

## Operation Keppel

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Ruling on application on behalf of Ms Berejiklian for orders under s 31(9) that certain evidence be adduced in private.

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1. This ruling concerns an application by Ms Callan of Senior Counsel, who appears with Mr Cooper for Ms Berejiklian, for orders pursuant to s 31(9) of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) that certain evidence be adduced in private session, accompanied by a direction under s 112 of the ICAC Act for non-publication of the evidence adduced in private session. (s 31(9) application). Mr Harrowell, who appears for Mr Maguire, supported the application.
2. Mr Robertson, who appears with Mr Brown as Counsel Assisting, opposed the application.
3. Section 31(8) of the ICAC Act provides that “[a] public inquiry is to be held in public. Section 31(9) provides that “[d]espite subsection (8), the Commission may decide to hold part of the inquiry in private if it considers this to be in the public interest.”
4. The s 31(9) application was made in circumstances where Mr Robertson had indicated to Ms Berejiklian’s legal representatives that in the public hearing examination of Daryl Maguire (on 28 October 2021) and Ms Berejiklian (on 29 October and 1 November 2021), it was intended to adduce evidence as to the details of their close personal relationship, including topics pertaining to the level of commitment or substance of that relationship (“relationship evidence”).
5. On 28 October 2021 I rejected the s 31(9) application on the basis that it was not in the public interest to make the order sought.
6. These are my reasons for that ruling.

### Background

7. The Commission is conducting a public inquiry under s 31 of the ICAC Act into:
  1. 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 NSW Parliament and the use of parliamentary resources,

to improperly gain a benefit for himself, G8way International/G8way International Pty Ltd and associated persons.

2. 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:

i. grant funding promised and/or awarded to the Australian Clay Target Association Inc in 2016/2017;

ii. grant funding promised and/or awarded to the Riverina Conservatorium of Music in Wagga Wagga in 2018.

and/or

b. conduct that constituted or involved the partial exercise of any of her official functions, in connection with:

i. grant funding promised and/or awarded to the Australian Clay Target Association Inc in 2016/2017;

ii. 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 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;

and/or

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

8. The general scope and purpose of the public inquiry is to gather evidence relevant to the matters being investigated for the purpose of determining the matters referred to in s 13(2) of the ICAC Act.

9. The public inquiry in Operation Keppel commenced in September 2020. At that time, the only allegation being investigated was that set out in paragraph 1. The investigation was expanded to include paragraph 2 following further investigative steps taken since the adjournment of the 2020 public inquiry. Whereas the focus of that inquiry was to investigate the allegations against Mr Maguire, the 2021 public inquiry has dual purposes: to continue the investigation of the allegations against Mr Maguire and to investigate the allegations against Ms Berejiklian.

10. At the 2020 Operation Keppel public hearing both Ms Berejiklian and Mr Maguire gave evidence that they were in a close personal relationship. Their evidence as to when it commenced varied, but they were as one as to them having been in such

a relationship from at least 2015 until September 2020 shortly before the commencement of the public hearing.

## **Submissions**

11. Ms Callan submitted that there was no public interest in exposing the relationship evidence in public. She contended that to do so would inevitably lead to intense and irremediable publicity, public scrutiny, humiliation and irreparable harm. She argued that the public interest in preserving the privacy of Ms Berejiklian and Mr Maguire outweighed any public interest in adducing such evidence (s 31(2)(d)).

12. Secondly, Ms Callan argued that eliciting the relationship evidence publicly would not advance the principal objects of the ICAC Act including “to investigate, expose and prevent corruption involving or affecting public authorities and public officials” in s 2A(a)(i) of the ICAC Act.

13. Thirdly, Ms Callan argued that the Commission “must temper its use of public inquiries by a careful consideration of where the public interest referred to in s 31(1) lies”, to avoid the risk that the public hearing of the relationship evidence is apt to become, or at least be perceived to become, an end in itself.<sup>1</sup>

14. Fourthly, Ms Callan contested the proposition that the relationship evidence might be relevant to any alleged conflict of interest (see cl 7 of the Ministerial Code of Conduct), as absent evidence of any “private benefit” or partiality by Ms Berejiklian towards Mr Maguire in respect of his private interests or a private benefit, a conflict of interest does not arise. She contended there was no such evidence.

