Operation Keppel

Ruling regarding the course that should be taken in the Public Inquiry in relation to Cabinet documents and Cabinet deliberations

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1. On 18 October 2021, the Commission will resume its public inquiry pursuant to s 31 of the *Independent Commission Against Corruption Act 1988* (NSW) (ICAC Act) in its Operation Keppel investigation.

2. The public inquiry is being conducted for the purposes of an investigation 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.

3. The ACTA grant referred to in the allegations was a decision of the Expenditure Review Committee (ERC), a sub-committee of Cabinet, made on 14 December 2016. Ms Berejiklian was the Treasurer at that date, and was present at the ERC meeting at which the ACTA decision was made. On 2 January 2017, Mr Maguire issued a media announcement of "$5.5 million in NSW Government funding for the Australian Clay Target Association Headquarters".[1]

4. The grant funding promised to the RSM referred to in the allegations was the subject of two decisions. The first tranche of $10 million which related to what was known as Stage 1 of the RCM development was a decision of the ERC made on 24 April 2018. Ms Berejiklian was the Premier at that date, and was present at the ERC meeting at which the RCM grant decision was made. The reservation of a second tranche of $20 million (which related to Stage 2) was a decision made by the Premier, Ms Berejiklian and the then Treasurer, Mr Perrottet on 23 August 2018. On 24 August 2018, Don Harwin, the Minister for Arts, issued a media release regarding the $20 million funding reservation for Stage 2 of the RCM.

5. This ruling concerns the extent and manner in which Counsel Assisting may examine witnesses and tender documents which are described as Cabinet Deliberations because they record the actual deliberations of Cabinet or a committee of Cabinet and Cabinet Documents, being documents prepared outside Cabinet, such as reports or submissions, for the assistance of Cabinet.[2]

6. During the Operation Keppel investigation, the Commission has obtained from the Department of Premier and Cabinet (DPC) pursuant to its powers under ss 21 and 22 of the ICAC Act, information and documents falling into both categories.

7. At the time the DPC produced the documents pursuant to s 22, it advised that "[t]he documents produced contain Cabinet information and may be subject to public interest immunity or legal professional privilege" and noted "that such information must be produced in response to the Notice notwithstanding any claim of privilege on these bases, in accordance with section 24 of the ICAC Act." It contended that "[i]t may therefore be appropriate for the ICAC to issue a direction restricting the publication of documents produced under section 112 of the ICAC Act." It asked "if the ICAC could please ensure that the Department has an opportunity to consider whether it wishes to make submissions in respect of any documents (or information contained in any documents)

[1] Master Brief volume 26.4 p66.

[2] See *Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 614 – 615; [1993] HCA 24 ("NLC") per Mason CJ, Brennan J, Deane J, Dawson J, Gaudron J and McHugh J as to the distinction between the two categories.

proposed to be published before any decision concerning their public disclosure is made."

Counsel Assisting's Provisional Submissions

8. On 8 October 2021, the Commission forwarded to the DPC (and to the legal representatives for Ms Berejiklian) Counsel Assisting's Provisional Submissions regarding the course that should be taken in the Public Inquiry in relation to Cabinet Documents and Cabinet Deliberations (Provisional Submissions). Those submissions addressed the statutory framework within which the Commission conducts its investigations and a public inquiry, in particular ss 21, 22, 24 and 37 of the ICAC Act.

9. The Provisional Submissions contend that the effect of these provisions is that this Commission has power to do the following for the purposes of an investigation:

    (a) require production of Cabinet Documents;

    (b) require production of documents evidencing Cabinet Deliberations; and

    (c) require witnesses to answer questions concerning Cabinet Documents and Cabinet Deliberations,

    whether or not a House of Parliament would have a like power in like circumstances and whether or not the doctrine of public interest immunity would be enlivened in like circumstances in a Court or other tribunal.

