

KEPPELPUB01844
18/10/2021

KEPPEL
pp 01844-01891

PUBLIC
HEARING

COPYRIGHT

INDEPENDENT COMMISSION AGAINST CORRUPTION

THE HONOURABLE RUTH McCOLL AO
COMMISSIONER

PUBLIC HEARING

OPERATION KEPPEL

Reference: Operation E17/0144

TRANSCRIPT OF PROCEEDINGS

AT SYDNEY

ON MONDAY 18 OCTOBER, 2021

AT 10.00AM

Any person who publishes any part of this transcript in any way and to any person contrary to a Commission direction against publication commits an offence against section 112(2) of the Independent Commission Against Corruption Act 1988.

This transcript has been prepared in accordance with conventions used in the Supreme Court.

THE COMMISSIONER: This is a continuation of the public inquiry in the Commission's Operation Keppel. The general scope and purpose of the public inquiry is as follows. One, whether between 2012 and August 2018, Mr Daryl Maguire MP engaged in conduct that involved a breach of public trust by using his public office, involving his duties as a member of the New South Wales Parliament and the use of parliamentary resources, to improperly gain a benefit for himself, G8way International, G8way International Pty Ltd and associated persons.

10 Two, whether between 2012 and 2018, the Honourable Gladys Berejiklian MP engaged in: (a) conduct that constituted or involved a breach of public trust by exercising public functions in circumstances where she was in a position of conflict between her public duties and her private interest as a person who was in a personal relationship with Mr Daryl Maguire in connection with, one, grant funding promised and/or awarded to the Australian Clay Target Association Inc in 2016-2017; two, grant funding promised and/or awarded to the Riverina Conservatorium of Music in Wagga Wagga in 2018.

20 And/or (b) conduct that constituted or involved the partial exercise of any of her official functions in connection with, one, grant funding promised and/or awarded to the Australian Clay Target Association Inc in 2016-2017; two, grant funding promised and/or awarded to the Riverina Conservatorium of Music in Wagga Wagga in 2018.

And/or (c) conduct that constituted or involved the dishonest or partial exercise of any of her official functions and/or a breach of public trust by refusing to exercise her duty pursuant to section 11 of the Independent Commission Against Corruption Act 1988 to report any matter that she
30 suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Mr Daryl Maguire.

And/or (d) conduct that was liable to allow or encourage the occurrence of corrupt conduct by Mr Daryl Maguire.

The general scope and purpose of the public inquiry is to gather evidence relevant to the matters being investigated and for the purposes of determining the matters referred to in section 13(2) of the Independent
40 Commission Against Corruption Act.

MR ROBERTSON: If it pleases the Commission, my name is Robertson. I appear with my learned friend Mr Brown to assist the Commission.

THE COMMISSIONER: Thank you, Mr Robertson. I note that the following persons have been granted leave to appear to represent the following witnesses: Mr Lawrence to represent Mr Toohey today; Mr Michael Taylor to represent Mr Minucos tomorrow; Mr Carr to represent Mr Chris Hanger on the 21st of October; Mr Agius of Senior Counsel to

represent Mr Barilaro on the 26th of October; Mr White to represent Ms Cruickshank on the 26th of October; Mr Harrowell to represent Mr Maguire at all sessions of the public inquiry; Mr Walker of Senior Counsel, Ms Callan of Senior Counsel, Mr Cooper, Ms Dempster and Mr Dougal Ross to represent Ms Berejiklian – they’ve been given leave to appear at all sessions; Mr Gary Patterson to represent Mr Neil Harley; Mr Phillip Boulten of Senior Counsel to represent Mr Baird; Mr Hodges also to represent Mr Baird on the 20th of October; Mr Crawford-Fish to represent Mr Paul Doorn tomorrow; Mr Arnott of Senior Counsel to represent Mr Stuart Ayres and
10 also Mr Drinnan to represent Mr Ayres, and Mr Cook; Ms Woodward to represent Mr Gary Barnes on the 22nd of October; Mr Hemsall to represent Mr Burden on the 25th of October; and Ms Edwards to represent Mr Nigel Blunden on the 20th of October.

Mr Robertson, I invite you to make your opening address.

MR ROBERTSON: Commissioner, this is a further public inquiry conducted for the purposes of this Commission’s investigation known as Operation Keppel. It arises following further investigative steps that have
20 been taken since the adjournment of the public inquiry conducted in September and October of last year. The public inquiry that occurred in September and October of last year was conducted for the purposes of investigating certain allegations concerning Mr Daryl Maguire, the former Member for Wagga Wagga.

After the first public inquiry was adjourned and having regard to the evidence received in that public inquiry, this Commission has decided that it was in the public interest for Operation Keppel to be expanded so as to include an investigation into certain allegations concerning the Honourable
30 Gladys Berejiklian MP. To date, that expanded investigation has been performed in private, including through the use of this Commission’s powers to require production of documents and statements of information and through the conduct of private compulsory examinations.

Having regard to the material available to the Commission as a consequence of those investigative steps in private, this Commission has decided that it is in the public interest for a public inquiry to be conducted for the purposes of investigations focused on three categories of allegations concerning Ms
40 Berejiklian and for the purpose of this Commission’s continuing investigation into allegations concerning Mr Maguire.

In order to understand that decision, it’s necessary to say something about this Commission’s functions. Under the Independent Commission Against Corruption Act, this Commission is conferred with the function of investigating allegations or complaints or circumstances which, in the Commission’s opinion, imply that corrupt conduct, conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or conduct connected

with corrupt conduct, may have occurred, may be occurring or may be about to occur.

The Commission is directed by the ICAC Act to conduct its investigations with a view to determining, amongst other things, whether corrupt conduct has occurred and whether conduct liable to allow, encourage or cause the occurrence of corrupt conduct has occurred.

10 The term “corrupt conduct” is the subject of detailed definition in the ICAC Act. As a result, this Commission’s function of investigating corrupt conduct neither extends to, nor is limited by, the concept of corruption in some general sense of that word. Rather, this Commission’s function is, relevantly, to investigate allegations, complaints and circumstances that imply that corrupt conduct, as defined by the NSW Parliament, may have occurred.

20 For conduct to constitute corrupt conduct for the purposes of the ICAC Act, it must, generally speaking, fall within the description of corrupt conduct in section 8 of the ICAC Act but not be excluded by section 9 of that Act. Both section 8 and section 9 of the ICAC Act identify categories of conduct. Thus, for conduct to amount to corrupt conduct for the purposes of the ICAC Act, it must fall within one of the categories of conduct in section 8 as well as being in one of the categories of conduct in section 9. The categories of conduct in section 8 include: any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions; and any conduct of a public official or former public official that constitutes or involves a breach of public trust.

30 As we said in our opening statement for the first public inquiry, the concept invoked by the second of the categories I’ve just identified – that is, the concept of a breach of public trust – is one that has a considerable historical pedigree. It is directed to the public trust and confidence reposed in public officers by virtue of their office. Such trust may be regarded as having been breached where, for example, a public official exercises public functions in circumstances where there is a conflict between the public official’s public duties and her or his private interest.

40 As for the categories of conduct in section 9 of the ICAC Act, the categories of particular potential relevance to this investigation are: firstly, conduct that could constitute or involve a criminal offence, such as the offence of misconduct in public office; and, secondly, conduct that could constitute or involve a substantial breach of an applicable code of conduct.

As to that latter category, the ICAC Act has, since 1995, empowered the NSW Government to prescribe for the purposes of the ICAC Act an applicable code of conduct in relation to Ministers of the Crown. That was first done by the Baird Government in September 2014, although the code of conduct prescribed on the advice of that Government ceased to have

force at the beginning of 1 September, 2017. The presently applicable code of conduct for Ministers of the Crown is the one prescribed on the advice of the Berejiklian Government on 1 September, 2017. The Berejiklian Ministerial Code of Conduct is in substantially the same form as the Baird Ministerial Code of Conduct, save that the Berejiklian Code of Conduct was amended late last year so as expressly to prohibit ministers and parliamentary secretaries from accepting or seeking payment of a commission from a property developer, either directly or through a third party.

10

The Berejiklian Ministerial Code of Conduct commences by observing that: “It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest.”

20

To further those principles, the code of conduct prescribes standards of ethical behaviour and imposes internal governance practices directed towards ensuring that possible breaches of ethical standards are avoided. For example, clause 6 of the code expressly provides that “A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be in the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.” Further, clause 7(1) of the code provides that “A Minister must knowingly conceal a conflict of interest from the Premier.”

30

THE COMMISSIONER: “Must not knowingly conceal”.

MR ROBERTSON: “Must not knowingly conceal a conflict of interest from the Premier.” And clause 7(2) provides that “A Minister must not, without the written approval of the Premier, make or participate in the making of any decision or take any other action in relation to a matter in which the Minister is aware that they have a conflict of interest.”

40

The Schedule to the NSW Ministerial Code of Conduct prescribes certain additional administrative and governance requirements that ministers, and in some cases parliamentary secretaries, must comply with and that are directed to minimising the risk and opportunities for a breach of the code. A substantial breach of the schedule is, if done knowingly, a substantial breach of the NSW Ministerial Code of Conduct and may therefore constitute corrupt conduct of a kind that this Commission has a function to investigate.

Part 3 of the schedule contains administrative and governance requirements in relation to conflicts of interest. Those requirements include: a requirement that a minister must promptly give notice to the Premier of any conflict of interest that arises in relation to any matter; and a requirement

that a minister who has a conflict of interest in a matter must abstain from making, or participating in, any decision or from taking or participating in any action in relation to the matter absent a ruling by the Premier – or, in the case of the Premier, a ruling approved by the Cabinet – that no conflict of interest arises or that any potential conflict of interest can be appropriately managed.

10 Part 3 also includes requirements to the effect that, if during a meeting of the Cabinet or a Cabinet committee a matter arises in which a minister has a conflict of interest, the minister must disclose to those present the conflict of interest and the matter to which it relates as soon as practicable after the commencement of the meeting; ensure that the making of the disclosure is recorded in the official record of the proceedings; abstain from participating in any discussion of the matter and from decision-making in respect of it absent a ruling that no conflict of interest arises or that any potential conflict of interest can be appropriately managed; and not be present during any discussion or decision-making on the matter unless the Premier, or the chair of the meeting in the absence of the Premier, otherwise approves. One issue to be investigated in this public inquiry is whether Ms Berejiklian breached
20 any of those requirements either as Treasurer or as Premier and, if so, how and why.

It should be apparent from what we have said so far that the concept of a conflict of interest is a central concept under the Berejiklian Ministerial Code of Conduct, as it was under the Baird Ministerial Code of Conduct before it. The term “conflict of interest” is defined in the code in the following terms: “A conflict of interest arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister’s private interest could objectively have the potential to influence the performance of their public duty.”
30

In that definition, the term “private interest” is not limited to pecuniary interests – that is, interests sounding or measured in money. It extends to non-pecuniary private interests. The kinds of interests that may be private interests for the purposes of the code are manifold and include what could be described as private concerns or personal connections. For example, where a minister’s attention or concern is particularly engaged in relation to a person by reason of their personal association or connection with them – whether that association or connection be one of friendship, enmity, family
40 relation or romantic involvement – a private interest for the purposes of the code may exist depending on the circumstances.

That helps explain why it is sometimes necessary – and, in many cases, will at least be desirable – for a minister to disclose any substantial personal connection that she or he has to a person relevant to a proposed decision, even if the minister would not her or himself receive a private benefit if the decision is made.

For example, in 2013, Ms Berejiklian declared an interest to Cabinet and abstained from discussions regarding the appointment of a particular individual to a government board due to attendance with that individual at functions. In 2017, Ms Berejiklian made a disclosure under the NSW Ministerial Code of Conduct to the effect that two of her cousins were then employed in the NSW Public Service. In 2018, Ms Berejiklian made a declaration of interest to Cabinet in relation to a particular Liberal Party supporter in relation to a potential appointment of that person to a government advisory board. And in 2019, Ms Berejiklian declared to
10 Cabinet that a particular person proposed to be appointed to a government board was known to her. So far as the material presently available to this Commission reveals, Ms Berejiklian never gave a disclosure under the NSW Ministerial Code of Conduct in relation to Mr Maguire.

