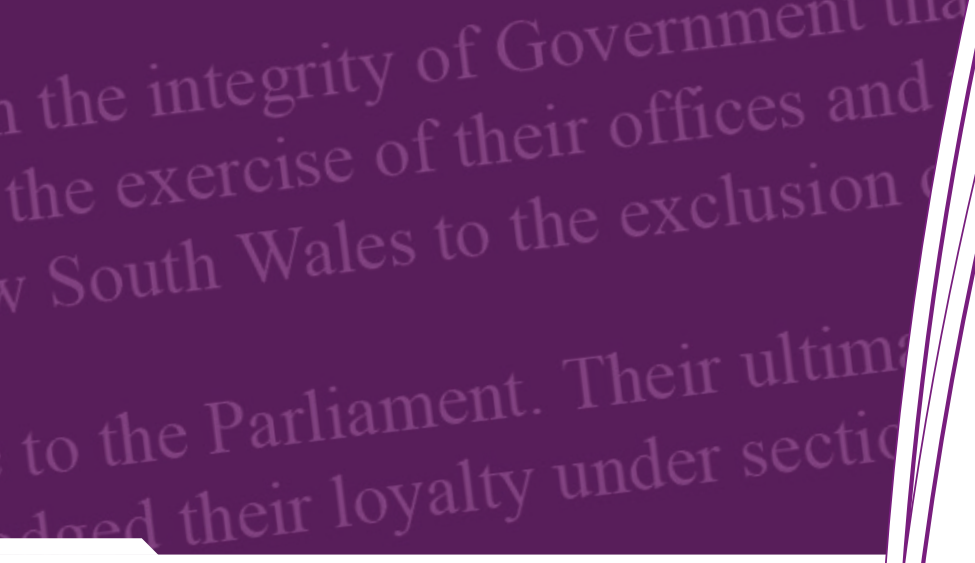


ICAC

INDEPENDENT COMMISSION AGAINST CORRUPTION

NEW SOUTH WALES

Appendix NSW Ministerial Code of Conduct

Preamble

1 It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest.

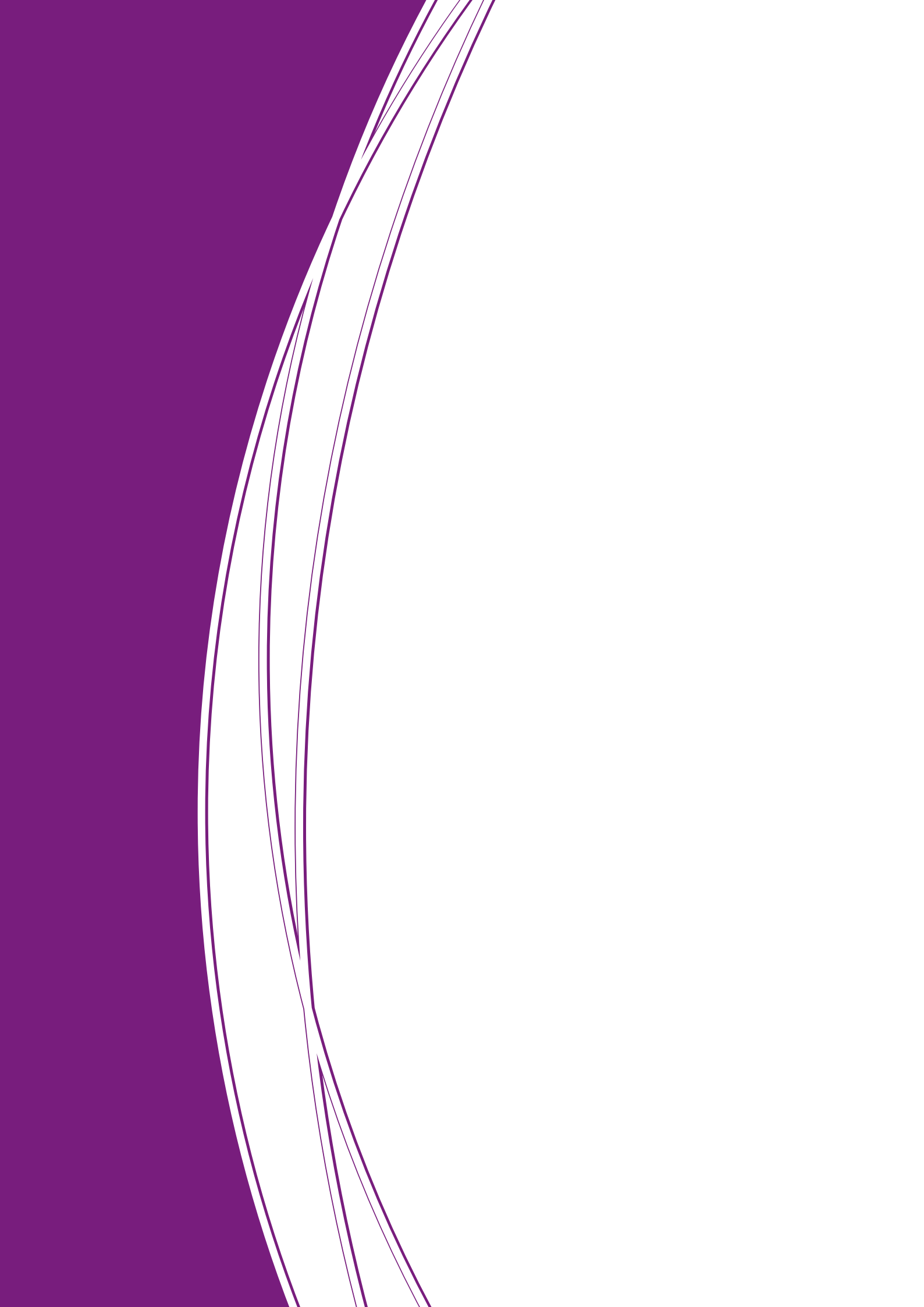
2 Ministers are individually and collectively responsible to the Parliament. Their ultimate responsibility is to the people of New South Wales, to whom they have pledged their loyalty under section 35CA of the *Constitution Act 1902*.

3 Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales.

INVESTIGATION INTO THE CONDUCT OF THE THEN MEMBER OF PARLIAMENT FOR WAGGA WAGGA AND THEN PREMIER AND OTHERS (OPERATION KEPPEL)

VOLUME 2

ICAC REPORT
JUNE 2023



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I·C·A·C

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INVESTIGATION INTO THE CONDUCT OF THE THEN MEMBER OF PARLIAMENT FOR WAGGA WAGGA AND THEN PREMIER AND OTHERS (OPERATION KEPPEL)

VOLUME 2

This volume focuses on matters concerning the conduct of the former premier of NSW, Gladys Berejiklian and, in particular, whether she exercised her official functions in connection with grant funding promised and/or awarded to the Australian Clay Target Association (ACTA) and the Riverina Conservatorium of Music in Wagga Wagga ("the RCM") when she was in a position of conflict between her public duties and her private interest as a result of her personal relationship with the former member for Wagga Wagga, Daryl Maguire. This volume also examines whether Ms Berejiklian failed to exercise her duty under s 11 of the ICAC Act to report any matter that she suspected on reasonable grounds concerned, or may have concerned, corrupt conduct in relation to the conduct of Mr Maguire. It also examines corruption prevention matters relevant to the Commission's investigation. It is recommended that it be read in conjunction with volume 1 of the report.

Contents

Contents

Correction to paragraph 10.13

In paragraph 10.13, an error referring to 13 September 2021 and the Berejiklian allegations has been corrected to refer to 13 September 2020 and the Maguire allegation. The NSW Parliament was advised of such on 29 June 2023.

