to that code.

The Commission investigated the following matters:

1. Whether, between March 2023 and August 2023, the Hon Timothy Crakanthorp MP: engaged in conduct that constituted or involved a breach of public trust by exercising public functions; and/or involved the partial exercise of his official functions; in circumstances where he failed to declare a conflict of interest in connection with the Hunter Park Sports and Entertainment Precinct.
2. Whether, between March 2023 and August 2023, the Hon Timothy Crakanthorp MP engaged in conduct that constituted or involved a breach of public trust by claiming travel expenses for travel involving his public official functions in circumstances where he was travelling for personal reasons.

The Commission did not make any corrupt conduct findings. It considered however that it was in the public interest that the results of its investigation be communicated to The Cabinet Office and the Premier by way of a report (the Report) under s 14(2) of the *Independent Commission Against Corruption Act 1988* (ICAC Act). That section provides that if the Commission obtains any information in the course of its investigations relating to the exercise of the functions of a public authority, the Commission may, if it considers it desirable to do so: furnish the information or a report on the information to the authority or to the minister responsible for the authority; and make to the authority or the minister for the authority such recommendations (if any) relating to the exercise of the functions of the authority as the Commission considers appropriate.

With respect to matter 1, the Commission was satisfied that, when Minister for the Hunter, Mr Crakanthorp knowingly failed to declare a conflict of interest arising from interests in property in or around the Broadmeadow Investigation Area and the Hunter Park Sport and Entertainment Precinct held by him, his wife and his in-laws, and that such failure constituted a breach of public trust. The Commission was also satisfied that Mr Crakanthorp's conduct in participating in meetings when Minister for the Hunter that could affect his and his extended family's properties constituted a breach of public trust.

The Commission found that Mr Crakanthorp breached the NSW Ministerial Code of Conduct ("the Code") by failing to declare his conflict of interest as required by section 7(1) and (2) of the Code and clause 10(1) of the Schedule to the Code (duty to disclose) and also breached clause 12(1) of the Schedule to the Code by participating in "any action in relation to the matter" in which he had the conflict of interest by attending and participating in meetings on 10 May 2023, 30 May 2023, 16 June 2023 and 22 June 2023.

With regard to matter 2, the Commission was not satisfied that Mr Crakanthorp engaged in any misconduct.

In coming to its findings, the Commission had regard to and applied the standards required by the NSW Ministerial Code of Conduct (the Code). As noted at pages 21 and 22 of the Report:

> *As noted above, s 7 of the Code imposed a duty on Mr Crakanthorp to not knowingly conceal a conflict of interest from the Premier. Section 7(2) of the Code required that he must not "make or participate in making any decision or take any other action in relation to a matter in which the Minister is aware they have a conflict of interest". Section 7(3) of the Code defines where a minister is taken to have a conflict of interest. Mr Crakanthorp held such a conflict because there was a conflict between his public duty and private interest in which his private interest could objectively have the potential to influence the performance of his public duty. The nature and extent of the interest was such that it could objectively have the potential to influence him in relation to the actions he took when attending the meetings on 10 May 2023, 30 May 2023, 16 June 2023 and 22 June 2023 as set out above.*
>
> *Knowingly is defined as "with awareness that the relevant circumstance or result exists or will exist in the ordinary course of events" (s 11 of the Code).*
>
> *Clause 10(1) of Part 3 of the Schedule to the Code required that Mr Crakanthorp give notice to the Premier "of any conflict of interest that arises in relation to any matter"*

without the Premier's written consent. He was precluded from "participating in any action in relation to the matter" where such a conflict arose (s 7 of the Code and clause 12(1) and (2) of the Schedule).

The "matter" in which Mr Crakanthorp as minister was aware he was in a position of conflict of interest was his, his wife's, and his in-laws' property holdings, which were likely to benefit from the significant development in Broadmeadow and the Precinct. Mr Crakanthorp himself told Commission investigators he was becoming increasingly worried about this. Those worries arose because he knew he was in a position of conflict of interest.

Mr Crakanthorp's actions on 10 May 2023, 30 May 2023, 16 June 2023 and 22 June 2023 as set out above were precluded by clause 12(1) in Part 3 of the Schedule to the Code, which required him to abstain from taking or participating in any action in relation to matters where he had a conflict of interest.

