# ICAC REPORT - AUGUST 2022

# [Summary of investigation and outcomes](Report-on-investigation-into-pork-barrelling-in-NSW_Jersey-Aug22.pdf)

This investigation by the NSW Independent Commission Against Corruption (“the Commission”) concerned the practice of pork barrelling. The term “pork barrelling” is widely used and understood in Australia but the Commission has defined it as:

***the allocation of public funds and resources to targeted electors for partisan political purposes.***

The Commission’s investigation commenced in 2020 after it received complaints alleging that the distribution of public money under the NSW Government’s Stronger

Communities Fund (SCF) involved corrupt pork barrelling.

Also in 2020, the NSW Auditor-General announced a performance audit of the SCF, and the Public Accountability Committee (PAC) of the NSW Legislative Council established an inquiry into NSW grant programs (including the SCF). The reports issued by the Auditor-General (in February 2022) and the PAC (in March 2021 and February 2022) made numerous observations about the management of the SCF, including adverse findings. The State Archives and Records Authority (SARA) also released a report in January 2021, dealing with recordkeeping aspects of the SCF.

In November 2021, Premier the Hon Dominic Perrottet MP announced a review of grants administration in NSW. Given the existing findings and review processes concerning the SCF, the Commission decided that it was not in the public interest to continue investigative action that could have led to adverse findings against any individual. Consequently, the scope of the Commission’s investigation was revised to focus on the practice of pork barrelling more broadly and, in particular, whether it could allow, encourage or cause corrupt conduct (chapter 1).

To assist its investigation, the Commission engaged a number of experts to prepare papers and participate in a forum held on 3 June 2022. This report represents the view of the Commission but draws on the analysis of these experts.

**Results**

The Commission has found that, in certain circumstances, pork barrelling can constitute corrupt conduct (chapter 3). In the *Independent Commission Against Corruption Act 1988* (“the ICAC Act”), corrupt conduct is defined in s 7 as any conduct which falls within the description of corrupt conduct in s 8 and which is not excluded by s 9.

While individual matters should always be assessed on a case-by-case basis, the Commission has found that a minister, for example, may engage in corrupt conduct involving pork barrelling, within the meaning of s 8 of the ICAC Act, if the minister:

* influences a public servant to exercise decision- making powers vested in the public servant, or to fulfil an official function, such as providing an assessment of the merits of grants, in a dishonest or partial way
* applies downward pressure to influence a public servant to exercise decision-making powers vested in the public servant, or to fulfil an official function, such as providing an assessment of the merits of grants, in a manner which knowingly involves the public servant in a breach of public trust conducts a merit-based grants scheme in such a way as to dishonestly favour political and private advantage over merit, undermining public confidence in public administration, and benefiting political donors and/or family members
* deliberately exercises a power to approve grants in a manner that favours family members, party donors or party interests in electorates, contrary to the guidelines of a grant program which state that the grants are to be made on merit according to criteria
* exercises a power to make grants in favour of marginal electorates, when this is contrary to the purpose for which the power was given.

In summary, those who exercise public or official powers in a manner inconsistent with the public purpose for which the powers were conferred betray public trust and so misconduct themselves.

The Commission has also found that pork barrelling could satisfy s 9 of the ICAC Act. It may do so, for example, by conduct amounting to a substantial breach of the Ministerial Code of Conduct or the Members’ Code of Conduct. In particular, substantial breaches of the following clauses of the Ministerial Code could arise in a pork barrelling scheme:

* clause 3, stating that a minister must not knowingly breach the law
* clause 5, stating that ministers “must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law” and “must not direct that agency to provide advice with which the agency does not agree”
* clause 6, stating “A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person”.

In circumstances where pork barrelling is serious and wilful, it may constitute conduct so far below acceptable standards as to amount to an abuse of the public’s trust in the office holder, such that criminal punishment is warranted. Such conduct could potentially satisfy the elements of the criminal offence of misconduct in public office and, consequently, also satisfy s 9 of the ICAC Act.

In issuing this report, the Commission intends to make it clear that ministers and their advisers do not have an unfettered discretion to distribute public funds. The exercise of ministerial discretion is subject to the rule of law, which ensures that it must accord with public trust and accountability principles. As set out in the judgment of Isaacs and Rich JJ in *R v Boston* (cited in chapter 3), chief among the public duties of a member of Parliament is “the fundamental obligation … the duty to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community”.

However, the principles of public office are not at odds with political reality. It should also be recognised that in some areas, such as, in formulating policy, public power may be legitimately exercised in order to satisfy a political objective. A minister may legitimately harbour a hope

or expectation of some political (or personal) advantage flowing from their exercise of public power. But they may only legitimately do so if that hope or expectation is in the nature of a “side wind” and not the dominating motivation for the exercise of public power in a manner

inconsistent with the public purpose for which that power was granted.

### Corruption prevention

Chapter 4 of this report sets out some observations about how pork barrelling could be revented and better regulated. In doing so, the chapter examines topics including the framework for grants and funding, potential gaps, the role of ministers and members of Parliament, accountable officers, assessing funding applications and submissions, value for
money, recordkeeping and audits.

The following recommendations are made.

RECOMMENDATION 1

That any whole–of–government guidelines concerning grants funding be issued pursuant to a statutory regulation.