Chapter 10: The Berejiklian allegations

10.1. For convenience, the Berejiklian allegations are repeated as follows:

whether, between 2012 and 2018, the Hon 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 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* ("the ICAC Act") to report any matter that she suspected on reasonable grounds concerned or may concern corrupt conduct in relation to the conduct of Daryl Maguire

   and/or

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

Ms Berejiklian and Mr Maguire's "close personal relationship"

Background

10.2. The Commission is acutely conscious that the Berejiklian allegations require it to investigate, and report upon, what are normally regarded as matters couples are entitled to keep private – as Ms Berejiklian described it, "intensely private terrain".

10.3. However, the Commission is obliged to investigate any circumstances which in its opinion imply that corrupt conduct may have occurred (s13(1)(a)(i) of the ICAC Act). The matters which came to its notice while investigating the Maguire allegation, dealt with in volume 1, led it to form that opinion in relation to Ms Berejiklian's conduct concerning matters of particular interest to Mr Maguire.

10.4. Section 31(2)(d) of the ICAC Act contemplates that there will be circumstances in which the privacy of the persons concerned will be exposed publicly. In addition, evidence of the relationship between Ms Berejiklian and Mr Maguire is intrinsically bound up in, and intersects, each of the Berejiklian allegations.

10.5. Accordingly, in considering the Berejiklian allegations, it is relevant for the Commission to consider the nature and strength of Ms Berejiklian's close personal relationship with Mr Maguire which may affect:

10.5.1. whether Ms Berejiklian relevantly had a conflict of interest (which, in turn, is relevant to whether she engaged in conduct constituting or involving corrupt conduct)

10.5.2. whether the Commission finds that Ms Berejiklian engaged in dishonest and/or partial conduct favourable to Mr Maguire influenced by her close personal relationship with him or by a desire to maintain or advance that relationship.

10.6. Counsel Assisting submitted that in the case of a potential conflict of interest scenario, where a minister is close friends with a person who could receive a private benefit as a result of a potential decision by the minister, the minister's relationship of friendship may (depending upon the circumstances) be one that could objectively have the potential to influence the performance of the minister's public duty. In that event, duties in relation to conflicts of interest would arise under the NSW Ministerial Code of Conduct ("the ministerial code").

10.7. Counsel Assisting submitted that in the case of a partial conduct scenario, the Commission might consider it more likely that Ms Berejiklian would engage in partial conduct the stronger the personal relationship between her and Mr Maguire. They contended that the closer one's relationship with someone, the more likely one may be influenced by that relationship. They suggested one might take steps, in preferment of a lover in respect of whom one desires a long-term relationship, that one would not take in preferment of a casual friend.

The close personal relationship

10.8. Both Ms Berejiklian and Mr Maguire gave evidence that they were, at material times, in a "close personal relationship" with each other. Ms Berejiklian agreed it had started at least about the time of the 2015 election. Mr Maguire said it was "on again/off again from" about 2015.

10.9. However, the evidence before the Commission is that from at least about mid-2014, Ms Berejiklian and Mr Maguire were exchanging messages which suggest that the relationship was one of considerable intensity accompanied by mutual and deep feelings of love.

10.10. The Commission has received into evidence a consolidated telephone extract from two of Mr Maguire's mobile telephones containing hundreds of private communications between Ms Berejiklian and Mr Maguire from July 2013 to August 2018, in the form of SMS and instant messages. It shows messages exchanged every day or couple of days and often multiple times in a day.

10.11. Witnesses were not asked about these messages (in public or private) due to their deeply personal nature and the consequent embarrassment that may have been caused by such an examination. Both Mr Maguire and Ms Berejiklian were given an opportunity to adduce evidence about them but declined. The Commission considers the messages highly relevant to the matters it is obliged to consider. However, it maintains the non-publication order made in relation to them under s 112 of the ICAC Act, on the ground that the public interest in preserving Ms Berejiklian and Mr Maguire's privacy in relation to them outweighs the public interest of exposing to the public this relevant evidence.

