



Office of the Inspector of the
Independent Commission Against Corruption

**Report pursuant to sections 57B(5) and
77A of the *Independent Commission
Against Corruption Act 1988*
determining a complaint by Mr Arthur
Moses SC on behalf of the Hon Gladys
Berejiklian MP against the Commission**

Executive Summary

1. This is a report pursuant to sections 57B(5) and 77A of the Independent Commission Against Corruption Act 1988 (“the ICAC Act” or “the Act”) determining a complaint against the Independent Commission Against Corruption (“ICAC”) made by Mr Arthur Moses SC on behalf of the Hon. Gladys Berejiklian MP. That complaint is set out in a letter to me dated 16 October 2020 and in further submissions dated 23 October 2020.
2. The complaint concerns the circumstances in which a transcript of evidence given in private at the Commission by Mr Daryl Maguire on 15 October 2020 was erroneously uploaded to the Commission website and, as a result, was accessed by a number of persons contrary to its intended confidentiality. The complaint suggests that the security of Ms Berejiklian’s home was compromised because information about it was disclosed in the transcript. The complaint also raised another issue which I am not yet able to resolve. Consequently, I have redacted references to it from the correspondence I have attached. An example is the (deleted) paragraph 7 of the letter from Mr Moses quoted in paragraph 14 below.
3. The materials I have examined establish that the transcript was uploaded and made publicly available for approximately 35 minutes as a result of human error on the part of a relatively junior employee of the ICAC. As a result, I have decided that the matters raised by the complaint do not amount to “abuse of power, impropriety and other forms of misconduct” as those terms are used in s 57B of the ICAC Act 1988.
4. I have carefully considered whether the circumstances of the upload and the Commission procedures which enabled it to occur, amount to “maladministration” also within the meaning of s 57B of the ICAC Act. Although Mr Moses did not make an express allegation of maladministration on the part of the Commission, I am nevertheless required by the Act to consider whether the conduct in question satisfies the statutory criterion. I have decided that, on balance, the conduct which is the subject of the complaint do not amount to “maladministration” within the meaning of the Act, for the reasons I express below. Nevertheless, those circumstances reveal, in my opinion, a serious administrative failure which has had unfair and detrimental consequences for Ms Berejiklian which would not have happened had adequate processes been in place.
5. I am concerned about the responsibility the Commission places on junior employees who do not have sufficient understanding of the issues involved in a public inquiry but who are given responsibility for the significant role of uploading material to the Commission’s website without perhaps having a full appreciation of the contents of the material in question, or the day’s events in a particular hearing during which highly sensitive matters may be dealt with as part of the Commission investigation.

6. As part of my investigation into this matter, I conducted a review of the Commission procedures that relate to the uploading of material to the Commission's public and restricted websites. While my preliminary review is that they are prescriptive and thorough as a procedure, they do not seem to display sufficient detail about the risks associated with handling sensitive material.
7. Following the uploading of the private examination transcript, the Commission committed to reviewing its internal procedures for uploading material to its website and retraining Commission officers tasked with the responsibility of uploading content to the ICAC website. By letter dated 13 November 2020, the text of which I set out below, the Commission informed me of its proposals to improve its procedures to prevent similar incidents happening in the future.
8. I propose to monitor the Commission's implementation of the revised procedures and report on that implementation in my annual report for the 2020-2021 year. Further, I may revisit the adequacy of the relevant Commission processes while doing so.

Background—ICAC Operation Keppel

9. In Operation Keppel, the Commission is investigating allegations that, from 2012 to August 2018, the then Member of the Legislative Assembly for the electorate of Wagga Wagga, Mr Daryl 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 and/or entities close to him. These entities included G8wayinternational/G8wayinternational Pty Ltd and associated persons. During that investigation it became known to the Commission that Mr Maguire and Ms Berejiklian had been, for some years, been in a close personal relationship which they both wished to remain private. That relationship has now been revealed to the public through the public hearings the Commission has carried out in Operation Keppel and mentioned below.
10. Among the witnesses examined in public pursuant to s 31 of the ICAC Act was Mr Maguire. Mr Maguire gave evidence in a public inquiry on 14-16 October 2020. On 15 October 2020, in the course of that public inquiry Mr Scott Robertson, counsel assisting in Operation Keppel made an application to the Assistant Commissioner Hon R S McColl AO, SC that she exercise her powers under s 31(9) to hold part of the public inquiry in private. The application and the Commissioner's ruling were in the following terms (TR1712-3):

MR ROBERTSON: Commissioner, I wish to explore some of the matters that I've just addressed with the witness, but can I make this submission regarding that. My application is for the Commission to convene a private session of the public inquiry pursuant to subsection 9 of section 31 of the Independent Commission Against Corruption Act. There's a difficult matter of balance that the Commission must undertake in relation to this public inquiry, in my respectful submission. Regretfully it's been necessary for this inquiry to trespass on matters that ordinarily would be entirely private, but as part of this Commission's responsibility of investigating not just alleged corrupt conduct, but conduct that is connected with alleged corrupt conduct, it was necessary in my judgement, and as apprehended in the Commission's judgement generally, to trespass at least in part on matters that would ordinarily be private. To take an example, the telephone intercept call that I played, Exhibit 324, couldn't properly be understood without having some understanding of the nature of the relationship between Mr Maguire and Ms Berejiklian. That having been said, in my respectful submission, this Commission should not conduct something in the nature of a public trial as to the nature and extent of the relationship between these two individuals. The nature and the extent of the relationship between the individuals is relevant to the Commission's exercise in that to assess the evidence that's presently before the Commission and such further evidence that might be before the Commission, that's a factor that that affects the proper assessment of that material, in my submission. However, given that it trespasses on matters of considerable personal privacy, in my respectful submission, the public interest in dealing with matters in public that are recognised by section 31 – in the case of the particular matters that I now want to put to Mr Maguire – is outweighed and, indeed, in my respectful submission, significantly outweighed by the public interest in ensuring the privacy of Mr Maguire and Ms Berejiklian in relation to a subject matter that I consider myself bound to ask about but which trespasses on matters of privacy of the kind that I have now identified. So my application is for the Commission to proceed in a private session pursuant to section 31(9) that should exclude everyone other than Counsel Assisting, Commission officers, those who appear for Mr Maguire and those who appear for Ms Berejiklian. It shouldn't otherwise be in the public domain in my respectful submission.