The Commission also found that Mr Crakanthorp's failure to declare a conflict of interest was done knowingly because he:

- *knew that he and his wife held property in the Broadmeadow area*
- *knew that his in-laws and his wife held significant property holdings around the Precinct area*
- *told the Commission he had concerns about having a conflict of interest.*

The Commission also found his conduct in participating in the meetings set out above that could affect his and his extended families' properties was a breach of public trust. This was because Mr Crakanthorp was in a privileged position responsible for maintaining the public trust placed in him. Mr Crakanthorp was aware of his duty to disclose his conflict and yet failed to do so while he participated in meetings about those developments and publicly supported the development.

The Commission found that failure to declare a conflict of interest in those circumstances is a breach of public trust.

The Commission concluded that Mr Crakanthorp's conduct constituted substantial breaches of the Code because: he was aware, at least generally, that his in-laws had interests in properties likely to be affected by proposed government action; he attended meetings with ministers and

others who were involved in the proposed government action on four occasions; and he declared no conflict of interest on any of those occasions.

Q2 **Other than being naïve and clumsy as a new Minister, what did Mr Crakanthorp do wrong? What professional property valuation reports did ICAC use in finding pecuniary benefit to Mr Crakanthorp?**

A2 What Mr Crakanthorp did "wrong" is set out in the Commission's s 14 report and is summarised in the response to Question 1 above.

The Commission did not find Mr Crakanthorp obtained any pecuniary benefit. Rather, the Commission found that Mr Crakanthorp was cognisant of the proposed urban renewal of the Broadmeadow and Precinct areas and that it was likely to benefit his wife's and his in-law's property interests (see pages 17 and 22 of the Report).

Q3 **Why did ICAC fail to apply a reasonable test to Mr Crakanthorp's state of mind as the Member for Newcastle: that is, he was heavily committed as a decent local MP to the development of the much-needed Newcastle Regional Sports Complex and without clear evidence of this work affecting the value of family-held properties in the general vicinity, it would be a betrayal of his electorate not to work hard on the sports project?**

A3 In coming to its conclusions, the Commission had regard to all the relevant evidence, including Mr Crakanthorp's interview and his submissions (which included information relating to his state of mind) and applied the relevant standard of proof, being on the balance of probabilities. This standard requires reasonable satisfaction. In applying this standard, the Commission takes into account what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *...reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

Q4 **In light of the Crakanthorp decision, does ICAC now believe that MPs should not fulfill their election promises to achieve facility upgrades for their electorates because they are**

related to someone in the general vicinity who owns property and it remains unlikely the property value would be affected by the facility upgrade? Have we now got to the point where ICAC has made the regular, community-minded work of MPs impractical?

A4 The Commission's position is that all Members of Parliament should comply with relevant laws, including the Constitution (Disclosures by Members) Regulation 1983 and applicable codes of conduct.

Q5 **Does ICAC recognise that Mr Crakanthorp accepted its findings under sufferance, that it was the only practical way for him to clear the slate and start his political career afresh? What is the alternative in challenging ICAC, other than a Supreme Court case?**

A5 The Commission is unable to speculate as to the basis upon which Mr Crakanthorp "accepted" its findings.

The Commission is subject to the supervisory role of the Supreme Court of New South Wales exercised under the *Supreme Court Act 1970*. The Supreme Court has jurisdiction to ensure that the Commission conducts its operations in accordance with law.

The relevant grounds of potential judicial review of a Commission report were summarised by McDougall J in Duncan v ICAC [2014] NSWSC 1018 (at [35]:

1) there is a material error of law on the face of the record (which includes the reasons given for the decision – see s 69(4) of the *Supreme Court Act 1970* (NSW));
2) the reasoning is not objectively reasonable, in the sense that the decision was not one that could have been reached by a reasonable person acquainted with all the material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences therefrom;
3) there is a finding that is not supported by any evidence whatsoever – that is to say, there is no evidence that could rationally support the impugned finding;
4) relevant matters have not been taken into account, or irrelevant matters have been taken into account; and
5) there has been a material denial of natural justice.

As a history of litigation involving the Commission demonstrates, these avenues of review are well understood and readily utilised by those seeking to challenge the exercise of Commission powers.

Although the Inspector cannot conduct a merits review of a Commission report, it would be open to make a complaint to the Inspector in circumstances where a matter comes within the Inspector's principal functions under s 57B of the ICAC Act.