10.12. In summary and relevantly, these messages include plans for meals and drinks together after work, plans for holidays and attending social events together, references to Ms Berejiklian's Sydney residence by both of them as "home" and mundane domestic arrangements such as requests to pick up bread and things to eat on the way "home". The messages are replete with terms of endearment, the use of pet names and other indications of mutual affection and love. They include discussions about marriage and the possibility of having a child together.

10.13. From at least the early part of 2014 onwards, the messages are consistent with physical and emotional intimacy and a romantic relationship having developed between Ms Berejiklian and Mr Maguire. The messages demonstrate the indices of a continuing deep attachment and love between the two of them up until August 2018. This is when the extract concludes, however, as is common ground, the relationship continued until 13 September 2020, a week before Operation Keppel's public inquiry into the Maguire allegation.

10.14. Ms Berejiklian accepted in her written submissions that there was evidence of a connection of at least some substance since 2014. As Counsel Assisting submitted, the depth of attachment demonstrated by those messages is consistent with a romantic relationship having been on foot for at least several months before that point.

10.15. Both Ms Berejiklian and Mr Maguire agreed that their close personal relationship was accompanied by a close emotional connection from which Ms Berejiklian "derived emotional strength". It is clear that there were mutual feelings of love during the relationship. Ms Berejiklian and Mr Maguire agreed that they discussed marrying each other and contemplated having a child together. The relationship was attended by physical intimacy. Although Ms Berejiklian and Mr Maguire do not appear to have cohabitated with each other for any significant period, Mr Maguire had a key to Ms Berejiklian's home which she said she had given him "many years ago". They holidayed with each other from time to time and would at times stay at each other's houses. Ms Berejiklian did not dispute any of these facts.

10.16. It is apparent that this was a relationship of profound importance to Ms Berejiklian and Mr Maguire. On 12 April 2018, they exchanged the following text messages:

MAGUIRE:	*I am busy killing mmc you do your job and lead the state.*
BEREJIKLIAN:	*I can't without you.*
MAGUIRE:	*I am your biggest supporter! Got your back go and do your job.*
BEREJIKLIAN:	*But you are my family.*

10.17. Ms Berejiklian said her statement "you are my family" was a "turn of phrase" and was her "way of expressing what [she] felt at the time about [Mr Maguire] … the close connection [she] felt to him". She said she "did not mean it in the context that I regarded him as family, especially not in relation to the [ministerial code]," it "wasn't a, a definition that I, that I, that I was wedding myself to", that she "often regarded other colleagues or friends as family or brothers and, in fact … regard[ed] my closest friends as family" while accepting that "of course, this was a different, a different nature of feeling". She also agreed the phrase was "demonstrative of the deep emotional attachment" she had to Mr Maguire which conveyed "the close connection I felt to him". She said he was "part of my love circle, part of people that I strongly cared for".

10.18. Although Ms Berejiklian qualified that agreement by saying she "had no assurance it was reciprocated or that it was going to lead anywhere," this clearly did not affect her commitment to the relationship. Nor, as is apparent from the relationship's persistence for many years, did Mr Maguire's commitment to it diminish.

10.19. The numerous lawfully obtained interceptions of the couple's telephone and text message conversations reveal their close relationship. Indeed, at the time of the above conversation in April 2018, they were contemplating that Mr Maguire would retire from politics at the 2019 election, and that they would then make their relationship public, possibly get married and go on holidays together.