*THE COMMISSIONER: Yes, very well. Thank you, Mr Robertson. Having regard to the matters Mr Robertson has just identified, I am satisfied that it's in the public interest to hold a part of the public inquiry in Operation Keppel in private pursuant to section 31(9) of the Independent Commission Against Corruption Act concerning the evidence now to be given by Mr Maguire. **Accordingly I direct that the evidence given by him in private or the contents of any document or a description of anything shall not be published in any manner except by Commission staff for Commission purposes pursuant to section 112 of the Act.**(my emphasis)*

11. The Commissioner made the following formal order:

HAVING REGARD TO THE MATTERS MR ROBERTSON HAS JUST IDENTIFIED, I AM SATISFIED THAT IT'S IN THE PUBLIC INTEREST TO HOLD A PART OF THE PUBLIC INQUIRY IN OPERATION KEPPEL IN PRIVATE PURSUANT TO SECTION 31(9) OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT CONCERNING THE EVIDENCE NOW TO BE GIVEN BY MR MAGUIRE. ACCORDINGLY I DIRECT THAT THE EVIDENCE GIVEN BY HIM IN PRIVATE OR THE CONTENTS OF ANY DOCUMENT OR A DESCRIPTION OF ANYTHING SHALL NOT BE PUBLISHED IN ANY MANNER EXCEPT BY COMMISSION STAFF FOR COMMISSION PURPOSES PURSUANT TO SECTION 112 OF THE ACT. (emphasis in original)

12. The private transcript of Mr Maguire's evidence, despite the s 112 order, was published on the ICAC website on 15 October 2020 from about 4:45pm to 5:16pm by which time Commission staff, who had by then become aware of the erroneous upload, took steps to remove it, as I explain below. In the 31-minute period the private transcript was on the Commission's public website, it was downloaded 205 times.
13. At 10.00am on 16 October 2020, the Assistant Commissioner apologised to Ms Berejiklian in the following terms (TR 1745):

THE COMMISSIONER: Yesterday evening the transcript of a private hearing conducted immediately prior to the luncheon adjournment was inadvertently uploaded to the public transcript area of the Independent Commission Against Construction, Independent Commission Against - -

MR MOSES: Against Corruption.

*THE COMMISSIONER: - - - Corruption website. It touched on the relationship between Ms Berejiklian and Mr Maguire. **On behalf of the Commission I would like to apologise both to Ms Berejiklian and Mr Maguire for that inadvertent uploading.** I should note that at the time that private transcript was uploaded, it was the subject of a section 112 order I had made at the outset of the hearing directing that the evidence given by Mr Maguire during that private hearing not be published in any manner. Subsequent to the Commission learning that that private transcript had been inadvertently uploaded, a further section 112 order preventing the publication of the private evidence was made. It remains in force and will remain in force, and any publication of material in that private transcript will be in breach of the Independent Commission Against Corruption Act. I should also state that the Chief Commissioner has instructed that there be an*

internal investigation of how the private transcript came to be uploaded and also that the whole matter will be referred by the Commission to the Inspector of the Independent Commission Against Corruption.(my emphasis)

The Complaint

14. On 16 October 2020, the day following the erroneous upload, Mr Moses SC, senior counsel for Ms Berejiklian, complained to my Office in the following terms:

I wish to draw to your attention to a serious error which occurred yesterday in this Inquiry.

Shortly before lunch the Assistant Commissioner made a non-publication direction pursuant to section 112 of the Act in respect of part of Mr Maguire's evidence. Notwithstanding that order, at about 4:45pm a version of the transcript containing the private testimony in full was uploaded to the Commission's public website. It was not removed until about 5:18pm, and I am informed that during that period a significant number of people downloaded the transcript.

*I expressed my concerns by email to counsel assisting and [REDACTED] at 6:15pm. [REDACTED] responded to my email at 6:56pm. A copy of that correspondence is **attached**. I also confirm that I have discussed the matter over the phone with counsel assisting, and that I am aware of the notification published on the Commission's website in respect of the matter.*

The private hearing concerned, in part, [REDACTED]. This information has now been published and downloaded by a significant number of unknown individuals.

This is despite the fact that precisely these matters – [REDACTED]. In response to those concerns the Commission gave assurances that it understood the seriousness of these matters and that there would be no publication of such information.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

These details were published – apparently inadvertently – by the Commission. In light of the seriousness of this error, I request that the matter be investigated. In particular, I respectfully ask that the following matters be addressed:

1. *What were the circumstances surrounding the erroneous publication?*
2. *Who made the error and how did it occur?*
3. *How did the Commission become aware of the error?*
4. *What processes and procedures does the Commission have in place to ensure that material subject to a s 112 direction remains properly suppressed?*
5. *What measures are in place to preserve the confidentiality of the records of the Premier's evidence given in private hearing?*
6. *What orders does the Commission propose to make concerning the individuals who downloaded the version of the transcript containing the private testimony?*

- [REDACTED]
- [REDACTED]
8. *Please confirm that the Commission will issue a public apology to the Premier tomorrow.*

15. On 22 October I received further representations from Mr Moses concerning an incident that had occurred in the NSW Parliament¹:

Dear Inspector,

I refer to our telephone conversation. I confirm that in light of [REDACTED] apparent derivative use of material from a private hearing that was released by ICAC and which is the subject of an investigation by you, that it is respectfully requested that you consider issuing a public statement this afternoon:

- 1. That confirms that you are currently conducting an investigation into a breach by ICAC concerning the release of a private hearing transcript that was the subject of a suppression order in order to ascertain how that breach came about;*
- 2. It is a matter of fundamental importance that any person whether they be a member of Parliament, member of the media, or member of the public who had access to the transcript whilst it remained on the ICAC website, until it was taken down, understand that it would be a breach of the ICAC Act which is subject to severe penalties for direct or derivative use to be made of that transcript;*
- 3. There should be no unnecessary invasion of the privacy of the Premier who is a witness at ICAC, not an affected person, including any matters being disclosed that may undermine her security.*

I responded to Mr Moses SC on the same day and indicated that my powers as Inspector were limited by the legislation and I would not accede to his request.

16. I also received further submissions from Mr Moses SC on 23 October 2020 which are too lengthy to quote conveniently. I will attach them to this report. I should add that I express no particular view as to Mr Moses' submissions except in so far as my views are specifically stated in this report.
17. In response to Mr Moses' submissions, on 26 October 2020 I sought clarification concerning the terms of his complaint to my Office:

Thank you for the materials attached to the email to which this is a reply, which I will consider in determining your complaint on behalf of Ms

¹ This incident has been the subject of extensive correspondence between Mr Moses, the Commission and myself which does not affect, at least directly, the subject matter of my inquiry into the erroneous upload. The suggestion is that there may have been a breach of S112 of the ICAC Act. I am not able to deal with that myself and probably have no statutory power to do so. Rather, it may be a matter for the Presiding Officers if they thought it appropriate.

Berejiklian. I note the following material which appears in [3.7] of your submissions:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18. Mr Moses responded to me on the same day as follows:

Thank you for affording me the opportunity to clarify this aspect of the submission.

