

**Submission
No 16**

**INQUIRY INTO INQUIRY INTO RECOMMENDATIONS OF
THE ICAC REGARDING ASPECTS OF THE CODE OF
CONDUCT FOR MEMBERS, THE INTEREST DISCLOSURE
REGIME AND A PARLIAMENTARY INVESTIGATOR**

Organisation: Department of Premier and Cabinet

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THE ICAC REGARDING ASPECTS OF THE CODE OF
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Organisation: Department of Premier and Cabinet

Name: Chris Eccles

Position: Secretary



Premier & Cabinet

2014-92662

Mr Trevor Khan MLC
Chair
Legislative Council Privileges Committee
Parliament House
Macquarie St
SYDNEY NSW 2000

20 MAR 2014

Mr John Sidoti MP
Chair
Legislative Assembly Privileges and Ethics Committee
Parliament House
Macquarie St
SYDNEY NSW 2000

Dear Chairs

I refer to your joint letter to me, dated 22 January 2014, regarding the joint Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee inquiry into certain recommendations of the Independent Commission Against Corruption (**ICAC**) which were contained in its report titled *Reducing the opportunities and incentives for corruption in the State's management of coal resources* (**Report**).

The Government's response to the ICAC's Report was tabled on 21 November 2013. A copy of that response is enclosed for your reference.

I thank you for the invitation to make a submission to this joint inquiry on behalf of the Department of Premier and Cabinet.

Your letter also refers to previous recommendations of the Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee concerning the interest disclosures regime and, in particular, recommendations to move toward 'exception reporting' and to enable the publication of the Register of Disclosures by Members on Parliament's website.

The Government considers that, in principle, there is merit in simplifying the arrangements regarding the disclosure of Members' pecuniary interests, provided there is no diminution of accountability.

These reforms would require amendments to the Constitution (Disclosure by Members) Regulation 1983 (**Regulation**). Recommendation 24 contained in the ICAC's Report requests that the Parliamentary Committees consider further possible amendments to the Regulation in relation to the disclosure of the pecuniary interests of family members.

The Government proposes to await the findings of this joint inquiry so that any amendments to the Regulation can be progressed as a single package.

Yours sincerely

~~Chris Eccles~~
Secretary



Tabled by the
Premier at
3:28pm
21 November
2013.

**Government Response to the Independent Commission Against Corruption's report
on *Reducing the opportunities and incentives for corruption in the State's
management of coal resources***

The NSW Government welcomes the Independent Commission Against Corruption's (ICAC) report, which follows the ICAC's Jasper and Acacia investigations into corrupt conduct. This most recent report makes a series of recommendations to tighten up the processes for managing the state's coal resources.

Recommendation 1

That the NSW Government sets out the objectives, priorities and outcomes it wants to achieve from the allocation of the state's coal resources. These should demonstrate consistency and alignment with the goals of the NSW 2021 state plan and the "make NSW number one" strategy.

Government Response: Support

The NSW Government will develop a clear statement of the objectives, priorities and outcomes of the allocation and development of the State's coal resources.

The Government will establish clear timeframes for development of the statement and ensure that it is fully integrated with other planning and resources policies and reforms.

Recommendation 2

That the NSW Government develops a set of predetermined factors to provide guidance in the release, allocation and development of NSW coal resources. These factors must be given consideration by all decision-making bodies involved in the process.

Government Response: Support

The NSW Government will identify factors to guide decisions made in relation to the release, allocation and development of the State's coal resources.

The development of a high level statement of relevant factors to be taken into consideration by decision makers will provide greater clarity and transparency. This will be linked to the objectives in Recommendation 1 and include economic, social and environmental factors.

The Government notes that any development proposals for coal resources are also subject to development consent under the *Environmental Planning and Assessment Act 1979*, which provides a framework for merit based assessment of proposals.

Recommendation 3

That recommendations to the NSW Government on the areas to be released and the method by which ELs are allocated be made by a steering group chaired by a representative of the NSW Department of Planning and Infrastructure and made up of three senior officials from the Resources and Energy Division of the NSW Department of Trade and Investment, Regional Infrastructure and Services, the NSW Department of Planning and Infrastructure and the NSW Treasury.

Government Response: Support in principle

The NSW Government supports the establishment of a cross agency body to assess and provide recommendations to the Minister for Resources and Energy on the release of coal resources and allocation of exploration licences.

Further consideration will be given to the membership of the group, to ensure the right mix of expertise.

Following further discussions with the ICAC, it has been agreed that an independent chair will be appointed to the steering committee.

Recommendation 4

That recommendations made by the steering group be directed to the NSW Government Cabinet Standing Committee on Resources and Land Use for consideration and final approval.

Government Response: Support

The steering group will submit its recommendations to the Cabinet Standing Committee on Resources and Land Use for approval, prior to the Minister for Resources and Energy making a final determination in accordance with the *Mining Act 1992*.

The ICAC has confirmed that it is appropriate for Ministerial responsibility for the making of statutory decisions to be vested in that Minister.

