



Office of the Inspector of the  
**Independent Commission Against Corruption**

**Special Report by the Inspector of the  
Independent Commission Against Corruption  
pursuant to section 77A of the *Independent  
Commission Against Corruption Act 1988*  
regarding the Decision to Hold a Further Public  
Inquiry in Operation Keppel**

**Special Report 2022/01**

1. On 1 October 2021, the Independent Commission Against Corruption (ICAC) issued a Media Release in the following terms:

*The NSW Independent Commission Against Corruption (ICAC) will hold a further public inquiry in Operation Keppel from **10:00 am on Monday 18 October 2021.***

*The Commission is investigating whether, between 2012 and 2018, the Hon Gladys Berejiklian MP engaged in 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 the then NSW Member of Parliament, Mr Daryl Maguire, in connection with: grant funding promised and/or awarded to the Australian Clay Target Association Inc in 2016/2017; and grant funding promised and/or awarded to the Riverina Conservatorium of Music in Wagga Wagga in 2018; and/or*
- constituted or involved the partial exercise of any of her official functions, in connection with: grant funding promised and/or awarded to the Australian Clay Target Association Inc in 2016/2017; grant funding promised and/or awarded to the Riverina Conservatorium of Music in Wagga Wagga in 2018; and/or*
- 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 suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Mr Daryl Maguire; and/or*
- was liable to allow or encourage the occurrence of corrupt conduct by Mr Maguire.*

*The Commission is also investigating whether, between 2012 and August 2018, Mr Maguire 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, G8wayInternational/G8wayInternational Pty Ltd and associated persons.*

*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 section 13(2) of the ICAC Act.*

\* \* \* \*

*Assistant Commissioner the Hon Ruth McColl AO SC will preside at the public inquiry. Counsel Assisting the Commission will be Mr Scott Robertson and Mr Alex Brown.*

*It is expected that the inquiry will continue for approximately 10 days. A witness list for the first week of the public inquiry will be published closer to the commencement date of the proceedings, along with further information about*

*how to access the live stream. The Commission will also advise if there are changes to the public health orders that may affect the conduct of the inquiry.*

2. As is well known, after that Release was made public by the ICAC, Ms Gladys Berejiklian resigned as Premier of New South Wales and indicated her intention to resign from the New South Wales Parliament.
3. Following Ms Berejiklian's resignation, I received several complaints from members of the public about the conduct of the ICAC in deciding to investigate her conduct and in making the public announcement in question. The ICAC itself has informed me that it too received complaints from members of the public in relation to this matter.
4. Because of the public interest involved, I determined to carry out an investigation pursuant to section 57B of the *Independent Commission Against Corruption Act 1988* (ICAC Act) as to whether in determining to hold the public inquiry into the matters specified concerning Ms Berejiklian and in making the announcement itself, the ICAC had committed any act of "maladministration" within the meaning of the ICAC Act. Maladministration is defined by section 57B(4) as follows:
  - (4) *For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is--*
    - (a) *contrary to law, or*
    - (b) *unreasonable, unjust, oppressive or improperly discriminatory, or*
    - (c) *based wholly or partly on improper motives.*
5. I decided to focus on the question whether the ICAC had acted contrary to law, unreasonably or oppressively.
6. Accordingly, I wrote to the Chief Commissioner, the Hon Peter Hall QC on 5 October 2021 seeking information concerning the ICAC's decision to conduct a further public inquiry in Operation Keppel. The Chief Commissioner responded to me on 12 October 2021 setting out the basis for the decision in question and supplying the materials upon which the decision was based, including legal advice obtained by the Commission.
7. The provision of the ICAC Act that empowers it to conduct a public inquiry is section 31 which relevantly provides:
  - (1) *For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry.*
  - (2) *Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following--*
    - (a) *the benefit of exposing to the public, and making it aware, of corrupt conduct,*