Q6 **Can ICAC guarantee that, due to the excessive length of time taken with its reports (such as with John Sidoti), no other MP will be in a situation where the process is the punishment, that they are stood down for so long that resumption of their political career becomes impossible?**

A6 As noted in the Commission's 2022-23 Annual Report (page 66), its Operation Witney report *Investigation into the conduct of the local member for Drummoyne* was furnished to the Presiding Officers on 20 July 2022 (during the term of the previous Commissioners). This was 210 days from the date of completion of the public inquiry (being the date on which the last submissions were received). At that time, the Commission's corporate goal was for 75% of reports to be completed within two months (60 days) where the duration of the public inquiry was five or less days and three months (90 days) otherwise. The Operation Witney public inquiry took 22 days. The Commission therefore did not meet its corporate goal for furnishing this report.

In June 2022, the Committee on the ICAC commenced its review of aspects of the ICAC Act, which included the time standards in place for the Commission to finalise its reports. The Commission made a submission to the Committee. Part 2 of that submission sets out the process for preparing s 74 reports, the challenges impacting upon the time taken to prepare reports and how progress on completion of such reports is monitored. With respect to the preparation of s 74 reports, the submission notes that:

> *Given the nature of ICAC s 74 reports and the impact adverse factual and corrupt conduct findings can have on individuals, including by way of reputational harm, it is both necessary and appropriate that the ICAC have robust processes in place to ensure that the ICAC observes procedural fairness and that reports are factually accurate, the reasoning in the reports is logical and objectively reasonable, all findings are soundly supported by the available evidence (including identification and consideration of any exculpatory evidence) and only relevant matters have been taken into account when reaching findings.*

The Commission's submission is published on the Committee's website.

The Committee published its report in December 2022. That report recommended that the Government amend the ICAC Act to require the Commission to develop and publish time standards for completing s 74 reports, and to report on its own performance against these

standards. The *ICAC and LECC Legislation Amendment Act 2023* gave effect to that recommendation by inserting a new s 74E into the ICAC Act in the following terms:

(1) The Commission must publish, on a website maintained by the Commission, information (***time standards***) about the time within which reports under section 74 will be prepared and given to the Presiding Officer of each House of Parliament under the section.

(2) The time standards must include the following—

(a) the standard timeframes adopted by the Commission for preparing reports and providing the reports to the Presiding Officer of each House of Parliament under section 74,

(b) how the Commission monitors the progress of the preparation of the reports to ensure the reports are dealt with promptly,

(c) what action the Commission takes if the standard timeframes for the preparation of a report are not met.

(3) The Commission must, in each report prepared under section 74—

(a) report on the Commission's performance against the time standards in relation to preparing the report and providing the report to the Presiding Officer of each House of Parliament, and

(b) give reasons for any failure to comply with the time standards in relation to the preparation of the report.

This information must also be included in the Commission's annual report under s 76.

In January 2023, the Commission changed its corporate goal to 80% of reports to be completed within 80 days where the duration of the public inquiry was five days or less and 180 days otherwise. This was consistent with the Commission's submission to the Committee on the ICAC.

In August 2023, the ICAC Inspector published a special report regarding the time taken by the Commission to furnish its Operation Keppel report.

The Inspector noted that the 417 days it took between the end of submissions for the Operation Keppel public inquiry and the furnishing of the report clearly fell well outside the 180 days of the Commission's benchmark for completion of complex reports. The Inspector found however that, given the complexity of Operation Keppel, it can be readily seen to be an exception and that drafting the report was legally and factually complex. The Inspector was satisfied that the time taken to report to Parliament did not amount to maladministration because while the issue is serious, it was not unreasonable, unjust, oppressive or improperly discriminatory.

The Inspector recommended that the Commission review its procedures in relation to the preparation of s 74 reports and in doing so consider the following:

1. imposing a limit on the pages of submissions made by counsel assisting and those in reply,
2. the composition of the Review Panel and the priority given by the Review Panel members over its usual duties when considering reports,
3. exploring other means of achieving the efficient proof reading, layout and printing of reports,
4. updating its procedures and manuals to reflect current KPIs, emphasising the need for timely provision of reports and clarifying how resources are allocated, and
5. whether the current KPIs are achievable or should be adjusted.