[REDACTED]

. The reason for the inclusion of those passages is to contextualise the submissions concerning the sensitivity of the material disclosed in the transcript. In particular, the point which this highlights is that in a case, like this, where a discrete part of the private evidence of one witness is erroneously published, it is especially apt to mislead the reader because he or she will not have the benefit of the remaining body of secret evidence on the same subject matter.

[REDACTED]

Accordingly, those passages were included to underscore the sensitivity of the material which was published in order to reinforce the point that the

Commission should have had measures in place to ensure such private transcripts were not inadvertently published, or if so published, mechanisms available to detect who had downloaded the material. Accordingly, I confirm that this complaint is not about the line of questions identified in your email.

19. In an email of 27 October 2020 Mr Moses requested that as part of the complaint to my Office I also take into consideration the following correspondence he had received from the Chief Commissioner dated 27 October:

Operation Keppel - questions in Parliament

I am writing in response to your letter of 23 October 2020.

[REDACTED]
[REDACTED]
[REDACTED], I note that the Commission provided information to [REDACTED] of the NSW Police Force Anti-Terrorism and Intelligence Group to enable NSW Police to conduct a risk assessment.

With respect to any information in the private transcript being referred to or used by members of Parliament, I refer you to my letter of 23 October 2020. Whilst it may be probable that the questions asked by [REDACTED] in Parliament on 22 October 2020 were informed by the private transcript, the Commission cannot be certain that is so. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

In terms of your requests that I issue a statement and write to each member of the NSW Parliament reminding them of the non-publication order concerning the private transcript, I reiterate that I am satisfied that the Commission has to date taken appropriate action to correct its error in publishing the private transcript and to ensure that it is not published further.

Those steps include the making of non-publication orders under s112 of the ICAC Act, the noting on the private session transcript that it is subject to such an order, the publication on the Commission's public website of a notice that the private session transcript is subject to such an order and the statement made by Assistant Commissioner McColl at the

commencement of the public inquiry session of 16 October 2020 that the private session transcript had been inadvertently uploaded to the Commission's public website and was subject to two non-publication orders.

As noted in your letter, the matter is now with the Inspector.

In light of all the above, I do not intend to do anything further regarding the matters you have raised.

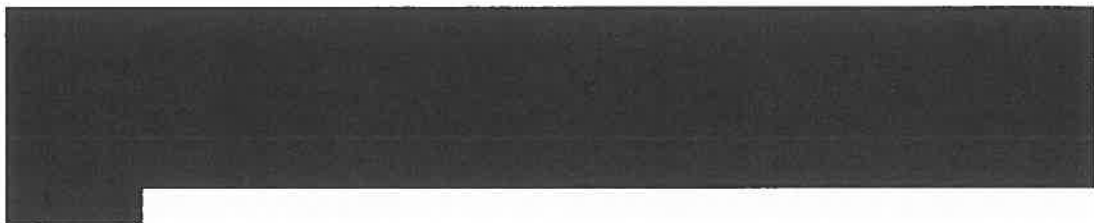
The Commission Response

20. Given the seriousness of the matters raised in Mr Moses' complaint I sought and was provided on 16 October 2020 with a response by the Commission to the matters raised.
21. My request to the Commission was in the following terms:

I attach correspondence I received this morning from Mr Arthur Moses SC, who, as you know, represents the Premier in the current Operation Keppel hearings.

You will note Mr Moses complains about the circumstances in which evidence given by Mr Daryl Maguire in a private examination subject to a s 112 non-publication order was made publicly available on the Commission's website and was apparently accessed by members of the public.

I would appreciate an answer to the questions Mr Moses raises and, in particular, how such obviously sensitive material came to be made publicly available. Surely the circumstances indicated that extreme caution should be exercised in relation to it?



Since preparing the above, Ms Zekanovic has informed me that you would like to discuss these matters with me. I am of course available to discuss this with you at a time convenient to you.

22. *I look forward to the Commission's response as soon as is reasonably possible. On that same day I was provided with the Commission's own internal investigation report concerning the events that had led to the erroneous upload of the transcript, the steps taken by the Commission to remove it once it had become aware that it was publicly available and Commission recommendations concerning the review of internal procedures and retraining of staff.*
23. Given the contents of the internal investigation report, including the names of Commission officers that were involved in the incident I do not think it is appropriate that the entirety of the report be reproduced here, however it is appropriate to include the Commission's recommendations which are as follows:
 1. *That Operations Manual work instruction - WI-IP03-D-Use of the public and restricted website for Commission hearing is reviewed to strengthen the security measures around the upload of private transcripts to the restricted and public website.*
 2. *Retraining and reinforcement of appropriate actions and security measures in uploading private transcripts to the Commission's Investigation Division support staff to the "restricted" and public website.*
 3. *Inform the Inspector when the update of the Operation work instruction, retraining and reinforcement of appropriate actions and security measures have been completed, and the adoption of any additional safeguards.*
24. In addition to the report the Commission also provided my Office with the following materials:
 - a. IP-03 – WI Use public and restricted website, Operations manual.
 - b. IP-03 - Compulsory Examinations and public inquiries
 - c. Private session transcript of Mr Daryl Maguire of 15 October 2020 during the Operation Keppel Public Inquiry (1713t to 1722T).
 - d. Attachment 6 – IP-03B7 Hearings Associates Duties.
 - e. Attachment 7 – Minute – erroneous version of Operation Keppel Public Inquiry transcript.
 - f. Attachment 7A – emails 1-9 associated with erroneous upload.
 - g. Attachment 8 – Email from Wagga Wagga ABC Journalist re transcript.
 - h. Attachment 9 – PI Exhibit EXH-372 – Maguire Private Transcript excerpts.

25. Following the provision of that information, on 20 October 2020 I requested all the transcripts of the compulsory examinations of Ms Berejikian and Mr Maguire for the entirety of the Operation Keppel investigation, and not merely those the subject of Mr Moses complaint to my Office.
26. On that same day the Chief Commissioner asked that I specify the purpose of my request given that the transcript that I requested was subject to a s 112 order of the ICAC Act which restricts the publication of Commission material:

Since my last email sent to you today, Commission staff have been requested to assist in meeting your request for compulsory examination transcript. Whilst that is being done there is a matter upon which I require clarification and that relates to the basis for your request. As you are aware there is a limited exception provided for in S112 (1B) of the ICAC Act in relation to orders restricting publication of evidence insofar as the office of Inspector is concerned (complaints to the Inspector etc). I do not know whether your request relates to a complaint or other matter within S112 (1B). Given that your letter does not state the basis for your request it is necessary for me to seek your advice as to whether it is made in relation to and or concerns a function or functions being performed by you as Inspector. Should you wish to raise any matter concerning the above please let me know so that I can assist.

27. On 22 October 2020 I responded as follows:

Thank you for your email and letter dated 20 October 2020 inquiring as to the basis of my request for the Keppel compulsory examination transcripts. While I appreciate the reasons for your inquiry, I am only prepared to say that I require production of those transcripts to perform my functions under the ICAC Act.