*(b) the seriousness of the allegation or complaint being investigated,*

*(c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry),*

*(d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.*

8. Section 6(2) of the ICAC Act requires any decision to conduct a public Inquiry under section 31 to be authorised by the Chief Commissioner and at least one other Commissioner.
9. Having considered the materials provided by the Commission, I am satisfied of the following matters:
  1. On the material in its possession the Commission had a proper basis for determining to conduct a public inquiry into the matters referred to in the Media Release regarding the conduct of Ms Berejiklian.
  2. In making that determination, the Commission considered specifically each of the matters referred to in section 31(2)(a)-(d), that is, the benefit of exposing to the public, and making it aware of, corrupt conduct, the seriousness of the allegation or complaint being investigated, the risk of undue prejudice to a person's reputation and whether the public interest in exposing the matter was outweighed by the public interest in preserving the privacy of the persons concerned.
  3. The decision in question was made unanimously by the Chief Commissioner and the two Commissioners and, as a result, section 6(2) of the ICAC Act was satisfied.
  4. Neither the Chief Commissioner nor the Commissioners were in a position of conflict of interest so as to preclude them from performing their duties under sections 6 and 31 of the ICAC Act.
10. I will state my reasons for the conclusion expressed in paragraph 4 above that the Chief Commissioner and Commissioners were not precluded from participating in the decision to hold the public inquiry. Some background is necessary. During the earlier hearings in Operation Keppel, the Sydney Morning Herald reported that it had been necessary to appoint Assistant Commissioner McColl to conduct the public inquiry to avoid a perceived conflict of interest arising from tension between the New South Wales government and the Commission over its funding. It has since been suggested that this "conflict of interest" should have prevented the Commissioners from participating in the decision to authorise the further public inquiry under sections 6(2) and 31 of the Act. I disagree with that proposition.
11. There are two reasons. The first is that, properly understood, as a matter of law there was no conflict of interest which would have prevented the Chief Commissioner or the Commissioners from conducting the Operation Keppel public inquiry. The fact that the Commission was seeking additional funding, or

a particular funding model, from the New South Wales government which was resisting the Commission's proposals, does not establish a bias or an interest so as to require their disqualification. Rather, the Commission's decision to appoint Assistant Commissioner McColl was made from an abundance of caution rather than from any legal requirement to do so.

12. The second reason is that, even if there were any bias or interest that would be sufficient in ordinary circumstances to require disqualification, the doctrine of necessity would apply to permit exercise of the powers granted by section 31 of the Act. That doctrine was stated by Mason CJ and Brennan J in *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70, 89 as follows:

*The rule of necessity gives expression to the principle that the rules of natural justice cannot be invoked to frustrate the intended operation of a statute which sets up a tribunal and requires it to perform the statutory functions entrusted to it. Or, to put the matter another way, the statutory requirement that the tribunal perform the functions assigned to it must prevail over and displace the application of the rules of natural justice. Those rules may be excluded by statute.*

13. The principle is applicable here, or would be, if, contrary to the view I have expressed above, there were some form of conflict of interest. The reason is that section 6(2) mandates participation by the Chief Commissioner and at least one other Commissioner. While section 6(4) permits an Assistant Commissioner, at the request of a Commissioner, to act for the Commissioner for the purpose of giving a section 6 authorisation if the Commissioner considers that there may be a conflict of interest in the matter, that could not conceivably operate to permit the Assistant Commissioner to be the sole decision maker. The only rational construction of the provision is that the Chief Commissioner must be involved and that overrides any common law principle of natural justice. I should add that the materials I have seen indicate Assistant Commissioner McColl was consulted about the decision to hold a public inquiry and agreed with it.
14. Thus, I am satisfied that the Commission acted lawfully and in conformity with the ICAC Act in determining to hold the public inquiry. Specifically, its conduct was not "contrary to law" or "unreasonable" nor any other form of "maladministration" within the meaning of section 57B of the Act. Nor was there any impermissible conflict of interest.
15. In coming to these conclusions, I am not expressing any view at all as to whether the allegations concerning Ms Berejikian as set out in the Media Release will or will not be sustained. That is not a matter for me but, ultimately, for the Commission after hearing the evidence and submissions on behalf of Ms Berejikian and other persons.
16. Finally, several complaints to me raised issues concerning the timing of the Commission's Media Release, suggesting that it was inappropriate to make the

announcement in question while New South Wales was in the grip of the Covid-19 pandemic in which Ms Berejiklian had a significant and important public role. Having concluded that there was a sufficient basis to investigate the matters in question further and hold a public inquiry, I believe the Commission was correct to proceed as it did. Had it failed to do so, it could itself have been justifiably accused of failing to perform its significant statutory functions and, indeed, of partiality towards the former Premier.

17. I have considered whether as part of this Special Report I should set out some of the matters considered by the Chief Commissioner and the Commissioners in determining to authorise the public inquiry pursuant to sections 6(2) and 31 of the ICAC Act but have decided that should not be done because of the risk of prejudice to the Commission's investigation, the undesirability of making material public which is yet untested and as to which procedural fairness has not yet been given. In addition, some relevant materials are the subject of legal professional privilege.

*B. R. McClintock*

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