

**INQUIRY INTO BUDGET PROCESS FOR INDEPENDENT
OVERSIGHT BODIES AND THE PARLIAMENT OF NEW
SOUTH WALES**

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INDEPENDENT COMMISSION
AGAINST CORRUPTION
NEW SOUTH WALES

SUBMISSION TO THE PUBLIC
ACCOUNTABILITY COMMITTEE INQUIRY
INTO THE BUDGET PROCESS FOR
INDEPENDENT OVERSIGHT BODIES AND
THE PARLIAMENT OF NEW SOUTH WALES

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Introduction

This submission is made by the NSW Independent Commission Against Corruption (“the Commission”) for the purposes of the Public Accountability Committee inquiry into the Budget process for independent oversight bodies and the Parliament of New South Wales. The terms of reference for the inquiry are set out at Appendix 1 of this submission.

This submission:

- highlights the risk to the Commission’s ability to operate effectively from 2020–21 due to inadequate funding, and
- proposes consideration be given to a new funding model to overcome that risk.

Lack of appropriate funding undermines the Commission’s independence. The capacity of the Commission to sustain its core operations is challenged by the lack of adequate ongoing parliamentary appropriation funding and reliance on grant funding from the Department of Premier and Cabinet (DPC) to make up deficiencies in appropriation funding.

In 2019–20, the Commission is due to receive appropriation and grant funding of up to \$27.399 million to fund its operations for the year. This is barely sufficient to fund the Commission’s work for the year. The forward estimates for 2020–21, however, provide for funding of only \$24.814 million. Already, the Commission has been advised that this funding will be reduced by \$673,000 in additional savings for that year alone thereby reducing appropriation funding for 2020-21 to \$24.141 million. Absent further funding this means that the Commission is due to receive \$3.258 million less in 2020-21 than it received in 2019-20. Increased levels of expenditure in 2020-21 including increases arising through inflation, rental and mandated staff salary increases means that in 2020-21 the Commission will need additional funding of about \$4.7 million on top of the \$24.141 million in appropriation funding just to maintain its 2019-20 level of operations. Absent that additional funding, the Commission will need to reduce its expenditure.

As will be explained in section 4 of this submission, the Commission has little flexibility to reduce variable costs, as these have already been reduced as far as possible to meet previous savings imposed upon the Commission. The only area in which it could find the amount of savings required by this level of reduced funding would be to reduce its staff numbers. To make the requisite savings of about \$4.7 million for the year 2020–21, the Commission would need to reduce its full-time equivalent (FTE) staff by up to 31 positions from the currently funded number of 120. That is about one quarter of the Commission’s staff. This would reduce the Commission’s FTE staffing level to the lowest number in the Commission’s 30-year history. Such reductions will have an immediate and devastating effect on the Commission’s frontline services and, therefore, its ability to fight corruption. Such a reduction could only be achieved through a forced redundancy program. The Commission would not be able to fund such a program and would require additional Government funding for that purpose.

That, however, would not be the end of the matter. To meet ongoing savings measures embedded in the forward estimates, Commission FTE positions would need to be further reduced in each following financial year up to the year 2025–26.

To overcome this danger to the Commission's effectiveness the Commission proposes that its appropriation for 2020–21 and subsequent years be set at a core funding level that properly reflects its operational requirements and is not subject to Government-imposed efficiency dividends or other cost-saving measures imposed from time to time.

The Commission also proposes that consideration be given to a new funding model having the underlying principles of certainty, flexibility, transparency and accountability, while acknowledging and ensuring the Commission's independence. As discussed in section 5 of this submission, such a funding model would have two components:

- a fixed amount to meet the Commission's core funding needs to maintain its operational effectiveness, including costs associated with optimum staffing levels and the conduct of compulsory examinations and public inquiries
- supplementary funding that the Commission could draw upon to meet unforeseeable or unexpected operational expenses.

The need for a new funding model arises from the need to properly sustain the Commission's work through appropriate funding levels. A significant number of complex matters have been, and are being, investigated. Larger volumes of data are being seized and analysed. Own-motion investigations are starting to bear fruit using sophisticated information analytical techniques by the Commission's Strategic Intelligence and Research Unit (SIRU).

The current parliamentary appropriation system does not accommodate the unforeseeable and unpredictable nature of the Commission's work program. The current budget process usually requires new funding business case proposals for the following financial year to be made in February. It is not possible to predict more than 12 months in advance what allegations of serious corrupt conduct and systemic corrupt conduct will require investigation over the coming financial year.

In the past, the Commission has relied upon grant funding to cover any shortfall between the budget appropriation and its expenses. Over the last 12 months, it has become increasingly difficult to secure grants from the DPC. There has been a recent communication from the Secretary DPC that indicates a reluctance on the part of the DPC to provide grant funding in the future (see section 4 of this submission).

In addition, funding of the Commission has been adversely affected by the escalation in, and cumulative impact of, the imposition of savings measures or efficiency dividends by government. The latter have been imposed both through reduced parliamentary appropriations and within-year funding reductions after the passage of the appropriations through the NSW Parliament. These are almost impossible to absorb into the Commission's current budget, as the discretionary, non-staffing and non-fixed cost operational expenditure is very small.

Applying these cuts will seriously compromise the Commission's work program of fighting corruption in, and affecting, the NSW public sector.

Section 1: Overview of the Commission and its work

The Commission's mandate under s 2A of the *Independent Commission Against Corruption Act 1988* ("the ICAC Act") is to investigate, expose and prevent corruption involving or affecting public authorities and public officials and to educate public authorities, public officials and members of the public about corruption and its detrimental effects on public administration and the community. The Commission also investigates conduct that may involve certain specified criminal offences that the NSW Electoral Commission refers to the Commission for investigation under s 13A of the ("the ICAC Act").

Since the commencement of its work in 1989, the Commission has conducted numerous investigations and undertaken significant corruption prevention work to strengthen NSW public administration against corruption. Up to 30 June 2019, the Commission has published 194 investigation reports under s 74 of the ICAC Act and has made in excess of 1,300 corrupt conduct findings against approximately 850 individuals. There have been significant financial savings to the public sector through the detection and prevention of corruption. As a result of its investigations and corruption prevention work, the Commission has identified corruption risks and made hundreds of corruption prevention recommendations to address these risks. The Commission has published other corruption prevention material and conducted numerous corruption prevention seminars and training sessions.

Why the Commission was established

One of the reasons the Commission was established was that existing agencies had been ineffective in exposing and preventing corruption. In the words of then Premier, the Hon Nick Greiner MP, during the second reading speech for the Independent Commission Against Corruption Bill:

The bottom line is simply this; the people of this State are fed up with half-hearted and cosmetic approaches to preventing public sector corruption. This legislation will establish an institution that has strong and effective powers and has jurisdiction to look at the entire public sector. That is what the people expect. It is our responsibility to ensure that that expectation is met and not disappointed.¹

Thirty years later, the reasons for the establishment of the Commission remain valid and compelling. The key roles of investigation, prevention and exposure continue to be integral to the fight against corruption. The Commission continues to investigate and expose significant corruption in, and affecting, the NSW public sector. Much of this corrupt conduct would not have been discovered if it were not for the Commission and its ability to exercise broad powers. The investigation and prevention

¹ Hansard, 26 May 1988, p. 675.

roles have proven to be complementary; both of which are required to effectively monitor and improve integrity in the public sector. Significant changes have been made to public agency work practices and procedures as a result of the Commission's work in exposing, preventing and educating about corrupt conduct.

Independence of the Commission

The Commission is, as reflected in its title, an *independent* anti-corruption commission. From its inception, it was intended that the Commission would operate independently from executive government. As stated by Mr Greiner during the aforementioned speech:

*The commission will have an independent discretion, and will decide what should be investigated and how it should be investigated. That is the whole point of having a commission independent of the Executive Government and responsible only to Parliament.*²

Mr Greiner emphasised the independence of the Commission when telling the Parliament: "The commission will not be subject to public service legislation".³

The Commission's independence arises at a number of levels, including the following:

- (i) It is independent of Government and, accordingly, it is not subject to the control or direction of Government.
- (ii) It is independent in the conduct of investigations – in what it investigates, when, how and the extent to which it investigates, subject only to jurisdictional limits.
- (iii) It is operationally independent in that it may employ such powers, including in particular its statutory powers, as it determines, and it may employ strategic and other investigative methodologies as it considers appropriate.
- (iv) It is independent in the resources (both financial and otherwise) it uses and how such resources are deployed or expended.

Under s 4 of the ICAC Act, the Commission is constituted as a statutory corporation. It is not a department of Government. It is not a Government agency in any sense. Instruction and directions to Government agencies issued by Executive Government are not applicable or binding upon the Commission. In particular, the Commission is not bound by directions issued by Government with respect to employment or reporting matters. The Commission's staff are not employed under the *Government Sector Employment Act 2013*. They are employed under the ICAC Act: s 104 and s 104A. The *Government Sector Finance Act 2018* provides that the Commission is not required to comply with a relevant treasurer's request or a minister's information request if the request is not consistent with the Commission's statutory functions.

² Ibid, p. 674.

³ Ibid, p. 678.

The Commission's independence from Executive Government is the equivalent in every respect to the constitutional independence of the Supreme Court of NSW.

Although independent, the Commission is accountable in a number of ways for the exercise of its powers. In particular, it is accountable to the NSW Parliament through the Parliamentary Committee on the ICAC. The Commission is also accountable to the Inspector of the ICAC. In matters of financial management, the Commission is accountable to the NSW Treasury and the Auditor-General of NSW for the proper expenditure of its funds.

It has long been accepted that the provision of appropriate financial resources for an anti-corruption agency is inextricably linked to its independence. It is, therefore, important that any funding model for the Commission respects this independence.