The foregoing is not to suggest that a conflict of interest for the purposes of the code will always exist whenever a person has a substantial personal connection to another person associated with a particular decision or other action. Indeed, the NSW Ministerial Code of Conduct itself recognises that
20 some substantial personal connections might not raise a conflict of interest but nevertheless permits a minister to, in her or his discretion, disclose an interest and abstain from decision-making even if the interest might not comprise a conflict of interest. Thus, the fact that Ms Berejiklian disclosed interests arising from personal connections from time to time does not necessarily mean that a conflict of interest existed or, for that matter, that Ms Berejiklian thought that such a conflict of interest existed.

Further, even when a conflict of interest exists, a minister is not necessarily excluded by the code from making or participating in a decision or other action. Where a conflict of interest exists and can be managed, a minister
30 may be able to continue to act despite her or his conflict. For example, where a Premier has a conflict of interest in relation to a matter before Cabinet, her or his Cabinet can approve the Premier continuing to play a role in decision-making in relation to the matter, but only if the conflict of interest is disclosed.

Before leaving the Berejiklian Ministerial Code of Conduct, it is important to make an observation about the nature of that code and this Commission's functions in relation to it. The Berejiklian Ministerial Code of Conduct is not a criminal statute, nor is it a source of civil liability cognisable in the
40 courts. Rather, it's a code that prescribes standards of ethical behaviour and internal governance practices that Ms Berejiklian and her ministers set for themselves.

This Commission has been charged by the NSW Parliament – and, indirectly, by Ms Berejiklian and her ministers – with investigating certain allegations and circumstances which imply that a substantial breach of the NSW Ministerial Code of Conduct may have occurred. In many cases, this Commission will be the only body capable of effectively investigating an

alleged substantial breach of the NSW Ministerial Code, at least in the absence of the Premier causing for such an investigation to take place. Alleged breaches of the code of conduct cannot, for example, be investigated by the NSW Police because a breach of the code does not amount to a crime. Indeed, even the parliament may not be in a position effectively and fully to investigate an alleged substantial breach of the ministerial code given that that the power of the houses of parliament to require the production of documents is limited in relation to Cabinet documents, and given that one house of parliament does not have the power to require the attendance of a member of the other house to give evidence. Like restrictions do not apply to the investigative powers of this Commission.

With that sketch of this Commission's functions in mind, we now turn to the matters to be further investigated through the conduct of this public inquiry. As we said at the outset, the matters to be investigated in this public inquiry concerning Ms Berejiklian can be seen to fall within three categories: first, allegations that Ms Berejiklian engaged in partial conduct or conduct constituting or involving a breach of public trust in relation to certain projects in Wagga Wagga advanced by Mr Daryl Maguire; secondly, an allegation that Ms Berejiklian refused to discharge her duty under the ICAC Act to notify this Commission of possible corrupt conduct; and, thirdly, an allegation that Ms Berejiklian engaged in conduct that was liable to allow or encourage the occurrence of corrupt conduct by Mr Maguire.

This public inquiry will examine the first category of allegations concerning Ms Berejiklian with a particular focus on two case studies: first, grant funding awarded to the Australian Clay Target Association Incorporated; and, secondly, grant funding promised and/or awarded to the Riverina Conservatorium of Music in Wagga Wagga.

At the outset, we make clear that the material presently available to the Commission does not suggest that any officer or employee of the Australian Clay Target Association or the Riverina Conservatorium of Music engaged in corrupt conduct in relation to grant funding sought on behalf of those two organisations. This public inquiry is instead focused on the conduct of Ms Berejiklian and Mr Maguire in relation to grant funding sought and/or awarded to those two organisations. We expect the evidence to demonstrate that, over an extended period, Mr Maguire was a strong supporter of certain building projects advanced by the Australian Clay Target Association and the Riverina Conservatorium of Music and vociferously advocated for government support for those projects within government, including to Ms Berejiklian directly.

We also expect the evidence to demonstrate that Ms Berejiklian made or participated in the making of decisions and took other steps that advanced the building projects advocated for by Mr Maguire but without disclosing to anyone within government that she was in a close personal relationship with

Mr Maguire at the time that she took those steps. It will be recalled that, during the first public inquiry, both Ms Berejikian and Mr Maguire gave evidence to the effect that they were in a close personal relationship with each other from at least about 2015 if not earlier.

10 Commissioner, ordinarily, of course, it is entirely a matter for the parties to a relationship to decide whether they disclose the existence of that relationship to anyone and, if so, to who. However, there are circumstances in which a person's ordinary entitlement to privacy must be subordinated to their public duty. Put in another way, public duties come first. For example, whilst a person holds an office of public trust such as the office of Premier or that of Treasurer, it may be necessary for that person to disclose that she or he is in a personal relationship with a particular person if the existence of that relationship is something that could objectively have the potential to influence the performance of the officeholder's public duties. Importantly, that obligation of disclosure may arise even if the officeholder thinks that they are able to compartmentalise their public and private lives.

20 That is for a number of reasons, including that, in a particular case, there may be a risk that an officeholder's personal concern for another may – whether consciously or subconsciously – influence or be seen to have the potential to influence the performance of the officeholder's public duties. That risk can be avoided or at least managed if the risk of conscious or subconscious influence is identified and managed.

30 The disclosure of potential conflicts of interest is of particular importance, we submit, in relation to very senior public officials such as the Premier and Treasurer. We expect the evidence to demonstrate that various public officials were influenced in the steps that they took in relation to the building projects to be considered in this public inquiry by what those public officials understood to be Ms Berejikian's support for, or interest in, those projects. We also expect that there will be evidence to the effect that a number of public officials would have acted differently had they known about Ms Berejikian's close personal relationship with Mr Maguire.

40 That is potentially significant as it may mean that funding proposals advanced by Mr Maguire may have been given a level of priority or attention that they may not have been given had Ms Berejikian disclosed the existence of her personal relationship with Mr Maguire. That may well have been to the detriment of equally or more deserving projects or funding proposals.

In that regard, we observe that we expect the evidence to demonstrate that the proposals being investigated in this public inquiry were not subjected to a competitive assessment as to whether those proposals, or either of them, should be preferred to other possible demands on the public purse. And while that does not, without more, indicate corruption, it does raise the possibility that Ms Berejikian's conduct had the effect of preferring

organisations based in Wagga Wagga to other equally or more deserving organisations based elsewhere in this state.

Turning then to the second category of allegations concerning Ms Berejiklian. Whilst she was a Minister of the Crown, Ms Berejiklian – like all other ministers and like principal officers of public authorities – had a duty to report to this Commission any matter that she suspected on reasonable grounds concerned or may concern corrupt conduct. Ministers of the Crown may make a report to the head of an agency responsible to the minister as an alternative to making a report directly to this Commission. This Commission has no record of Ms Berejiklian making any report to it of any suspicion by her that Mr Maguire may have been engaged in corrupt conduct. There is also no material presently available to this Commission to the effect that Ms Berejiklian made any report of suspected corrupt conduct in relation to Mr Maguire to a head of an agency responsible to Ms Berejiklian.

That is so even after Mr Maguire gave evidence before this Commission on 13 July, 2018, during a public inquiry conducted for the purpose of the investigation known as Operation Dasha. During Mr Maguire’s evidence on that occasion, Mr Maguire initially denied that he had ever attempted to do business with Michael Hawatt, a councillor of the former Canterbury Council, or that Mr Hawatt had ever attempted to do business with him. However, after intercepted telephone calls between Mr Maguire and Mr Hawatt were played to the Operation Dasha Public Inquiry, Mr Maguire ultimately accepted that he was planning to share in commissions obtained from property developers who sold their properties to clients of Mr Maguire.

Ms Berejiklian asked for and obtained Mr Maguire’s resignation as parliamentary secretary late on the afternoon of 13 July, 2018 and, in a public statement issued two days later, said that she was “shocked” by the events of the 13th and expressed the view that Mr Maguire had “let his constituents, the people of New South Wales and the NSW Liberal Party down”. I’ll read that quote again, “let down his constituents, the people of New South Wales and the NSW Liberal Party”.

In a compulsory examination held in private on 18 September this year, I asked Ms Berejiklian whether – by the time that she asked for Mr Maguire’s resignation as parliamentary secretary late on 13 July, 2018 – she suspected that Mr Maguire had been or may have been engaged in corrupt conduct. I will have played one of my exchanges with Ms Berejiklian in relation to this issue on the 18th of September this year.

AUDIO RECORDING PLAYED

[10.40am]

MR ROBERTSON: Commissioner, an issue arises as to whether this Commission should accept that evidence just played and, if not, to consider why Ms Berejiklian did not make a report to this Commission concerning Mr Maguire.

10 The third category of allegation to be investigated in this public inquiry is an allegation that Ms Berejiklian engaged in conduct that was liable to allow or encourage the occurrence of corrupt conduct by Mr Maguire. During the first public inquiry, evidence was received suggesting that Mr Maguire told Ms Berejiklian information concerning aspects of some of the matters that Mr Maguire ultimately admitted involved an attempt to monetise his offices as a member of parliament, parliamentary secretary and chair of the NSW Parliament Asia Pacific Friendship Group. There was also evidence that suggested, on one view, that Ms Berejiklian sought to limit the information that she had regarding Mr Maguire's activities, including evidence of a conversation between Mr Maguire and Ms Berejiklian in which Ms Berejiklian, referring to a deal that Mr Maguire was attempting to do, said, "I don't need to know about that bit."

20 Although, in the first public inquiry, Ms Berejiklian rejected any suggestion that she was seeking to blind herself from information that might require her to take action in relation to Mr Maguire's conduct, a question arises as to whether Ms Berejiklian's apparent inaction in relation to the information provided to her by Mr Maguire was apt to allow or encourage Mr Maguire to engage in corrupt conduct. Investigating that matter forms part of this Commission's function of investigating allegations or complaints that conduct liable to allow or encourage the occurrence of corrupt conduct has occurred.

30 Commissioner, as we've already mentioned, the Berejiklian Ministerial Code of Conduct opens by stating: "It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest." This public inquiry will investigate whether Ms Berejiklian exhibited those high standards of probity that she set for herself and her ministers.

40 May it please the Commission.

THE COMMISSIONER: Thank you, Mr Robertson. The Commission will adjourn for 15 minutes to allow the pooled camera and the person running it to leave the hearing room.

SHORT ADJOURNMENT

[10.45am]

THE COMMISSIONER: I apologise for the slightly longer delay. There were some technical issues we had to deal with. I want to make some further formal announcements. The Commission will sit from today until 29 October and sitting days will commence at 10.00am and finish at 4.00pm with breaks for morning tea and lunch. I note that the public inquiry is being conducted in accordance with the Commission's Operation Keppel Public Inquiry COVID-19 protocol, which is published on the Commission's website. Anyone else, apart from those to whom I have already granted leave to appear or to be legally represented should make a written application in accordance with section 3 of the Operation Keppel Public Inquiry COVID-19 protocol. Mr Robertson, do you seek a further section 112 direction?

MR ROBERTSON: We do. In our respectful submission it's appropriate that a suppression order be made in relation to private email addresses, private residential addresses, private phone numbers, bank account numbers and tax file numbers. As I understand it a proposed of direction has been provided to you, Commissioner.

20 THE COMMISSIONER: Yes. Thank you, Mr Robertson. Pursuant to section 112 of the Independent Commission Against Corruption Act, and being satisfied that it is necessary and desirable in the public interest to do so, I make a suppression order protecting against publication to any person outside the Commission any private email addresses, private residential addresses, private phone number, bank account numbers and tax file numbers contained in any exhibits to be tendered in this inquiry and/or other documents shown during this inquiry, with the exception to Commission officers for statutory purposes and between witnesses in the inquiry and their legal representatives, subject to any further order of the Commission.