10.20. Two months earlier, on 14 February 2018, Ms Berejiklian and Mr Maguire had a telephone conversation during which there was the following exchange:

BEREJIKLIAN:	*No but Hokis if I did something bad, I need to I need to perhaps.*
MAGUIRE:	*Well you were just over the top over the top right and you just don't need to be so mean that's all.*
BEREJIKLIAN:	*Okay I'm sorry.*
MAGUIRE:	*You just appeared mean.*
BEREJIKLIAN:	*Do you know why because I forget that I need to look like I'm you impress me in front of like I forget that.*
MAGUIRE:	*No you should I impress, I impress a lot of people why aren't you impressed in front of people you should be.*
BEREJIKLIAN:	***That's what I mean I forget that I'm meant to be with you know, technically the Premier so, you know. I get that.***
MAGUIRE:	*Hmm anyway.*
BEREJIKLIAN:	***Because you know what I tell you why because normally you're the boss and it's hard when we have to switch it around that's the truth.***
MAGUIRE:	***Yeh but I am the boss, even when you're the Premier.***
BEREJIKLIAN:	***I know. So therefore it's hard when I had to switch it around.***
MAGUIRE:	***Glad even when you are the Premier I am the boss alright.***
BEREJIKLIAN:	***Yes I know.***
MAGUIRE:	*You are at my table eating my food that's fine right you've just got to calm down you just came over like, oh Jesus, why are you sitting there no fuck off but.*

BEREJIKLIAN: *I'm sorry I apologise.*

MAGUIRE: *That's alright you don't need to apologise I'm just telling you an observation that's all.*

(Emphasis added)

10.21. In a private examination during Operation Keppel's public inquiry into the Maguire allegation ("the First Public Inquiry"), Ms Berejiklian was asked whether this exchange was "a fair understanding of your relationship at that point in time, that in the sense that, at least privately, it was Mr Maguire was the leading party or the boss?" She replied:

> *Look, as you can appreciate, when you're the Premier of the state, it's very difficult in private relationships to make people feel that – he wanted, he, he wanted to feel equal in the relationship because of my position … To make him feel less insecure in a private capacity I'm talking now, not in a public capacity. In a private capacity, it's very personal … when you have a position of power, it's very difficult in a personal relationship to address that position of power, and that's what I was referring to. It's very personal and private. It's got nothing to do with work. It's actually making him feel that because I was the boss during the day, that I wouldn't necessarily be exercising that relationship in the private relationship.*

10.22. Counsel Assisting recognised the significance of the private context of this conversation. They emphasised that Ms Berejiklian's words should not be taken as conveying that she generally deferred to Mr Maguire as her "boss" in the public sphere, nor that she necessarily did so in the private sphere. They accepted as plausible Ms Berejiklian's explanation that she was seeking to allay concerns that Mr Maguire held regarding his status in the relationship as a consequence of her position as premier.

10.23. Nevertheless, Counsel Assisting submitted that the conversation highlighted Ms Berejiklian's concern about Mr Maguire's insecurity and her preparedness to seek to placate him in order to preserve their personal relationship. In this sense, Counsel Assisting contended the conversation related directly to how Ms Berejiklian interacted with Mr Maguire in the public sphere. In circumstances where Mr Maguire became aggrieved and insecure over a perceived social slight, Ms Berejiklian was on notice of a risk that Mr Maguire would suffer greater levels of insecurity and disquiet in the event that Ms Berejiklian did not support projects for which he was a strident advocate.

10.24. Counsel Assisting argued that Ms Berejiklian's observation that "normally you're the boss and it's hard when we have to switch it around that's the truth" was in all likelihood an accurate one: separating the personal from the professional in such circumstances would be "hard" at the least. They contended that observation tended against acceptance of Ms Berejiklian's evidence that what she "felt for [Mr Maguire] was completely separate to what [she] did in terms of executing [her] responsibilities".

10.25. Ms Berejiklian was given the opportunity to make submissions as to whether the transcripts of the 14 February 2018 conversation and of her private examination about it should be made public in this report. She submitted they should not. She argued that the fact that in a private conversation, which "had nothing to do with work", Ms Berejiklian showed concern over Mr Maguire's insecurities, and sought to placate them, was unremarkable. She contended that her "banal reassurances in this conversation" were a world away from evidence that she would exercise her public functions with partiality, alive to Mr Maguire's insecurities and/or in a manner calculated to placate him and that the exchange was easily recognisable as an instance of a woman appeasing an insecure man to make him feel better about himself. It did not reflect her sincere sentiments.