As Inspector, I am entitled access to all records of the Commission without limitation and regardless of any order under s 112 of the Act. This is a necessary consequence of both s 57C and s 112 itself. Thus, s 57C(b) entitles the Inspector to full access to the records of the Commission and s 57C(c) empowers the Inspector to require officers of the Commission to supply information and produce documents about any matter relating to the Commission.

It was those provisions I regarded as the basis for my requirement to produce the compulsory examination transcripts in question. There is nothing in the legislation that suggests the existence of an obligation to specify the reason for my request.

S 112 does not qualify the Inspector's entitlement to all Commission records. That provision is primarily directed to persons who wish to make a complaint or disclose information to the Inspector. But, in any event, it expressly exempts disclosure of documents to the Inspector. S 112(1B) reads relevantly "A direction under this section does not apply to (a) . . . the disclosure of information, documents or other things to the Inspector".

I hope you agree that these provisions afford me unfettered access to all Commission records whether they are subject to a direction under s 112 or not.

I believe it would be inappropriate for me to provide details of the reasons why I require the transcripts because I would not wish it to be thought that I accept the existence of an obligation to provide such information. While this is not the case here, there may be situations where an enquiry or investigation by the Inspector, whether the Inspector is me or one of my successors, would be prejudiced by the disclosure of such information.

I have left out of account s 57B(3) although my tentative view is that its effect is that I am not bound by any s 112 direction while I am performing my functions as Inspector. The relevant restriction on me appears to me to arise from s 111.

I look forward to access to the transcripts.

28. The Commission subsequently provided the requested transcripts.
29. On 26 October 2020 I sought from the Chief Commissioner further particulars about matters raised in Mr Moses submissions dated 23 October:

Thank you for your email of 23 October 2020 in which you indicate that the matters raised by Mr Moses in his complaint to my Office of 16 October have been addressed as part of the Commission's internal investigation (a copy of which I have already been provided) into the erroneous upload of Mr Maguire's unredacted transcript.

I attach a copy of a submission I received from Mr Moses on 23 October 2020 in support of his complaint to my Office of 16 October 2020. I would appreciate your response to two matters in particular that are raised by Mr Moses.

At 3.5 of his submission, Mr Moses raises concerns about what the Commission did with the security briefing provided by NSW Police in relation to Ms Berejikian's security arrangements for her appearance before the Commission. Specifically, what steps did the Commission take to ensure the integrity of any evidence that concerned the disclosure of details concerning Ms Berejikian's private residence?

Furthermore, in relation to the matters raised at 4.6, what risk management strategies is the Commission intending to implement? Specifically, is the Commission considering implementing detection measures to determine who has downloaded content from its website in case such an incident occurs again?

Finally, I note that Ms Dubois in her investigation report indicates that "in the 31 minutes the private transcript was on the Commission's public website there were 205 downloads (that is people accessing the website), 2 of the downloads were by Commission staff and 2 were failed accesses". Could you please clarify whether the transcript was downloaded 205 times or 205 people accessed the Commission's website during the period in question.

I look forward to your response

30. On 28 October 2020 the Chief Commissioner provided the following comprehensive response:

Thank you for your letter of 26 October 2020.

My letter addresses the matters raised by Mr Moses on 23 October 2020 for which you have requested a response.

What the Commission did with the security briefing provided by NSW Police in relation to Ms Berejikian's security arrangements for her appearance before the Commission?

In the early afternoon of Thursday 8 October, two members of the Premier's NSW Police security detail attended the Commission to assess the premises in readiness for her attendance on 12 October 2020.

Three investigators involved in the investigation met with the security detail and walked them through the options for accessing and exiting the building. There was no discussion about security at the Premier's residence.

The visit and proposed arrangements were recorded in an email from Chief Investigator Fox to the Executive Directors Legal and Investigations Divisions, the case lawyer, and the Human Resources manager.

The next interaction with NSW Police regarding the Premier's security and her evidence was on 16 October 2020. At 1.16pm that day, Chief Investigator Fox received an email from the case officer, who had been dealing with the security detail, in which he stated he had received a call from a [REDACTED], NSW Police, regarding the impact of the erroneous upload and [REDACTED].

The case lawyer organised a variation to the s.112 order in relation to the relevant portion of the private transcript. At 4.14pm that day, the case officer sent the s.112 order and redacted transcript to [REDACTED].

What steps did the Commission take to ensure the integrity of any evidence that concerned the disclosure of details concerning Ms Berejikian's private residence?

The evidence was taken from Ms Berejikian in a private session rather than public. At the commencement of the private session the Assistant Commissioner made a direction as to who could be present and required all other persons to leave the hearing room (1713T).

The only Commission personnel who had access to the private transcript on the 15 October 2020 were the Assistant Commissioner's Associate, the case lawyer, and the relevant Investigation Services staff, which included the [REDACTED]. The case officer received access on 16 October 2020.

The content of the private hearing was limited to those persons in the hearing room as all internal live streaming was suspended within the Commission. The persons present in the hearing were Assistant Commissioner McColl, the Associate, the case officer and case lawyer, Counsels Assisting, Mr Arthur Moses and a transcription officer.

The evidence was made the subject of a s112 non-publication order at the time the private session commenced and a further s112 order subsequently when

it was discovered the private session transcript had been inadvertently published.

All correspondence relating to Operation Keppel and any details surrounding the Premier's security is recorded in the Commission's and document management system (TRIM) and case management system (CMS), Resolve. The case files are contained in TRIM and classified as "Protected".

In relation to TRIM records strict access controls were put in place as soon as information relating to Ms Berejiklian arose within the investigation. "Protected" access was limited to the Chief Investigator, case officer and case lawyer, the Commissioners and the Executive Directors Legal and Investigation Division. Permission for access to the TRIM case file required the approval of the Chief Investigator. As the public inquiry progressed and evidence was presented some access restrictions were eased to allow Commission personnel to carry out their respective roles in support of the administration of the hearing.

In relation to the CMS few, if any, "Protected" documents were stored in this system. Nonetheless, the same "Protected" status was applied to the CMS. Access to the CMS required the approval of the Chief Investigator.

Both the Operation Keppel Trim case file and CMS continue to have "Protected" access control.

Clarify whether the transcript was downloaded 205 times or 205 people accessed the Commission's website during the period in question

There were 205 downloads of the private transcript. The transcript may have been downloaded multiple times by the same person or multiple persons using a shared network address. The Commission is unable to establish this but there were 165 individual network addresses. A single network address can be shared by multiple persons.

Each time a person accesses a document published on the website during the public inquiry the access causes the file to be downloaded. If an individual accesses the published document on their device, closes a browser, then reopens the browser and selects the same document, this would equal 2 downloads. Of the 205 downloads there would most certainly be the same person accessing the transcript on a number of occasions.