Recommendation 5

That the steering group obtains from the NSW Department of Planning and Infrastructure a preliminary strategic assessment of areas considered for release in order to provide a view of potential major risks to the future development of mining in the proposed areas.

Government Response: Support in principle

The NSW Government supports preliminary strategic assessment of the areas considered for release to identify potential benefits and risks.

The Government is already implementing upfront strategic consideration of land use issues as part of the Strategic Regional Land Use Policy.

Recommendation 6

That the steering group's recommendations to the NSW Government on the areas to be released be determined against the objectives and predetermined factors identified in recommendations 1 and 2, and that the steering group's recommendations are made publicly available in the same transparent way as are the NSW Department of Planning and Infrastructure's recommendations to the NSW Government.

Government Response: Support

The steering group's recommendations will be guided by the Government's statement of objectives under Recommendation 1 and decision-making factors under Recommendation 2. The recommendations will be made publicly available.

Recommendation 7

That the steering group is given the resources to establish an assessment panel and working groups, as required, that can provide additional information and analyses to make quality recommendations to the NSW Government.

Government Response: Support

The NSW Government recognises that the effectiveness of these reforms will depend on having access to the right expertise and resources.

Recommendation 8

That the assessment panel provides a triple bottom line assessment of the environmental, social and economic factors of allocating an EL and reports its findings to the steering group.

Government Response: Support

As noted above, the steering group and any supporting groups will be guided by the Government's statement of objectives under Recommendation 1 and decision-making factors under Recommendation 2.

This will include consideration of economic, social and environmental factors.

Recommendation 9

That the NSW Department of Premier and Cabinet reviews and reissues the ministerial memorandum M1998–12 "Use of Probity Auditors by Public Sector Agencies".

Government Response: Support

The Government notes the ICAC's advice that it "does not advocate the routine use of probity advisers and is of the view that probity advisers should be used as the exception rather than the rule. Calls for a greater degree of probity should not result in expenditure on private consultancies, including probity advisers, every time a public sector agency is involved in what is seen to be a complex project."

The NSW Procurement Board has issued a Direction with effect from 1 November 2013 to provide updated guidance on the use of probity advisers and auditors.

The Department will review the Memorandum and update the Government's practices on the engagement of probity auditors as necessary.

Recommendation 10

That the NSW Government uses the auction method as the default method for allocating ELs, and that any variation from this be justified by the recommendations of the steering group or by a decision of the NSW Government.

Government Response: Support in principle

The NSW Government agrees that the allocation of exploration licences should be based on the principles of transparency, maximising the value of the resource for the people of NSW and ensuring highly competitive outcomes.

The NSW Government will give further consideration to possible models.

Recommendation 11

That decisions made by the NSW Government on the release of mature areas for ELs and the auction of those ELs are linked to the likelihood of approval to mine.

Government Response: Support in principle

The NSW Government supports greater consistency across the release of coal resources for exploration under the Mining Act and the development consent process under the planning system.

However, it is important that the assessment and determination of development consent is not pre-empted by this process.

The NSW Government will make it clear to mining companies that the release of coal reserves and obtaining an exploration licence does not guarantee that development approval will be given.

Recommendation 12

That, if government policy allows negotiation on any auction payments made at the EL stage, then such negotiations be overseen by the steering group.

Government Response: Support in principle

Any allocation model will be overseen by the steering group.

Recommendation 13

That the NSW Treasury be responsible for the technical design of auctions of ELs and has oversight of the auctioning process.

Government Response: Support in principle

The NSW Government will consider this issue as part of the development of possible allocation models.

Recommendation 14

That the steering group makes recommendations to the NSW Government Cabinet Standing Committee on Resources and Land Use on the appropriate use of restrictions within the auction process in allocating ELs based on the administrative assessment of bidders.

Government Response: Support in principle

The NSW Government will consider this issue as part of the development of possible allocation models.

Recommendation 15

That the transfer of an application for direct allocation of an EL be referred to the assessment panel in circumstances where an application meets a specified threshold determined by the steering group.

Government Response: Support

The NSW Government agrees with the ICAC that, in some situations, direct allocations will continue to be necessary.

The steering group will propose a trigger for whole of government consideration of direct allocation applications.

Recommendation 16

That the assessment panel conducts technical analyses of preferred companies to determine if each company has the technical expertise to undertake the exploration activities.

Government Response: Support in principle

Under the Mining Act, applicants are required to provide information about the financial resources and technical advice available to the applicant.

The Government will explore how best to give effect to this provision.

Recommendation 17

That the assessment panel conducts financial analyses of preferred companies to determine if each company has the capacity to fund exploration work.

Government Response: Support in principle

Under the Mining Act, applicants are required to provide information about the financial resources and technical advice available to the applicant.

The Government will explore how best to give effect to this provision.

Recommendation 18

That the NSW Government replaces the current arrangements of ELs in mature coal allocation areas with a system of EL tenure for which exponentially increasing rents are payable.