On 26 October 2023, changes were approved to the relevant Commission Operations Manual procedures to address recommendations 1, 2 and 4.

Recommendation 1 was addressed by requiring the Commissioner presiding at a public inquiry to consider whether to impose a limit on the pages of submissions of counsel assisting and those in reply.

Recommendation 2 was addressed by limiting membership of the Review Panel to the three Commissioners, the Executive Director Legal and, if the report contains a corruption prevention chapter, the Executive Director Corruption Prevention. The Chief Executive Officer and Executive Director Investigation Division are no longer members. The relevant procedure also now provides that members of the Review Panel should aim to complete their reading and consideration of the draft report and meet no later than two weeks after receiving the draft report.

Recommendation 4 was addressed by setting out in the relevant Operations Manual procedure the Commission's current KPIs for finalisation of reports.

With respect to recommendation 3, the Commission advised the Inspector its CEO met with the Manager Communications and Media, who is responsible for oversight of the editing, proof reading, layout and printing of reports. The times taken to complete these processes will be actively monitored with a view to identifying any efficiencies that may be implemented.

With respect to recommendation 5, in January 2023 the Commission advised that, given the relatively recent adoption of the new timelines for completion of reports, it was not proposed to

revisit them in response to the recommendation, but the Commission would actively monitor them and review within the next 12 months whether they require any change.

In responding to the Inspector's recommendations, the Commission noted that, as a result of receiving additional funding from Government, the Commission has been able to increase the number of its legal staff. This has allowed the Commission to assign two lawyers to major public inquiries as opposed to only one lawyer for previous public inquiry matters. It has also meant that additional resources are available for drafting s 74 reports. These additional resources should assist the Commission to meet its goal.

Q7 **Has ICAC ever commenced an inquiry which has become publicly known but then ended the inquiry due to a lack of evidence or some other changed circumstance? What are the details?**

A7 See the response to Question 8 below.

Q8 **Is there a problem of institutional pride at ICAC whereby having started an inquiry it can't admit to closing it down, effectively clearing the individual it inquired into? Having started an inquiry, does ICAC always need to find some sort of wrongdoing, no matter how minor?**

A8 It is not clear whether these questions relate to investigations in general or are limited to where the Commission has determined it is in the public interest to conduct a public inquiry (after taking into account the matters set out in s 31(2) of the ICAC Act). This answer deals with both situations.

The Commission conducts a number of investigations that do not proceed to a public inquiry or to the publication of a report. Section 13(2) of the ICAC Act requires the Commission to conduct its investigations with a view to determining:

- whether any corrupt conduct, conduct liable to allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct has occurred, is occurring or is about to occur, and
- whether any laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct, and
- whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct.

The Commission will usually discontinue an investigation where it has established there is insufficient evidence to identify any conduct that comes within the above or the conduct established by the evidence is insufficiently serious to warrant further investigation by the Commission. Where it is known to the persons or persons the subject of the investigation that the Commission was conducting an investigation, they will be advised of the outcome of the investigation. Where it is publicly known the Commission has conducted an investigation, the Commission may issue a public statement about the outcome of its investigation. For example, such a statement was published on the Commission's website in March 2024 concerning allegations involving an officer of the Department of Planning, Housing and Infrastructure. The Commission may also decide to refer information to another agency or make a report pursuant to s 14 or s 74 of the ICAC Act. The Commission may deem it is in the public interest to conduct a public inquiry to "clear the air" of public rumour and speculation, as was the case in 2010 when the Commission conducted a public inquiry into allegations of corruption made by or attributed to Michael McGurk.

The Commission does not conduct a public inquiry with any pre-determined view as to what findings will be made. The purpose of any public inquiry conducted by the Commission is to establish what occurred and, once having established the facts, to determine whether any person has engaged in corrupt conduct, whether consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of any person for a criminal offence, whether consideration should be given to the taking of action against a person for a disciplinary offence or other action leading to dismissal and whether any corruption prevention recommendations should be made. Where the evidence given in the public inquiry is insufficient to support any adverse finding, the Commission will make that clear in the report it is required to prepare under s 74(3) of the ICAC Act.