Before discussing the current flawed funding model and the need for change, it is appropriate to set out some information concerning the nature and extent of the Commission's work. This will assist in understanding the Commission's resource needs.

Exercise of the Commission's functions

The Commission's overarching aims are to protect the public interest, prevent breaches of public trust and guide the conduct of public officials.

Section 12A of the ICAC Act requires the Commission, in exercising its functions, to direct its attention to serious corrupt conduct and systemic corrupt conduct and to take into account the responsibility and role that other public authorities and public officials have in the prevention of corrupt conduct.

The degree of seriousness of conduct or whether it raises systemic issues will not always be apparent from the information initially provided to the Commission. Only further investigation may establish the degree of seriousness and whether the conduct raises systemic issues. In many cases, the full extent of the conduct under investigation may be established only during a public inquiry (which is part of the investigation).

In determining which matters to investigate, the Commission takes into account the role and abilities of other agencies and, where appropriate, disseminates material to them or refers matters for investigation or other action. The Commission complements, rather than replaces, the roles performed by other agencies and has a long history of working cooperatively with other agencies to ensure that matters that come to its attention are dealt with by the most appropriate agency.

Under s 53 of the ICAC Act, the Commission may refer a matter for investigation or other action to any person or body considered by the Commission to be appropriate in the circumstances. The Commission may also require the person or body to submit a report to the Commission in relation to the matter and the action taken by the person or authority.

The assessment process

The Commission's Assessments Section is responsible for considering and reporting on complaints and reports of corrupt conduct received by the Commission. The assessment process:

- determines whether any corrupt conduct, conduct liable to allow, encourage or cause the occurrence of corrupt conduct or conduct connected with corrupt conduct has likely occurred, may be occurring or may be about to occur
- evaluates the nature and extent of any corrupt conduct to determine whether it is serious or systemic
- ensures the Commission is able to make appropriate decisions about its response to allegations of corrupt conduct.

Table 1 compares the number of matters received for consideration by the Commission from 1 July 2016 to 30 June 2019.

Table 1: Matters considered by the Commission since 2016–17

Category	2018–19	2017–18	2016–17
Complaint (s 10)	1,220	1,264	1,096
Report (s 11)	789	646	650
Query	431	468	427
Outside jurisdiction	235	302	246
Feedback	47	64	60
Referral (s 16(1))	9	5	7
Own initiative (s 20)	12	1	3
Referral (s 73)	0	0	0
Referral (s 13A)	0	1	0
Total	2,743	2,751	2,489

All matters within the Commission's jurisdiction are made the subject of individual written reports by officers of the Assessments Section. These set out the allegations and relevant background information, provide an analysis of the information, and recommend what action should be taken. These reports are considered by the Commission's Assessment Panel twice a week. The Assessment Panel comprises the three Commissioners and the executive directors of the Investigation Division, Legal Division and Corruption Prevention Division.

Only a small portion of matters reported to the Assessment Panel are made the subject of a Commission investigation. In 2018–19, only 18 matters were retained by the Commission for preliminary investigation. This represents about 0.65% of the 2,743 matters considered by the Commission in that period. This demonstrates that the Commission focuses on matters involving or likely to involve serious corrupt conduct and systemic corrupt conduct and that other agencies are not able to adequately investigate.

The investigative process

The majority of the matters investigated by the Commission arise from complaints of corrupt conduct made under s 10 of the ICAC Act and reports of suspected corrupt conduct made under s 11 of the ICAC Act. The Commission, however, has also developed a proactive capability to undertake research projects focused on intelligence gathering that may then progress to a preliminary investigation. The Commission's Strategic Intelligence and Research Unit (SIRU) commenced in July 2018 and is responsible for identifying current, emerging and changing corruption risks and proactive investigation opportunities.

All investigations commence as preliminary investigations. A preliminary investigation may be conducted for the purpose of discovering or identifying conduct that might be made the subject of a more complete investigation or deciding whether to make particular conduct the subject of a more complete investigation. If appropriate, a matter may then be escalated by the Commission's Investigation Management Group (IMG) to a full investigation (known as an operation).

Each preliminary investigation and operation is assigned to an investigation team. One or more lawyers is assigned to each investigation. If the matter involves potential system issues, a corruption prevention officer will also be assigned.

A primary case manager is appointed for each Commission investigation. This person is responsible for regularly reviewing the conduct of the investigation to ensure compliance with relevant procedures and investigation plans.

The IMG is responsible for making and/or approving key decisions made in the course of a Commission investigation.

Investigations may focus on both historic and current activities. Methods of investigation will vary depending on the nature of the conduct under investigation. Investigation plans are prepared for all matters, and each investigation is regularly assessed to determine the most appropriate investigation strategy.

The primary purpose of a Commission investigation is to determine whether any:

- corrupt conduct, conduct connected with it or conduct liable to allow, encourage or cause the occurrence of corrupt conduct has occurred, is occurring or is about to occur

- 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
- 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.

Compulsory examinations (private hearings) or a public inquiry may be conducted as part of the investigation; however, not all investigations require compulsory examinations or involve a public inquiry (these are considered in more detail below).

The conclusion of an investigation may result in no further action or a number of different actions, which may include:

- referral to a public authority of information that is relevant to the exercise of its functions (such as information for consideration of disciplinary action or system changes to reduce the likelihood of corrupt conduct)
- the dissemination of intelligence and other information
- a brief of evidence for referral to the NSW Director of Public Prosecutions (DPP)
- the furnishing of a report on the investigation to the presiding officers of the NSW Parliament (the Commission is required to prepare reports where it has conducted a public inquiry and where matters are referred to the Commission by both Houses of Parliament).

Although the number and nature of statutory powers exercised in any year will vary depending on the number, nature and complexity of the investigations being undertaken during that period, some indication of the work involved in conducting investigations can be derived from the Commission's use of its statutory powers. Table 2 sets out the use of the Commission's statutory powers over the past five years.

Table 2: Use of statutory powers by the Commission since 2014–15

Power	2018–2019	2017–2018	2016–2017	2015–2016	2014–2015
Notice to produce a statement (s 21)	18	23	17	8	16
Notice to produce a document or thing (s 22)	538	680	499	522	879
Notice to enter public premises (s 23)	1	1	0	0	3
Summons (s 35)	158	233	150	167	308
Search warrant (s 40)	32	5	11	11	17
Controlled operation approvals	0	0	0	0	0
Surveillance device warrants	2	3	0	2	2
Telecommunications interception warrants	18	16	5	13	5
Stored communications warrants	7	0	0	0	0
Telecommunications data authorities	295	289	209	266	550
Compulsory examinations	83	112	69	65	127
Public inquiries	4	4	2	6	7
Public inquiry days	133	47	31	48	64

The numbers in Table 2 reflect only part of one aspect of the Commission's work – the gathering of information. Information may also be obtained through other methods such as interviewing potential witnesses, reviewing open source information and undertaking physical surveillance. Once obtained, information needs to be considered and analysed for the purpose of ascertaining relevant facts. The skills required to undertake the necessary work include those of investigators, forensic accountants, intelligence analysts, computer forensic experts, surveillance operatives and lawyers. Corruption prevention analysis, where required, is undertaken by corruption prevention officers.

The time required to undertake the necessary analysis depends on the volume and complexity of information that has been gathered. Most investigations involve consideration of a large volume of

physical and electronic material. Emails alone may comprise tens of thousands or even hundreds of thousands of separate communications that need to be sifted through to identify relevant material. There is a direct correlation between the number of experienced and expert staff the Commission can afford to employ and the Commission's ability to analyse information in a timely manner.

Table 3 provides information on the number of preliminary investigations and operations over the last five years and the average time taken to complete those matters.

Table 3: Preliminary investigations and operations conducted by the Commission since 2014–15

	2018–2019	2017–2018	2016–2017	2015–2016	2014–2015
Preliminary investigations as at 1 July	15	6	9	11	9
Number referred during year	18	41	27	41	42
Number discontinued during year	27	32	30	43	40
Number current as at 30 June each year	1	15	6	9	11
Days on average to complete	125	100	94	85	74
Operations as at 1 July	12	9	8	13	10
Number escalated from preliminary investigation during year	12	12	10	10	14
Number discontinued during year	6	9	9	15	11
Number current as at 30 June each year	18	12	9	8	13
Days on average to complete	456	524	396	505	454

As can be seen from this table, the number of investigations on hand as at 30 June each year has increased over the last two years and, as at 30 June 2019, were at a record high of 18 investigations. The number of investigations tell only part of the story. Each investigation is different – there is no such thing as a standard investigation. Many of the investigations currently being conducted by the Commission are complex in nature and require the use of substantial resources over extended periods of time.

Corruption prevention

The Commission's corruption prevention functions are set out in s 13 of the ICAC Act, and are principally exercised over four areas:

1. Investigations – involves examining contributing organisational factors that create vulnerability to corruption arising from Commission investigations and making recommendations to affected agencies and/or ministers.
2. Agency development – involves examining agency practices or procedures considered high risk and providing assistance in the management of corruption risk.
3. Community awareness and reporting – involves encouraging the reporting of corruption and changes in inappropriate behaviour by groups/communities that are involved in high-risk exchanges with the public sector.
4. Policy research and analysis – involves making recommendations to government in relation to issues of substantial sector-wide corruption risk and public concern.

Where appropriate, officers from the Commission's Corruption Prevention Division work with investigators on investigations with a view to identifying corruption risks and strategies for dealing with those risks. Corruption prevention recommendations are often included in Commission investigation reports. In addition, other projects are undertaken each year aimed at addressing corruption risks affecting the NSW public sector.

