



# Matt Kean MP

Member for **Hornsby**



Dear Auditor General,

I am writing with the regard to your Performance Audit into the “design and administration of the WestInvest Program”

The report has been purportedly issued under s 38EC of the Government Sector Audit Act 1983. The law requires public officials to provide people with procedural fairness where a statutory decision directly and immediately affects a person’s rights or interests: *Kioa v West* (1985) 159 CLR 550. One such interest is a person’s reputation (*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564) and reporting bodies - such as your office - are required to afford procedural fairness to those whom they intend to make findings about: *Ibid*.

A failure to afford procedural fairness is a jurisdictional error (*Re Refugee Tribunal; Ex Parte Aala* (2000) 204 CLR 82). Accordingly, a failure to afford it in making a statutory decision means that such a “decision... lacks legal foundation and is properly regarded, in law, as no decision at all”: *Minister for Immigration v Bhardwaj* [2002] HCA 11 at [53].

The obligation to afford procedural fairness, means that a decision maker should hear a relevant person’s submissions on a topic. One reason for this is that it ensures that a decision-maker has all the relevant facts before them prior to making a decision, especially one that is adverse to an individual’s interests.

To put the matter simply:

- you were required to afford procedural fairness to relevant people who you intended to make findings about, including to support good decision-making; and
- that requirement is a legal obligation which if not met will generally render your decision unlawful and a nullity.

Accordingly, it was extremely disappointing that, at no stage was I invited, by you or your Deputy – Ian Goodwin, to make submissions, be interviewed or otherwise afforded the opportunity to respond to findings you were minded to make about the administration of WestInvest.

Had I been so invited, a series of factual errors in your report may have been avoided. Those errors include, but are not limited to:

- In relation to the state’s AAA credit rating, the report (pg. 3) makes the false claim that: ‘The NSW Government did not have sufficient regard to the implications and risks of committing \$5 billion of funding to the WestInvest program for its credit rating’. As Treasurer I ensured the AAA was central to all funding decisions. As a result, the AAA was confirmed by both Moody’s and Fitch after the announcement of Westinvest programs and funding. Details are on the NSW Government website. This ‘finding’ appears to be a personal opinion and a negative reflection on me by the Auditor General that is contrary to the evidence and has no basis in fact.
- In relation to the selection of four additional projects, the report makes the inaccurate claim that: ‘The reasons for selecting the specific projects that were added, rather than other projects within the same LGAs that had received the same assessment scores, was not documented by the then Treasurer’ (pg. 4). This is false. The reasons were documented by the Treasurer in a formal letter to DPC, explaining that the four projects were in LGAs that had been allocated a low percentage of funding on a per capita basis.

- Though you correctly state that the Government round was not a grant program, you incorrectly stated that: 'justifications for the funding decisions made by the Treasurer were not documented' (pg. 3). The decisions were correctly and appropriately documented through the normal Government ERC decision-making process. The justification was also stated in numerous media releases, press conferences and interviews.
- Your report incorrectly states the Government-round projects were 'examples of 'business as usual' (pg. 12). Transformative health facilities, new education precincts, transformative road infrastructure and transformative parklands are not business as usual – but instead fit clearly into the stated purpose of the WestInvest program which was to fund 'transformational' community infrastructure.

Further, I note that your conclusion (pg. 2) turns a blind eye to your own concerning findings (pg. 3) that the new Labor government breached the integrity of NSW government funding rules when you note that 15 out of 17 'projects did not have business cases completed, as required by NSW Government rules'. I also note this is one of few occasions you do not name the NSW Treasurer or Premier as the ultimate approver, though you did make this distinction when referencing me throughout your report. Your recommendations also fall silent in relation to these new Government breaches, leaving a reasonable person to conclude you find it appropriate that the Labor Government breaches funding rules.

In summary, not only did the failure to afford procedural fairness lead to errors of fact, it also leaves your purported Performance Audit a report which is beyond your lawful authority to issue, and a complete nullity.

Accordingly, I ask that you withdraw your report (to the extent that it can be properly regarded a lawfully concluded report at all), afford procedural fairness to myself and others about whom you intend to make findings about, and reissue your report with the errors corrected. I would be happy to participate in any such process. I also request you publish this letter in full on your website on the same page that hosts your report and displayed with equal prominence.

I am forwarding this letter to the Speaker of the Parliament, the Independent Reviewer of the Auditor General, the CPA Australia Disciplinary Panel and reserve my right to take further action as I deem necessary.

Your role is an important one. It is to support proper public administration. This episode is disappointing because your office is meant to be the custodian of proper (and lawful) public administration, committed to transparency, evidence-based decision making, and factual accuracy. It does not enhance your office's standing to opine on and oversee the proper administration of government by others when it makes such basic legal error.

Regards,



**The Hon Matt Kean MP**  
Member for Hornsby  
Shadow Minister for Health

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