Specifically is the Commission considering implementing detection measures to determine who has downloaded content from its website in case such an incident occurs again?

The Commission's website is a public web site and all information published is publicly available. The Commission does not require visitors to the site or those that download documents to register access to the site.

The Commission in the first instance will review the Operations Manual work instruction - WIIP03-D - Use of the public and restricted website for Commission hearing to strengthen the security measures around the upload of private transcripts to the restricted and public website. Appropriate quality assurance and security measures will be implemented to significantly reduce the risk of the upload of an un-redacted private transcript occurring in the future.

Secondly, information and technology (IT) business solutions will be considered to add a further layer of security. Some measures for consideration are:-

Introducing a business requirement that all visitors to the public website must register their access to the site, or alternatively only those that wish to download document/s. The Commission will need to engage with the Commission's website developer to determine how this is to function. Website registration may require the person requesting the downloaded document to provide an email address. The Commission would then send the email address a link. Access may also be changed from an automatic download to view only.

A further solution is to engage with the website developer to improve the publishing process by the introduction of an IT workflow. This would involve one Commission officer submitting a document/s for publication, the second Commission officer would be required to approve the content of the publication before the document/s are made publicly available.

What risk management strategies is the Commission intending to implement?

In addition to the IT risk strategies the Commission is considering a change to the way documents are published on the website. Currently due to resourcing issues the staff member/s who upload transcripts and exhibits to the public website have other duties and they are not familiar with the hearing proceedings.

Consideration is to be given to allocating a staff member who is dedicated to the process of uploading documents during public inquiries with no other tasks. The individual should be involved in the hearing and is familiar with exhibits, is following the proceedings and has the necessary authority to make urgent changes to the public website in the event that suppression orders are required or varied.

A project group has been established to review the Commission's relevant procedures and processes and to provide advice and recommendations on appropriate risk strategies for implementation.

Advice will be provided once these measures have been determined.

I would welcome the opportunity to discuss and / or provide any further information on matters raised in this letter.

31. On 6 November 2020 I wrote to the Chief Commissioner to find out when the Commission was intending to implement the recommendations in its internal investigation report of 16 October 2020:

I note that in Ms Dubois' investigation report of 16 October 2020 concerning the public release of the unredacted private transcript of Mr Maguire's evidence to the Commission on 15 October 2020 the following recommendations were made:

- 1. That Operations Manual work instruction - WI-IP03-D-Use of the public and restricted website for Commission hearing is reviewed to strengthen the security measures around the upload of private transcripts to the restricted and public website.*
- 2. Retraining and reinforcement of appropriate actions and security measures in uploading private transcripts to the Commission's Investigation Division support staff to the "restricted" and public website.*
- 3. Inform the Inspector when the update of the Operation work instruction, retraining and reinforcement of appropriate actions and security measures have been completed, and the adoption of any additional safeguards.*

Would you let me know whether the Commission intends to implement all of Ms Dubois' recommendations and if so, the timeline for doing so.

I will submit my final report determining Mr Moses' complaint to Parliament on 27 November 2020 and wish to include the Commission's response in that report.

I look forward to your response

32. In a response to me dated 13 November 2020, the Chief Commissioner indicated that the Commission intends to implement all of the recommendations from the investigation report by 29 January 2021. I am also advised that the Commission has established a project group "to review the Commission's relevant procedures and processes and to provide advice and any further recommendations on appropriate risk strategies for implementation.

Consideration—how did the erroneous upload come about?

33. Ms Dubois sets out in her Investigation Report dated 16 October 2020 the circumstances of the erroneous upload, in response to Mr Moses' eight numbered questions set out in his 16 October 2020 letter quoted in paragraph 14 above. The responses provided by Ms Dubois are set out below. To protect the identity of Commission officers, their names and/or position within the Commission have either been redacted or a pseudonym has been used. Although the Commission provided me with the names of the officers involved, I determined that it is not in the public interest that they be disclosed in this report.

2. COMMISSION PUBLIC WEBSITE PROCEDURE

The Commission has a website (the "public website") to which members of the public have access to information about the Commission and the work it performs.

The Manager Communications and Media (MCM) has general responsibility for managing the content on the Commission's public website. Prior to the commencement of a public inquiry, the MCM will create an investigation page on the Commission's public website for the purpose of facilitating public access to the website.

The Commission has a procedure for the use of the public and restricted website for Commission hearings. In relation to the use of the public website the procedure provides that the Product Support Officer (PSO), Investigation Services Section (ISS), is responsible for uploading all transcripts, exhibits and witness lists that have been approved for publication. The case lawyer is

required to provide written approval and instructions to the PSO before private transcripts or exhibits can be uploaded to the public website.

3. UPLOAD OF THE UNREDACTED TRANSCRIPT AND HOW DID IT OCCUR?

On the morning of 15 October 2020, evidence was taken from Mr. Daryl Maguire in a private session. Ms. AB (PSO), a grade 2 officer, was responsible for the uploading of Operation Keppel Public Inquiry transcripts, exhibits and witness lists on Thursday 15 October 2020. Ms. AB commenced with the Commission as a PSO on [REDACTED].

Ms. AB commenced duty at 8:15am in the Commission's Property Office. In addition to the responsibility to complete uploads relating to the Public Inquiry, Ms. AB was also responsible for recording physical property items being lodged or signed out of Property to Commission officers.

Ms. AB had assumed the responsibility of uploading documents to the public website for most of the operation Keppel Public Inquiry.

Following an extended break in the Public Inquiry proceedings Ms. AB was advised by her manager, Chief Investigator CD, to leave the office and finish uploading Public Inquiry material from home. This instruction was in accordance with the Commission's CEO advice from 8 October 2020 regarding travel on public transport outside peak hours where possible during the Covid-19 pandemic.

Ms. AB completed a number of responsibilities associated with physical property and departed the office at 3:10pm. Ms. AB arrived home and reviewed emails at 4:30pm. Instructions to upload exhibit 366, change the witness list and upload the morning transcript were separate emails awaiting her action.

Ms. AB advised Chief Investigator CD, that on most occasions emails to upload transcripts (private and public) and exhibits were sent by [REDACTED] Lawyer, with instructions in the subject line of the email and with no content on the body of the email.

At 4.40pm [REDACTED] sent an email to Ms. AB with the subject FW: Morning transcript and an attachment 2020-10-15 Keppel Public – Private Transcript (01656T 01722T) Redacted.pdf. In the body of the email [REDACTED] instructed Ms. AB to, "Please upload this version of the morning transcript to the website", being a version of the transcript with those pages relating to the private session

redacted. Ms. AB read the subject line and did not open the email to read the instruction.

At 4:45pm Ms. AB, instead of uploading the redacted transcript attachment from [REDACTED], uploaded the unredacted private transcript of Mr. Maguire from TRIM, the Commission's document management system. Ms. AB had been following this process since the commencement of the Inquiry.