30 MR ROBERTSON: Thank you, Commissioner.

THE COMMISSIONER: During the Operation Keppel investigation, the Commission obtained from the Department of Premier and Cabinet, pursuant to its powers under sections 21 and 22 of the Independent Commission Against Corruption Act, information and documents traditionally described as Cabinet deliberations because they record the actual deliberation of Cabinets or a committee of Cabinet and Cabinet documents, being documents prepared outside Cabinet, such as reports or submissions for the assistance of Cabinet. A question arose, when the Department of Premier and Cabinet produced that information and those documents, concerning the extent and manner in which Counsel Assisting may examine witnesses and tender such documents, having regards to principles of public interest immunity. Both the Department of Premier and cabinet and Ms Berejiklian were given the opportunity to make submissions in relation to that issue. The Department of Premier and Cabinet took that opportunity and Ms Berejiklian did not wish to be heard. I have ruled on that issue as follows.

During the public inquiry, (a) Cabinet documents falling within the following categories can be tendered by Counsel Assisting, and if tendered and received in evidence would form part of the public record of the public inquiry and be made available on the Commission's public website: (1) documents recording any decisions made by Cabinet or a committee of Cabinet concerning either or both of the Australian Clay Target Association and the Riverina Conservatorium of Music during the period from 2012 to 2018; (2) submissions to Cabinet or a committee of Cabinet proposing one or more decisions directly affecting the Australian Clay Target Association and the Riverina Conservatorium of Music and advice or speaking notes in relation to any Cabinet or Cabinet committee submission falling with a previous category with any such documents redacted so as to obscure material concerning decisions made that are not connected with either of the two identified organisations.

(b) any records of matters before Cabinet or a committee of Cabinet in respect of which Ms Berejiklian made a disclosure would also be available to be tendered and made publicly available. However, the names of any persons referred to in such disclosure or disclosures would, subject to further leave of the commission, be redacted from any record made publicly available.

(c) the Commission will permit questions to be asked that disclose the contents of Cabinet documents or the contents of Cabinet deliberations, but only to the extent reasonably necessary to expose to the public and made it aware of evidence relevant to the allegations being investigated in the public inquiry.

Thus, questions concerning whether Ms Berejiklian declared any conflict of interest at any relevant meeting of Cabinet or a Cabinet committee would, for example, be permitted, as would questions concerning Ms Berejiklian's participation, if any, in deliberations concerning the two identified organisations. However, questions would not without leave be permitted to be asked in public that would reveal the substance of any agenda item other than ones concerned with the two identified organisations and/or the disclosure of conflicts. That limitation would not operate to prevent counsel from asking questions in public regarding matters of general practice and procedure of Cabinet or Cabinet committees or prevent counsel from drawing to the attention of a witness the substance of an agenda item concerning something other than the two identified organisations and/or the disclosure of conflicts in connection with asking a question provided that the question does not without leave of the Commission reveal in public or invite any witness to reveal in public the substance of any agenda item other than one concerning the two identified organisations and/or the disclosure of conflicts. The reasons for my ruling will be published on the Commission's website today.

MR ROBERTSON: Commissioner, in light of that ruling and having regards to my opening, can I formally tender the documents that are referred to in my opening? First, I tender a redacted extract from the 2012 to 2020 report of matters abstained by government re Gladys Berejiklian. I understand the next exhibit number is 373.

THE COMMISSIONER: Yes. So that will be Exhibit 373.

10 **#EXH-373 – EXTRACT FROM 2012-2020 – REPORT OF MATTERS
ABSTAINED BY GOVERNMENT RE GLADYS BEREJIKLIAN**

MR ROBERTSON: And I confirm that the version that I've just tendered has been redacted consistent with the ruling that you just publicly announced and which was made available to me, to Ms Berejiklian's advisers and to the Department of Premier and Cabinet last night. Can I also observe that the document that I've just tendered has been viewed in its redacted form by the General Counsel of the Department of Premier and Cabinet who's indicated that they agree to the redactions to that particular document were appropriately made.

THE COMMISSIONER: Thank you, Mr Robertson.

MR ROBERTSON: Next I tender a letter from Ms Berejiklian to the secretary of the Department of Premier and Cabinet making a disclosure under the Ministerial Code of Conduct regarding two cousins.

THE COMMISSIONER: That will be Exhibit 374.

30 **#EXH-374 – LETTER FROM GLADYS BEREJIKLIAN TO
SECRETARY OF DEPARTMENT OF PREMIER AND CABINET
MAKING DISCLOSURE UNDER MINISTERIAL CODE OF
CONDUCT RE TWO FIRST COUSINS**

MR ROBERTSON: Next I tender a statement regarding Daryl Maguire dated 15 July, 2018, released by Premier Berejiklian.

THE COMMISSIONER: That will be Exhibit 375.

40 **#EXH-375 – STATEMENT REGARDING DARYL MAGUIRE
DATED 15 JULY 2018 RELEASED BY PREMIER BEREJIKLIAN**

MR ROBERTSON: And, finally, I tender the excerpt from the compulsory examination of the Honourable Gladys Berejiklian of 18 September, 2021, being the excerpt that I had played during the course of the opening. I tender both the video and an excerpted transcript in relation to that excerpt.

THE COMMISSIONER: That will be Exhibit 376.

10 **#EXH-376 – EXCERPT FROM COMPULSORY EXAMINATION OF
HON GLADYS BEREJIKLIAN ON 18 SEPTEMBER 2021 (VIDEO
AND TRANSCRIPT)**

MR ROBERTSON: Those are the only formal tenders. Can I just by way of housekeeping provide assistance to those following along in terms of the program of witnesses for this week. Shortly, I'll call Mr Michael Toohey, who is a director in the Office for Sport. I expect the examination of Mr Toohey to take the remainder of the day. Tomorrow I'll call Mr Paul Doorn, D-o-o-r-n, who at material times was an executive director in the
20 Office for Sport. That will take most of the day. It may well be that I can have it finished by 3 o'clock or 3.30 although it may go a little bit longer than that. On Wednesday I'll call Nigel Blunden, who at material times was the Director of Strategy for former Premier Mike Baird and following him, I'll call the former Premier Mr Baird. I hope to finish both of those examinations by lunchtime and if not by lunchtime, then maybe by about 3.00pm. On Thursday I'll call Mr Chris Hanger, who is currently the Deputy Secretary at the Department of Regional NSW. I expect that to be a very fulsome day. Our respectful submission would be to start at 9.30am on Thursday if that's convenient to the Commission - - -

30 THE COMMISSIONER: Yes, Mr Robertson.

MR ROBERTSON: - - - noting that there's quite a bit of material to go through with Mr Hanger. On Friday, I'll call Mr Stuart Ayres, who was the Minister for Sport at material times followed by Mr Barnes. And, again, I expect Friday to be quite a fulsome day. And so, again, our submission would be to start at 9.30am, again, if that's convenient to the Commission?

40 THE COMMISSIONER: Yes. Very well.

MR ROBERTSON: It may be that I won't be in a position to finish with Mr Barnes on Friday. I'll certainly do my best. And so it may be necessary for me to recall Mr Barnes in the following week. In terms of the witness list for the following week, I hope to make that available on either Wednesday or Thursday of next week.

THE COMMISSIONER: This week or next week?

MR ROBERTSON: Sorry. This week. Wednesday or Thursday of this week in relation to next week. Obviously, enough, what I've just announced may be subject to change depending on what occurs during the course of the investigation.

THE COMMISSIONER: Thank you, Mr Robertson.

MR ROBERTSON: Those are the only housekeeping matters from my side. And if it's convenient to the Commission, I then call Michael Toohey.

10

THE COMMISSIONER: Yes. Thank you. Mr Toohey, do you wish to make an oath or take an affirmation?

MR TOOHEY: I'll take an affirmation.

MR LAWRENCE: Commissioner, I representative Mr Toohey. Lawrence is my name.

THE COMMISSIONER: Yes, Mr Lawrence.

10 MR LAWRENCE: I can indicate that he seeks a section 38 declaration in relation to his evidence.

THE COMMISSIONER: Very well. Thank you, Mr Lawrence. In respect of the declaration Mr Lawrence has indicated you wish me to make, Mr Toohey, I'll inform you of your rights and your obligations here today before I actually make that declaration. As a witness, you must answer all questions truthfully and you must produce any item described in your summons or which I require you to produce. You may object to answering a question or producing an item. The effect of any objection is that although you must still answer the question or produce the item, your answer or the
20 item produced cannot be used against you in any civil proceedings or, subject to two exceptions, in any criminal or disciplinary proceedings. The first exception is that this protection given by objecting does not prevent your evidence from being used against you in a prosecution for an offence under the Independent Commission Against Corruption Act, including an offence of giving false or misleading evidence, for which the penalty can be imprisonment for up to five years. The second exception only applies to New South Wales public officials, which I understand you to be one. Evidence given by a New South Wales public official may be used in
30 disciplinary proceedings against the public official if the Commission makes a finding that the public official engaged in or attempted to engage in corrupt conduct. So if you give false or misleading evidence, the objecting to answering a question or to producing an item will not protect you, and a penalty for giving false or misleading evidence can be, as I've said, imprisonment for up to five years. It's a very serious matter to give false or misleading evidence to the Commission, and if convicted of that offence, a person can be sentenced to substantial prison terms. Do you understand that?---Yes, I do.

40 Very well. I now make that declaration. Pursuant to section 38 of the Independent Commission Against Corruption Act, I declare that all answers given by this witness and all documents and things produced by him during the course of his evidence at this public inquiry are to be regarded as having been given or produced on objection and there is no need for him to make objection in respect of any particular answer given or document or thing produced.

DIRECTION AS TO OBJECTIONS BY WITNESS: PURSUANT TO SECTION 38 OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT, I DECLARE THAT ALL ANSWERS GIVEN BY THIS WITNESS AND ALL DOCUMENTS AND THINGS PRODUCED BY HIM DURING THE COURSE OF HIS EVIDENCE AT THIS PUBLIC INQUIRY ARE TO BE REGARDED AS HAVING BEEN GIVEN OR PRODUCED ON OBJECTION AND THERE IS NO NEED FOR HIM TO MAKE OBJECTION IN RESPECT OF ANY PARTICULAR ANSWER GIVEN OR DOCUMENT OR THING
10 **PRODUCED.**

THE COMMISSIONER: Yes, Mr Robertson.

MR ROBERTSON: Can you state your full name, please, sir?---Michael Alan Gerard Toohey.

Might just need you to just get a little bit closer to the microphone on the right-hand side, if you don't mind.---Oh, on the right-hand side.
20

You're currently a director within the Office of Sport, is that right?---Yes, that is correct.

Your responsibilities are associated with the Greater Sydney region, is that right?---That's correct.

The Office of Sport is presently an executive agency related to the Department of Communities and Justice, is that right?---That is correct.

30 And that's regarded as part of the Stronger Communities Cluster within government, is that right?---That is correct.

And so is this right, the departments and agencies and indeed some statutory corporations within the NSW Government are organised into a series of clusters, is that right?---That's correct.

And one of those clusters, the one to which the Office of Sport is related, is the Stronger Communities Cluster, is that right?---That's correct.

40 And so does that mean that, in practice, a particular agency may have both a portfolio minister – for example, the Minister for Sport – and also a cluster minister, who may be the same or may be different to the portfolio minister?---That's correct.

Is it right that the Office of Sport in the past has been related to the Department of Premier and Cabinet?---In the past, yes.

Also in the past, for I think a fairly short period, related to the Department of Industry.---Correct, yes.

Is it right that you've worked in government for all of your professional career?---That's correct, yes.

It's included roles in Treasury, is that right?---Yes.

10 I think you were a principal adviser for agency procurement in 2007-2008, is that right?---Yes, I'm trying to remember the job. My position changed while I was in Treasury. Yes, that was part of it.

But at least for a substantial period of time in your time in Treasury, you were involved in procurement, is that right?---Yes, that's correct.

And I think at one point in time you were an Acting Director of Infrastructure and Procurement, is that right?---That's correct.

20 In 2009, you moved to the Department of Premier and Cabinet, is that right?---Correct.

And in 2016, you moved to the Office for Sport. Sorry, I should say the Office of Sport.---Originally – yep, sorry. Yeah, I was originally seconded there but have since taken up a permanent position.