10.26. Ms Berejiklian also submitted that the suggestion this conversation put her "on notice" that non-support by her of projects advanced by Mr Maguire would somehow damage their relationship was not borne out by this conversation nor anything else in the evidence before the Commission. She argued that there was a conspicuous absence in the significant body of material obtained by the Commission of any evidence linking the fortunes of Ms Berejiklian and Mr Maguire's personal relationship with her support of projects in his electorate.

10.27. Ms Berejiklian also submitted that public interest remained heavily in favour of maintaining the s 112 direction in relation to the telephone call, particularly given the probative value is very low. In circumstances where Counsel Assisting accepted that the call was not (and it was submitted could not be) deployed as proof of Ms Berejiklian's real view of the dynamic between them, she argued the damage done by the publication of this call far outweighed any public interest in disclosure. She argued its asserted relevance was – at its highest – circumstantial evidence from which a tenuous inference was sought to be drawn as to the likelihood of Ms Berejiklian acting partially towards Mr Maguire.

10.28. The Commission has considered Ms Berejiklian's submissions carefully. It appreciates the delicacy of making public matters couples are ordinarily entitled to keep private. However, in the Commission's view, the 14 February 2018 exchange between Ms Berejiklian and Mr Maguire is probative of the matters for which Counsel Assisting contend. The Commission accepts it is circumstantial evidence, but it is part of the mosaic of information before the Commission which must be carefully considered as part of its investigation of the Berejiklian allegations. It is, as Ms Berejiklian's submissions recognised, relevant to her exercise of her official functions, albeit she argued the relevance was tenuous.

10.29. Contrary to Ms Berejiklian's submissions, in the Commission's view, this evidence is relevant to the consideration of her exercise of her official functions in relation to the Australian Clay Target Association (ACTA) and the Riverina Conservatorium of Music ("the RCM") proposals dealt with later in the report. While it may not have been, as Ms Berejiklian submitted, her real view of the dynamic between them, her concern to address what she perceived as Mr Maguire's insecurities can, as a matter of human experience, be expected to have manifested itself in a continuing desire to assuage his feelings and support him to the best of her ability. That would include supporting him bringing to fruition two Wagga Wagga projects for which he was a fervent advocate.

10.30. The close personal relationship persisted as of 13 July 2018. The prospect of Ms Berejiklian and Mr Maguire getting married was also still a possibility on 13 July 2018.

10.31. The close personal relationship continued notwithstanding the events of 2018, including Ms Berejiklian publicly stating that Mr Maguire should leave Parliament consequent upon his Operation Dasha public inquiry evidence, referred to earlier in this report. It finally broke down on 13 September 2020, when Ms Berejiklian said she ceased contact with Mr Maguire approximately a week before the commencement of the First Public Inquiry, and after she participated in a compulsory examination on 16 August 2020.

10.32. Ms Berejiklian submitted that her relationship with Mr Maguire could not be equated with a relationship between married or de facto partners, pointing to her unchallenged evidence that she and Mr Maguire did not share finances.

10.33. Ms Berejiklian gave evidence, which she relied upon in her submissions, that her relationship with Mr Maguire "wasn't a normal relationship". She explained that opinion as being based on the facts that "[w]e weren't public … I didn't see him very often. I was very busy. I did speak to him frequently but we didn't see each other very often". Nevertheless, this was how their continuous close personal relationship worked.

10.34. The proposition that their relationship was not "normal" in that sense might be accepted. No two relationships are alike. The fact that a relationship does not conform to a societal template, or legal definition, does not detract from its quality and strength. Here, as both Ms Berejiklian and Mr Maguire agreed, their close personal relationship persisted over many years, even withstanding what could fairly be described as the tumult which surrounded Mr Maguire's evidence in July 2018 at the Operation Dasha public inquiry.

