

JOHNSON WINTER & SLATTERY

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Dougal Ross

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C8534
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19 October 2021

[REDACTED]
Solicitor Assisting
Independent Commission Against Corruption
Level 7, 255 Elizabeth Street
SYDNEY NSW 2000

BY EMAIL [REDACTED]@icac.nsw.gov.au

Dear [REDACTED]

Operation Keppel – Clarification sought

As you are aware we act for Ms Berejikian in the further public inquiry in Operation Keppel (**Public Inquiry**) pursuant to a grant of leave by the Commissioner.

We note that, as announced on 1 October 2021, this Public Inquiry, which commenced yesterday 18 October 2021, is proposed to amongst other things investigate whether our client engaged in 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* (NSW) to report any matter that she suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Mr Daryl Maguire.

We refer to the opening by Counsel Assisting yesterday, during which he relevantly (T1853) noted that:

1. Ms Berejikian, like all other Ministers and Principal Officers of Public Authorities, had a duty to report to the Commission any matter that she suspected on reasonable grounds concerned or may concern corrupt conduct; and
2. the Commission has no record of Ms Berejikian making such a report of any suspicion by her that Mr Maguire may have engaged in corrupt conduct.

Counsel Assisting went on to observe that “that is so even after Mr Maguire gave evidence before this Commission on 13 July 2018, during a Public Inquiry conducted for the purposes of the investigation known as ‘Operation Dasha’”.

In this respect, it is not clear from the reference to ‘Operation Dasha’ what Counsel Assisting is referring to or meaning to imply in relation to 13 July 2018. We note that there was no allegation that Mr Maguire engaged in corrupt conduct in ‘Operation Dasha’, nor was there any finding that he engaged in corrupt conduct in the Report that was delivered by Commissioner McDonald SC on 22 March 2021.

Counsel Assisting went on to refer to the evidence that Ms Berejiklian asked for and obtained Mr Maguire's resignation as Parliamentary Secretary late on the afternoon of 13 July 2018, and that in a public statement issued two days later she said she was "shocked" by the events of 13 July 2018.

Counsel Assisting then played and tendered (exhibit 376) an exchange of questions and answers between Counsel Assisting and Ms Berejiklian during the compulsory private examination conducted on 18 September 2021, which concerned her state of knowledge and/or suspicion as at 13 July 2018.

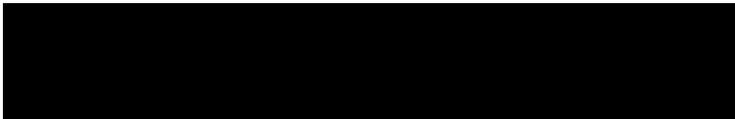
It is apparent from the manner in which Counsel Assisting has opened that the investigation in relation to this ground is focused upon Ms Berejiklian's alleged state of mind and/or duty under section 11 of the ICAC Act as at 13 July 2018 and thereafter. Please confirm that is the relevant date of focus.

It is by no means apparent from Counsel Assisting's opening what "matter" or "matters" it is contended Ms Berejiklian "suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Mr Daryl Maguire".

In order to permit our client to engage meaningfully with this aspect of the investigation, we ask as a matter of priority that the Commission indicate its present position as to the "matter(s)" said to give rise to the alleged suspicion (for instance, by reference to particular things said by Mr Maguire during telephone calls to our client). We respectfully suggest this is necessary in order to give substance to this ground, and to provide procedural fairness to our client. It will enable us to take appropriate instructions and also focus on any appropriate and relevant questions (with the Commissioner's leave) of relevant witnesses.

We would be grateful for your prompt response and assistance in relation to the above.

Yours faithfully,

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Mr Dougal Ross
Partner
Johnson Winter & Slattery

BY EMAIL: [REDACTED] and [REDACTED]

26 October 2021

Your Ref: C8534

Our Ref: E17/0144

Dear Mr Ross

SUBJECT: Operation Keppel – your request for clarification

I refer to your letter of 19 October 2021 which seeks, in effect, clarification of Counsel Assisting's opening address insofar as it concerned the allegation "Whether, between 2012 and 2018, the Honourable Gladys Berejiklian MP engaged in ... (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 s 11 of the *Independent Commission Against Corruption Act 1988* (NSW) to report any matter that she suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Mr Daryl Maguire." ("s 11 allegation").

In particular:

1. you ask that the Commission confirm that "the relevant date of focus" of the s 11 allegation in the Commission's scope and purpose is "Ms Berejiklian's alleged state of mind and/or duty under section 11 of the ICAC Act as at 13 July 2018 and thereafter";
2. complain that "It is by no means apparent from Counsel Assisting's opening what "matter" or "matters" it is contended Ms Berejiklian "suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Mr Daryl Maguire";
3. ask that the Commission "indicate its present position as to the "matter(s)" said to give rise to the alleged suspicion (for instance, by reference to particular things said by Mr Maguire during telephone calls to our client);
4. contend that such indication "is necessary in order to give substance to this ground, and to provide procedural fairness to our client. It will enable us to take appropriate instructions and also focus on any appropriate and relevant questions (with the Commissioner's leave) of relevant witnesses."

Your letter misapprehends the nature of the Commission proceedings.

This Commission is conducting an investigation into the allegations set out in the summons issued to your client on 30 September 2021 and announced at commencement of the present

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public inquiry by Assistant Commissioner McColl AO SC. The time period to which the s 11 allegation relates is not narrowly confined as you suggest, but encompasses the period 2012 – 2018.

Insofar as you seek in effect particulars of the s 11 allegation, this misapprehends the nature of the public inquiry. A public inquiry is conducted for the purpose of an investigation: see *Independent Commission Against Corruption Act 1988* (NSW) s 31(1). An investigation is not an “accusatory process at which a formulated issue is to be resolved”: *Aristodemou v Temby* (Grove J, 14 December 1989, unreported; BC8901329, *Aristodemou*). It is not “shackled by the formal rules as to particulars that apply in civil proceedings”: *McMillan & Anor v Director-General of Communities NSW* [2009] NSWSC 1236 at [210] per Hall J.

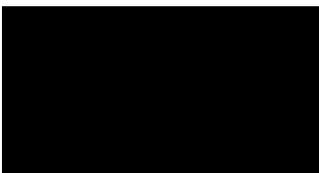
Rather, “the procedures [the Commission] adopts should be structured, consistently with the relevant provisions of the ICAC Act, so as to enable it to discharge its investigative function with the greatest efficiency.”: *McCloy v Latham* [2015] NSWSC 1879 at [259] (“*McCloy*”) per McDougall J, referring with approval to *Aristodemou* and *Donaldson v Wood* (Hunt CJ at CL, 12 September 1995, unreported; BC9507330).

In that context, to require the Commission to give “advance disclosure of possibly contradictory material to be given to witnesses before they give evidence would undermine an essential feature of the power to investigate that the ICAC Act gives”: *McCloy* at [78].

The Commission will ensure your client is afforded procedural fairness. The content of that obligation of course, depends on the circumstances of each case. Ultimately, the Commission’s obligation will be discharged by the exchange of written submissions at the conclusion of the public inquiry. In particular, Counsel Assisting will be directed to include in their written submissions any findings, opinions and recommendations that they contend should, or could, be stated in the report that the Commission is required to prepare and furnish to the Presiding Officer of each House of Parliament pursuant to s 74(4) of the ICAC Act.

In the event that Counsel Assisting submit that any findings, opinions or recommendations adverse to your client should be stated, your client will be provided with Counsel Assisting’s submissions and be given the opportunity to respond.

Yours sincerely

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Principal Lawyer