30 So at least in the first instance, from October of 2016, you were physically seated in the Office of Sport, albeit by way of a secondment from the Department of Premier and Cabinet, is that right?---Yeah, I can't remember if it was September or October, but it was around that time, yeah.

Now, at the point at which you first started within the Office of Sport, that was an executive agency within the Department of Premier and Cabinet, is that right?---Correct.

And so I take it it was therefore part of the Premier and Cabinet Cluster at that point in time?---That's, yes.

40 So therefore the cluster minister, at least when you first joined in 2016, was Premier Baird, is that right?---Yes.

But the portfolio minister was the Minister for Sport, the Honourable Stuart Ayres, is that right?---When I, yeah, when I joined, yes.

When you first joined.---Yes.

It's obviously changed since. Minister Ward, I think, is the portfolio minister, is that right?---That's correct, yes.

The Treasurer, at that point in time when you first joined the Office of Sport, was Ms Berejiklian, is that right?---That's correct.

And when you first joined the Office of Sport, you joined as a director within that agency, is that right?---That's correct.

And I think your first responsibilities were within stadia network implementation, do I have that right?---That's correct.

10 You reported to Mr Paul Doorn, is that right?---That's correct.

At that point in time, he was an executive director within the Office of Sport, is that right?---correct.

And Mr Doorn I think reported to Mr Matt Miller, who, at that point in time, was the Chief Executive Officer of the Office of Sport, is that right?---Yes, that's correct.

20 And then in turn, I take it, Mr Miller, as CEO would report to Minister Ayres as the portfolio minister, is that right?---Yes, that's correct.

You hold an Executive Master of Public Administration, is that right? ---Yes, that's correct.

And your other qualifications include a Graduate Diploma in Public Sector Management from Curtin University?---That's correct.

30 Now, I take it with both that academic experience and the professional experience that we've gone through, you have quite a bit of experience with government processes for procurement?---Yes, that's correct.

And I take it that you also have at least a general familiarity with the process of making submissions to Cabinet or committees of Cabinet?---Yes, I do.

You're aware, I take it, this Commission is investigating grant funding that was promised and/or awarded to the Australian Clay Target Association in 2016 and 2017?---Yes, I am.

40 When did you first become aware that consideration was being given within government to either promise or award funding to the Australian Clay Target Association?---The, the first I became aware of it, there was a reference in an email from Paul Doorn to myself and other directors about seeking budget bids for an upcoming State Budget, and it's referred to, there's, there's a line in there, I can't remember the exact wording, but there's a line in there about the provision of funds for the Clay Target, Clay Target, excuse me, clubhouse in Wagga.

So let me try and assist here. I'll put up on the screen volume 26.1, page 187. Mr Toohey, don't worry about those reference numbers. That's just to assist those who are assisting the Commission.---Thank you.

And for those following along the live stream, you won't see the documents that I'm showing to Mr Toohey, although to the extent that I tender them and that they're received in evidence, they'll become available on the Commission's public website. Can we zoom in, please, on the top half of page 187 of volume 26.1. Now, do you see there, Mr Toohey, an email from Mr Doorn entitled "New Policy Proposals", 27 October, 2016?---Yes, I do.

Is that the email to which you were referring a moment ago?---Yes, yes, it is.

Now this, the subject heading of this email refers to a new policy proposal. Can you just explain in general terms what a new policy proposal is, at least as you understood it, within the Office of Sport?---A new policy proposal is essentially a bid to be lodged as part of the State Budget process. So there's a procedure around it. It's an internal agency procedure. Anyway, it, it goes through it, but it starts off with the idea that the public servants nominate projects of interest or that they've been advised by the ministerial office that those projects should be proposed for the next year. Nominating doesn't guarantee them, of course. It just puts them into the mix for the State Budget process.

It's, I think, one of the terms you used in answer to a previous question was a budget bid. When you use the term budget bid, do you include in that this concept of a new policy proposal?---Yes, yeah, it's, yeah, it was, from memory it was Treasury's term for a budget bid, a State Budget bid.

And so in effect, is this right, these new policy proposals are a series of proposals for possible funding that, in the first instance, are being put together at the agency level but are ultimately being submitted as part of ordinary budgetary processes?---Yeah, so in essence that's correct. It's whether or not they survive to the final submission is, it's a long road but, yeah, but at this point they'd just be identified as potentials.

And so in terms of that long road, the fact that it starts on the long road, I take it, doesn't give any guarantee at all in terms of actual funding being provided in due course?---Absolutely not. It's - - -

I take it that, at least in your experience, there is always more new policy proposals put forward than are ultimately successful in getting funding? ---Yes, it's, yes, I, that's accurate.

And so is it right that, at least from the agency level, these new policy proposals are proposals that the agency think might be good proposals but

won't necessarily involve or result in funding for the particular proposals?
---Yeah, yes, that's correct. The level of agency support depends. At this stage there's been no formal business case or any sort of detailed work that – this is very much at the early idea proposal stage. They haven't – to get to the start of the NPP process, there hasn't been any rigorous analysis. It's just a collection of ideas.

10 And I take it that, at least as a matter of practice, the new policy proposals process, at least in your experience, is one that will occur over a series of many months?---Oh, yes. Oh, yeah. Yeah.

And so looking at the one on the screen, for example, this is a request to start thinking about NPPs for next year. I take it that's a reference to the 2017-2018 budget year. Is that how you understood Mr Doorn?---That's, that's what I understood, yes.

20 So next year's not next calendar year, October to January, it's next financial year, July 2017 to June of 2018?---Absolutely, in line with the State Budget process.

And so this is, in effect, I think you called it the idea stage, but there's then, what, a further process where there might be some refinement of the particular new policy proposals that are put forward?---That is, in, in my experience, there is a long process to, to go through to make sure that a concept is feasible and that it, it stacks up and that process is described in Treasury guidelines that were available.

30 In your experience, is there some kind of competitive ranking-type process that applies at the agency level in putting forward or at least having a list of new policy proposals, by which I mean, this is priority 1, 2, 3, 4, 5, down to whatever number, or are these simply just ideas that are put forward and it's left to other people to in effect rank them or decide whether they're to be funded or not?---At, at this stage, if we just go back to, you know, 27 October, 2016, at this stage they're just ideas but the, there is a point later in the, in the process, and it just depends on the specific, the specifics of the project, and I'll explain that in a second, where they're then ranked. At this point it's just, you know, the net's cast for ideas. If we, the, the work I was brought into Office of Sport to do was around stadia and, for example, in, in those, there was a considerable amount of analysis that was done
40 beforehand. Now, it's a much bigger, they, they are much bigger and much more complicated projects but those, there's, and it's also they reflect government priorities and, and policies of course, but there's a lot more analyses that goes into, into those proposals, just by virtue of their size and profile compared to these. But there is a ranking yet to occur with these, these are just ideas.

And so is it right to say that, at least in your experience in the new policy proposals process, there will be a ranking process that will ultimately be

performed at the agency level to say, in effect, here are our new policy proposal ideas but we're ranking them in a particular order?---That's, that's right. The, the, yes, the agency will rank them, it will be done, in my experience, in consultation with the, the ministerial office and so there's a sense of what, what does the minister want? I mean, the, the agency's there to serve the minister and so ultimately that's where it goes. The agency may bring, if I can call it technical expertise around economic analysis, around the feasibility of delivery, a whole range of points, but ultimately it's the, the minister's office is, had the call but you would always present it with the best advice that you could in the time you had.

And so then in the case of an agency like the Office of Sport, which is an executive agency related to one of the departments, does the ranked new policy proposals go straight from the agency into the Treasury process or do they find their way back into what I might call the cluster process?---Oh - - -

In your experience at least.---In, in my experience it would go – I'm just, the agency would develop them, there would be discussions with the, in an ordinary process, discussion with the minister's office and that may just be in formal discussions or brought as part of, you know, regular meetings between the agency head and the, the, the, the minister's office or their advisers and depending – it's really just a question at the, of the chief executive, whether or not they would want to, in formal briefings with the, the cluster head and that process as well. Then, and that all, all, those discussions showed the ranking and then you would go to the formal, submitting them through the Treasury process.

And when you say the formal submitting in the Treasury process, that's a submission of the ranked new policy proposals from the agency to Treasury?---They did not shortlist them. There, there may have been somebody that just completely culled off the list.

And obviously enough that doesn't guarantee that all or indeed any of the policy proposals would be funded at all as part of all the budgetary processes?---No, no, no, it doesn't, no.

And I take in your experience it's never the case that every new policy proposal is ultimately the subject of funding?---No. Absolutely no.

And indeed that's one of the purposes of the ranking process, with a view to at least hoping that there's funding for things at the top of the ranking process, even if there's not funding available for ones towards the bottom of the ranking process.---That's right. I mean, it has to reflect, ultimately, the priorities of the government of the day. Yep.

And so I showed you that email before, 27 October, 2016.---Yep.

Is that your first recollection of there being any consideration to funding for the Australian Clay Target Association in relation to their facilities?---Yes, it is. Yeah, I, I don't, I don't recall ever hearing of it before then.

Commissioner, I tender the email from Mr Doorn to Mr Toohey and others, 27 October, 2016, 4.06pm.

THE COMMISSIONER: That will be Exhibit 377.

10

#EXH-377 – EMAIL FROM PAUL DOORN TO MICHAEL TOOHEY, MICHAEL BANGEL AND JOHN EGAN REGARDING NEW POLICY PROPOSALS DATED 27 OCTOBER 2016 AT 4.06PM

20

MR ROBERTSON: What's your next recollection after 27 October, 2016 of any involvement in any proposal for funding in relation to the Australian Clay Target Association?---It was the, the middle of November. It was either the 14th or the 15th of November. I, I can't recall the exact date, I'm sorry. I was asked by Mr Doorn to put together an ERC, Expenditure Review Committee, subcommittee of Cabinet, submission that the minister's office wanted it completed by that Friday. And, yeah, on the second, the granting of funds for the Australian Clay Target Association's clubhouse at Wagga Wagga.

So can I show you, please, volume 26.1, page 213, which may well be the request to which you just referred. This is an email of Tuesday, the 15th of November, 2016.---Right.

30

From Mr Doorn to you. Can we zoom in to the top half of the screen first. You'll see there Mr Doorn says, "Fancy a challenge? MO has requested a draft ERC submission today!" See that there?---Yeah, today, sorry, it wasn't by the end of the week.

Now, let's just translate that MO is minister's office, I take it?---That's right.

40

And that's a reference to the portfolio minister, Minister Ayres, is that right?---That's what I took it to mean, yes.

"Has requested a draft ERC submission". That's a reference to the Expenditure Review Committee of Cabinet, is that right?---Yeah, that's, that's how I interpret it, yes.

And then he says "today", "today" exclamation mark.---Yep.

What, as you understood it, was the urgency in putting together an ERC submission in a single day?---I didn't understand the urgency. It was – but

if, if the minister's office had requested it, then I would do my best endeavours to make that.

In your experience, is it a fairly usual or unusual thing to be asked to prepare a draft ERC submission within a day?---Extremely unusual.

10 Has it happened before?---I don't remember it happening before. There, there is, there is a Cabinet, which includes Cabinet subcommittee, processes. There were – which was publicly published and available. And that, in a perfect world, that allows due time for things to be developed and proper agency consultation and any other work that's got to go into, to feed into that. Now, sometimes that process is a pressing matter. That process can be truncated so it doesn't always, you know, run to what is the publicly available policy, and that's just how it goes. But for something to be done in a day, it was unusual circumstances.

20 Well, do you recall ever being asked to prepare a draft ERC submission or other Cabinet or Cabinet committee submission within a day in your extensive experience in the public service?---No, I, I, I can't recall.

And do we take it that this suggestion, preparing a draft ERC submission, was to adopt an alternative approach to the new policy proposals approach that you and I discussed? In other words, let's go straight to the ERC, the Expenditure Review Committee, with a view to getting money, as opposed to going through the ordinary budget processes involving new policy proposals?---That's how I interpreted it, yes. Sorry, as you're suggesting, yeah.