The Corruption Prevention Division provides advice on preventing or combating corruption and educating public sector agencies on how to examine and design their operations to design their operations so as to create a corruption-resistant environment. Training is also undertaken within the public sector, including at rural and regional levels.

Table 4 sets out the number of occasions over the last five years in which the Commission has provided corruption prevention advice, training workshops and other speaking engagements.

Table 4: Corruption prevention advice, training and speaking engagements conducted by the Commission since 2014–15

	2018–2019	2017–2018	2016–2017	2015–2016	2014–2015
Number of occasions on which corruption prevention advice was provided	180	139	105	94	134
Number of training workshops	111	126	74	107	85
Other speaking engagements	93	122	32	68	109

In addition, the Commission maintains its commitment to serving the needs of rural and regional NSW by conducting its Rural and Regional Outreach Program twice each year. This program provides practical corruption prevention information and advice to communities outside the metropolitan areas of NSW. Since 2001, the Commission has conducted 35 visits under the program.

The Commission also supports prevention and education initiatives as follows:

- delivery of “Strategic responses to corruption”, a course conducted each year with the Australia and New Zealand School of Government, for which several scholarships are competitively awarded by the Commission
- participation as partner of the biennial National Investigations Symposium
- participation as partner of the biennial Australian Public Sector Anti-Corruption Conference, Australia’s premier corruption prevention conference.

Compulsory examinations and public inquiries

If it is satisfied that it is in the public interest to do so, the Commission may conduct a compulsory examination for the purposes of an investigation. The number of compulsory examinations conducted in any year depends on the nature of the investigations being conducted by the Commission. The Commission usually uses its own in-house lawyers as counsel for compulsory examinations. This represents a considerable monetary saving over briefing external counsel. The main financial costs associated with compulsory examinations are for the provision of transcription services.

A public inquiry may be conducted as part of an investigation. It is a matter for the Commission to determine whether it is in the public interest to conduct a public inquiry and to determine the scope of the public inquiry.

A decision to conduct a public inquiry must be authorised by the Chief Commissioner and at least one other Commissioner.

As shown in Table 2 above, the number of public inquiry days has increased dramatically over the last five years. In 2014–15, there were seven public inquiries conducted over 64 days. In 2018–19, there were only four public inquiries but they were conducted over 133 days. The increased number of days is a reflection of the increased complexity of the matters being dealt with in public inquiries. Given the nature of current matters under investigation by the Commission, there is no reason to assume that future public inquiries will involve less complex issues or that there will be any reduction in the number of hearing days required for public inquiries.

Preparation of prosecution briefs of evidence

Section 14 of the ICAC Act requires the Commission to gather and assemble admissible evidence and furnish it to the NSW DPP and, in the case of evidence relating to offences against a law of another state, the Commonwealth or a territory, to provide the evidence to the Attorney General or to the appropriate authority of the jurisdiction concerned.

The Commission has a memorandum of understanding (MOU) with the NSW Office of the Director of Public Prosecutions (ODPP) that sets out, in general terms, the responsibilities of the Commission and the ODPP. The MOU provides that the Commission will furnish to the ODPP evidence in admissible form, together with a covering letter, outlining what charges have been identified by the Commission as being open on the evidence and identifying any relevant legal and evidentiary issues.

The Commission regularly provides briefs of evidence to the DPP on matters arising from its investigations. The preparation of such briefs often requires additional work in order to obtain the necessary evidence in admissible form. This involves the allocation of resources, including staff time, to gather and collate the necessary evidence. There have been recent delays in finalising briefs for furnishing to the DPP caused by the need for relevant Commission officers to concentrate on more pressing operational matters.

As a matter of transparency, the Commission publishes on its website and in its annual reports information concerning which briefs have been provided to the DPP, which prosecutions have been commenced, and the results of those prosecutions.

Unpredictability of investigations and public inquiries

The unpredictable nature, content, and timing of the Commission's workload makes it impossible to accurately predict what amount of funding will be required each year in order to, in particular, effectively discharge its investigative functions.

The reasons for this are well known. The Commission cannot predict in advance what matters may be received by it by way of complaint or s 11 report or the nature of those matters. It cannot predict whether it will receive a referral from the NSW Parliament, or from the NSW Electoral Commission (as was the case in 2018). It cannot predict what matters might be identified by SIRU, as involving significant allegations of serious and systemic corruption within, or affecting, the NSW public sector. The need for further resources is always a contingency where the Commission assesses a reasonable suspicion of corrupt conduct as credible and decides to investigate a matter.

No matter how much the Commission analyses fluctuations in workload and costs from the previous financial year(s), it has no bearing on what will emerge during the following financial year. This is not to say that matters being investigated may not continue from one financial year to the next, which is quite common. However, it is not a predictive tool for estimating investigation and public inquiry loads in any new financial year in the future.

The inability of the Commission or any other body to undertake *accurate forecasting* given the nature of corruption investigations indicates a need for flexible funding to meet actual needs.

Section 2: Historical funding concerns

Concern about the level and security of funding received by the Commission is not new. Before examining current funding arrangements and issues arising from those arrangements, it is useful to set out some information in relation to historical funding concerns.

Over most of the 30 years that the Commission has operated, its parliamentary recurrent appropriations have been below the level of inflation (see Figure 1 in section 4 of this submission). One result of the failure to maintain funding in real terms has been wide fluctuations in the number of staff the Commission has been able to employ in any given year. That, in turn, has impacted on the effectiveness and efficiency with which the Commission has been able to meet its statutory role.

The funding for the Commission has been a feature of public comments made by previous Commissioners in their forewords to the Commission's annual reports.

The first significant statement was by then Commissioner, the Hon Barry O'Keefe AM QC, in the 1997–98 annual report, in which he stated that:

In real terms the ICAC has had a decrease of \$3.27 m in its allocation when 1997–98 is compared with 1990–91, the Commission's first year of operation ... This consistent reduction in funding has had an adverse effect on the operations of the ICAC. It has forced a decrease in financial and staff resources. The allocation available for the various ICAC programs has inevitably been reduced.

In the Commission's 1998–99 annual report, Mr O'Keefe advised that:

The government acted only recently to stem an effective budget cut of more than \$3.5 million per annum in real terms since 1990–91. Such funding cuts have adversely affected what the Commission has been able to achieve in its areas of statutory responsibility for investigation, corruption prevention and education. This has meant significant lost opportunities which can never be retrieved.

In the Commission's 2003–04 annual report, then Commissioner, Irene Moss AO, stated:

As the statistics in this Annual Report clearly show, demand for the ICAC's investigative and corruption prevention functions has been steadily rising. In addition, amendments to the Local Government Act that expand the ICAC's jurisdiction over local government councillors passed through the Parliament in September 2004. These legislative changes will result in an increase in the number of matters referred to the ICAC. In this context of significantly increased demand for ICAC's services, Government must ensure that the organisation receives the resources it needs to properly fulfil its statutory functions.

In the Commission's 2004–05 annual report, then Commissioner, the Hon Jerrold Cripps QC, stated that:

...previous annual reports have contained warnings that further budget cuts could adversely affect the work of the Commission. It is unfortunately necessary to reiterate and, in the light of recent decisions by government, to heighten such warnings.

Over the past two years the ICAC has been required to make budget savings of over \$500,000 and is expected to make a further saving of more than \$300,000 over the next two years. Further, in 2004–05 the increase in investigation activity resulted in a rise of \$647,000 in external legal and transcript fees, with the Commission being required to seek an extra \$400,000 from Government to assist in meeting these expenses. In addition to these budgetary constraints the ICAC has been advised that all costs for the establishment of the Inspector of the ICAC are to be borne by the Commission itself. These costs amount to \$382,000 from recurrent expenditure and \$162,000 from capital expenditure.

During the term of the Hon David Ipp AO QC as Commissioner, approaches were made to the premiers of the day that resulted in the annual supplementary grant funding provided to the Commission by the DPC, allowing the Commission to take on additional staff to deal with an increased workload. The additional funding was noted by Mr Ipp in the annual reports for 2009–10, 2010–11, 2011–12 and 2012–13.

In the Commission's 2015–16 annual report, then Commissioner, the Hon Megan Latham, noted that:

Over the next financial year, the Commission will be operating at staffing levels similar to those in 2006 as a result of funding cuts and efficiency savings imposed by the NSW Government. There will inevitably be some reduction in the Commission's capacity to respond to complaints of corrupt conduct as quickly as we would like and there may be a corresponding reduction in the number of full investigations carried out in a given year.

These historical concerns highlight the need for a funding model that provides an appropriate ongoing level of funding that enables the Commission to fulfil its statutory mandate.

Section 3: Current funding arrangements

The availability of funds directly determines the Commission's independence and its ability to serve the public interest through its investigation and corruption prevention functions is directly commensurate with its financial resources.

This section sets out the two principal ways in which the Commission is presently funded.

Appropriations and grants

Total anticipated funding for 2019-20 is up to \$27.399 million, comprising a mix of appropriation funding and grant funding from DPC.

The Commission's main source of funding is through recurrent parliamentary appropriations. The appropriation for 2019-20, as provided for in the *Appropriation Act 2019*, is \$24.899 million, comprising recurrent expenditure of \$24.099 million and capital expenditure of \$800,000.

A secondary but essential source of revenue for 2019-20 is grant funding from the DPC, which has been promised in the amount of up to \$2.5 million.

How the budget process works

The Commission is part of the DPC cluster of agencies and is dealt with for budgetary purposes as part of that cluster. The DPC cluster is one of eight clusters. It comprises a number of agencies ranging in diversity and, apart from the Commission, includes such agencies as the Art Gallery of NSW, the Audit Office of NSW, the Australian Museum, Government House Sydney, the Greater Sydney Commission, Infrastructure NSW, the Library Council of NSW, the Ombudsman Office, Parliamentary Counsel's Office, Office of the Inspector of the Law Enforcement Conduct Commission, Public Service Commission, Sydney Opera House and Trustees of the Museum of Applied Arts and Sciences.