10. They also contended that when ss 21, 22, 24 and 37 of the ICAC Act are read with the Commission's power to conduct a public inquiry s 31, it was clear that the Commission has the power, as part of a public inquiry conducted for the purposes of an investigation, to treat Cabinet Documents as exhibits in the public inquiry and make them publicly available accordingly and to require witnesses to answer questions concerning Cabinet Documents and Cabinet Deliberations.

11. The Provisional Submissions also submitted that notwithstanding the Commission's broad powers in relation to Cabinet Deliberations and Cabinet Documents, in deciding whether (and, if so, the extent to which) those powers should be exercised, the Commission should have regard to the principles that underlie the doctrine of public interest immunity as it is applied in Courts and other tribunals and the related principles that explain the absence of power on the part of the Houses of the NSW Parliament to require the production of documents revealing Cabinet Deliberations.

12. In the light of those principles, Counsel Assisting submit that "the Commission should, as a general proposition, only make available to the public Cabinet Deliberations and Cabinet Documents to the extent reasonably necessary to expose to the public, and make it aware, of evidence available relevant to the allegations being investigated in the Public Inquiry.

13. The Provisional Submissions identified the documents which might be described as Cabinet Deliberations and Cabinet Documents for such purposes, and which may 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 as:

a) documents recording any decisions made by Cabinet or a committee of Cabinet concerning either or both of the Australian Clay Target Association Inc (**ACTA**) and Riverina Conservatorium of Music (**RCM**) during the period from 2012 to 2018;

b) submissions to Cabinet or a committee of Cabinet proposing one or more decisions directly affecting ACTA /or the RCM; and

c) advice or speaking notes in relation to any Cabinet or Cabinet committee submission falling within the 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.

14. In addition, Counsel Assisting identified the following matters which they would seek to tender and/or elicit as evidence and make publicly available during the hearing:

a) records of matters before Cabinet or a committee of Cabinet in respect of which Ms Berejiklian made a disclosure, subject to further leave of the Commission, the names of any persons referred to in such disclosure or disclosures being redacted from any record made publicly available;

b) questions that disclose the contents of Cabinet Documents or content of Cabinet Deliberations but only to the extent reasonably necessary to expose to the public, and make it aware, of evidence relevant to the allegations being investigated in the Public Inquiry; but they would not, without leave, be permitted to ask in public questions that would reveal the substance of any agenda item other than one concerned with ACTA and/or the RCM and/or the disclosure of conflicts.

c) questions regarding matters of general practice and procedure of Cabinet or Cabinet committees.

DPC submissions

15. The DPC and the legal representatives for Ms Berejiklian were asked to respond to Counsel Assisting's submissions by noon on 14 October 2012. The Commission received a response from the DPC. Ms Berejiklian's legal representatives advised that she did not intend to make any submissions in response to the Provisional Submissions.

16. The DPC:

a) takes issue with the manner Counsel Assisting has framed the legal principles concerning public interest immunity contending that the Commission is legally required to have proper regard to these principles, particularly in considering whether it is "necessary or desirable in the public

interest" to direct that certain evidence or other information not be published, pursuant to section 112(1A), and in considering whether it is in the public interest to hold part of a public inquiry in private pursuant to section 31(9); ultimately it appeared not to press that proposition if the Commission was proposing to have regard to these principles in relation to the documents the subject of this ruling;

b) submits that the Commission should explore with Ms Berejiklian (or with any other relevant person) whether it may be possible to agree certain facts, or provide evidence in another form, so as to minimise or avoid the need to disclose Cabinet Documents, or evidence of Cabinet Deliberations;

c) identifies difficulties with the proposed redactions relating to the disclosures made by Ms Berejiklian relating to matters before Cabinet, or a committee of Cabinet, which it contends are not connected with the subject matter of the present inquiry;

d) seeks an opportunity to inspect and make submissions, within a reasonable timeframe, on whether any Cabinet Documents, Cabinet disclosures and any other documents which disclose or may disclose Cabinet Deliberations, - proposed by Counsel Assisting to be exhibited or otherwise made public - should be made public; this submission identifies the possibility that such submissions may also address whether the documents should be made public in a redacted form, including (but not limited to) any redactions proposed by the Commission;

e) submits that any evidence about documents which relate to the contents of Cabinet Documents or of Cabinet Deliberations should be heard in private, pursuant to s 31(9) of the ICAC Act so as to give DPC an opportunity to seek, within a reasonable timeframe, to review the transcript of any evidence heard in private, and to make submissions on whether all, or specific parts, of the transcript should remain private or be made public.