Government Response: Support in principle

The NSW Government supports the intent of the recommendation, which is to encourage mining companies to progress projects in an efficient manner and provide certainty to the local community.

Further consideration will be given to the best means of implementing this.

Recommendation 19

That the NSW Treasury develops a transitional regime for moving all existing ELs to a rent-based arrangement and makes recommendations to government.

Government Response: Support in principle

As per Recommendation 18.

Recommendation 20

That the NSW Department of Premier and Cabinet amends the *Code of Conduct for Ministers of the Crown* to prohibit ministers, either directly or via their staff, from demanding that NSW Government agencies change recommendations in instances where the agency remains of the belief that a recommendation ought to be made.

Government Response: Support in principle

The ICAC Commissioner has confirmed that this recommendation is not intended to limit, in any way, Ministerial discretion. He has noted that if the recommendation is adopted Ministers will be free as they are now to disagree with the recommendation and decide the issues before them in any way they wish, in accordance with government policy or otherwise. It is also not intended to limit, in any way, reasonable attempts by Ministers to persuade their departments to come to a different view or to interfere in proper discourse and interchange between Ministers and their departments.

The Government supports the recommendation in principle and recognises the role of the public service in providing apolitical advice in the public interest. In 2011, the Government introduced amendments to the *Public Sector Employment and Management Act 2002* to establish an ethical framework for the public sector that provides for a merit-based, apolitical and professional public sector that implements the decisions of the Governments of the day.

The Premier will amend the Code of Conduct for Ministers of the Crown that will acknowledge this ethical framework and require that Ministers not make demands that would place the public service in a position that would be inconsistent with it.

Recommendation 21

That the NSW Public Service Commission develops a best practice guide for public officials who work with the offices of ministers, and that this guide covers the issue of revised briefing materials.

Government Response: Support

The provision of apolitical and non-partisan advice is a core value for the public sector that is reflected in the ethical framework contained in the amendments to the *Public Sector Employment and Management Act 2002* introduced by the Government in 2011.

The Public Service Commission is currently developing a new Ethics Toolkit to help public service employees better understand the obligation to act ethically and in the public interest, at all times. The issues raised by the ICAC will be covered during the development of the Ethics Toolkit.

Recommendation 22

That the NSW Parliament's Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee consider amending the *Code of Conduct for Members* to deal comprehensively with improper influence by members.

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will review the Code of Conduct for Members of Parliament.

As has previously occurred, for example when the Code of Conduct for Members was originally being developed, it is proposed that the Committees will come together to consider and hear the relevant matters with a view to a consistent approach.

Recommendation 23

That the NSW Government adopts the Code of Conduct for Ministers of the Crown as an applicable code for the purposes of s 9 of the ICAC Act.

Government Response: Support

Currently, findings of corrupt conduct can be made by the ICAC against Ministers and former Ministers who engage in criminal conduct or conduct in breach of the Members of Parliament Code of Conduct.

The current Ministerial Code of Conduct has been drafted as an administrative instrument for use by the Premier and, in its current form, is not suitable for adoption for the purposes of the ICAC Act.

The Premier intends to review the Code in terms of both its substance and with a view to making the Code suitable for adoption under the ICAC Act.

Recommendation 24

That the NSW Parliament's Legislative Council Privileges Committee conducts a new inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the Constitution (Disclosures by Members) Regulation 1983, with a view to making third-party disclosures a requirement.

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will each conduct an inquiry into the mechanism for elected members to disclose the interests of their spouses/partners and dependent children under the provisions of the *Constitution (Disclosures by Members) Regulation 1983*, with a view to making third-party disclosures a requirement. As noted above (Recommendation 22), it is proposed that the Committees hold joint hearings and deliberations for the purposes of their inquiries.

Recommendation 25

That the NSW Parliament's Legislative Council Privileges Committee considers the establishment of a parliamentary investigator position in consultation with the Legislative Assembly Privileges and Ethics Committee.

Government Response: Support

The Legislative Council Privileges Committee and the Legislative Assembly Privileges and Ethics Committee will initiate inquiries into the establishment of a parliamentary investigator position. As noted above (Recommendation 22), it is proposed that the Committees may hold joint hearings and deliberations for the purposes of their inquiries.

The NSW Government notes that the ICAC supports further consideration of a parliamentary investigator provided there is no change to its jurisdiction or the definition of corrupt conduct in the ICAC Act as a result of any review.

Recommendation 26

That the NSW Government reviews the recommendations contained in the Commission's 2010 publication, *Investigation into corruption risks involved in lobbying*, and considers adopting the recommendations that apply to the state government's lobbying regulatory regime, which have not been implemented to date.

Government Response: Support

The NSW Government has introduced a number of reforms to strengthen the regulation of lobbyists, including banning success fees and preventing officeholders in political parties from lobbying government officials. The Government will review the recommendations contained in the Commission's 2010 publication *Investigation into corruption risks involved in lobbying* and consider what additional recommendations should be adopted.