Each year the Commission submits its budget proposal to the NSW Treasury through the latter's on-line Prime system, to which DPC has access. There is currently no formal consultation process whereby the Commission is able to explain to NSW Treasury or DPC the business case for its budget bid. This is a relatively recent change. Up until about two years ago there was a mechanism in place where relevant agency chief financial officers met with DPC and senior NSW Treasury staff to present and explain funding requests and respond to any questions.

The Commission's budget proposal is considered by the DPC Secretary along with the proposals from the other DPC cluster agencies. The Commission has no direct input into that consideration and there is no formal consultation process. The DPC Secretary finalises the DPC cluster budget bid and provides that to NSW Treasury. The amount sought referable to the Commission may differ substantially from what the Commission sought. There is no mechanism in place requiring the DPC Secretary to advise

the Commission whether or in what way the amount of funding sought by DPC on behalf of the Commission differs from what was sought by the Commission.

Table 5 summarises how the appropriation budget process works with respect to the Commission.

Table 5: ICAC budget process

Date	Event
November	NSW Treasury sends letter to all agency heads, CEOs and cluster secretaries outlining key deadlines to support preparation of NSW Government budget.
February	The Commission submits its Final Budget Proposal ("FBP") bid via NSW Treasury's on-line Prime system. NSW Treasury and DPC have automatic access to the FBP in Prime.
February/March	The Commission's FBP is considered by NSW Treasury and DPC. The DPC Secretary evaluates the FBP bids of each cluster agency and determines funding priorities which may be discussed at the Cluster Secretaries Board meeting where final adjustments may be made by the DPC Secretary. The DPC Secretary then submits the cluster budget to NSW Treasury with prioritised rankings of individual agency budget bids as determined by the DPC Secretary.
February/March	NSW Treasury receives and considers the DPC cluster budget bid and consults with the DPC Secretary prior to finalising its recommendations to the Expenditure Review Committee ("ERC"). Relevant agencies are not consulted by NSW Treasury as part of this process.
March	NSW Treasury provides brief to the ERC with recommendations as to whether particular funding bids should be approved or not supported. The brief does not include a copy of the FBP so the ERC does not have before it the detail of what was sought by the Commission. The brief is a Cabinet in confidence document that is not available to the affected agencies.
March/April	The ERC meets to consider funding proposals for each cluster and makes decisions impacting cluster agencies.
April/May	Cabinet considers ERC decisions and approves funding decisions.
May	The budget decisions are available to be viewed by agencies in Prime.
May/June	NSW Treasury prepares consolidated budget papers for tabling in Parliament.
June	NSW budget handed down by Treasurer.

As can be appreciated from the above, the amount the Commission will receive through appropriations is initially determined by the DPC Secretary as part of the DPC cluster funding requirements before consideration by NSW Treasury and the ERC. Funding decisions are determined without formal consultation with the Commission. The first time the Commission becomes aware of the funding it is likely to receive for the following year is in about May when the ERC budget decisions are available to be viewed in Prime. If the proposed funding is less than that sought in the FBP, no explanations are provided as to the reasoning behind that decision.

The Commission may be invited to submit new funding proposals to the NSW Treasury during the annual budget cycle but this is by no means guaranteed. In some years, the parameters that apply may exclude the Commission from applying, or only allow applications on certain aspects of the Commission's budget. By way of example, as part of the process leading up to the 2019–20 budget, NSW Treasury invited agencies to make submissions for supplementary funding for what was termed a *parameter and technical adjustment* with tighter eligibility criteria than in previous years.

The Commission made a submission based on work it had commissioned from KPMG on the challenges facing the Commission under the three-Commissioner model. That work identified additional staff positions that required funding, plus a two-year program of moving a large number of manual work processes to electronic ones to improve the Commission's efficiency and effectiveness. The Commission sought \$4.065 million for 2019–20 and forward years for these purposes. The Commission's submission was unsuccessful. The latter work was deemed by NSW Treasury to be outside the scope of the parameter and technical adjustment. NSW Treasury advised that funding for that work would require a new business case to be prepared and submitted but such a business case would not be supported by NSW Treasury.

As demonstrated by the above, even being allowed to submit new funding proposals does not guarantee that additional funding will be received or even part-provided. There is no entitlement or opportunity to participate in any discussion surrounding such proposals, only to provide further information if asked. There is no special treatment for the independent or integrity agencies. All entities are treated together under the cluster model. The Commission only ascertains the outcome around the time the budget papers are to be tabled in Parliament. Then even later, entities will be told what the actual Parliamentary appropriation will be. There is no opportunity to challenge or seek review over these outcomes.

The Commission has applied for increases in recurrent funding in seven (of 12) annual budget processes for the financial years between 2008–09 and 2019–20. The Commission was only fully successful on two of these occasions (\$0.85 million in 2009–10, and \$3.6 million in 2018–19) and partly successful on one occasion (\$1.2 million in 2010–11, when \$2.24 million was sought, but \$2.2 million was funded over the forward estimates). Applications were rejected on the other four occasions as follows:

- \$1.7 million rejected in 2013–14

- \$1.9 million rejected in 2015–16
- \$1.89 million rejected in 2016–17
- \$4 million rejected in 2019–20.

The budget-setting process is covered by the cloak of secrecy surrounding the NSW Treasury and ERC process.

According to DPC Circular C2014-04, the Treasurer is the Chair of the ERC, determines the order of proceedings, and summarises the decisions made for recording by the note takers. The Secretary DPC is the Secretary to the Committee. DPC and NSW Treasury provide note takers for meetings. All funding decisions for recurrent and capital proposals, including new proposals, should be considered by the ERC. A new proposal is considered to be one that will have a certain or potential financial impact on existing estimates within the forward estimates period or beyond. A new proposal must be fully offset by savings or involve movement of funds between years or within the departmental Cluster. Savings must represent genuine savings to the budget. The savings required to offset any new proposal are in addition to those that the ERC may ask ministers to bring forward in other processes and will not count towards any other savings unless agreed by the ERC.

Thus, the Commission does not have independent funding under the current system of appropriation funding. There is no independent process for the Commission, which was established as a unique independent agency. It is not – in substance or in form – a government agency. Yet, all funding is determined by the government of the day by a process appropriate for government agencies and under processes that are not transparent. The Commission has little capacity to influence the outcomes of the process and no opportunity to put its case directly to the ERC or the full Cabinet.

Appropriation funding

Figure 1 sets out the appropriations the Commission has received since its inception.

Figure 1: Appropriations the Commission has received since its inception

Year	"Appropriation (\$'000)"	Inc/Dec	"Appropriation (excl Capital) (\$'000)"	Inc/Dec	"Capital (\$'000)"	Capital Expenditure (\$)	Inc/Dec	FTE Employees	Inc/Dec	Inflation	Cumulative Inflation	"Appropriation + Inflation (\$'000)"
1988/89	42	N/A	42	N/A	-	-	N/A	61.0	N/A	7.30%		42
1989/90	14,308	N/A	14,201	N/A	107	107	N/A	117.0	N/A	7.92%	15.22%	16,485.68
1990/91	11,540	-19.35%	11,433	-19.49%	107	107	0.00%	132.5	13.25%	5.72%	20.94%	13,956.48
1991/92	15,421	33.63%	14,206	24.25%	1,215	1,685	-37.45%	142.0	7.17%	2.12%	23.06%	18,977
1992/93	13,466	-12.68%	12,706	-10.56%	760	782	-37.45%	141.0	-0.70%	1.02%	24.08%	16,709
1993/94	12,612	-6.34%	12,420	-2.25%	192	181	-74.74%	123.0	-12.77%	1.80%	25.88%	15,876
1994/95	14,088	11.70%	13,907	11.97%	181	222	-5.73%	129.0	4.88%	2.86%	28.84%	18,151
1995/96	14,057	-0.22%	13,877	-0.22%	180	232	-0.55%	143.3	11.09%	4.36%	33.20%	18,724
1996/97	12,904	-8.20%	12,700	-8.48%	204	221	13.33%	137.6	-3.98%	1.58%	34.78%	17,392
1997/98	13,508	4.68%	13,268	4.47%	240	255	17.65%	127.8	-7.12%	0.04%	34.82%	18,211
1998/99	14,010	3.72%	13,789	3.93%	221	306	-7.92%	129.5	1.33%	1.16%	35.98%	19,051
1999/00	13,625	-2.75%	13,385	-2.93%	240	242	8.60%	131.0	1.16%	2.22%	38.20%	18,830
2000/01	13,816	1.40%	13,663	2.08%	153	153	-36.25%	125.0	-4.58%	5.70%	43.90%	19,881
2001/02	15,524	12.36%	15,274	11.79%	250	388	63.40%	126.0	0.80%	3.02%	46.92%	22,808
2002/03	15,924	2.58%	15,523	1.63%	401	401	60.40%	101.0	-19.84%	3.02%	49.94%	23,876
2003/04	15,330	-3.73%	14,756	-4.94%	574	574	43.14%	111.0	9.90%	2.44%	52.38%	23,360
2004/05	16,383	6.87%	15,404	4.39%	979	979	70.56%	112.6	1.44%	2.40%	54.78%	25,358
2005/06	14,886	-9.14%	14,657	-4.85%	229	229	-76.61%	105.2	-6.57%	3.10%	57.88%	23,502
2006/07	15,334	3.01%	15,094	2.98%	240	240	4.80%	111.5	5.99%	3.08%	60.96%	24,682
2007/08	16,239	5.90%	15,539	2.95%	700	700	191.67%	116.1	4.13%	3.14%	64.10%	26,648
2008/09	18,198	12.06%	17,157	10.41%	1,041	1,437	48.71%	111.9	-3.62%	3.38%	67.48%	30,478
2009/10	18,867	3.68%	18,389	7.18%	478	479	-54.08%	117.6	5.09%	2.20%	69.68%	32,014
2010/11	20,093	6.50%	19,857	7.98%	236	236	-50.63%	117.1	-0.43%	3.09%	72.76%	34,713
2011/12	22,766	13.30%	21,604	8.80%	1,162	1,162	392.37%	124.8	6.58%	2.50%	75.26%	39,900
2012/13	21,422	-5.90%	20,770	-3.86%	652	1,352	-43.89%	123.8	-0.80%	2.16%	77.42%	38,007
2013/14	23,774	10.98%	22,272	7.23%	1,502	1,502	130.37%	126.4	2.10%	2.66%	80.08%	42,812
2014/15	27,512	15.72%	21,238	-4.64%	6,274	6,125	317.71%	122.3	-3.24%	1.86%	81.94%	50,055
2015/16	20,222	-26.50%	19,638	-7.53%	584	584	-90.69%	114.3	-6.54%	1.40%	83.34%	37,075
2016/17	21,103	4.36%	20,533	4.56%	570	583	-2.40%	98.1	-14.20%	1.62%	84.96%	39,032
2017/18	21,113	0.05%	20,097	-2.12%	1,016	932	78.25%	105.0	7.03%	1.92%	86.88%	39,456
2018/19	25,407	20.34%	24,463	21.72%	944	944	-7.09%	114.0	8.61%	1.65%	88.53%	47,900
2019/20	24,899	-2.00%	24,099	-1.49%	800	800	-15.25%	120.0	5.26%	2.00%	90.53%	47,440