f) Argues that it is necessary for the Commission to follow a three-stage process in assessing whether Cabinet Documents or Cabinet Deliberations should be publicly disclosed:

    1. determine whether the information is material, in the sense of there being a legitimate forensic purpose for it in the context of the Commission's current investigation;

    2. establish whether there is a sound basis for the claim of immunity; and

    3. conduct the balancing exercise – having regard to the unique considerations that apply in relation to the disclosure of the deliberations of Cabinet and its committees.

g) Disputes Counsel Assisting's reliance upon the exceptional circumstance "exception" referred to in *NLC* by observing the High Court's observations were directed to criminal proceedings relating to allegations of serious

misconduct on the part of a Cabinet minister, whereas the current investigation by the Commission is not "a criminal proceeding".

Submissions in reply

17. In reply, Counsel Assisting emphasised the nature and extent of the Commission's functions and powers, particularly that one of the principal objects of the ICAC Act is to "expose" corruption through the exercise of those functions by exercising its "special powers": s 2A(a)(i) and (b). One of those special powers in pursuance of its objects is the power to conduct a public inquiry if it considers that it is in the public interest to do so: s 31(1).

18. In essence, Counsel Assisting argued that the "regime" the DPC proposed in relation to how evidence of cabinet documents (using that expression generically) would risk rendering the public inquiry a "public inquiry" in name only.

19. They point to allegation 2(a) which concerns the question whether Ms Berejiklian exercised public functions in circumstances where she was in a position of conflict between her public duties and her private interest. They submit that a proper investigation of that allegation requires consideration of whether Ms Berejiklian exercised public functions in or in connection with Cabinet or a committee thereof in circumstances where she was in a position of conflict. They argue that it would not be in the public interest for the public to be excluded from such a significant aspect of the public inquiry.

20. Counsel Assisting disputes the standing of the DPC or anyone else as entitled to make a "claim of public interest immunity" or to regard it as "necessary" for such a claim to be "overcome" by "the balancing exercise" that is applied in courts when a question of public interest immunity arises before the Commission is entitled to exercise its power to take evidence at a public inquiry. Rather, they contend that the Commission has a broad power to take evidence at a public inquiry (in oral and documentary form) for the purposes of an investigation, such power extending to taking evidence in oral or documentary form concerning Cabinet Deliberations and Cabinet Documents unconfined by the doctrine of public interest immunity as it is applied in courts.

21. While Counsel Assisting accept that in deciding the extent to which the Commission should take evidence in a public inquiry (and in deciding whether to exercise its power to hold part of a public inquiry in private), the Commission is entitled to have regard to the principles that underlie the doctrine of public interest immunity as it is applied in courts, they contend that nothing in the ICAC Act or otherwise requires this Commission to deal with an assertion of public interest immunity in the way in which a similar assertion would be dealt with by a court.

22. In similar vein, Counsel Assisting submit that the DPC's submission that the Commission should explore with Ms Berejiklian (or any other relevant person) whether it may be possible to agree certain facts" with a view to "minimis[ing] or avoid[ing] the need to disclose Cabinet Documents, or evidence of Cabinet Deliberations", must be rejected as inconsistent with the proper discharge of this Commission's functions.

23. Finally, Counsel Assisting dispute the DPC's assessment as to whether matters are "related to the subject matter of the present inquiry".

Consideration

24. The principal objects of the ICAC Act include the promotion of "integrity and accountability of public administration by constituting [a body] … to investigate, expose and prevent corruption involving or affecting public authorities and public officials, and…to educate …members of the public about corruption and its detrimental effects on public administration and on the community": s 2A(a). To that end, the ICAC Act confers "on the Commission special powers to inquire into allegations of corruption s 2A(b)."