RECOMMENDATION 2

**SUMMARY OF INVESTIGATION AND OUTCOMES**

That the *Government Sector Finance Act 2018* be amended to mirror s 71 of the *Commonwealth Public Governance, Performance and Accountability Act 2013* by including obligations that a minister must not approve expenditure of money unless satisfied that the expenditure would be an efficient, effective, economical and ethical use of the money and that the expenditure represents value for money.

RECOMMENDATION 3

That the grant funding framework, or equivalent requirements, apply to the local government sector. This should include situations where local councils are both grantees and grantors.

RECOMMENDATION 4

That the NSW Procurement Board considers the need for a direction, policy or guidance that specifically prohibits or deals with pork barrelling. If necessary, relevant guidance can be published on the buy.nsw website or reflected in relevant procurement training.

RECOMMENDATION 5

That clause 6 of the Ministerial Code be amended to read, “A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act in the public interest, and must not act improperly for their private benefit or for the private benefit of any other person”.

RECOMMENDATION 6

That the proposed cross-agency Community of Practice develops templates and guidance that prompt the consideration of public interest, which may be consistent with the general approach adopted by the Legislative Council under its order 136A.

RECOMMENDATION 7

That, in addition to being documented, any input from a minister or their staff in the assessment of grants should be published on the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.).

RECOMMENDATION 8

That information required for publication on the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.) should not contain any redactions for Cabinet confidentiality.

**RECOMMENDATION 9**

That the requirement for ministers to give reasons if they make a decision contrary to advice from public officials should be strengthened by requiring those reasons to reference the relevant selection criteria, merit and the public interest.

RECOMMENDATION 10

That the cross-agency Community of Practice identifies mechanisms for determining and managing situations where a minister is in a position to award, or influence the award of, grants in their own electorate.

RECOMMENDATION 11

That where grant schemes or opportunities seek the input of local members, the process should encompass all relevant members and not be limited to members of the political party or parties that form government. This requirement could be reflected in the Proposed Guide or supporting materials.

RECOMMENDATION 12

That the proposed cross-agency Community of Practice:

* be led by a senior officer who is accountable for funding policy and practice across the NSW public sector
* includes at least one nominated senior officer from each cluster
* addresses pork barrelling in its proposed training materials.

RECOMMENDATION 13

That, with regard to proponent-submitted business cases and cost-benefit analyses, the assessing official or agency should consider:

* the assumptions made, whether explicit or implicit
* the reliability of the information provided, including any gaps
* the need for additional due diligence to be performed on the proponent or related parties
* overstatement of benefits or understatement of costs
* opportunity costs.

The cross-agency Community of Practice should develop standardised templates, guides and scoring mechanisms to assist proponents and public officials who assess grant applications. These should supplement but be consistent with TPP 18-6 and TPP 17-03.

RECOMMENDATION 14

That the cross-agency Community of Practice considers preparing a model contract for external consultants

who are engaged to prepare business cases and cost-benefit analyses.

RECOMMENDATION 15

That the agency responsible for the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.) undertakes audits at two yearly intervals to ensure compliance with the requirement to provide end-to-end information on all grant programs after the website has become fully operational.

RECOMMENDATION 16

That the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.):

* contains two main categories – one for entities providing funding and another for those seeking funding. The information should include guidance on requirements and best practice in categories
* provides information on topics such as:
	+ what pork barrelling is
	+ why it should be avoided
	+ responsibilities of public officials in relation to pork barrelling
	+ practical measures to avoid pork barrelling
	+ how to report pork barrelling.

RECOMMENDATION 17

That the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.) has search and reporting functionality that presents data in an interactive way and allows analysis across grant schemes.

RECOMMENDATION 18

That the grant funding framework requires additional information for *ad hoc* and one-off funding to be published on the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.), including:

* the document explaining why that method has been used and outlining the risk mitigation strategies
* whether the funding decision was in line with the agency’s recommendation (noting that this is already proposed in the case of ministerial decision-makers) if the agency’s recommendation was not followed, the decision-maker’s reasons for not following that recommendation (noting that this is already proposed in the case of ministerial decision-makers).

In addition, any grant guidelines applying to ad hoc and one-off funding should be published on the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.).

RECOMMENDATION 19

That the [**central grants website**](https://www.psc.nsw.gov.au/reports-and-data/state-of-the-nsw-public-sector/state-of-the-nsw-public-sector-report-2023/case-studies/a-single-location-for-all-nsw-government-grants#:~:text=The%20Department%20of%20Customer%20Service%20partnered%20with%20agencies,500%20grants%20across%2046%20agencies%20in%20one%20location.) requires information to be displayed about complaints and appeals processes in a prominent location.

RECOMMENDATION 20

That the Department of Premier and Cabinet arranges for an independent audit to be conducted to verify that the recommendations in the State Archives and Records Authority’s 22 January 2021 report have been fully implemented.

RECOMMENDATION 21

That:

* the proposed funding framework encourages internal audit reports to be provided to an agency’s audit and risk committee on certain categories of high-risk grants
* the NSW Government considers requiring the Auditor-General to conduct regular performance audits in relation to high-risk grants or grant schemes, including those that involve a high risk of pork barrelling
* the Audit Office of NSW be given “follow-the- dollar” powers, as previously recommended by the Public Accounts Committee of the NSW Legislative Council.

These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and as required by s 111E of the ICAC Act, will be furnished to the responsible minister or officer. **The Commission will seek advice in relation to whether the recommendations will be implemented and, if so, details of the proposed plan of action and progress reports. The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission’s website at** [**www.icac.nsw.gov.au .**](http://www.icac.nsw.gov.au/)