15. In opposing the s 31(9) application, Mr Robertson argued that the fact the Commission had already determined pursuant to s 31(1) of the ICAC Act that it was satisfied that it was in the public interest to conduct a public inquiry provided the framework for the exercise of the s 31(9) discretion. This included requiring it to consider the factors in s 31(2) including the matter in s 31(2)(d).

16. Secondly, Mr Robertson pointed to s 31(8) of the ICAC Act which provides that a “public inquiry is to be held in public”. He argued that to make the blanket order Ms Callan sought such that relationship evidence could not be given in public would make the notion of the public inquiry illusory.

17. Thirdly, Mr Robertson contested Ms Callan’s analysis of the Ministerial Code of Conduct conflict of interest aspect of the allegations. Rather than turning on the issue of “private benefit”, he pointed out that subclause 7(3) of the Ministerial Code of Conduct established a test of conflict of interest which turned on whether a conflict between the public duty and the private interest of the Minister could objectively have the potential to influence the performance of their public duty.

18. Fourthly, Mr Robertson pointed out that following the 2020 public inquiry, Ms Berejiklian had made public statements concerning her relationship with Mr Maguire.

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<sup>1</sup> See *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [96], per Basten JA.

He tendered Volume 36 of the master brief (exhibit 497) which contains a number of interviews/statements made by Ms Berejiklian supporting that proposition.

19. Mr Robertson accepted that, as was the case in the 2020 public inquiry, there may be occasions when, pursuant to s 31(9) of the ICAC Act, the Commission should adopt a course of playing some telephone intercepts in private then, again in private, having any necessary debate as to whether they could and should be played in public. He pointed out that an opportunity to make a s31(9) application in particular respects could be made by reason of the delay between the proceedings in the hearing room occurring and the public stream of the proceedings being broadcast.

### **Consideration**

20. The Ruling regarding the course that should be taken in the Public Inquiry in relation to Cabinet documents and Cabinet deliberations (Cabinet Documents Ruling) which I made on 17 October 2021,<sup>2</sup> has enabled the Commission to call evidence at the public inquiry concerning, among other matters, the manner in which Ms Berejiklian discharged her public duties as Treasurer and Premier respectively in relation to the grants awarded to the Australian Clay Target Association (ACTA) and the Riverina Conservatorium of Music (RCM). This was despite the “general rule [in the context of documents such as Cabinet Documents and Cabinet Deliberations] that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it”.<sup>3</sup>

21. At what might be called the other end of the spectrum, relationship evidence of the kind the subject of the s 31(9) application is of a character generally accepted to be inherently private. As much is implicit in the requirement that in determining whether to hold a public inquiry, the Commission consider “whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned” (s 31(2)(d)). As with the provisions of the ICAC Act which indicated a legislative intention that the Commission may use Cabinet documents and Cabinet deliberations at a public inquiry,<sup>4</sup> s 31(2)(d) contemplates that there will be circumstances in which the privacy of the persons concerned will be exposed publicly.

22. It might be presumed that the Commission took that issue into account when determining pursuant to s 31(1) to conduct the public inquiry. However, that decision is, of its nature, a unilateral one. Once made, s 31(8) mandates that the Commission conduct that public inquiry in public, but empowers the Commission to decide, whether of its own accord, or on an application by a person with a sufficient interest, part of the public inquiry should be held in private. As in s 31(1), the test for making that decision is whether such an order is in “in the public interest”.

23. “[T]he expression ‘in the public interest’, when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual

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<sup>2</sup> <https://www.icac.nsw.gov.au/investigations/current-investigations/2020/former-nsw-mp-for-wagga-wagga-operation-keppel>

<sup>3</sup> *Sankey v Whitlam* (1978) 142 CLR 1 at 39 per Gibbs ACJ; [1978] HCA 43.