25. Section 12 of the ICAC Act provides that "[i]n exercising its functions, the Commission shall regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns". Section 12A requires the Commission in exercising its functions, "as far as practicable, to direct its attention to serious corrupt conduct".

26. The concept of public interest appears elsewhere in the ICAC Act. For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct in private a compulsory examination (s 30(1), (5)) and a public inquiry: s 31(1). In making the decision to hold a public inquiry, the Commission is to consider, without limitation, the benefit of exposing to the public, and making it aware, of corrupt conduct and the seriousness of the allegation or complaint being investigated: s 31(1)(a) and (b). The Commission may decide to hold part of the inquiry in private if it considers this to be in the public interest: s 31(9). The Commission may also make a direction restricting the publication of evidence if it is satisfied that the direction is necessary or desirable in the public interest: s 112(1), (1A).

27. It is "impossible to identify the purpose of the ICAC Act … without reference to the scope of operation of the Act as defined by ss 8 and 9."[3] Section 8 describes conduct which constitutes "corrupt conduct", as long as it is not "excluded by section 9": see s 7(1). The s 8 descriptions of "corrupt conduct" are "excluded by s 9 from corrupt conduct unless it could constitute or involve 'a criminal offence' or one of the other categories of conduct in pars (a) to (d) of s 9(1)."[4] It is within those parameters that the legislature has charged the Commission to pursue its objects of promoting "integrity and accountability of public administration", and in doing so to exercise its "special powers".

28. To that end the Commission has, as explained in the Provisional Submissions, broad powers in relation to the gathering of evidence all expressed to be "for the purposes of an investigation". Those broad powers include the power to require a public authority or public official to produce a statement of information (s 21) and the power to require production of documents or other things (s 22).

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[3] *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1; [2015] HCA 14 at [35] per French CJ, Hayne, Kiefel and Nettle JJ.
[4] Ibid at [79] per Gageler J.

29. Significantly, the ICAC Act proscribes the circumstances in which a recipient of a s 21 or a s 22 notice may object to complying with its requirements. Thus, subsection 24(3) provides that a person must comply with requirements of those kinds despite:

> (a) any rule which in proceeding in a court of law might justify an objection to compliance with a like requirement on grounds of public interest, or
>
> (b) any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law, or
>
> (c) any duty of secrecy or other restriction on disclosure applying to a public authority or public official or former public authority or public official.

30. Further, s 37(2) of the ICAC Act provides that:

> "A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other group of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground."

31. It is also notable that, subject to the exceptions in s 37(4), s 37(3) provides that "an answer made, or document or other thing produced, by a witness at a compulsory examination or public inquiry before the Commission or in accordance with a direction given by a Commissioner under section 35 (4A) is not (except as otherwise provided in this section or section 114A (5)) admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.

32. It is significant that the legislature has seen fit to confer on the Commission broad powers to pursue its objects. The language of ss 21, 22, 24 and 37 explicitly overrides for the purposes of an investigation the operation of principles which would be required to be taken into account in a court of law. They might readily be characterised as "special powers" of the type envisaged by s 2A(b).

33. It is apparent that the legislature saw fit to confer such special powers on the Commission because of the particular matters which lie at the heart of its remit: the investigation, exposure and prevention of corruption involving or affecting public authorities and public officials to promote the integrity and accountability of public administration. It is apparent that in many circumstances, the Commission could not discharge that remit without having to obtain evidence (including documents) about matters which lie at the heart of government: Cabinet Deliberations and Cabinet Documents. It is equally apparent that the legislature intended that the Commission's functions should not be circumscribed by it being prevented from obtaining access to such evidence by principles which might preclude it being obtained in a court of law by arguments based, among others, on public interest immunity: s 24(3)(a).

34. A public inquiry is conducted "for the purposes of an investigation". Once information and documents are obtained "for the purposes of an investigation" pursuant to ss 21 and 22, in my view they can be used for all and any part of that investigation. That includes a public inquiry or a compulsory examination. Using that information and/or documents in that context means they will become evidence in either hearing.