Appropriation funding for the Commission is based on historical baselines, with inadequate adjustments for inflation and other adjustments for so-called efficiency savings. The present system does not adequately take into account how the Commission operates or what it needs to function effectively.

Between 1989 and 1994, the Commission's appropriation was a separate line item for recurrent (and one for capital) funding under the Premier's section of the relevant appropriation bill. Between 1995 and 2010, there was a separate appropriation bill for the "Special Offices", as defined within the *Public Finance and Audit Act 1983*. The Commission had its own line item in these bills under the Premier's section. Then, from 2011 to the current year, the Commission's appropriation appears in the same appropriation bill as every other government entity, but it is now listed in the section entitled "Appropriation (Special Offices)".

In the 5 September 2019 Portfolio Committee No 1 Estimates Committee, the current Secretary DPC, Tim Reardon, noted that:

We get an appropriation directly out of the House towards those independent agencies and special officers [sic], and that appropriation then goes to the agency.

This is not entirely accurate, as some funds may be withheld by the DPC and/or NSW Treasury as part of the savings measures imposed across Government, where they were not removed as part of the budget processes prior to the appropriation bill being drafted.

Generally, the savings that have been flagged from previous years or new savings to be introduced in the new financial year, will already have been removed from the forward estimates prior to the appropriation bill being introduced into Parliament. Thus, Parliament is voting on imposing these savings at the time of the passage of the bill through Parliament. But on other occasions, as was the case in 2018–19, additional imposts may be made during the budget process but the funds not removed from the Commission appropriation line item in the appropriation bill. For 2018–19, they were removed by the DPC in conjunction with NSW Treasury after the appropriation had become law. In 2018–19, \$210,000 was removed from the Commission's appropriated budget because the Government determined that an additional 1% in efficiency savings measures be imposed on top of the existing 2% savings impost. A further \$38,000 was removed by the DPC for "procurement" savings. The latter savings will be removed from the Commission's available budget by the DPC each year until 2028–29, at which time it will be \$49,000. The issue of Government-mandated savings is dealt with in more detail in the next section of this submission.

The Secretary DPC also stated to that Committee that:

The Appropriation Bill sets down the \$104 million to ICAC as an independent integrity agency ... In terms of their funding, then they have an appropriation of \$104 million over the forward estimates.⁴

⁴ Hansard page 24, Portfolio Committee No 1 Estimates Committee Hansard, 5 September 2019.

This is factually incorrect. The appropriation bills and Acts only ever appropriate the current financial year's funding to any entity. The forward estimate years are only estimates and usually appear in the budget papers tabled at the time of the presentation of the appropriation bill to Parliament, or are advised in writing to the particular government entity. There is no guarantee that those forward estimate amounts will ever be appropriated to the entity. The Government gets to reconsider the funding level for each government entity again as part of the next budget cycle.

Grant funding

The inflexible annual appropriation processes and unpredictable outcomes of new funding business cases to government has necessitated a history of the Commission seeking and receiving grant funding to cover the costs of its activities. This has become a normal part of the Commission's current funding model. Applications for such funding however are considered on a case by case basis and there is no guarantee that applications will be granted at all or granted for the full amount sought.

Table 6 shows the amount of grant funding received or promised from 2001–02 to 2019–20.

Table 6: Grant funding received by the Commission since 2001–02 to 2019–20

Year	Amount
2001–02	2,570,000
2002–03	305,000
2003–04	234,000
2004–05	1,218,000
2005–06	Nil
2006–07	82,000
2007–08	Nil
2008–09	Nil
2009–10	850,000
2010–11	1,200,000
2011–12	Nil
2012–13	2,510,000
2013–14	2,625,000
2014–15	2,630,000
2015–16	2,621,000
2016–17	529,000
2017–18	1,683,000
2018–19	1,716,000
2019–20	3,500,000*
Total	24,273,000

*This includes \$1 million for 2018–19, which was received in July 2019.

It can be seen from this table that the amount of grant funding has varied over the years but has, since at least 2012–13, formed a vital part of the Commission's overall funding.

Section 4: Problems with current funding arrangements

This section of the submission examines problems with current funding arrangements.

The Commission's cost base – fixed and variable costs

To understand the financial pressures faced by the Commission, it is necessary to have regard to its cost base. Much of that base is fixed, in the sense that there is no flexibility in expenditure. Rent, insurance, equipment lease costs, telephone, licence fees and depreciation are examples of non-discretionary fixed costs. In essence, the only cost areas of any substance in which the Commission may be said to have any discretion are salaries for staff and expenses associated with the conduct of compulsory examinations and public inquiries. Other expenses have already been pared back as far as possible to meet previous savings requirements.

The bulk of the Commission's budget for 2019–20 comprises employee-related expenses. This represents 68% of Commission funding. Those fixed costs, over which the Commission has no discretion, represent a further 23% of the Commission's funding. The bulk of the 9% that is left is accounted for by legal and transcription costs associated with public inquiries and compulsory examinations, costs associated with the Commission's telecommunications interception capability and training of staff.

It is, therefore, clear that any reductions in funding must be met primarily through reducing staff numbers and reducing the number of compulsory examinations and the number and duration of public inquiries. Each of these measures will necessarily have a detrimental impact on the Commission's ability to fulfil its statutory charter as the NSW anti-corruption Commission.

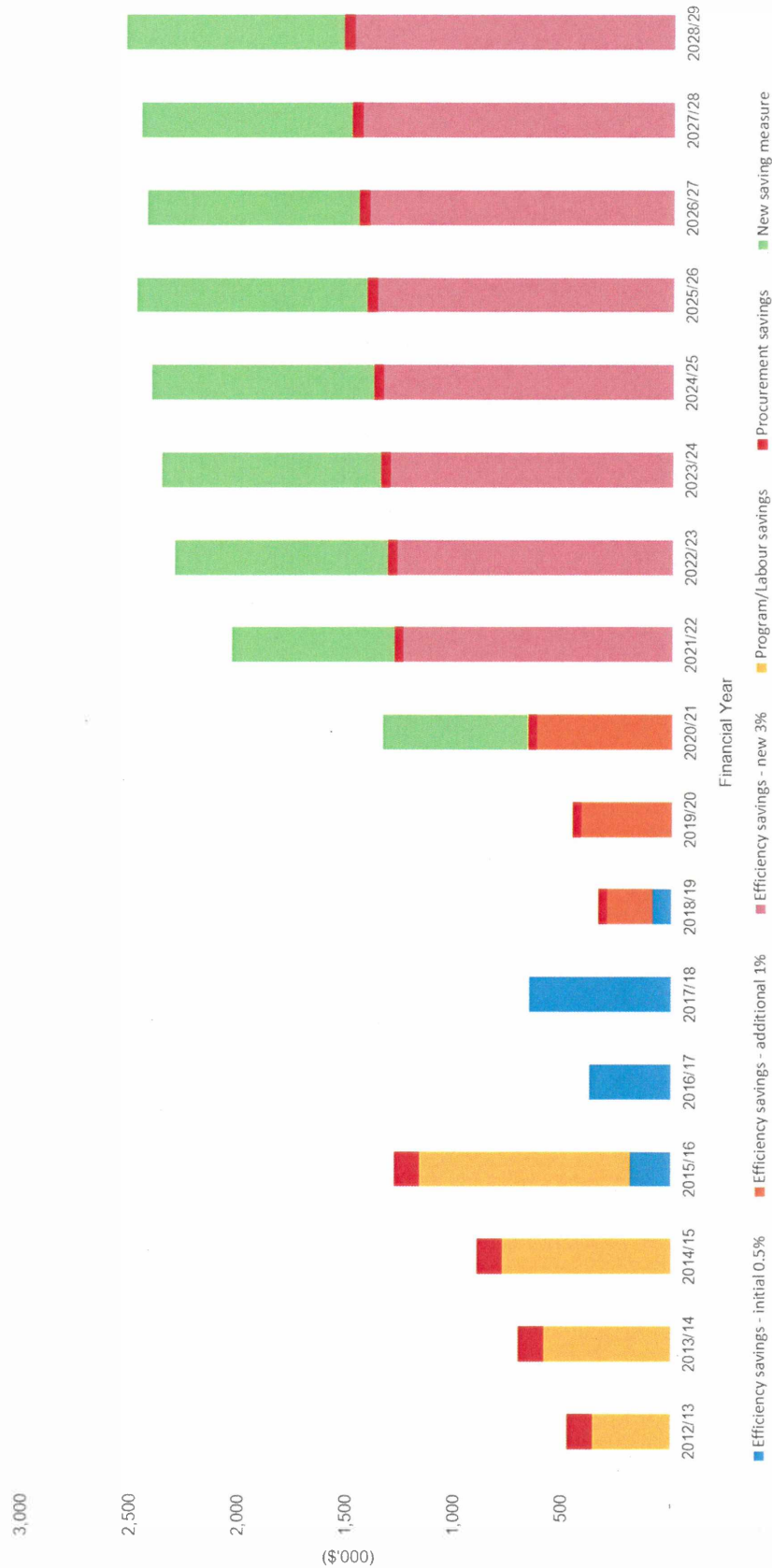
Government-mandated savings

Appropriation funding is subject to Government-mandated savings.