At 5:03pm Ms. EF, Manager MCM, received an email from [REDACTED], a reporter at the ABC in Wagga Wagga. [REDACTED] advised she had noticed the private transcript posted on the Commission public website included the evidence presented in the compulsory examination and that the transcript was "not blacked out – is that a mistake?"

At 5:11pm Ms. EF saw the email and notified [REDACTED]
At 5:13pm [REDACTED] sent an email to the group "KeppelPublicWebsite" address requesting the urgent removal of the unredacted private transcript from the public website.

At 5:16pm Senior Property Officer, Ms. GH saw the email, accessed the public website, and deleted the transcript. At 5:18pm Ms. GH advised [REDACTED] that the transcript had been deleted.

At 6:22pm, [REDACTED] requested the urgent publication of a s112 prohibition on the Keppel website directing that any part of that version of transcript shall not be published, copied, or described in any manner that may reveal the contacts of same. She also advised that a corrected version of the transcript had been published.

About 7:24pm Ms EF uploaded the s 112 order to the ICAC website at approximately 7:24pm. It was also linked to the website homepage and tweeted on the Commission's Twitter account with a link to the order at 7:43pm. Media who have been covering the public inquiry were emailed the link at 7:41pm.

Part of the private session transcript was tendered in evidence in the public inquiry today, 16 October 2020 as exhibit 372 (copy attached).(footnotes omitted)

I should also set out the remainder of the Commission response:

4. PROCESS AND PROCEDURES REGARDING S112 DIRECTIONS

The Commission has a policy and procedure to outline the requirements for the planning and conduct of compulsory examinations and public inquiries pursuant to the Independent Commission Against Corruption Act 1988 (the ICAC Act), section 112 directions (suppression orders), making or varying a s112 direction during a hearing and after a hearing has conducted. The Commission also has procedure with respect to the recording and filing of s112 directions made during a hearing are dealt with.

When a s112 direction is made or varied it should be read onto the record by the presiding Commissioner including that the direction or variation is necessary or desirable in the public interest.

At the end of each day of a public inquiry, the case lawyer is to check the accuracy and currency of the s112 directions recorded against the day's transcript session the case management system. The case lawyer should then arrange for any suppressed information to be redacted from the relevant transcript or exhibit to which the order refers prior to the authorizing its public on the Commission's website.

At the conclusion of an investigation, the case lawyer should review all outstanding suppression orders and wherever possible have the orders lifted or their direction prescribed by the presiding Commissioner. A suppression order can only be lifted by the presiding Commissioner.

5. WHAT MEASURES WERE IN PLACE TO PRESERVE CONFIDENTIALITY

There are 2 orders under s112 in place with respect to the private session transcript. The first is recorded at 1713T. The second was made by Chief Commissioner Hall, to be supplied.

6.

[REDACTED]

[REDACTED]

7. CONFIRM THAT THE COMMISSION WILL ISSUE A PUBLIC APOLOGY TO THE PREMIER TOMORROW.

Assistant Commissioner McColl issued an apology on behalf of the Commission at the commencement of the public inquiry on Friday, 16 October 2020, to be supplied.

8. CONCLUSION

Ms. AB is extremely remorseful and distressed by her error and understands she made an error by not reading the full email instructions sent by [REDACTED]. Ms. AB understands the significance of the impact of her action and has offered her sincere apologies to her colleagues and to those affected.

Ms. GH has assumed responsibility of publishing documents for the remainder of the Public Inquiry.

The emails show the actions of Ms. AB in uploading the unredacted transcript was a failure by [REDACTED] to not read the email instructions and it was not an action that was intended by [REDACTED].

Having worked for the Commission for 16 years I am not aware of any instances where an unredacted private transcript has been inadvertently released to the public or on the Commission's public website.

To access the private transcript from the Commission's website the transcript must be downloaded. A review of the Commission's public website shows in the 31 minutes the private transcript was on the Commission's public website there were 205 downloads (that is people accessing the website), 2 of the downloads were by Commission staff and 2 were failed accesses.

9. RECOMMENDATIONS

- 1. That Operations Manual work instruction - WI-IP03-D-Use of the public and restricted website for Commission hearing is reviewed to strengthen the security measures around the upload of private transcripts to the restricted and public website.*
- 2. Retraining and reinforcement of appropriate actions and security measures in uploading private transcripts to the Commission's Investigation Division support staff to the "restricted" and public website.*

3. *Inform the Inspector when the update of the Operation work instruction, retraining and reinforcement of appropriate actions and security measures have been completed, and the adoption of any additional safeguards.*

The Commission's Procedures

34. As part of my investigation of Mr Moses' complaint I reviewed the following Commission procedures which concern the uploading of material to the Commission's public and restricted websites:
 - Operations Manual, Work Instruction IP03-D, Policy and Procedure OM-IP-3. Use of the public and restricted website for Commission hearings.
 - Operations Manual, OM Policy and Procedure, Compulsory Examinations and Public Inquiries.
 - Operations Manual, Work Instruction IP03-B, Hearing Associate duties and responsibilities.
35. A review of those procedures indicates that although they are prescriptive and detailed in guiding staff how to undertake certain duties, I am concerned that they do not explain the risks involved of mistakenly or incorrectly handling Commission material. In addition, *Operations Manual, Work Instruction IP03-D, Policy and Procedure OM-IP-3 - Use of the public and restricted website for Commission hearings* mostly explains the processes for uploading material to the Commission's restricted website and only briefly explains uploading material to the Commission's public website.
36. Following a review of those documents I am considering conducting a formal audit of the procedures separate to my current investigation. I anticipate that that audit will consider the procedures referred to above in addition to other Commission procedures that deal with the handling and security of information.

Consideration—Inspector's Powers under the Legislation

37. My powers in respect of complaints are relevantly stated in s 57B(1) of the ICAC Act:
 - (b) *to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
 - (c) *to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of*

investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission

“Maladministration” is defined in s 57B(4) as follows:

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*

38. I should also note s 112 of the Act which is in the following terms:

112 RESTRICTION ON PUBLICATION OF EVIDENCE

(1) The Commission may direct that—

- (a) any evidence given before it, or*
- (b) the contents of any document, or a description of anything, produced to the Commission or seized under a search warrant issued under this Act, or*
- (c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or*
- (d) the fact that any person has given or may be about to give evidence at a compulsory examination or public inquiry, or*
- (e) any written submissions received by the Commission (including, but not limited to, submissions made by Counsel assisting the Commission),*

shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.

(1A) The Commission is not to give a direction under this section unless satisfied that the direction is necessary or desirable in the public interest.