35. I do not understand the DPC to contest the latter proposition. Rather its submissions focus on the Commission taking public interest immunity principles into account before permitting those steps being taken in public. As I have said, Counsel Assisting is content that the Commission have regard to such principles in determining whether to permit the information and documents which constitute Cabinet deliberations and/or Cabinet Documents to be used publicly. I will proceed on that basis. It is unnecessary to determine whether I am required to do so.

Public interest immunity

36. The common law principles concerning public interest immunity were developed in the context of court proceedings and are expressed in these reasons in that context. Neither Counsel Assisting or the DPC drew attention to any case in which public interest immunity had been considered in an investigative context.

37. In the context of documents such as Cabinet Documents and Cabinet Deliberations, the "general rule [was] 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".[5] This involves a balancing exercise.

38. Underlying the general rule are principles of collective ministerial responsibility,[6] by virtue of which the executive arm of government (the Cabinet) is responsible, through Parliament, to the electorate as their representatives,[7] and of "cabinet solidarity."[8] Conventionally, it is recognised the latter aspect of collective ministerial responsibility would be undermined if Cabinet Deliberations were not generally kept confidential, at least in relation to current or controversial matters.[9] There are exceptions to these principles which are referred to below.

39. Insofar as Cabinet Documents are concerned, a claim of public interest immunity "is generally [made] upon the basis that disclosure would discourage candour on the part of public officials in their communications with those responsible for making policy decisions and would for that reason be against the public interest". No such express assertion has been made in this case, no doubt because such a suggestion "has been questioned as a sufficient, or even valid, basis upon which to claim immunity".[10]

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[5] *Sankey v Whitlam* (1978) 142 CLR 1 at 39 per Gibbs ACJ; [1978] HCA 43.
[6] *NLC* at 615; see generally *Egan v Chadwick* (1999) 46 NSWLR 563; [1999] NSWCA 176 at [15] – [47] per Spigelman CJ .
[7] Ibid at [34]; at [134] per Priestly JA.
[8] The convention that Ministers share responsibility for, and must publicly support, major governmental decisions (in particular, those made by the Cabinet) regardless of their personal views in relation to such decisions": Twomey, The Constitution of New South Wales (2004) 694.
[9] *NLC* at 615, 617.
[10] Ibid; see also *Sankey v Whitlam* at (63) per Stephen J.

40. Those who urge public interest immunity for classes of documents, regardless of particular contents, carry a heavy burden.[11] In the context of court proceedings, a party seeking the production of and access to documents in respect of which a claim to immunity is made, must first demonstrate a legitimate forensic purpose for having the documents produced.[12]

41. The balancing exercise the general rule to which I have referred requires consideration of two conflicting aspects: "the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and … the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done".[13]

42. "The balance between competing public interests 'may be struck differently in civil and criminal proceedings': *HT v The Queen* at [33]. The public interest in favour of disclosure is generally stronger in criminal proceedings, where the ultimate issue is the guilt or innocence of a particular individual.[14]

43. In *Sankey v Whitlam*, it was recognised that using public interest immunity to prevent either the informant or the accused from requiring the production of, and using in evidence, what were there described as "State papers" might cause injustice. In the case of the informant, that person could be precluded from being able "to present to the court his case that the defendants committed criminal offences".[15] In the case of the accused, that persons could be precluded from using "documents … necessary to support the defence of an accused person whose liberty was at stake in a criminal trial."[16]

44. In *Commonwealth v Northern Land Council* the majority accepted that the considerations of public interest immunity may apply differently in criminal as opposed to civil proceedings. Thus "the necessary exceptional circumstances [to overcome the public interest in immunity from disclosure of documents recording the actual deliberations of Cabinet] may exist in cases involving allegations of serious misconduct on the part of a Cabinet minister."[17]

45. Such a situation arose in *R v Obeid (No 9),*[18] during the trial of a former New South Wales Minister for wilful misconduct in public office, the subject matter of the charge being maladministration of political office which was said to be connected to a Cabinet decision.[19] The State of New South Wales submitted to the trial judge, Beech-Jones J, that the accused, Edward Moses Obeid, be denied access to certain documents placed before the Cabinet of New South Wales in 2007