Figure 2 shows the history of savings measures that have been applied to the Commission from 2012–13 to date, as well as the future savings measures for the 2019–20 financial year. As can be seen in figure 2, the currently known savings measures will come to \$2.536 million by 2028–29. These amounts come off the Commission's funding.

There is no certainty that these savings measures will not increase over time, based on the recent history of their application. It leaves small entities, such as the Commission, very vulnerable, as it creates no certainty for setting budgets in future financial years.

Figure 2: History of savings measures since 2012–13 and predicted savings to 2028–29



A recent example of additional savings mandated by Government and their effect on the Commission can be provided. On 16 August 2019, the Acting Secretary DPC wrote to the Commission advising that the DPC Cluster, of which the Commission is a part, had been allocated \$20.7 million in reductions for 2019–20, increasing to \$38.8 million by 2028–29. The rationale for these savings was expressed to be to strengthen the state’s fiscal position and “support streamlined service delivery”. There was no explanation as to how the projected savings would streamline the Commission’s service delivery.

The Commission’s share of these reductions for 2019–20 was \$400,000, but the Commission was advised that the DPC would absorb that amount to “allow your agency additional time to prepare for the forward year impacts of these reductions”. The Commission was, however, advised in the letter that it would be expected to “contribute \$8.5m in savings for the remaining nine year period from 2020-21 to 2028-29”. It was noted that the savings are “ongoing and permanent” and that “savings measures are expected to be applied predominantly to labour expenses”. Table 7 below details the estimation of the savings the Commission is required to make over the next nine years.

Table 7: Additional forecast savings between 2020–21 and 2028–29

Year	Savings from Commission budget
2020–21	673,000
2021–22	751,000
2022–23	983,000
2023–24	1,011,000
2024–25	1,026,000
2025–26	1,065,000
2026–27	979,000
2027–28	972,000
2028–29	1,008,000
Total	8,468,000

Clearly, there has been no analysis of how these savings will affect the Commission’s operations or to what extent any reduction in “labour expenses” will impact on the Commission’s ability to successfully fight corruption.

Future appropriation funding – the forward estimates

The forward estimates for funding the Commission are published on the NSW Treasury financial reporting system.

The forward estimates, which include recurrent and capital expenditure, provide for provisional funding of the Commission as follows:

- 2020–21 – \$24.814 million
- 2021–22 – \$24.248 million
- 2022–23 – \$24.206 million.

The \$24.814 million allocated for 2020–21 is actually less than the \$24.899 million in appropriations for 2019–20. The effective cut is more than the difference between the two amounts. The Commission's costs for 2020–21 must include allowances for salary increases in line with the NSW Government wages policy and the ICAC Award and increases in other costs, including fixed costs such as rental. Thus, while the Commission's cost base will increase in 2020–21, its revenue base will decline.

It should also be noted that the forward estimates do not take into account the additional savings advised by the Acting Secretary DPC in August 2019 (referred to above). Those savings, if imposed on the Commission, will reduce the forward estimates as currently published.

Of course, these are forward estimates and there is no guarantee that the Commission will actually receive these amounts. What is particularly troubling is that these figures represent a steady decline in funding over the next three financial years. They do not even keep pace with inflation.

Grant funding – an uncertain option

The amount of grant funding provided or promised to the Commission between the 2001–02 and 2019–20 financial years is set out in table 6 (see section 3 of this submission).

While funding shortfalls in the amounts appropriated to the Commission may be addressed through grant funding, recent experience demonstrates the limitations and risks of relying on grant funding from the DPC or NSW Treasury to make up any budgetary shortfalls. The ad hoc nature of such funding leads to uncertainty and less than optimum staffing arrangements. In addition, the necessity to rely on the discretionary and unreviewable decision-making by a member or members of Executive Government potentially challenges and may impair the Commission's independence.

For a number of years up until 2016–17, the Commission relied on grant funding to cover the difference between what it received by way of appropriation and its operating expenses. In 2016, the Commission was advised that grant funding would be significantly reduced for the 2016–17 financial year. Grant funding decreased from \$2.621 million in 2015–16 to \$529,000 in 2016–17. This represented a serious reduction in funding and necessitated the Commission embarking on a staff redundancy program under which 12 positions were lost, with the cost of most of the redundancies funded through a separate grant from the NSW Treasury.

More recent experience also demonstrates the limitations of reliance on grant funding.

During the second-half of 2018, having experienced 12 months of activity under the three-Commissioner model, the operational impacts of that model had become clearer. On 14 September 2018, the Commission sought grant funding of \$2,565,620 from the DPC for the 2018–19 financial year to meet unforeseen cost pressures associated with its operations. This included \$660,400 to meet estimated additional costs to fund then-current and projected public inquiries. Additional funds of \$1 million were granted by the DPC in November 2018. The Commission considered this was insufficient to adequately meet cost pressures associated with its current operations. Following further representations, an additional grant of \$716,000 was provided in late November 2018. That brought the amount provided to \$1.716m – almost \$850,000 short of what had been requested.

By early 2019, it had become apparent that, without further additional funding, the Commission would not be able to complete its work associated with the operation Skyline and Dasha public inquiries, which were being conducted at the time, or to conduct any other public inquiry that financial year. On 13 February 2019, the Commission sought a further grant from the DPC of \$750,000. In seeking the further grant, the Commission noted that early advice was required, as the Operation Dasha public inquiry was due to resume on 1 April 2019, but the Commission would not be able to proceed with that matter at that time without additional funds and would also need to curtail further work on Operation Skyline.

On 5 March 2019, the Secretary DPC acknowledged receipt of the request for additional funding but asked the Commission to bring the matter to a DPC Finance Committee meeting scheduled for the last week in March 2019. Clearly, that date did not reflect the urgency of the request, particularly given that there was no commitment that approval would be given at that meeting for additional grant funding. On 7 March 2019, the Chief Commissioner wrote to the Secretary DPC. The letter included the following:

The urgency of the additional funding request is increasing to the point whereby I will have no option but to soon provide notice to all parties, solicitors and counsel, involved in operation Dasha that the public inquiry is to be adjourned indefinitely. In that respect I envisage there will be difficulty in reprogramming the public inquiry in the second half of the present calendar year by reason of the fact that there are other operations for which public inquiries are presently in contemplation in respect of the months of July, August/September and October 2019 and there is at this point in time difficulty in forecasting the availability of the months of November and December 2019. Availability of counsel, including counsel for relevant parties, may also present difficulties in re-scheduling.

I should note that it is highly undesirable that the Dasha hearing be rescheduled. The public inquiry commenced in 2018 and it is in the public interest and in the interests of all the parties involved that it be completed as expeditiously as possible so that the Commission can prepare its report on the investigation.

In respect of Operation Ember, there will also be a need to consider in the near future as to whether current plans to conduct a public inquiry in May 2019 will need

to be placed on hold and the proposed announcement of the public inquiry in that Operation set aside. That would not be a satisfactory outcome.

A number of other matters are planned for the first half of 2019/20. It will be necessary to brief counsel in those matters before the end of June 2019, thereby incurring further legal expenses.

The primary driver of the increasing legal fees is the number of days of preparation associated with each hearing day, because of the complexity of the matters, and the multiplier effect where there are both senior and junior counsel involved. Provision also needs to be made for Counsel's submission-writing post the inquiry.

The Commission imposed a staff freeze in December 2018 (to 30 June 2019) to create savings to apply to the legal fee shortfall and reprioritising some other discretionary funding. Both these measures (although carrying negative impacts) have reduced the amount of additional grant funding being sought but do not cover the current shortfall.

On 11 March 2019, the Secretary DPC advised the Commission that the DPC did not have the capacity to provide further in-year funding to the Commission. He advised that he and the Treasury Secretary had actioned an audit of the Commission's accounts. The Commission welcomed and fully cooperated with the audit. Later in March 2019, the request for additional grant funding, which had the full and unqualified support of the Premier, was agreed to. Ultimately, in July 2019, \$1 million was provided by the DPC to fund the Commission's public inquiry schedule and to restore the Commission's cash buffer.

The amount appropriated out of the Consolidated Fund for the Commission in 2019–20 is less than the amount appropriated for the 2018–19 period. It was apparent to the Commission that, even after paring back operating expenses, there would be insufficient funds to properly resource its operations and in particular its public inquiry schedule for 2019–20. In June 2019, the Commission, therefore, sought grant funding from the DPC of \$1.26 million for the first six months of the 2019-20 financial year. The Commission advised it would review its funding requirements in early February 2020 and if necessary submit a request for additional grant funding.