(1B) A direction under this section does not apply to--

- (a) the making of a complaint to the Inspector or the disclosure of information, documents or other things to the Inspector, or*
- (b) the disclosure of information, documents or other things by a law enforcement officer to the Director of Public Prosecutions in accordance with the duty of disclosure under section 15A of the Director of Public Prosecutions Act 1986.*

- (2) *A person shall not make a publication in contravention of a direction given under this section.*

Maximum penalty--50 penalty units or imprisonment for 12 months, or both.

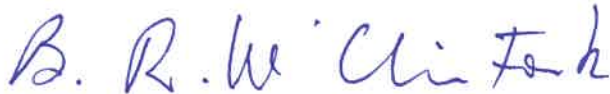
- (3) *It is not a contravention of a direction given under this section to publish any evidence, contents of a document or information to a registered medical practitioner or registered psychologist for the purposes of that health practitioner providing medical or psychiatric care, treatment or counselling (including but not limited to psychological counselling) to a person who has given or may be about to give evidence at a compulsory examination or public inquiry.*

39. It is obvious that the concepts of “abuse of power, impropriety and other forms of misconduct” involve conscious wrongdoing. Ms AB’s error does not, on any view, involve conduct of that nature. For that reason, I do not believe the s 57B(1)(b) criteria are established.
40. More difficult questions arise in relation to whether the statutory definition of “maladministration” has been satisfied. Neither of the matters specified in subsections (b) and (c) are established. It is, however, at least arguable that publishing the confidential transcript on the Commission website involved a breach of s 112(1) of the Act quoted above and was therefore “contrary to law”, the first of the statutory criteria for “maladministration”. On the other hand, to be maladministration it must be “action or inaction of a serious nature”. While the consequences of the publication have been extremely serious for Ms Berejiklian, I do not think that Ms AB’s action in uploading the confidential transcript can be categorised in that way and, therefore, constitute maladministration. Rather it was a simple, but regrettable, human error.
41. For these reasons, I do not believe I am entitled to make a finding that the Commission or any officer thereof has engaged in “maladministration”.
42. That said, the erroneous upload should not have happened and the fact that it did shows a clear failing on the part of the Commission. The material in question was obviously sensitive and significantly greater care should have been taken to ensure that the intended confidentiality was maintained. While I appreciate that the Commission is in the process of reviewing its processes as indicated by the Chief Commissioner in his letter to me of 13 November 2020, I am concerned that significant responsibility was placed on a junior officer of the Commission to carry out such an important task. The process that the Commission had in place to upload material such as transcripts, did not appropriately reflect the importance of the material being handled by that Commission officer.
43. The Commission knows that there is a significant increase in activity on its

website during public hearings and even more so when the witnesses have a public profile as is the case in Operation Keppel. That being the case the Commission should have had systems in place that ensured both the integrity and the content of its website was managed by staff that were directly involved in the investigation, such as investigators and lawyers, who are familiar with the contents of such transcripts. It seems to me that it is more appropriate that such staff are responsible for handling and ultimately uploading documents to the Commission website during a public hearing. That said, the steps outlined to address these issues seem to me to be appropriate, and as stated in [8] above I will monitor their implementation and report on them in my next annual report to Parliament.

Conclusion

44. I provided a draft copy of this Report to Mr Moses and the Commission to give each an opportunity to make any comments before its submission to Parliament.
45. Pursuant to 78(1A) of the ICAC Act I recommend that this Report be made public forthwith.

A handwritten signature in blue ink that reads "B. R. W. Clintock".

Bruce R McClintock SC

Inspector

Independent Commission Against Corruption

27 November 2020

**SUBMISSION ON BEHALF OF THE PREMIER, THE HON GLADYS
BEREJIKLIAN MP**

**PUBLICATION OF MR MAGUIRE'S PRIVATE EVIDENCE ON 15 OCTOBER
2020**

1. INTRODUCTION

1.1 The Inspector has invited a submission on behalf of the Premier in respect of the wrongful publication of a transcript recording private evidence given in this Inquiry by Mr Daryl Maguire on 15 October 2020. A complaint was lodged concerning this issue with the ICAC Inspector on 16 October 2020. It is also understood that the Commission referred the matter to the Inspector. The investigation by the Inspector into the wrongful publication was instituted on that day.

1.2 In the letter dated 16 October 2020, it was requested that the Inspector examine eight matters:

1. What were the circumstances surrounding the erroneous publication?
2. Who made the error and how did it occur?
3. How did the Commission become aware of the error?
4. What processes and procedures does the Commission have in place to ensure that material subject to a s 112 direction remains properly suppressed?
5. What measures are in place to preserve the confidentiality of the records of the Premier's evidence given in private hearing?
6. What orders does the Commission propose to make concerning the individuals who downloaded the version of the transcript containing the private testimony?



8. Please confirm that the Commission will issue a public apology to the Premier tomorrow.

1.3 It is noted that on 16 October 2020, the Assistant Commissioner of ICAC provided a public apology on behalf of the Commission in relation to the publication of the private transcript.

2. ICAC'S STATUTORY POWERS

2.1 The *Independent Commission Against Corruption Act 1988* (NSW) (**the Act**) confers powers upon ICAC which are "extraordinary": *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1 (**Cunneen**) at [3], [8], [53]. Those extraordinary powers involve a consequential abrogation of fundamental rights and privileges of individuals: *Cunneen* at [3].

2.2 The extraordinary powers are principally found in Divs 2, 3 and 4 of Pt 4 of the Act. Division 2 confers powers on ICAC to conduct investigations (see s 20), along with certain ancillary powers connected with such investigations: see ss 21-29. Those power were exercised in the present matter, namely the investigation known as "Operation Keppel".

2.3 Division 3 within Pt 4 is headed "Compulsory examinations and public inquiries". Within Div 3, s 30 confers a power upon ICAC to require individuals to attend compulsory examinations, which are to be conducted in private: s 30(5). The Premier attended such an examination in this matter on 16 August 2020, and Mr Maguire attended one on 15 September 2020.

2.4 Section 31 empowers ICAC, "if it is satisfied that it is in the public interest to do so", to conduct a public inquiry for the purposes of an investigation. Section 31 prescribes a number of mandatory considerations to be considered before deciding to hold a public inquiry, reflecting the seriousness of such a decision. Sub-section 31(8) says that a public inquiry is to be held in public, while sub-s 31(9) permits part of an inquiry to be held in private if the Commission "considers this to be in the public interest". In *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 at [95], Basten JA identified the importance of s 31 and the balance it strikes between public and private hearings:

there is a value in the privacy of investigations into unproven allegations which deserves to be considered by an investigative body with powers to undertake either private or public inquiries. Particularly is that so where the potential damage to reputation (and intrusions on personal privacy) result not from the considered assessment and reporting of an investigation but from public examination, often involving questions put in colourful terms and denials which are disregarded.