30 Can we have on the screen, please, the NSW Cabinet system document. I just want to ask you some questions about the ordinary Cabinet submissions processes.---Yeah. Yeah.

So I've just put up on the screen a currently publicly available summary of what's described as the NSW Cabinet system. Can you see that there on the screen?---Yes, I can.

And if you have a look on the left-hand side, with the words going upwards in black text against a grey background, it says "in eCabinet".---Yes.

40 Do you see that there?---Yes.

And that's an electronic system that manages the process of Cabinet submissions and Cabinet decisions. Is that right?---That's correct.

And do we take it from this document in your experience that the process of putting forward submissions and recording the decisions in relation to decisions of Cabinet and committees of Cabinet is, by and large, managed

through that eCabinet system?---That's correct, yeah. That's definitely my experience.

And if you just have a look at the light blue boxes in the section above the red line, do you see there's a series of stages. One's called Draft Submission Stage, Final Submission Stage, Lodgement, and do you see in the light blue boxes "minimum five days, minimum two days, minimum six days before the meeting"?---Yes.

10 Do you see all that there?---Yes, I can.

Is the document that we see on the screen, does that represent the approach to draft and final submissions to Cabinet and Cabinet committees as you understand it as a member of the public service?---That, it does, yes.

And this is a document that is said to represent the current practice. Does it also represent the practice as you recall it back in 2016 when you were asked by Mr Doorn to prepare a draft ERC submission?---Yes, it does.

20 And so just to understand that system, underneath the red line, it says "outside eCabinet" then it says "pre-draft, policy planning, project management, research, data connection, analysis, impact assessment, targeted consultation" et cetera. Do you see that there?---Yes, I do.

And so is it the case that at least in the ordinary course in your experience before one even gets to the process of preparing a draft submission, there's a whole lot of other work that will ordinarily get done in terms of things like policy planning, project management, research, data collection, analysis, impact assessment, targeted consultation, et cetera?---Definitely. It's the
30 due diligence on the proposal.

To your understanding, did any of that kind of work, policy planning, project management, et cetera, occur prior to the point in time that you were asked by Mr Doorn to prepare a draft ERC submission in relation to what I'm going to call the ACTA project?---Okay. I, I wasn't aware of it on the time that, that I was asked. Attached to the email was what was purported to be a business case prepared by GHD. I thought this was unusual because my understanding was that GHD was an engineering firm, engineering, a multinational engineering company, excuse me. And then when I read that
40 document, I thought that it was clear that what's in the blue box here under Pre-Draft, none of that had occurred to what I thought was the standard level of thoroughness.

Now, you referred to a document that you said purported to be a business case. Why did you qualify it in that fashion? Why did you say it purported to be a business case as opposed to, for example, was a business case?
---Yeah. The, I, I had, I had done some work when I was Treasury in drafting what became the, the guide to agencies on, on business cases. And

there, there was a wealth of material that was available to, to help agencies and consultancies prepare a business case. They would have, they have a, a range of, of contents that, you know, Treasury and the, the Secretary of Treasury at the time thought were material to understanding any investment proposal. The, the GHD document didn't have any, any of those sections. So, and there were material, I thought, to the, to the discussion or any assessment of the investment proposal. So, for example, there wasn't a project plan in there. We had no idea of how long this project would take to, to deliver. There wasn't a – sorry, I'm just thinking. There wasn't any, there wasn't any real design work in there as well. There was, like, there was a, a, like a map of the area where the building was, the proposed building, excuse me, was, was going to be built but, but there was nothing to substantiate the costs or any of the, any of those standard work. No risk analysis, no options analysis. The economic analysis was, was somewhat optimistic, put it that way, and then the, the business case, the, the rationale for going forward, as proposed by GHD, was, it, it didn't, it, it didn't stack up, it didn't make sense. It, it, it, it was based, broadly speaking, on an influx of tourism particularly from memory, international tourism but it was talking about one international event every 12 years. Like, it just, so it didn't fit the, the template and I don't mean by that, you know, it wasn't done in, you know, a standard Word document, that's not it at all, but there, there are key sections that Treasury expected, and Treasury policy was around the business case, that this document didn't comply with.

And you referred to an international event every 12 years. Do we take it from that that the proposal, as you understood it, was to provide some funding to build a facility that would be able to, as it were, win that international event or was it more in the nature of a "nice to have" in relation to an international event that was already going to happen?

---Initially, if we go back to November '15, both, at that point, I wasn't, I, I didn't know whether or not it was going to be for a bid. I, I discovered in the subsequent weeks after that it was, it was, there was an idea being thrown around that it was going to be relevant for bringing the Invictus Games to, to Sydney and also for a World Championships in 2018, DTL, Down the Line, which is a type of shotgun event, I understand, and it was presented in a way that this was, that this was going to, between the day I was given the work and by the end of the week, that week, I discovered that it was somehow related to, to getting those events but then I found out we already had one for the DTL event, we already got it. It, it wasn't relevant to it at all and in fact had construction commenced there would be the question of, well, could you host it there? I mean, it's going to be a building site. And then, but the, the, the bigger claim was with, for hosting the Invictus Games. I can't remember the status of, of Sydney's bid for the Invictus Games at that point but more material was that Invictus Games doesn't have shooting events. So it was, the claim that this was somehow related to the bid was imaginative.

And so in relation to the kinds of things that you're now talking about, getting a business case right, analysing what it's needed for and things of that kind, is that ordinarily something that is done after a draft submission is prepared or as part of a draft submission being prepared for Cabinet or a committee of Cabinet or is that something that is ordinarily, at least in your experience, done in advance of matters of that kind being prepared?---Oh, ordinarily done in advance.

10 So if we put the New South Wales Cabinet system document back on the screen, do we take it that the kinds of issues that you're now referring to would ordinarily be dealt with in what in this document's described as the pre-draft stage?---Definitely.

As distinct from doing it in, for example, the draft submission stage?---Yep. definitely.

20 And can you just explain what the draft submission stage is as compared with the final submission stage in your experience?---Okay, the, the, the draft, the draft submission, if, if you can just go – imagine we've got to the point where the agency has finished drafting the, drafting the submission. It has, there's been consultation with the, the minister's office. There may be informal consultation at this point with, with other agencies. And then there's an eCabinet process and it's lodged in eCabinet. At that, the purpose of the draft submission stage is to get feedback from other agencies about whether they would support it, or other clusters, sorry, other clusters, whether they're going to support it or whether or not there are weaknesses which have escaped the, the quality control process to date that need to be addressed. You know, is there something that, through all the work that's gone into it, that's been overlooked or hasn't been given sufficient weight.
30 So the draft submission stage is agency feedback on the, on the proposal. And then the, the next, so that feedback is taken on board and it, it usually results in some refinement of the submission. You usually, agencies usually have five working days to respond. Responses are all managed in the eCabinet process. It's taken onboard. It's lodged. There's the whole lodgement process managed through the Cabinet Secretary of Premier and Cabinet. And then it goes to final submission stage. And the way we used to regard that, when I was at DPC, is the final submission stage is the agency advice that they would give to their respective ministers as to whether or not it should be supported. So the, so the agency feedback at
40 that point is, typically, much more abbreviated than the feedback you've given at the, or received rather, at the, at the draft submission stage. It's usually something like "supported", "not supported" or "should take on board this". So that's, but that's the, the point of the consultation.

And is this right, at least one of the purposes, as you understand it, between having the draft submission stage and the final submission stage separately is to – as separate stages – is to do the thing that we can see towards the bottom of the screen, where it says, "Redraft, you may redraft the

submission to take into account comments that have been given at the draft submission stage.”---Yeah, comments from the clusters, yeah, that’s correct.

And so the final submission stage is, in effect, the final document from the agency level but has taken into account the submissions, or the comments at least, that have been provided at the draft submission stage, is that right?
---That’s correct, yes.

10 And then you’ll see underneath the final submissions stage document there’s a thing that says “coordinated comments”, do you see that there?
---Yes, I can.

What’s that a reference to, as you understand it?---It’s a reference to the comments from the respective clusters about whether or not, in essence, whether or not they are – that is their advice that they’re giving to the minister for the Cabinet or the Cabinet subcommittee meeting, whether or not the, the submissions should be supported.

20 And that then forms part of what appears in the final submission as uploaded to eCabinet, is that right?---It, it appears in the advice. I, I, I haven’t worked in Cabinet secretariat, so I can’t tell you the exact form it, it takes, but it is certainly a file that is accessible on eCabinet.

It’s at least a file that you, at the agency level, make sure that you upload to the eCabinet system, is that right?---Ultimately, yes, it’s the Cabinet secretariat that does the uploading, yeah.

30 That you arrange to cause the Cabinet secretariat to upload?---Yep, sorry, I’m not – yeah, yeah.

And then you see the next box, “lodgement”.---Yep.

It says “minimum six days before the meeting”. Do you see that there?
---Yes, I can.

40 And is that consistent with at least your recollection of the practice when you’ve been involved, namely that at least in the ordinary course, the final submissions, final Cabinet submission or committee of Cabinet submission, would be expected to be lodged a minimum of six days before the relevant meeting?---Yeah, in the ordinary course, yep. If, if there’s a pressing matter, my experience is – but, you know, that sometimes it’s, it’s not quite as long as this, but it, there’s, if there’s a genuine urgency in it, then it, it may not be six days but it would, but there is a time that is allowed for each of these three key steps, yeah, draft submission, final submission and lodgement.

Now, if you add the minimum six days plus five days plus two days, you get 13 days.---13 days.

In your experience is 13 days a fairly standard period between draft submission and lodgement or is that more in the nature of a minimum and it's at least more common in your experience for it to be a rather more lengthy, or at least a little bit more lengthy, process?---It, in my, from memory and in my experience, it's fairly typical. It can be, it can be longer. If an urgent item comes up, it can push a routine submission off the, off the agenda but I'm certainly aware of that happening a couple of times when I was at Premier and Cabinet, yeah, but typically that, I mean it's certainly
10 what everyone aims for and there's a lot of pressure to make those, give people enough time to consider it.

Including to get the kind of inter-cluster consultation that you referred to a little while ago, is that right?---Absolutely.

And then the last step in the process above the red line at least is the Cabinet or committee meeting and decision. Now in terms of the meeting, at least in your experience, does the submission that is lodged, does that find its way
20 onto an agenda in the ordinary course or does some person need to decide that this particular proposal will go on the agenda for the meeting that's going to happen in the first week of, say April, or whenever it's been scheduled to take place?---My understanding, because I haven't had any direct involvement, my understanding is that the agenda is essentially set, excuse me, between the Secretary of DPC, as in effect a Cabinet secretary, in effect, or the, either the Premier or the Treasurer chairing. My involvement has mainly been with either full Cabinet or ERC.

Well, focusing on the ERC because that's what Mr Doorn was asking you to prepare, do you have any knowledge as to how something gets on the
30 agenda for an ERC meeting or does it just happen in the ordinary course or does some person need to decide this particular submission that's been made by the Office of Sport is going to go on a particular agenda for a particular meeting?---In the ordinary course it, ultimately it's up to the Treasurer what goes on the agenda for a particular meeting, ERC that is.

And as at 2016 the Treasurer was Ms Berejiklian, is that right?---That's correct, that's my understanding, recollection.

Commissioner I tender the document on the screen being the document
40 entitled NSW Cabinet System.

THE COMMISSIONER: Exhibit 378.

#EXH-378 - NSW CABINET SYSTEM

MR ROBERTSON: If we go back, please, to page 213 item 26.1. We'll go back, Mr Toohey, to the email of 15 November, 2016 you and I were discussing about 20 minutes or so ago, and we'll zoom into the top half of the page first. I've shown you the email from Mr Doorn to you. If we just scroll down a little bit, I'll show you the context, this was forwarded as part of the email to you although the original email wasn't sent to you.---Yes.

It says, "Dear colleagues, Chris Hall called this morning," do you see that there?---Yes I can.

10

Mr Hall at that point in time was the chief of staff to Minister Ayres, is that right?---Yes, that's correct.