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[11] See *Sankey v Whitlam* (at 63) per Stephen J (albeit referring to "Crown privilege", as principles of public interest immunity were then described.
[12] *Derbas v R* [2012] NSWCCA 14 at [21]) per Meagher JA; Hoeben and Rothman JJ agreeing referring to *Alister v The Queen* (1984) 154 CLR 404 at 412, 414, 438-439, 456; [1984] HCA 85 (*Alister*).
[13] *Alister* at 434, citing *Sankey v Whitlam* at pp 38-39 per Gibbs ACJ.
[14] *Alister v The Queen* at 414 and 456; *Roberts-Smith v Fairfax Media Publications Pty Limited (No 14)* [2021] FCA 552 at [16] per Abraham J.
[15] Op cit per Gibbs ACJ (at 47)
[16] Ibid (at 42); see also Stephen J (at 56) and Mason J's discussion (at 99) of *United States v. Nixon* [1974] USSC 159; (1974) 418 US 683 (41 Law Ed 2d 1039) and (1993).
[17] 176 CLR 604 (at 618); [1993] HCA 24.
[18] [2016] NSWSC 520.
[19] Ibid (at [33]).

concerning the adoption of a proposed Commercial Lease Policy ("CLP") applicable to property owned by the Maritime Authority of New South Wales. The documents were produced without objection by the Independent Commission Against Corruption in response to a subpoena issued by Mr Obeid. However, "various emanations of the State have objected to the accused being granted access to some discrete parts of the material retained by ICAC on the basis that they … [were] Cabinet documents such that the public interest warrants the refusal of access."[20] The State contended that access should be refused on the basis that the public interest in preventing their disclosure outweighed the public interest in access being granted.[21]

46. Beech-Jones J referred to Allsop P's summary of relevant considerations to take into account in the weighing or balancing process in *State of New South Wales v Public Transport Ticketing Corporation*,[22] including "whether the documents concern policy, the currency and contemporaneous controversiality of the subject matter, the character of the subject matter otherwise, for instance whether national security or high policy and the forensic relevance of the documents".[23]

47. Although the documents to which Mr Obeid sought access did not record the "actual deliberations" of Cabinet, they did disclose the formation of policy albeit that their subject matter, namely the leasing policy of the Maritime Authority, was neither controversial nor contemporaneous. They must also have disclosed other matters which Beech-Jones J regarded as Cabinet deliberations, because his Honour said of such documents that their "outcome … has been known for many years".[24] His Honour held that "where the very subject matter of criminal proceedings is the alleged corruption of the processes of government, especially at a Cabinet level, a claim for public interest immunity over documents pertaining to that process is that much harder to maintain."[25]

48. Beech-Jones J examined the documents to determine the balancing exercise. He denied Mr Obeid access to documents which he concluded were of "little utility, if any, to the defence case", but granted access to those which were "of real significance to the issues in the prosecution [even if] …it [was] doubtful that the accused would consider deploying it" and those which "could assist in any cross examination".[26]

Ruling

49. The DPC's submission that in determining whether the Cabinet Deliberations or Cabinet Documents should be publicly disclosed, it is incumbent on Counsel Assisting to demonstrate a legitimate forensic purpose for it in the context of the Commission's current investigation pays no regard, in my view, to the exercise in which the Commission is engaged. It is conducting an investigation, not a court hearing. In the investigatory context,"[l]ines of enquiry which may appear to have

[20] Ibid at [5].
[21] Ibid at [1].
[22] [2011] NSWCA 60 (at [31] Hodgson JA and Sackville JA agreeing.
[23] *R v Obeid (No 9)* (at [32]).
[24] Ibid (at [32]).
[25] Ibid (at [35]).
[26] Ibid (at [[42] – 45]).

no relationship to a reference may lead to the uncovering of matters of vital importance".[27]