2.5 Section 35 empowers a Commissioner to summon a person to appear before the Commission to give evidence or to produce documents or things (or both). A failure to abide by such a summons empowers ICAC to seek the person's arrest (s 36), and is punishable by up to 2 years' imprisonment: s 86. Pursuant to s 37, a person summoned to give evidence is not entitled to refuse to answer any question or to produce anything. Specifically, the ordinary common law privilege against self-incrimination is abrogated by s 37(2).

2.6 Section 38 says:

The Commissioner or person presiding at the compulsory examination or public inquiry may declare that all or any classes of answers given by a witness or that all or any classes of documents or other things produced by a witness will be regarded as having been given or produced on objection by the witness, and there is accordingly no need for the witness to make an objection in respect of each such answer, document or other thing.

2.7 Part 11 of the Act sets out a number of "miscellaneous" provisions. Within that Part, s 104C prescribes a detailed procedure for the vetting of ICAC staff or consultants, in apparent recognition of the importance of the powers they are exercising and the matters they are dealing with. That provision is to be read with s 111, which applies to ICAC officers, and makes it an offence, punishable by imprisonment, to:

(a) make a record of any information, or

(b) divulge or communicate to any person any information,

being information acquired by the person by reason of, or in the course of, the exercise of the person's functions under this Act.

2.8 This recognises the importance of the secrecy and security of the matters dealt with by ICAC officers.

2.9 Section 112 then provides:

(1) The Commission may direct that—

- (a) any evidence given before it, or
- (b) the contents of any document, or a description of anything, produced to the Commission or seized under a search warrant issued under this Act, or
- (c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or
- (d) the fact that any person has given or may be about to give evidence at a compulsory examination or public inquiry, or
- (e) any written submissions received by the Commission (including, but not limited to, submissions made by counsel assisting the Commission),

shall not be published or shall not be published except in such manner, and to such persons, as the Commission specifies.

...

(2) A person shall not make a publication in contravention of a direction given under this section.

Maximum penalty—50 penalty units or imprisonment for 12 months, or both.

3. THE FACTS

3.1

[REDACTED]

3.2

On 31 August 2020 she was then summoned under s 35 of the Act to attend and give evidence at the public hearing. That summons recorded that it is an offence under s 86 of the Act to fail to attend without a reasonable excuse, and that such failure could cause the Commissioner to issue a warrant for her arrest, referring to s 36.

3.3

Subsequently, on 2 September 2020, the Premier was issued with a Notice to Attend and Produce a Statement of Information and Documents under ss 21 and 22 of the Act. She complied with this Notice.

3.4

In compliance with the 31 August 2020 Summons, the Premier attended ICAC and gave evidence on 12 October 2020. At the outset of her public evidence she exercised her right, through her Counsel, to apply for a direction under s 38 of the Act. That direction was made by the Assistant Commissioner, such that all of her evidence is to be regarded as having been given on objection. She gave evidence for most of the

day, and that evidence attracted (and continues to attract) an enormous amount of media interest.

[REDACTED]

[REDACTED]

3.7 Mr Maguire gave evidence on 14 to 16 October 2020. He, too, had the benefit of a s 38 direction from the commencement of his evidence. On 15 October 2020 he gave evidence of his personal relationship with the Premier. In addition to that public evidence, a private hearing was convened to deal with the 13 September encounter. A s 112 order was made in respect of that hearing, and all but a select few necessary people were directed to leave the hearing room. The following aspects of that evidence are worthy of note here:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3.8 As is now well-known, the private transcript of Ms Maguire’s evidence, in breach of the s 112 order, was published on the ICAC website from about 4:45pm to 5:18pm on 15 October.

4. THE AFTERMATH

4.1 ICAC has confirmed that (unsurprisingly) the transcript was downloaded by a number of individuals. While we have not been provided with the exact number, one would presume that given the intense media interest in the topic, together with the timing (shortly before evening news bulletins) it would have been downloaded by a very significant number of individuals. ICAC has no means of identifying who downloaded it.

4.2 Early on 16 October 2020 a complaint was lodged with the ICAC Inspector on behalf of the Premier. At the commencement of the hearing on 16 October 2020, Assistant Commissioner McColl offered a public apology to the Premier and to Mr Maguire. This investigation was announced on the same day.

[REDACTED]

4.4 In the light of the “extraordinary” powers that ICAC has at its disposal – which powers were exercised in this case to elicit this evidence – it is a matter of great concern that it appears not to have any proportionate mechanism in place to ensure that the evidence obtained under those powers is appropriately protected.

4.5 It is, frankly, bewildering that the document which was uploaded on 15 October 2020 at 4:45pm could have been posted without appropriate checks being in place to ensure that it did not contain private evidence. The explanation for it is unknown at this stage. If the explanation be human error, it appears to us to be deeply unsatisfactory that such a serious consequence could flow from an individual’s error.

4.6 It is not known what risk assessments or due diligence was done by ICAC regarding what would happen in the event of the erroneous publication of private evidence. In particular, it is a matter of concern, which may amount to recklessness, that the Commission appears to have no means whatsoever to identify individuals who downloaded the transcript from its website. Given the grave consequences which can follow from incidents such as this, it is a matter of serious concern that ICAC asserts that it has no means of identifying individuals who accessed the transcript. As a matter of due diligence, this is a matter which should have plainly been considered and implemented by the senior executive team of the Commission as part of a risk assessment as to what should occur when private transcripts are erroneously and

unlawfully published on the Commission website. If such detection measures have not been previously considered by the Commission, it raises a serious concern as to whether the Commission has taken appropriate steps to protect the rights and security of individuals who are compelled to give evidence before it.

4.7 The Premier was subjected to lengthy examination – under pain of imprisonment – on the nature and details of a personal relationship. At least from the Premier’s perspective – who has not been accused of any wrongdoing and is not the subject of any investigation – this was (as she has said on public record) a seriously distressing experience. Aside from the public aspect of the examination, the breach of privacy and security involved in publication of this transcript is a matter of the most serious concern.

4.8 Conducting private hearings is part and parcel of ICAC’s statutory functions. However, such powers need to be used appropriately and protections must be in place to ensure that the transcripts of private hearings are not published where there has been no order made that such transcripts should be published. [REDACTED]
[REDACTED] If the coercive powers of the State are to be engaged to elicit this private material, there must be proportionate measures in place to protect its privacy and if erroneously published, then mechanisms be available to detect who downloaded the material from the Commission website. It is a matter of serious concern that such measures were either not in place or were not adequate/adhered to in the case of the private transcript which was published on the Commission website.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



4.10 If the Inspector requires any further assistance or information relating to this matter, we would be pleased to provide that assistance or information.

ARTHUR MOSES SC
New Chambers
Counsel for the Premier,
the Hon. Gladys Berejiklian MP

HENRY COOPER
New Chambers
Counsel for the Premier,
the Hon. Gladys Berejiklian MP

23 October 2020