By letter of 9 July 2019, from the Secretary DPC, the Commission was advised that:

*...DPC **reluctantly** agrees to provision for around \$2.5M to assist the ICAC for 2019-20 in addition to the ICAC's annual appropriation*

*...the ultimate aim should be that the ICAC receives an annual appropriation covering all forecast workload and surge demand, and delivers outcomes within that budget and independently **without further supplementation from DPC or other sources.***

(Emphasis added)

These statements appear to indicate a reluctance on the part of the DPC to entertain any further requests for grant funding whether for 2019–20 or later years.

Such stated *reluctance* and the stated aim to do away with “*supplementation from DPC*” is alarming in the extreme for a number of reasons, among which are as follows.

- Such views display a complete misapprehension or misunderstanding of the inherent unpredictability of the anti-corruption work undertaken by the Commission and the reasons for the same.
- The fact that the unpredictability as to the nature and extent of the Commission’s work renders assessment of the required amount of funding by way of annual parliamentary appropriations impossible to quantify.
- The stated “aim” of removing supplementary funding overlooks, and is at odds with, the basis on which premiers, past and present, have accepted the undeniable need for the Commission to have supplementary funding when required, as demonstrated by the grant funding received by the Commission (as set out in table 6 in section 3 of this submission).
- The apparent reluctance to provide grant funding and the aim to remove it altogether are the views of one member of Executive Government, the Secretary DPC. The Commission being ultimately accountable to the Parliament, not Government, should not be constrained by a member of the bureaucracy who seeks to dismantle long-accepted processes for funding that enable the Commission to prevent and expose corruption whether by elected officials, members of the bureaucracy or public officials generally.

In July 2019, the Commission invited the Secretary DPC to attend a meeting at the Commission with all of its executive directors and the three Commissioners. That invitation was extended as a means of providing him with relevant information; in particular, information as to the processes, the procedures, the functions and the work of the Commission. To date, the Secretary DPC has not taken up that invitation.

Effect of reduced funding on operations

Restricting Commission funding over the next three financial years to the amounts set out in the forward estimates and not providing further grant funding from DPC to maintain the Commission’s overall funding at least at 2019-20 levels in real terms would have a devastating impact on the Commission’s ability to conduct its work.

The Government wages policy allows for annual wage increases up to 2.5%. The conditions of employment of Commission staff are set out in the ICAC Award. The effect of the Award is to adjust the annual salaries of Commission officers covered by the Award by 2.5% from the first full-pay period after 1 July each year. In addition, of course, the Commission faces increased costs each year for rent and other operating expenses. Given the lack of discretionary spending, the only way the Commission could accommodate the reduced estimates would be to substantially reduce staff numbers. This, in turn, would adversely impact on the Commission’s ability to fulfil its statutory functions.

In 2019–20, the Commission is funded for up to 120 FTE members of staff. The Commission currently has 118.93 FTEs. The savings represented by the slightly lower FTE number to those funded have been temporarily assigned to other operational priorities. The FTEs are divided among the Commission's divisions and sections as follows:

- Corporate Services Division – 17.8 FTEs
- Corruption Prevention Division – 15.03 FTEs
- Investigation Division – 52.19 FTEs
- Legal Division – 10.84 FTEs
- Assessments Section – 11.15 FTEs
- Communications and Media Section – 3.92 FTEs
- Executive Section – 8 FTEs.

These are the monetary and staff resources the Commission currently has with which to undertake its work.

Funding determines the level of resources available to the Commission to undertake its statutory role. It is essential that funding is maintained at a rate that enables the Commission to act both effectively and efficiently.

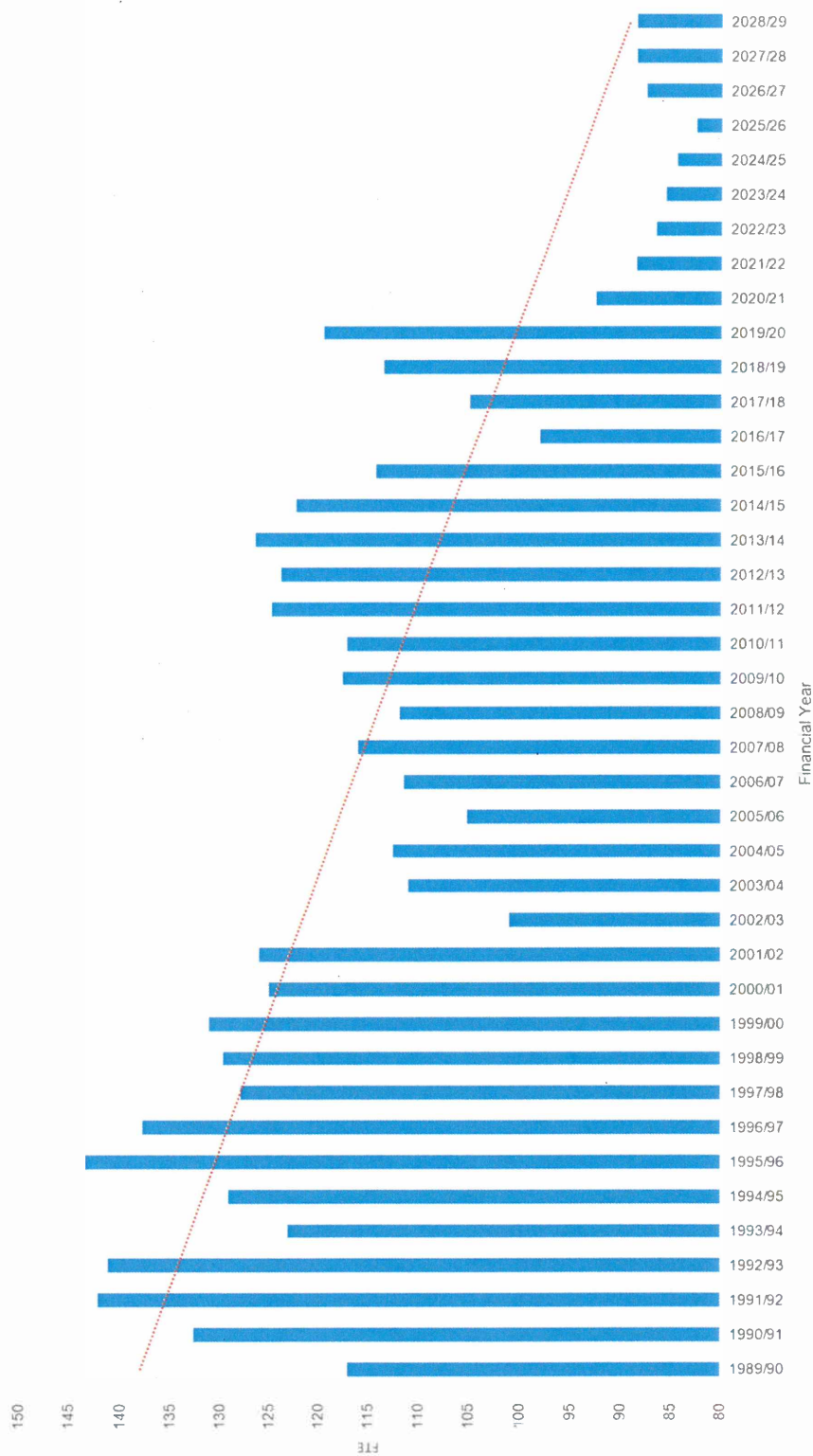
One indicator of the Commission's ability to operate effectively and efficiently is the number of staff that it is funded to employ. Figure 3 provides a breakdown of FTE-funded positions since the Commission's inception, with projections through to 2028-29 based on anticipated funding through that period.

In 1989–90, the first full year in which the Commission operated, FTE numbers were 117. As would be expected for a new organisation, those numbers gradually rose and were 141 by 1992–93. There was a decline in numbers over the subsequent two years, before FTEs reached an all-time peak of 143 in 1995–96. Thereafter, up to 2016–17, the numbers fluctuated between 138 and 101 but, over those 20 years, averaged about 120. The reduction in grant funding in 2016–17 led to a dramatic decline in numbers from 114 to 98. Thereafter, there have been modest increases, bringing numbers up to 120 for 2019–20 (the average between 1996–97 and 2015–16).

However, anticipated funding cuts in future years will radically reduce FTE numbers in 2020–21 and subsequent years. Indeed, in 2020–21, on current appropriation funding estimates, the Commission will only have funding for about 89 FTE positions – well below the currently funded level of 120 FTEs and lower than at any time in the Commission's history. That would require a reduction of about 31 FTE positions – a quarter of the Commission's current staff. Such a reduction could only be achieved through a forced redundancy program. The Commission would not be able to fund such a program and would require additional Government funding for that purpose. Thereafter, numbers would need to be further reduced to meet ongoing decreases in funding. Given the Commission's limited "back-

office” establishment, these reductions in staff numbers would have to come predominantly from operational areas directly responsible for delivering the Commission’s investigation and corruption prevention functions.

Figure 3: FTE-funded positions since the Commission's inception



Maintaining funding in line with NSW Government wages policy and inflation would greatly assist in overcoming these fluctuations in staff numbers. Figure 1 demonstrates that funding has not kept pace with inflation. If appropriation funding had kept pace with inflation, it would be \$34,614,860 for 2019–20 in contrast to the appropriation funding of \$24.899 million for 2019–20. That is \$9,715,860 above the current 2019–20 appropriation. Even when the promised DPC grant of up to \$2.5 million is added to the appropriation funding for 2019–20, the total amount is still more than \$7.2 million less than if funding had kept pace with inflation.