Q9 **In looking at the ICAC Act, a public authority can be defined as "an auditable entity within the meaning of the Government Sector Audit Act 1983". How does the new Follow the Dollar laws for the Auditor General, introduced in 2022, change the scope of the public authorities which can be subject to ICAC investigation? Can ICAC now investigate:**

(a) A public authority within the theoretical scope of the Follow the Dollar laws; or

(b) Does the Auditor General have to first conduct an actual audit of the public authority under the Follow the Dollar laws for it to then come under the jurisdiction of ICAC?

A9 The *Government Sector Audit and Other Legislation Amendment Act 2002* amended the *Government Sector Audit Act 1983* (GSA Act) to enable the Auditor-General to conduct follow the dollar type performance audits of government funded activities of a non-government entity (defined as a "relevant entity") carried out for or on behalf of State and local government entities. This was achieved by inserting a new Division 2A into Part 3 of the GSA Act.

The Commission has jurisdiction with respect to NSW public authorities. The definition of public authority in s 3 of the ICAC Act includes an "auditable entity" within the meaning of the GSA Act. Section 38D of the GSA Act provides that a "relevant entity" that is subject to a performance audit under Division 2A of Pat 3 f the GSA Act "is not to be taken to be an auditable entity under this Act merely because the Auditor-General may conduct an audit of one or more of its activities under this Division". In these circumstances, a "relevant entity" subject to a follow the dollar performance audit by the Auditor-General under Division 2A of Part 3 of the GSA Act is not, merely by reason of such power on the part of the Auditor-General, a "public authority" for the purposes of the ICAC Act.

Q10 **What communications has ICAC had regarding (9) above with the NSW Auditor General? What has been the outcome?**

A10 The Commission has not had any communications with the NSW Auditor-General regarding the Commission's jurisdiction as a result of the Auditor-General gaining follow the dollar performance audit powers.

Questions from Chris Rath MLC (on behalf of the Opposition)

Independent Commission Against Corruption – Local Procurement Content Rules

Q1 **What criteria or guidelines should the NSW Government consider before embarking on local procurement content rules so as to mitigate potential conflicts and corruption?**

A1 Aspects of the Commission's evidence to the Standing Committee on Social Issues *Inquiry into Procurement practices of government agencies in New South Wales and its impact on the social development of the people of New South Wales* are relevant. For example, its responses to questions on notice, (available at AQoN and ASQ - ICAC - Received 1 May 2024.pdf (nsw.gov.au)) the Commission advised:

In terms of evaluating the local preference component of a tender, the evaluation methodology should consider:

- *the specific attributes that a tenderer requires in order to be assessed as "local" and the method for scoring these attributes*
- *whether it is possible to game the evaluation (for example, by establishing a token or cometic local business presence for the purpose of gaining an advantage)*
- *what claims made by tenderers need to be verified. For example, if a tenderer submits that it has an ethical supply chain, or will generate many local jobs, the evaluation committee needs to determine whether and how to test those claims*
- *officers assessing tenders should adhere to an agreed evaluation methodology which is unaffected by lobbying efforts that take place outside the formal assessment process. This is often established by setting an agreed protocol for communications between tenderers and the committee.*

As noted to the Standing Committee, the Commission's primary concern is that local supplier preference could be used to mask a conflict of interest between a local supplier and an agency decision-maker. Some techniques for managing conflicts of interest include:

- carrying out due diligence activities in respect of any prospective suppliers
- requiring relevant public officials to disclose any conflicts of interest or potential associations
- removing or limiting the involvement of any official with a conflict of interest
- segregating duties so that no individual has end-to-end control over the process
- ensuring a competitive process (that is, avoiding directly negotiated or sole source procurement arrangements) and refraining from order splitting
- for significant transactions, appointing a probity adviser or auditor.

Independent Commission Against Corruption – Election Commitments from Opposition

Q2 **Does ICAC have any power of oversight or enforcement against potential corruption with respect to election commitments from an Opposition party during an election campaign?**

A2 Opposition Members of Parliament are public officials and their functions and official conduct fall within the Commission's jurisdiction. Any conduct falling within s 8 of the ICAC Act and not excluded by s 9, could be corrupt. It should also be noted that s 8(2) of the ICAC Act sets out a number of matters that could involve corrupt conduct if they adversely affect the exercise of official functions. Relevant to elected officials, these include election bribery, election fraud and treating.

However, by themselves, election commitments are unlikely to become the subject of a Commission investigation. This is because while making an election commitment would constitute "conduct", it only represents a proposed or intended use of public power.