<sup>4</sup> See Cabinet Documents Ruling in particular at [33].

matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.'"<sup>5</sup>

24. In this context, factors which determine the Commission's s 31(1) decision can be re-visited.

25. At the time of the allegations concerning Ms Berejiklian, she was respectively the Treasurer and Premier – the two highest offices in the State. The seriousness of the allegations being investigated and, too, the benefit of exposing to the public, and making it aware, of corrupt conduct at such high echelons is self-evident.

26. At the time of the allegations concerning Ms Berejiklian, she was bound by the Ministerial Code of Conduct which declared that a "conflict of interest" arose "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" (cl 7). The test is not confined as Ms Callan appeared to contend to whether a particular decision conferred a "private benefit" on either Ms Berejiklian or Mr Maguire.

27. As Mr Robertson outlined in his Opening Statement, the term "private interest" in the cl 7 definition is not limited to pecuniary interests – that is, interests sounding or measured in money, but extends to non-pecuniary private interests. Thus, "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 relation or romantic involvement – a private interest for the purposes of the code may exist depending on the circumstances".<sup>6</sup>

28. The relationship evidence addresses the issue of determining objectively whether such a private interest giving rise to a conflict of interest existed in relation to Ms Berejiklian's exercise of her public duties in participating in funding decisions taken in respect of the ACTA and the RCM.

29. Although Mr Robertson described it as "a relatively weak factor", it is not irrelevant in my view to note that soon after Ms Berejiklian gave evidence in the 2020 public inquiry, she made public statements concerning the nature and extent of her relationship with Mr Maguire, described as a "radio blitz" by one publication.<sup>7</sup> During radio interviews, Ms Berejiklian variously said that she "loved Maguire and hoped he could be her boyfriend", suggested "he wasn't my boyfriend, he wasn't anything of note (but) you know, I certainly hoped it would be," and "revealed ... that she loved Maguire and hoped the relationship could lead to marriage."<sup>8</sup>

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<sup>5</sup> *O'Sullivan v Farrer* (1989) 168 CLR 210 (at 216); [1989] HCA 61 per Mason CJ, Brennan, Dawson and Gaudron JJ.

<sup>6</sup> 1849T

<sup>7</sup> Exhibit 497, p 38, "She loves him, loves him not."

<sup>8</sup> Exhibit 497, p 38.

30. These are matters of the nature of the hallmark evidence Ms Callan suggested the Commission should not hear in public. In the light of Ms Berejiklian’s preparedness in 2020 to engage in public disclosures of her private relationship, it is difficult to accept Ms Callan’s submission, that further public disclosures will entail a risk of undue prejudice in the sense of leading to “intense and irremediable publicity, public scrutiny, humiliation and irreparable harm.” If there is such a risk, it is, in my view outweighed by the other factors to which I have referred.

31. As Mr Robertson submitted, to make a blanket order requiring the relationship evidence to be heard in private and make a s 112 order preventing it from being made public as Ms Callan sought, would be to make the public inquiry illusory. It would detract from the important role a public inquiry plays “in ... disclosing the ICAC’s investigative processes.”<sup>9</sup>

32. It is not possible accordingly, as Ms Callan effectively argued, to contend that the relationship evidence is peripheral to the allegations being investigated. That evidence is intrinsically bound up in, and intersects, each allegation the Commission is publicly investigating concerning Ms Berejiklian. The relationship evidence should be addressed in the same forum as the evidence the subject of the Cabinet Documents Ruling so that the public can see the tension, if any, between Ms Berejiklian’s discharge of her public duties and her private interests.

33. In these circumstances, I did not consider it to be in the public interest to hold that part of the inquiry concerning the relationship evidence in private.

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The Hon. Ruth McColl AO SC

Assistant Commissioner

1 November 2021

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<sup>9</sup> Independent Panel (The Hon. Murray Gleeson AC (Chair) and Mr Bruce McClintock SC) – Review of the Jurisdiction of the Independent Commission Against Corruption Report (2015) at [9.4.6].