To request OOS, I assume that's Office of Sport?---Yes.

"Urgently develop a submission for ERC requesting funds for the upgrade to the Australian Clay Target Association's Club House and site in Wagga Wagga," do you see that there?---Yes.

20 Were you ever given any explanation as to why an ERC submission needed to be prepared urgently, at least from the perspective of Minister Ayres' office?---No I wasn't.

Can you see, "we've previously recommended that this issue be dealt with in the NPP process for 2017/2018 budget", do you see that there?---Yes.

And so, is that a reference to the more standard budgetary processes of the kind that you and I have discussed at the start of your examination?---Yes, yes.

30

Is this fair, that would be the ordinary way in which one might seek to get funding in relation to something like the Australian Clay Target Association's clubhouse, put it through the new policy proposals process as, what I think you've described as, a budget bid and hope that the budget bid is ultimately successful?---Yes, that's correct.

And so the idea of going, as it were, directly to ERC is at least an exception or alternative approach adopted in this particular case?---Yes, that's correct.

40 Then if you have a look at the next sentence, apparently the announcement of the Invictus Games to be hosted in Sydney has ACT, reference to Australian Clay Target, excited that they may be able to host this event at their site, do you see that there?---Yes, I can.

And then he says, this is Mr Doorn, to the series of individuals there, "FYI, our own Sydney International Shooting Centre was the host of the clay target shooting discipline at the Sydney 2000 Olympics." See that there?---Yes, I do.

So was that a factor, at least in your mind as a public servant, that might be relevant to considering whether or not the Clay Target Association's proposal should be funded, namely that there was in fact an Olympic-standard facility, and indeed is an Olympic facility in greater Sydney in respect of which shooting disciplines could be adopted?---It, it, it wasn't a factor in my response. It, the, to be honest the, the question was, I, I was focusing on getting an ERC submission ready by, by that day. At, at this point I hadn't, when I got the email, I hadn't yet had time to read the, the --
10 well, because they hadn't seen before the GHD submission or the letter from the Clay Target Association that was attached to the email. Right then when I got it, it was like, okay, I've got a lot of, lot of work to do in a very short period of time.

But is this right, the existence of a shooting centre that was of at least Olympic quality as at the Sydney 2000 Olympics was a factor that you were taking into account as a public servant as to whether the ACTA's proposal was one that should be funded?---It would be, yeah, it, it, in my view, it is, if we go back to, you know, what, what do you expect in the business case,
20 one is that what are the options to investment? You know, Sydney had the, the Sydney International Shooting Centre, which hosted shotgun events. It would be an option for, for funding as opposed to the, the Wagga Wagga clubhouse. It's, it definitely would have to be a -- an adequate business case would have considered that as an option.

Is one of the things that would expect to be dealt with in a, either in a business case itself or at least allied to a business case is whether there's a benefit-to-cost ratio in relation to a particular funding proposal of 1 or more than 1?---Absolutely. That's, that's, yeah, it should, it should be, at, at least,
30 at least 1. There, there can be discussions around methodology but it should always be at least, if not greater than, 1.

And so just to understand what a business-to-cost ratio is, that's an analysis to work out what the benefit to the state would be in relation to a particular proposal as compared with the cost of pursuing that proposal, is that right? ---Yeah. The BCR, it's benefit-to-cost ration, not business-to-cost ratio.

I'm so sorry.---No, sorry - - -

40 That's what I meant, I may not have said that. I apologise.---Yeah. Sorry. The, yeah, the, the, essentially that the benefits, the benefits are, are quantified and that they outweigh the costs over the, over the lifecycle of, of the, of the asset.

And so is this right, if the benefit-to-cost ratio is less than 1, it is costing the state more money than the benefit it's receiving from the expenditure of funds, is that right?---Yes. The, the, the government of the day may decide that there are other intangible benefits for the reason for proceeding with the

project but typically, from a, the purpose of the business case, is to qualify the BCR to make, to identify whether or not the, the, the benefits outweigh the costs. A, a, a project can proceed, proceed with a BCR less than 1 but there has to be, the reasons are usually understood, put it, put it that way.

And just to be clear, that's what a BCR is attempting to estimate, are the benefits to the state of a particular proposal more than or less than the cost?
---Correct, yeah.

10 Obviously enough there's a whole lot of analysis you need to do in order to work out that magic number.---Certainly, yes, yeah.

But at the end of the day, what you're seeking to demonstrate is that the benefits to the state outweigh the cost to the state, is that right?---That there's a return on investment, yeah.

And is this right, at least so far as your experience in the New South Wales public service in concerned, it's focused on the benefits to the state not to, for example, Wagga Wagga or greater Sydney or any particular part within
20 the state?---Absolutely, yeah. You have to look at it from the perspective of the state economy, not the local economy.

In the thing you describe as the purported business case that was available in relation to what I'm calling the ACTA proposal, was there any analysis, as you recall it, in relation to a business to cost, a - - -?---BCR.

- - - a BCR, a benefit-to-cost ratio?---Yeah, there was. Yeah. Up, up towards the back of the document, I can't remember, but there was, yeah. GHD had performed a, a BCR analysis.

30 Was that, as you saw it, a satisfactory business to cost ratio analysis?
---Well, the, the number was, from memory, 2.3 or 2.3 something, I, I can't remember. It was, but the methodology was inadequate.

Do you recall any particular aspects of the methodology that were, as you saw it, inadequate?---The, yeah. The, the, from, the economic benefit was, from memory, was, was predicated on increased tourism to the area, so there's not a direct financial benefit per se but there, there's a, a broader local economic benefit from increased tourism. But the assumptions
40 underlying all of that suggested, as much as anything else, that it was, it was cannibalising local events. So even if one took the view that it was just the impact on the local economy, which is not the correct view, but even if, if, if, just allowing for that, the question is why, why spend the money on this, then you get to the whole, all of the, the assumptions around what it meant by, for increased, particularly international travel I thought were, were very optimistic, especially given, I, from memory, I, I think it said that there's no, there was no increase, no real increase in overseas visitation but somehow people would be staying longer, but didn't explain

any of those assumptions, so that there's no change to the event calendar, so why would people stay longer just for, because of a, you know, an upgraded clubhouse? Then when you get to the costs side of it, this is where I thought it was really flawed, in, in my personal view, that the, we had, because there, there was no design really other than just this kind of aerial drawing on a, on a page, there was no detailed design therefore there was no basis to know whether or not that the, the \$6.7 million was even correct, what that meant for project contingency, a whole range of detail in, in that, so were the costs even correct? And then there was, there was no life cycle cost, that is, what are the costs to operate the venue and, and that, as well? So it, there was no way of knowing that the costs were right, were robust. There was no indication – what, what normally happens in a business case, so usually there's two stages of, of a business case. There's a preliminary business case, and at that point, Treasury policy at the time said that they, the estimated cost could be at the P50 level, and that means that you're 50 per cent, the probability of them being correct was 50 per cent. So it's still a generous margin. But the time you get to a final submission, the cost should be at the P90 level, that is, you're 90 per cent that the, the, the costs are within the specified range. None of that was in the GHD business case. So it was, it was quite deficient on what I thought were material matters. We didn't even, the other thing that, it was missing in all of it is that we didn't even know how the, the project was, was going to be managed. The, the risk with, that I saw it, in my, my professional opinion, the risks that I saw that that meant was that government could put all this money into, into something but we had no idea whether or not it would be delivered, let alone, even if we, say, you know, economically does it stack up, the question was could it be completed in time? Now, I'm not saying that it couldn't be but there was no evidence provided as part of an ERC submission that this was a feasible project.

And, in your experience, are these kinds of issues that you're now raising, issues that are ordinarily sorted out after a draft ERC submission is prepared or before it even gets to the point of preparing a draft ERC submission? ---before, it should be done beforehand.

And the kinds of analyses that you're talking about, you referred to a \$6.7 million figure. Was that a reference to your expectation or at least the suggestion as to how much the new clubhouse facility would cost to build? ---Yeah, for – it might have been in the, in the, the GHD submission. I can't remember where. But, like, on November 15, whenever it was, when Paul Doorn sent the email, the estimated cost was \$6.7 million to do, to do the clubhouse work.

But at least in your experience, would the kind of analysis that you're now talking about – proper business case rather than a purported one, benefit-to-cost ratio analyses and things of that kind – ordinarily be performed in relation to a project of that kind of magnitude?---Absolutely.

Six or \$7 million type figure?---Absolutely. You, you, if the numbers are - -
-

Keep going.---I'm sorry. If for no other reason, sooner or later you have to go to market to, you know, you know, you go through a tender process to get the company to build it, and there was even, the documentation for that would have been sufficient to develop a (not transcribable) cost, and none of that had been presented in the GHD business case.

10 But I take it the kind of detailed analyses that you're now talking about would not necessarily be done in relation to every funding proposal. For example, if it's only \$10,000 or \$30,000 - - -?---No.

- - - one's not going to spend time, effort and money on doing that level of rigour, have I got that right?---Yeah, yeah, that's, yeah.

20 But for a project of this kind of level of potential funding, six or so million dollars, \$6.7 million dollars was the figure you identified before, you would expect, in your experience as a lifelong public servant, that kind of analysis would be done before it even gets to the draft ERC stage, is that right?
---Absolutely.

And can we go, please, to page 235 of volume 26.1. I just want to show you one of the tables within what you described as the purported business case. And can we please zoom in on the bottom half of that page. I think this is one of the issues that you were drawing attention to a little while ago. Can we just zoom in to the bottom half of the page.---Oh, here we go. Yes.

30 I think you just said "here we go". What memory did that jog when you saw that up on the screen?---Oh, this is from the GHD business case. We - -
-

Well, let me ask it this way.---Yeah, sorry.

Just so we understand this document, this is, is this right, this is in effect saying that providing the funding that's proposed would not increase the number of shooting events on a national level or a state level, is that right?
---That's how I interpreted, yeah.

40 And so the way one should produce at least inputs or a BCR is to prepare a base case versus a project or proposal case, is that right?---Yeah, yes, that's standard.

In other words, compare doing nothing against doing something, is that right?---Yeah, that, that's correct.

And so here the doing nothing and doing something wasn't suggested to change the number of shooting events either at a national or a state level. Is

that how we read this table, at least as you understand it?---That's how I interpreted it, yes.

And then if you have a look at the international one, it says "zero to zero" but just note there's a very tiny footnote 8 near the zero.---Yep.

And if we can just scan down to the bottom of the page, there's a reference at the very bottom of the page to it being based on a current - - -?---Yeah.

10 - - - World DTL Championship event. You see that there?---Yes, I can.

And that's a reference, is it, to the Down the Line Championships that you referred to in a previous answer?---Yes, that's - - -

But at least as you read this document as the person putting together a draft ERC submission, did you understand this to be suggesting that there'd be an increase in international events at Wagga Wagga or that it would start at zero or perhaps one per 12 years and continue at one per 12 years?

20 ---Perhaps one per 12 years and continue one per 12 years. The, the way I interpreted this table was that there would be an increase in the number – can we just go to the, I just want to make sure I've got the, but basically an increase in the number of conferences that wasn't shooting event related.

So if we just scan up a little bit, just so we can see the top.---Yeah, yeah, yeah.

30 And so I think you've anticipated my next question, if you look on the right-hand side, underneath the heading called Conference, there is a suggested change of conferences from zero to four in the case of 400-people conferences and zero to two in the case of 800-people conferences?---Yeah, that, that's - - -

And so is the way that we read this table, at least as you understood it, that what was really being suggested here is let's build a conference facility, and that's really going to be the benefit to the state here, an increase in the number of conferences that would be held at the Wagga Wagga facility?

---That's the claim that this makes, yeah.

40 But a claim, that at least based on this document, you didn't regard as a claim that was justified by this document?---Not, not in my opinion, no.

I drew attention a little while ago to, I think you used the phrased cannibalising local events, can you just explain what you meant by that phrase?---If we accept the premise of the business case that the work's done – the upgrade, refurbishment, whatever is done – and that more events are held at the new centre, the question is where do they come from? I thought it likely that it meant that they were coming from other events that were going to, other conferences that were going to be held in Wagga Wagga

because we weren't aiming, on the basis of this table and at this point where we are, sorry, like, in November 2016, I just took this at face value, there was no way to check it, none of the independent assurances or the Treasury Gateway processes, no way to check it.