The Commission's 2022 *Report on investigation into pork barrelling* (the Jersey Report) dealt with the obligations of elected official in detail. At page 7, the Jersey Report states:

> *In issuing this report, the Commission intends to make it clear that ministers and their advisers do not have an unfettered discretion to distribute public funds. The exercise of ministerial discretion is subject to the rule of law, which ensures that it must accord with public trust and accountability principles. As set out in the judgment of Isaacs and Rich JJ in R v Boston (cited in chapter 3), chief among the public duties of a member of Parliament is "the fundamental obligation ... the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community".*
>
> *However, the principles of public office are not at odds with political reality. It should also be recognised that in some areas, such as, in formulating policy, public power may be legitimately exercised in order to satisfy a political objective. A minister may legitimately harbour a hope or expectation of some political (or personal) advantage flowing from their exercise of public power. But they may only legitimately do so if that hope or expectation is in the nature of a "side wind" and not the dominating motivation for the exercise of public power in a manner inconsistent with the public purpose for which that power was granted.*

At page 39 of the Jersey Report, the Commission quotes the Hon Paul Finn, former judge of the Federal Court:

> *It is right that we should be unrelenting in our insistence upon probity in government and in public administration. But equally we should not forget, as a media-driven Australian public opinion seems in danger of doing, that the processes of the democratic, representative and party-based system to which we have committed ourselves, are based, in part at least, upon the striking of compromises, upon securing and using influence, upon obtaining advantages for constituents, and – let it not be gainsaid – for Members of Parliament and for Ministers. Necessarily, limits, and strict ones at that, must be placed upon the compromises and the like we are prepared to countenance in allowing our systems of government to function. But unless we recognise in the roles we have given our politicians and in the laws that bind them, that in some degree and for some purposes, compromise, the use of influence, and advantage seeking and taking are tolerable if not necessary features of our public life, we run the risk of demanding standards of our elected*

officials which are beyond their reach and which also may be prejudicial to the very public purposes we ask them to serve for our benefit.

Also on page 39, the Commission states:

Those aspiring for political office should be free to inform the electorate about how they plan to exercise executive power if elected. This is usually achieved by announcing policies and making election promises. In a democratic system, candidates for office should have broad scope to campaign, including by proposing new laws, disagreeing with bureaucratic or expert advice and proposing to confer benefits on some parts of the electorate but not others. As noted by Mr Finn above, running for office and forming government involves making compromises. In practice, many of these compromises will necessarily involve a degree of departure from the notion of technical merit. Such departures are to be accepted, provided that relevant public interest factors are considered and given effect.

However, as Professor Campbell has noted, executive decision-makers cannot expend public money on implementing a policy unless the expenditure is within the scope of a power that is conferred by law. Whether or not such expenditure is within the scope of a public power will be a matter of fact in a given case and "it is on the basis of the statute, and the role of the decision-maker, that one decides whether it is legitimate to take into account some governmental policy, or not".

The standards of conduct that apply to members of Parliament, including ministers in some areas, will vary according to the circumstances, the nature of the power being exercised, or the decision made. With the development of political parties, a parliamentarian subordinates their individual judgment to the binding force of party discipline. The principles that apply to the exercise of public power by ministers, as noted above, take account of the realities of the modern practice of government and are not to be applied so as to render the practice of government unworkable. The law does not part company with the reality of party politics.

Q3 **As members of an Opposition are not yet ministers, what probity is there around the administration of funding commitments and promises that are then to be implemented should the Opposition become the Government?**

A3 The observations above regarding the Jersey Report also apply.

In addition, like any parliamentarian, members of the Opposition are bound by the codes of conduct applying to each house of parliament and relevant standing/sessional orders. They are also bound by NSW laws including but not limited to the Constitution (Disclosures by Members) Regulation 1983, the *Electoral Act 2017*, the *Electoral Funding Act 2018* and the *Parliamentary Remuneration Act 1989* (and determinations of the Parliamentary Remuneration Tribunal).

The Parliamentary Budget Officer (PBO), established under the *Parliamentary Budget Officer Act 2010*), is a public official and their functions are subject to the Commission's jurisdiction. The PBO Act does not specifically refer to probity, but this office performs an important role in respect of funding commitments.

By convention, election promises are closely scrutinised by the media and other political parties and candidates. This creates an additional, albeit non-statutory, probity measure.