The failure to maintain funding in real terms, combined with the growing complexity of investigations, means that the Commission is effectively forced to try and do more with less resources. There is, however, a limit to what can be done without impairing effectiveness. Ultimately, insufficient funding means that matters which should, in the public interest, be investigated will not be able to be investigated with the real risk that cases of serious and systemic corruption will go unchecked. The only persons who would welcome that outcome would be those intent on benefitting or enriching themselves through undetected corrupt conduct.

Section 5: Developing a new funding model

The Commission faces a serious challenge to its independence, not directly, but indirectly through the withdrawal or reduction of available funding for the future.

While the Commission possesses all the coercive powers required for the task of investigating secret crime and other forms of corruption, without proper funding the Commission would be constrained in what it investigates and what it does through inadequate resources. The corrupt in our society would no doubt be pleased by that scenario.

Public trust and confidence in the Commission must be buttressed by independent funding processes.

Given the unpredictability of the Commission's work program in any one year, the inability to influence the Government's current budget decision-making process, the lack of transparency to the decision-making process because of Cabinet confidentiality, and the fragility of grant funding, it is time to give consideration to developing a new funding model for the Commission. The need for a new funding model has been publicly identified in the Chief Commissioner's foreword to the Commission's 2018–19 annual report.

The ultimate aim of any funding model for the Commission should be to provide an annual budget that has two core components, as follows.

- The first component should comprise base appropriation funding to cover the Commission's fixed and staffing costs with an additional amount for variable expenses such as compulsory examination and public inquiry costs.
- The second component should comprise an additional amount that the Commission could draw on during the financial year, under an agreed protocol, to enable it to undertake additional work that is identified as being necessary during the course of the year.

Underlying principles for a funding model

The underlying principles of any funding model for the Commission should be certainty, flexibility, transparency and accountability while acknowledging and preserving the Commission's independence. The funding model should demonstrate, reinforce and support the Commission's statutory independence from Executive Government.

There should be certainty in funding. This can be achieved by establishing the Commission's core funding needs for delivery of baseline activities, including, in particular, costs associated with a fixed optimum staffing level and the conduct of compulsory examinations and public inquiries.

Although certainty of funding is vital, the funding model also needs to be sufficiently flexible to provide additional funding when required to cover unforeseen costs, particularly those associated with

investigations and public inquiries. It may also be necessary, from time to time, to acquire new technical equipment to ensure that the Commission is able to continue to effectively investigate matters.

Transparency should provide evidence to demonstrate that the Commission's activities contribute to fighting corruption and improving the integrity of public administration and are delivered efficiently and effectively. In other words, the funding model should be capable of demonstrating that public financial resources are being used in a way that maximises positive impacts on outcomes for the people of NSW.

Accountability will continue to be achieved through accounting to NSW Treasury and the Auditor-General for the proper expenditure of funds, and through reporting to the NSW Parliament and the public on the Commission's expenditure of public funds through its annual reports.

A potential model

By applying these principles, it is possible to identify a potential funding model.

Based on the Commission's experience over at least the last 10 years, it is important that the funding model consist of two components – a fixed component for core funding and a flexible component to accommodate the unpredictable nature of the work of the Commission.

The fixed component should consist of sufficient funding to meet the Commission's normal operational requirements and cover its capital costs, fixed costs, costs associated with an optimum staffing level and costs associated with the conduct of public inquiries and compulsory examinations. This should be no less than the total of appropriation and DPC grant funding received for 2019-20 appropriately indexed to account for anticipated wage rises and other cost increases.

The fixed component could be revised from year to year through an assessment process designed to identify the Commission's core funding needs. This could follow a review by an independent, eminent person appointed by the Governor for that purpose or through some other transparent and independent process. Such a review could be requested by the Commission or by Executive Government.

The flexible component should comprise an amount of supplementary funding up to which the Commission might draw upon in that year to meet unexpected operational expenses. It would cover any additional legal and transcription costs for public inquiries and compulsory examinations, additional provision for investigations that emerge during the year that cannot be readily absorbed into the existing work program, and any need for new technical equipment or other additional capital expenditure. This flexible component could be set as a percentage of the fixed component.

The flexible component should be accessible to the Commission through an application-based gateway process. Application could be made to, and determined, by the independent, eminent person. It is important that access to the flexible funding component should be through an independent process rather than under the current grant funding process, whereby the power to grant or withhold funding resides in the hands of individual public servants.

Neither component should be subject to so-called efficiency dividends or other cost-saving measures imposed by Government from time to time.

In this respect it is noted that, at the Commonwealth level, the Australian Government announced in the 2015–16 budget that it would exempt the Office of National Assessments (now the Office of National Intelligence) and the Office of the Inspector-General of Intelligence and Security from the ongoing application of the efficiency dividend imposed on Commonwealth agencies.

The January 2015 *Review of Australia's Counter-Terrorism Machinery* by the Department of Prime Minister and Cabinet (PM&C) also recommended the removal of the efficiency dividend from the operational activities of ASIO, ASIS, the Australian Federal Police (AFP) and (in-principle) operations of the former Australian Customs and Border Protection Service. In its 2014–15 *Review of Administration and Expenditure*, the Parliamentary Joint Committee on Intelligence and Security recommended that, in line with the recommendations of the PM&C review, the efficiency dividend be removed from all ASIO, ASIS and AFP operations. In doing so, the committee noted that the high and increasing organisational security requirements of those agencies reduced their scope for cost-savings at a whole-of-organisation level without impacting operational capabilities.

Statutory models of a somewhat similar nature currently exist.

The *Statutory and Other Offices Remuneration Act 1975* establishes the Statutory and Other Offices Remuneration Tribunal (SOORT). The SOORT is a single person who is appointed by the Governor to determine remuneration payments to a range of statutory and other officers from across the NSW public sector. The SOORT is supported by two “assessors”, one being the Secretary DPC, and the other an individual appointed by the Governor on the nomination of the relevant minister, being an individual who has, in the opinion of the minister, special knowledge relating to salaries payable to persons engaged in commercial, banking, insurance, industrial or other activities at an executive or management level.

The SOORT provides reports to the responsible minister, which are published in the *Government Gazette* as soon as practicable after receipt by the minister. They are laid before both Houses of Parliament within 14 sitting days of gazettal. Either House of Parliament can pass a resolution disallowing the determination. The *Statutory and Other Offices Remuneration Act 1975* also requires the SOORT to give effect to government policy on remuneration that, in this case, also applies to the NSW Industrial Relations Commission when making or varying awards or orders in relation to conditions of employment.

The *Parliamentary Remuneration Act 1989* establishes a Parliamentary Remuneration Tribunal to determine salaries, expenses and allowances payable to members of Parliament. This Tribunal also consists of one person appointed by the Governor on a part-time basis who holds or has held a judicial office in NSW. Other persons may be appointed to assist the Tribunal. The Tribunal is required to make a report for each determination under the Act. The report is laid before each House of Parliament and is to be published in the *Gazette*. The Tribunal may conduct such inquiries as it thinks fit and may invite submissions.

A variant of these models could be used to revise the Commission's core budget and determine its contingent budget on an annual basis. The independent tribunal could receive submissions from the Commission and other interested parties and, if necessary, be supported by "assessors" to assist in the task of determining an appropriate level of funding for the financial year. The determination could be tabled in both Houses of Parliament as a report prior to the state budget being presented to the Legislative Assembly, and then be included in the appropriation bill. Through this process, there would be the opportunity for both Houses, and the community at large, to see what is being proposed and the reasoning behind the proposal, thus making it a more transparent process. Parliament would have the ultimate say in terms of what is passed in the appropriation bill.

Another recent example of an alternative funding model for an integrity body can be found in Victoria. The Integrity and Accountability Legislation Amendment (Public Interest Disclosures, Oversight and Independence) Bill 2018 amends the *Independent Broad-based Anti-corruption Commission Act 2011* to provide the Independent Broad-based Anti-corruption Commission (IBAC) and other agencies with greater budgetary independence.

The Bill will amend the budget processes for the IBAC so that draft budgets are determined in consultation with the Victorian Parliament's Integrity and Oversight Committee, which oversees the IBAC. It provides that the IBAC's annual appropriations will be specified in the relevant appropriation bill.

The aim of the reforms, as expressed by the Victorian Attorney General in the second reading speech for the Bill, is to strengthen the independence of the IBAC and the other bodies included in the Bill in a manner that accords with their status as "independent officers of Parliament".

Under the amendments, the IBAC, the Ombudsman, and the Victorian Inspectorate will no longer appear under the Department of Premier and Cabinet's annual appropriation. They will be vested with full responsibility for the financial management and financial services that support their annual appropriation allocation.

The Bill also requires the Integrity and Oversight Committee to appoint an independent performance auditor to conduct a performance audit of the Ombudsman, the IBAC and the Victorian Inspectorate at least every four years. The purpose of this is to establish an effective performance-monitoring regime to improve the overall performance of those bodies. The performance audit is intended to identify areas of strength and improvement to maximise the utilisation of taxpayers' funds and further increase and promote the accountability of these offices.

These reforms will commence on 1 July 2020.

Appendix 1: Inquiry terms of reference

1. That the Public Accountability Committee inquire into and report on the budget process for independent oversight bodies and the Parliament of New South Wales, and in particular:
 - (a) Options for enhancing the process for determining the quantum of funding of the following bodies, including the transparency of this process:
 - (i) Independent Commission Against Corruption
 - (ii) Law Enforcement Conduct Commission
 - (iii) Audit Office of New South Wales
 - (iv) NSW Electoral Commission
 - (v) NSW Ombudsman, and
 - (vi) Parliament of New South Wales (Legislative Council and the Department of Parliamentary Services)
 - (b) Any other matter.
2. That the committee report by the last sitting day in April 2020.