10 Presumably there was no time to do any checking when you've been asked for a draft ERC submission in a day?---No, no, no, no. So the question is, and relevant to writing the submission was this question of whether or not the BCR, the benefit-cost ratio, was credible. The only change that the
15 business case purports is as a result of the investment is an increase in the number of conferences. So then, where are they going to come from, where do those come from? I thought it was, where are those conferences being held now? I thought it was likely then as a matter of opinion that they were going to be coming from elsewhere, other events that were already scheduled to occur somewhere in Wagga Wagga, so that's what I meant by
20 cannibalising. You're taking events from one part of town to host conferences, to host them here. So that comes back to the question of, is there an increase economic return it the BCR because moving an event from one place to another doesn't increase the economy of the local economy let alone the state economy.

Well, you've just drawn a distinction between the local economy and the state economy. In your experience, which is the correct level of analysis? Is the state level for a BCR or is it the individual community level or might it depend on the circumstances?---Economically it's a state level, it's, yes, it has to benefit the state, because if you ask the question, well, what else could the money be used for just – I'm just talking very theoretically, I'm not making any other comment – you go, well, why is the investment in town A worth more than the investment in town B? And if that case can be
30 made, sure, that's fine. But to talk about it purely in terms of the benefit to Wagga Wagga is an incomplete analysis in my opinion. But then even if you drill in a little further to talk about it in terms of the benefit to the shooting, to the ACTA clubhouse, the shooting centre compared to, I'm sorry, I'm not that familiar with Wagga Wagga's conference facilities, but to another part in town, it's like, it doesn't stack up, it's like who's actually benefit, what is the benefit to the local economy then.

40 You referred to before about to invest in town A versus investing in town B, I take it the reason you're drawing attention to that is that you may have a proposal that may actually be good for a particular town in the sense that it may bring a shooting event, conferences or the like but it may simply be bringing them from down the road as it were, and so that the overall net benefit to the state might actually be zero or the benefit to the state might be in total zero even though you're spending money to get that benefit, is that the kind of thing you're talking about?---It, it, it could be because the, because the, the government may decide that that is, that is something it wants to do. I mean, it's, it's not – all a public servant can do is, is provide the advice within the methodologies and processes. The prerogative

remains with the government, of course. It's not, the, the public, the public servants don't make those decisions but they provide advice on the impact of the decisions to the best of their ability.

10 Was there ever any, what I'll call, competitive testing in relation to the ACTA proposal to say, well, should we put money to Wagga Wagga for the benefit of the Clay Target Association as opposed to some other town, say Albury, for example, in relation to getting conferences to the particular city?---Not that I'm aware of. It, it, not that I know. I'm totally unaware of it. If that occurred, I, I never saw it.

Is that one of the things that you would ordinarily expect in your experience, there to be at least some analysis with respect to that?---It, it should be part of the options analysis and the business case.

I'm just going to tender the email from Mr Doorn to Mr Toohey, 15 November, 2016, 11.21am.

20 THE COMMISSIONER: That will be Exhibit 379.

#EXH-379 – EMAIL FROM PAUL DOORN TO MICHAEL TOOHEY REGARDING ERC SUBMISSION – CLAY TARGET SHOOTING IN WAGGA DATED 15 NOVEMBER 2016 AT 11.21AM

30 MR ROBERTSON: Can we go now please to page 255 of volume 26.1? I'll show you your email in response to Mr Doorn's presentation of a challenge to you.---Do you mind if I just get a drink of water?

Of course.

THE COMMISSIONER: There should be some there, Mr Toohey.---Yeah. Sorry, I just - - -

And there should be a glass, I hope.---This is okay.

Is there a glass?---That's okay

40 MR ROBERTSON: And Commissioner, I should just make clear that my tender of what's now Exhibit 379 included the attachments to that email, which included the - - -

THE COMMISSIONER: GHD?

MR ROBERTSON: The GHD document to which I took Mr Toohey.

THE COMMISSIONER: Yes. Thank you, Mr Robertson.

MR ROBERTSON: Subject of course to the redactions in accordance with the section 112 direction that you made earlier. If we can zoom into the top-half of this page, please. You, it seems, have accepted the challenge, your dot, dot, dot, dot, or maybe ellipses and a further dot. Do we take it from that that you're saying sure in the sense of yes, it is a challenge, I'll do my best but it's an unusual thing I'm being asked to do?---That's, yes, that's a very accurate description of my response.

10 And you'll see there in the first substantive paragraph refers to the Invictus events where you say, "I'm confirming with events at DPC whether all Invictus events will be held in the Sydney metro area. Do you see that there?---Yes, I do.

Do you recall whether you made that enquiry?---Yeah, I would have. Because, yeah, at, at that point, Premier and Cabinet – and, and I knew some of the, the officers, they had, they had a, like, a state event section and yeah, I, I would have, it, it would have been a phone call. I don't think it was a, I don't recall doing it via email. It would have been a, a phone call and it
20 would have confirmed that, yeah, Invictus is just going to be held in the Sydney metro area and there's no shooting events.

So is this right, there was at least two issues with the idea that the ACTA proposal had anything to do with the Invictus Games. One was that it was being held in the Sydney metro area rather than in New South Wales more generally but secondly, the one you referred to before, namely the Invictus Games didn't have any shooting events in it at all?---No, there was no shooting events.

30 And then you say in the fourth line, "I think the ERC sub should be for funds for an independent feasibility study, preliminary business case et cetera." Do you see that there?---Yes, I - - -

And then you go on to say, "I can't see that the funds would be allocated on the basis of the attached business case." See that there?---Yes.

And so the particular – is this right, the particular issues or concerns that you had with the business case or as you put it, put forward a business case with the ones that you and I have discussed a little bit earlier today?---That's
40 correct.

It wasn't of sufficient quality or rigour to support a grant of the many millions of dollars that was being proposed, is that right?---That was my view, yes.

And so is this right, in effect what you're suggesting to Mr Doorn is, I can still do the ERC submission but by suggestion and my advice is that it should be for funding to do the kinds of analysis that should be done for a

proposed grant of this kind, as opposed to, in effect, putting the cart before the horse and finding it before you'd done that kind of analysis?---That, that was my advice to Mr Doorn. That was, yeah, my own view.

10 Was that advice ultimately taken up?---No, it wasn't. It, the, oh, later, later that day or sometime that night, I, usually when one drafts a submission in a, in a hurry, well, my practice is, is that you right the recommendations and, time permitting, an executive summary first, so there's, you can informally go, "Am I on the right track here?" I, my first cut of the, of the recommendations for this, I expressed it a little bit less informally than this
20 – more formally, rather – about doing a feasibility study. But I wasn't optimistic that that was going to get up, so I drafted that if, that funding be approved subject to a range of conditions that I thought were necessary to - -
-

20 Why were you not optimistic that that was going to get up in the sense of a feasibility study as distinct from simply agreeing to the allocation or approval of funding?---Because the, the sense that I had from, I would have had a conversation with Mr Doorn. The sense I had is that they wanted to move quick, the, coming to the minister's office, and I, at this point I hadn't spoken directly to the minister's office, but they wanted to allocate the funds and get it going, and that it was somehow related to hosting events in either later 2017 or 2018. So there was a need to get on with it.

You said "they wanted to move quickly". Who's the "they"?---Oh, I'm sorry, the minister's office.

30 Can we go, please, to page 256 of volume 26.1. And while that comes up, I tender page 255, volume 26.1, email from Mr Toohey to Mr Doorn, 15 November, 2016, 11.55am.

THE COMMISSIONER: That will be Exhibit 380.

#EXH-380 – RESPONSE EMAIL FROM MICHAEL TOOHEY TO PAUL DOORN REGARDING ERC SUBMISSION – CLAY TARGET SHOOTING IN WAGGA DATED 15 NOVEMBER 2016 AT 11.55AM WITH CABINET SUBMISSION ATTACHMENT

40

MR ROBERTSON: I'm going to show you, Mr Toohey, what I think is the document you were referring to before, at least the covering email. If we could zoom in to the top half. See there an email from you to Mr Doorn.
---Yep.

"First cut. It will be less than 10 pages."---Yep.

And then you say, “I’ll fill in the body of the proposal if this is on the right track. I’d like to confirm a couple of things with ACTA about the opex.”
---Yep.

Now, pausing there, that’s the operational expenditure, is that right?
---Operational expenditure, yep.

“And asset maintenance dollars”.---Yes.

10 See that? “But it would be better discussed with the MO and ACTA before finalising.” See that there?---Yep, yes.

So is that a reference to the fact that when one in fact builds a new facility, you might spend \$6.7 million dollars on it, perhaps more, perhaps less, but that’s not the end of it, because you need to maintain the asset and there’ll be operational costs associated with the new asset.---That’s, that’s exactly what it’s, yeah, what it’s referring to.

20 So was that one of the issues that you thought was appropriately chased down in connection with considering whether or not this particular funding suggestion should be approved?---I thought it was relevant because it’s, it’s a question of who bears the cost for an asset, you know, to keep it in a viable condition. That was, that was, that’s the issue I was thinking of when I wrote that. And there’s a second question, which is who bears the financial, well, who mitigates the financial risk if the – ‘cause at this stage we’re still talking about \$6.7 million from the NSW Government – who bears the financial risk if it’s not enough, not enough money.

30 And so was the proposal, as you understood it, that the government, in effect, would build a facility and would own and operate it and make the profits out of it? Or was it this is money that’s going to a private organisation, albeit I think a non-profit one, here’s a whole lot of money, build, build your own facility, and then you get to own it and run it and make the profits after that?---No, the latter of your two points. I was never aware that the, it was going to be a NSW Government asset. We already had the shooting centre, the Sydney International Shooting Centre.

40 So if we can then turn to the next page, you’ll see your first cut of the Cabinet submission. So the title here is Feasibility Study for Development of Infrastructure at the Australian Clay Target Association Facility in Wagga Wagga. Do you see that there?---Yes, I do.

That was you drafting that title, I take it?---Yes, yep.

And you’ll see a little bit further down it says, “Result of consultation, support.” And then highlighted. Do you see that there?---Yes.

What does that mean?---It means I hadn't deleted it. I'd picked up an old submission and done something else, and it was highlighted. Like, ordinarily you wouldn't, at this stage no consultation had occurred and it was highlighted as an area of something that we needed to do and to, to do quickly. It was, this was put together in a hurry. This was work that had to be done. It, I, it had been taken from another submission. And you can see the tracked changes. So it's written in red, so the red underlying text is that, these are the tracked changes I've made.

10 And so this was a template document, I take it - - -?---Yeah. Yeah.

- - - that you'd used to prepare the draft Cabinet submission. Is that right?
---Yeah. Yeah. Yeah.

But in relation to the field marked Result of Consultation, is that the box where one identifies the result of the consultation process that you and I discussed a little while ago - - -?---Yeah. Yeah.

20 - - - by reference to the NSW Cabinet system document?---Yeah. And it hadn't occurred at that point.

If we then turn to the next page, page 258, and zoom in on the top-half of the page.---Yeah. Here we go. Yeah.

We'll see the recommendations as you drafted them at that point in time.
---Yeah.

30 And so you've put, in effect, two options for consideration. Is that by Mr Doorn or by the minister's office or who gets to sign on your - - -?---
Ultimately, it's the minister's office at, at this, where, in drafting a, a Cabinet submission. It was to go through, through, I, I hadn't, at this point I hadn't been in contact at all with the minister's office about this submission. Mr Doorn was organising that communication. And so one was what I was suggesting as a way, given the, the, the, the quality and where we were with the GHD business case and the second one was, okay, well, if, if this doesn't get up, then we go with what's there as paragraph number 2 because there wasn't a lot of time.

40 So paragraph (i) was, in effect, your advice as to the appropriate way to progress what I've been calling the ACTA proposal. Is that right?---Yeah. Yeah.

