

The Hon Jeremy Buckingham MLC
Chair, Portfolio Committee No. 1
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: portfoliocommittee1@parliament.nsw.gov.au

Dear Mr Buckingham,

Budget Estimates 2024-2025

I refer to my evidence given to the Committee on 26 February 2025 where I was asked about aspects of the Commission's 2022 *Report on investigation into pork barrelling*, known as Operation Jersey.

The following passages from the Operation Jersey report may assist the Committee in its consideration of the Commission's functions.

On page 39:

In some areas of governmental activity, public power may be legitimately exercised in order to satisfy a political objective. Elected officials may take political considerations into account, for example, in the formulation and the implementation of policy matters that guide how a particular type of government decision-making will be made. In general terms, elected officials are permitted greater scope in such matters as to the factors that may legitimately be brought into their decision-making than is the case with appointed officials.

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. . . . 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.

On pages 169-170 of the report, Professor Anne Twomey stated:

A large loophole concerns 'election promises'. Prior to elections and by-elections, promises are frequently made to fund infrastructure or make grants within electorates without any assessment having been made about the value of the project, its feasibility and the capacity of the recipient to deliver the project and make best use of it. There are no guidelines, eligibility criteria, applications or assessments of merit

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before commitments are made to provide the funding. The consequence is that the resulting infrastructure and grants lead to poor outcomes which do not provide value for the community and that more needy areas miss out.

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

On page 253, Professor Joseph Campbell noted that the making of an electoral promise to benefit the electors of a particular area or demographic to encourage them to vote for a particular party does not breach the legislative prohibition on electoral bribery. At page 254, he added that this

. . . does not give a free rein to the candidate, if elected, to implement the policy or engage in the public action. It is still necessary for any expenditure of public resources to be authorised by a law, and for the expenditure of money, pursuant to that law, to comply with the requirements of administrative law, statute law, and the common law discussed elsewhere in this article.

As I noted during my evidence to the Committee, candidates for elected office are not public officials, political parties are not public authorities, and the Commission does not regard campaigning for office as involving the exercise of public power.

There are, however, relevant circumstances in which the Commission *might* take action with respect to an election promise.

First, in the event that it received a referral from the NSW Electoral Commission alleging that an individual was involved in an offence under NSW electoral law, the Commission could have jurisdiction to conduct an investigation pursuant to s 13A of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act").

Secondly, were the candidate to win office, and misuse their official functions to advocate the allocation of the promised funds, the Commission might have a basis for commencing an investigation or taking further preventative action in circumstances where the conduct came within s 8 of the ICAC Act and was not excluded by s 9 of the ICAC Act.

Thirdly, a person seeking public office may engage in corrupt conduct in respect of any proposed future exercise of their functions as public officials, even if they do not succeed in being elected or appointed, where the conduct comes within s 8 of the ICAC Act and is not excluded by s 9 of the ICAC Act.

On a related point, one of the key recommendations in the Commission's *Investigation into political donations facilitated by Chinese Friends of Labor in 2015* (Operation Aero, published in 2022) was that funding of political parties be made contingent on the achievement of acceptable standards of party governance and internal control. That recommendation does not embrace any proposed expansion of the Commission's jurisdiction. Nonetheless, it has yet to be implemented but is currently being examined by the Joint Standing Committee on

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Electoral Matters. The Commission's position along with other stakeholders is documented in submissions and evidence before that Committee. The Joint Standing Committee has, however, resolved not to pursue truth in advertising laws viewing that they would be ineffective (Report 1/58- October 2024).

I hope this additional information is of assistance. Please do not hesitate to contact my office should any of the Committee members require further information.

Yours sincerely

The Hon John Hatzistergos AM
Chief Commissioner

4 March 2025

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