50. Nevertheless, it is apparent that the documents Counsel Assisting proposes to examine witnesses about and tender:

    a) go directly to the grants awarded to the ACTA and the RCM, using redactions as appropriate to exclude irrelevancies;

    b) record matters before Cabinet or a committee of Cabinet in respect of which Ms Berejiklian made a disclosure, again using redactions as appropriate to names of any persons referred to in the disclosures in the publicly released documents;

    c) questions that disclose the contents of Cabinet Documents or content of Cabinet Deliberations but only to the extent reasonably necessary to expose to the public, and make it aware, of evidence relevant to the allegations being investigated in the Public Inquiry; and

    d) questions regarding matters of general practice and procedure of Cabinet or Cabinet committees.

51. All such documents and questions as described, in my view are relevant to the allegations being investigated.

52. The DPC's submission that the Commission might consult with either Ms Berejiklian or other (unidentified) persons to agree certain facts or produce evidence in another form appears misconceived in two respects. First, it suggests the Commission adopt a procedure more common to an *inter partes* process. Secondly, and more significantly, secondary evidence of the documents Counsel Assisting seeks to tender and ask questions about would attract the same principles of public interest immunity as the primary documents.

53. It is plain that the legislature passed the ICAC Act fully aware of principles such as those of public interest immunity. Sections 21, 22, 24 and 37 make it apparent the legislature was also aware that a public inquiry could be the vehicle through which the public became aware of matters which might matters which might ordinarily be protected by public interest immunity. No doubt it conceived the sensibility of such an outcome as promoting the objects of the ICAC Act.

54. It will be apparent from the allegations with which the Public Inquiry is concerned that they relate to matters which while they occurred relatively recently (2016 – 2018) concern what might be called one-off transactions and are not "current" or "controversial". Further, they do not concern matters of policy, let alone national security. On the other hand, they go to the heart of the allegations the subject of the investigation into Ms Berejiklian's conduct.

55. In S*ankey v Whitlam* Stephen J said that "to accord privilege to [documents of a class hitherto regarded as undoubtedly the subject of Crown privilege as a matter of course] is to come close to conferring immunity from conviction upon those who

[27] *AB v National Crime Authority* [1996] FCA 1294 at [24] per Northrop J.

may occupy or may have occupied high offices of State if proceeded against in relation to their conduct in those offices."[28]

56. A like observation may be made, particularly having regards to the burden on the Commission to "expose" corruption involving or affecting public authorities and public officials. In the context of conducting a Public Inquiry for the purposes of an investigation, to find that the public interest weighs against using in a public hearing a narrow class of Cabinet Documents and Cabinet Deliberations specific to the allegations in the public hearing would prevent the Commission from discharging one of its principal objects. This should not be regarded as a statement that such a finding could never be made, but in the present circumstances, in my view the nature of the documents Counsel Assisting proposes to examine witnesses about and tender is such that the public interest in the public aspect of the investigation outweighs the public interest in maintaining their confidentiality by taking evidence about them in private as the DPC submits.

57. Accordingly, I rule that 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:

i. documents recording any decisions made by Cabinet or a committee of Cabinet concerning either or both of the Australian Clay Target Association Inc (ACTA) and Riverina Conservatorium of Music (RCM) during the period from 2012 to 2018;

ii. submissions to Cabinet or a committee of Cabinet proposing one or more decisions directly affecting ACTA /or the RCM; and

iii. advice or speaking notes in relation to any Cabinet or Cabinet committee submission falling within the 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 content of Cabinet Deliberations but only to the extent reasonably necessary to expose to the public, and make it aware, of evidence relevant to the allegations being investigated in the Public Inquiry.

[28] Op cit at 57.

d) 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 ACTA or the RCM. However, questions would not, without leave, be permitted to be asked in public that would reveal the substance of any agenda item other than one concerned with ACTA and/or the RCM 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 ACTA and/or the RCM 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 ACTA and/or RCM and/or the disclosure of conflicts.

The Hon. Ruth McColl AO SC

Assistant Commissioner

17 October 2021