In effect, your fallback position because you weren't confident that your advised position would get through was the proposal that an allocation be approved but subject to certain conditions that you've got in (a), (b) and (c)?---Yeah. Yeah.

Including, for example, the development of a project delivery plan in B, a confirmation of a cost estimates through a competitive tender process in A.
---Yeah.

And ACTA undertaking to meet all ongoing maintenance and operational costs and any capital costs with the facility that are greater than \$6.7 - - -?
---Can, can we just move it up on the screen, sorry?

10 Of course- - -?---Yeah. It just - - -

Can you see a little (c) now?---Yeah, yeah, yeah. That, yeah. Thank you.

And if we zoom up a little bit further, your (iii) is the notation - - -?---Yeah.

- - - or is a notation regarding the World Down The Line Clay Target Championships.---Yeah.

Do you see that there?---Yeah.

20 Now, at this point in time, when you're preparing the draft Cabinet submission or the draft ERC submission on 15 November, 2016, as you understood it, was this funding proposal or the allocation of money in the building project, was that a must-have for the purpose of the World Down the Line Clay Target Championships, in other words, we need to spend this money and do this building project so as to secure the World Down the Line Clay Target Championships or was it more in the nature of a nice to have - - -?
---My understanding, my – I'm sorry.

30 - - - we've already got this event and it would be good to have a nicer clubhouse and facility in place when we've got the event?---More the latter. I, it, on, on 15 November, it was just, like, okay, if this is what they, they hadn't identified it as, as an, as an essential and by that stage, I think they would have, and, well, I subsequently found out that they had already confirmed that they were holding the, the 2018 DTL Championships irrespective of the, of the clubhouse.

40 So is this right? At the point in time you're preparing this document, 15 November 2016, you didn't know whether or not the World Down the Line Championships had been secured for Wagga Wagga?---Not, not on, not on 15 November, no.

You ultimately found out that it had already been secured.---Yeah.

And they were going to happen, in any event, funding or not?---That's correct, yeah.

THE COMMISSIONER: Mr Toohey, in your first proposal, to fund the business case, you picked a figure of \$500,000, I think, as a suggested cost

of that exercise. How did you assess that figure?---It was a, it was a guess, based on other consulting, other - - -

Based on?---It was other, other work that had been done for projects of around that, that size. It was just, there wasn't a lot of science in it. It was just, like, based on other similar feasibility studies and business cases, this would be adequate to, an adequate provision to make for that work.

Thank you.

10

MR ROBERTSON: If you have a look, Mr Toohey, at Roman (v) towards the bottom of the screen, note that the ACTA timetable precludes the development of a feasibility study, preliminary business case and INSW Review, do you see that there?---Yes.

So at least a feasibility study and a preliminary business case is a kind of thing that you would expect to take place before one gets to a draft ERC or cabinet submission, is that right?---Yes.

20

Then it says, INSW Review, what's INSW a reference to?---Infrastructure NSW, so that was the body that had been established, well, it still exists, the purpose is, is the same, and at that point I think Infrastructure NSW was running the Gateway Reviews, so these are independent assessments of – I think they'd moved from Treasury, I think INSW was doing it. But in any sense, it's an independent review by subject matters experts about the strengths and weaknesses of a business case for a capital investment.

30

Is that another example of the kind of thing that you would ordinarily expect to be done for a project of this kind of order of magnitude, some sort of a ideally external review in relation to the particular funding proposal?
---Absolutely.

40

Can we just turn to page 259. On the following page there's an executive summary that starts on the preceding page but I just want to draw your attention to paragraph 2.7 in particular, if you look at the second sentence on paragraph 2.7, "the absence of feasibility study and because capital cost estimates have not been market tested it is unlikely that they were within the levels or robustness recommended in NSW Treasury Guidelines for a capital business case." Do you see that there?---Yes I can.

So is that a more detailed explanation of something you referred to before, namely the thing that you described as the purported business case wasn't within the levels of robustness that you would ordinarily expect and which are, as you understood it, recommended in the NSW Treasury's Guidelines for a capital business case?---Yes, that's correct, that was.

If we could then go, please, to the following page, page 260, this is still in your first cut document, if I can zoom in on the table the financial impact table, do you see a figure of \$6.7 million?---Yes.

So that was at least at that point in time the amount of money that was expected to be required for the proposal of ACTA, is that right?---That's correct.

10 But see it says capital expenditure, was this in fact capital expenditure at least from the perspective of the NSW Government or was it more in the nature of recurrent expenditure in the sense of a bit of money being paid ultimately to ACTA to build a facility that they would keep?---At this point in the submission process, that became an issue down the track. At this point in the submission process my assumption that there would be \$6.7 million capital grant to ACTA from the NSW Government, yes, capital allocation. Whether or not it was a grant becomes relevant in subsequent iterations of this submission, but for now it was just like, okay, how would it be funded, a \$6.7 million allocation in capital.

20 If we turn to the next page, please, page 261, to zoom in the top half of the page. You see the fourth question that's asked, I take it these questions are asked in the template of the Cabinet submission?---Yes, this is a standard.

So one of them is what alternatives were considered, do you see that there? ---Yes.

Ordinarily, you would expect in your experience to consider alternatives to a particular proposal?---Absolutely.

30 Are you indicating here that this was not applicable for this submission, is that right?---That's correct.

By which I take it you were meaning on this occasion we haven't actually considered any alternatives?---That's correct.

40 And I take it that the reason that that says "No alternatives for this submission" was that there simply wasn't enough time to consider alternatives when you're asked to turn around a draft Cabinet submission in a day?---That's correct. And they hadn't been considered in the business case either.

And they hadn't been considered by you but at least to your knowledge hadn't been considered by anyone else, including in the purported business case?---That's correct, yes.

Commissioner, I tender the email from Mr Toohey to Mr Doorn, 15 November, 2016, 2.36pm, including the attachment, page 256 and following of volume 26.1

THE COMMISSIONER: That will be Exhibit 381.

**#EXH-381 – EMAIL FROM MICHAEL TOOHEY TO PAUL DOORN
REGARDING ERC SUBMISSION ACTA WAGGA WAGGA
DISCUSSION DRAFT DATED 15 NOVEMBER 2016 AT 2.36PM**

10 MR ROBERTSON: Can we then please go to page 262?

THE COMMISSIONER: Same volume?

MR ROBERTSON: In the same volume, volume 26.1. Now, I'm showing you an email there to which you're not a party but it attaches ERC submission ACT Wagga Wagga Discussion Draft and can we then turn to the attachment and go to page 263 first, so you can see the document, and then move to the next page and zoom into the top-half of the page. Do you see there that only the second of your two options from the first-cut
20 document is there, the "Approve allocation of \$6.7 million" as distinct from the feasibility study. Do you see that there?---Yeah. Yes, I can.

Do you recall how it was that it went from a first-cut submission where you suggested, at least your advice was, feasibility study, not \$6.7 million, to what we can now see in a draft a few hours later where the second of your options is adopted, or is at least put forward, rather than the first of the options?---Yeah. The, I think there's a, there's an email, after the first cut there's an email exchange between Mr Doorn and myself and it was, like, and there was, there was discussion, like, nobody's, a feasibility study isn't
30 going to get up, they're keen to make a grant that, you know, that, being the government wanted to make the grant so we just go into the recommendations here as, albeit as, as a draft. The, the, the, the caveats that I had suggested were, were still included, so at least I, I thought, well, that's something.

When you say "they", I think you said something like "They were keen to get it up" or something like that - - -?---I, I assume this was – yeah. I'm, I'm sorry, I assumed this was, this, the advice that I was being given, the direction that I had been given was the, the result of the discussion primarily
40 between Mr Doorn and the then Minister of the Sports Office.

So in terms of the "they", who was pushing it, at least from your perspective within the agency, it was being pushed by the minister's office, is that right?---Yeah, yeah. By Mr Doorn, yeah. I mean, which was just a standard chain of command, yeah.

I tender the email from Mr Doorn to Mr Chris Hall, Chief of Staff, to Mr Ayres, 15 November, 2016, 5.10pm, including the attachment there too.

THE COMMISSIONER: That will be Exhibit 382.

**#EXH-382 – EMAIL FROM PAUL DOORN TO CHRIS HALL AND
MARC LANDRIGAN REGARDING ERC SUBMISSION ACTA
WAGGA WAGGA DATED 15 NOVEMBER 206 AT 5.10PM**

10 THE COMMISSIONER: Is that a convenient time, Mr Robertson?

MR ROBERTSON: May I just go to one further document? I do appreciate I've trespassed into lunch a couple of minutes. But if, with your permission, of I can deal with one final document?

THE COMMISSIONER: Yes, Mr Robertson.

MR ROBERTSON: Can we go to page 263 of volume 26.1? So we're
now, Mr Toohey, on the next day, the 16 November, 2016, page 268,
20 please, in volume 26.1. If we can zoom up to the top of the page, there's an
email from Nicolai Meulengracht, M-e-u-l-e-n-g-r-a-c-h-t, Nicolai, N-i-c-o-
l-a-i. That gentleman performed what role as at November 2016?---He, he
was either the director of manager, apologies, I can't remember his exact
title. He was in the Office of Sport at that, this time and looked after
Executive and Ministerial Services. So that's the made conduit from the
agency into, you know, the, the Cabinet process itself. It's not a policy role
but it looked after, you know, the process of submissions.

30 So could have his title been the Director of Executive Services?---Executive
Services or Executive of Ministerial Services, I can't remember exactly.

He was a person at the director level, so the same level as you, is that right?
---Yes, that's my recollection.

But he was at least conduit in relation to things like ERC Submissions, is
that right?---Oh yes.

40 You see there, he's advising Mr Doorn but a copy to you, if the minister
wants something to go on the ERC agenda outside the six-monthly input to
Cabinet forward agenda process, do you see that there?---Yes I do.

What was the six-monthly input to Cabinet forward agenda process as you
understood as at November of 2016?---Ordinarily the standard process was
the agencies had two opportunities over 12 months to identify proposals that
they would want eventually consider by Cabinet, and then they would give
the titles or at least the working titles for those proposals. So it was roughly
every six months government called for what do you want Cabinet or a

Cabinet subcommittee to consider in the next six months. So that's what that is referring to.

But is this right – but if one doesn't get it, at least as at November 2016, if one doesn't put it through the six-monthly input to Cabinet forward agenda process, then it's necessary for the portfolio minister – at that point in time, Minister Ayres – to write a letter to the Treasurer requesting that it be put on an agenda without going through that six monthly input period?---That's my – Treasurer if it's an ERC paper, yes that's my understanding of the process.

10

You see it goes on to say, “we can draft the submission sure but it can't be progressed to ERC until the Treasurer has approved it as a future agenda item.” Do you see that there?---Yes I do.

Do you happen to know whether the Treasurer did approve it as a future agenda item as contemplated by Mr Meulengracht?---Not, I wasn't aware of it as of 16 November, around that time we didn't have an ERC date as yet but I was aware by early December we were aware that the Treasurer wanted on the agenda for 14 December, aware via emails from her office.

20

So just to be clear about that, is this right, as at early December 2016 it became known to you that Treasurer Berejiklian wanted the ACTA proposal on the ERC agenda?---Yes, that's right. There's emails from Zach Bentley who was a policy, I can't remember his exact title, who was a policy adviser or something, with respect, something along those lines, he worked in the Treasurer's Office and he was copying emails to other folk in the Treasurer's Office, including the chief of staff.

Is it a convenient time, Commissioner?

30

THE COMMISSIONER: Should we mark this last email?

MR ROBERTSON: Yes, I tender the email from Mr Meulengracht to Mr Doorn, 16 November, 2016, 11.12am, page 268 of volume 26.1

THE COMMISSIONER: It will be Exhibit 383.

40

#EXH-383 – EMAIL FROM NICOLAI MEULENGRACHT TO PAUL DOORN AND MICHAEL TOOHEY DATED 16 NOVEMBER 2016 AT 11.12AM

THE COMMISSIONER: We'll return at 2 o'clock. We'll now adjourn.

LUNCHEON ADJOURNMENT

[1.09pm]