

**Submission
No 15**

**REVIEW OF THE INSPECTOR'S REPORT TO THE
PREMIER: THE INSPECTOR'S REVIEW OF THE
ICAC**

Organisation: NSW Electoral Commission
Name: The Hon Keith Mason AC QC
Position: Chairperson
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Mr Damien Tudehope MP
Chair
Committee on the Independent Commission Against Corruption
Parliament of New South Wales
Macquarie Street
SYDNEY NSW 2000

20 July 2016

Dear Mr Tudehope

Review of the Inspector's Report to the Premier: The Inspector's Review of the ICAC

Thank you for the opportunity to contribute to this Inquiry on behalf of the New South Wales Electoral Commission (NSWEC).

Under the amendments to the *Independent Commission Against Corruption Act 1988* (the ICAC Act) that were passed in response to the report of the Joint Panel, ICAC has the responsibility to investigate conduct that may involve possible criminal offences under the *Election Funding, Expenditure and Disclosures Act 1981* (EFED Act), the *Parliamentary Electorates and Elections Act 1912* (PEE Act) and the *Lobbying of Government Officials Act 2011* (LOGO Act). The NSWEC may refer conduct mentioned in s 13A of the ICAC Act for investigation and there are formal and informal cooperation protocols.

Through its Funding, Disclosure and Compliance (FDC) branch, the NSWEC:

- performs audits of declarations and claims;
- conducts intelligence and data gathering;
- pursues investigations under the EFED, PEE and LOGO Acts; and
- takes enforcement action.

In 2015, the FDC underwent a comprehensive review with the aim of building a stronger regulatory function. This resulted in a substantial increase in the NSWEC investigative capacity. Nevertheless, ICAC has substantially more investigative powers and resources than the NSWEC. In short, the NSWEC depends upon an effective ICAC to support the public interests in an effective democracy that the NSWEC seeks to uphold.

The NSWEC strongly supports the balance struck in the Report of the Hon Murray Gleeson AC QC and Mr Bruce McClintock ("the Joint Panel") dated 30 July 2015 which was accepted by the Premier and enacted into law subsequently. That balance is captured in ss 31 and 74BA. Those provisions should be retained in their present form.

Two recommendations of the ICAC Inspector in his *Report to the Premier: The Inspector's Review of the ICAC* have the effect of undermining that balance and therefore should not be adopted.

The Inspector's proposal that ICAC should be *required* to work in secret unless and until it decided to report findings justifying a conclusion that "serious corrupt conduct" existed would be highly counter-productive. Like a Royal Commission, ICAC functions to investigate, gather, assess and report on matters within its remit. Some of this activity will be conducted in secret but it is very much in the public interest that ICAC retain its existing statutory authority to conduct proceedings in public, subject to the guidelines of s 31. Experience shows that such a method of procedure

frequently attracts additional evidence and witnesses and enables the more effective challenging of key witnesses especially by those retained on behalf of persons of interest. Greater public accountability of ICAC itself is secured. Commissions and courts that function entirely in secret risk undermining their very legitimacy; and for that reason they have not been favoured in our legal and constitutional tradition (with isolated exceptions, e.g., in matters of defence).

The NSWEC urged the Joint Panel to allow ICAC to separate the gathering and analysis of relevant information from any task of concluding that “corruption” as defined was involved. We supported and still support the new threshold requirement of “serious corrupt conduct”. But we consider it vital to be able to access transcripts and exhibits of relevant ICAC inquiries as they happen, without the impediment of having to wait until after reporting by ICAC, or for ever. For one thing, there are limitation of action provisions affecting civil and criminal remedies that a regulator and possible prosecutor needs to keep at the forefront of attention. This would not be possible under the regime proposed by Mr Levine unless, of course, “governmental” bodies were (presumably to the exclusion of the media) given privileged access to testimony and exhibits as they are put into evidence in the formal public inquiry. Such a regime would add to ICAC’s burdens and would scarcely enhance public confidence in its processes.

The ICAC Inspector’s recommendation that ICAC examinations should invariably be held in private would, in our view, also frustrate the public interest in exposing matters of concern to the NSWEC in its role as a regulator and educator relevant to the three statutes referred to above. The very decision to hold a public investigation into some topic can serve to deter as yet undetected wrongdoers from continuing their own course of corrupt or illegal conduct. It should be remembered that the legislation and protocols for cooperation as between the NSWEC and ICAC ensure that considerable care will be taken before an ICAC investigation is launched. The integrity of the ICAC Commissioner, and of his or her staff, the professional duties of counsel and the oversight of the ICAC Inspector are further checks and balances.

I would also recommend against acceptance of the ICAC Inspector’s proposal to repeal s 74BA(2) of the ICAC Act. The purpose of s 74BA(2) is to ensure that ICAC is fully able to report its findings whether or not a conclusion of “serious corrupt conduct” is drawn. Once again, this was a key recommendation of the Joint Panel that the NSWEC proposed and supported from the outset. The ability to report findings (usually publicly, sometimes privately) allows a mass of evidence to be sorted, and for focussed guidance to be given to would-be prosecutors, including the DPP and the NSWEC, thereby assisting proper decision-making. It is also vital to enable the media, the public and the Parliament (as well as the ICAC Inspector himself or herself) to understand and digest the true outcome of the ICAC investigation. It should not be forgotten that ICAC reports may vindicate the wrongly suspected or make narrower findings than foreshadowed in the opening address of counsel assisting.

Yours sincerely

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Hon Keith Mason AC QC
Chairperson, NSW Electoral Commission