10.35. Ms Berejiklian also submitted that the strength of the relationship was not consistent throughout its duration: there were, in Mr Maguire's words, "a couple of spats … in between", or in Ms Berejiklian's words, "it was on-again/off-again and different intensity for that duration". Many may think these are the hallmarks of a normal relationship.

10.36. Counsel Assisting submitted that Ms Berejiklian's relationship with Mr Maguire was not merely a relationship of friendship, it was one of mutual love and a mutual close emotional connection. They argued that a relationship of that kind is, of its nature, one that is "capable of influencing a person's conduct for the simple, completely legitimate and entirely human reason that people tend to wish to please and to seek to avoid disappointing the expectations or desires of people who they love and from whom they derive emotional strength as part of the maintenance and advancement of their relationship of [sic] that person".

10.37. Ms Berejiklian described that submission as "puerile". The Commission considers Ms Berejiklian's description as both supercilious and unworldly.

10.38. Close personal relationships, whether with the degree of intimacy Ms Berejiklian and Mr Maguire shared or not, are at the heart of the concerns addressed in the Bowen Report[203] in devising the "appearance test" as discussed later in this report when considering the meaning of "conflict of interest" for the purposes of clause 7(3) of the ministerial code. Ms Berejiklian appeared to appreciate that when she referred to the Bowen Report and the fact that it is the context which determines whether an interest is likely to create a conflict of interest. Of course, context is relevant. That does not diminish Counsel Assistings' submission as to the capacity of a relationship such as that between Ms Berejiklian and Mr Maguire, being one of mutual love and a mutual close emotional connection, to influence a person's conduct and, relevantly in the case of Ms Berejiklian, to influence her conduct both personally and in the performance of her public duties.

Ms Berejiklian's credibility and reliability

10.39. Counsel Assisting invited the Commission, in effect, to make a global finding about Ms Berejiklian's credibility on the basis of a number of examples of her evidence she gave which they contended cast a pall over her evidence generally.

10.40. As Basten JA said in *Sangha v Baxter*,[204] "[t]here are risks in making global findings about credibility of any particular witness. Because a witness has not told the truth with respect to a particular matter does not mean that other parts of his or her evidence are untruthful. Where possible, an assessment should be made of the reasons for the untruthfulness in order to see if other aspects of the evidence are likely to be infected by the same concern".

[203] *Public Duty and Private Interest: Report of the Committee of Inquiry* established by prime minister Malcolm Fraser, published on 15 February 1978, and prepared by a committee comprising the Hon Sir Nigel Bowen KBE (Chair), Sir Cecil Looker and Sir Edward Cain CBE ("the Bowen Report").

[204] [2009] NSWCA 78 (at [155]) Handley AJA agreeing.

10.41. Ms Berejiklian gave evidence over a number of days in private and public hearings. In the Commission's view, it would not be a useful approach to her evidence to make a global finding of the nature for which Counsel Assisting contends. It is true that Ms Berejiklian was an unsatisfactory witness in many respects. Some of that may be explicable on the basis of the period of time over which the evidence ranged, and a tendency to view the witness box as more like a husting than a place from which to respond directly to the question.

10.42. Nevertheless, in such circumstances the Commission has had regard to the objective facts proved independently of Ms Berejiklian's testimony, in particular by reference to the numerous documents, the numerous records of communications between herself and Mr Maguire, to the extensive evidence of other participants in the events and also to Ms Berejiklian's motives and to the overall probabilities.[205]

The NSW Ministerial Code of Conduct

10.43. The NSW Ministerial Code of Conduct is set out below by reference to its headings: "the Preamble", "the NSW Ministerial Code of Conduct" ("the ministerial code") and the "Schedule to the NSW Ministerial Code of Conduct" ("the Schedule").

The Preamble

10.44. Clause 1 of the Preamble to the ministerial code states that it is "essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest".

10.45. Clause 2 of the Preamble provides that "Ministers are individually and collectively responsible to the Parliament. Their ultimate responsibility is to the people of New South Wales, to whom they have pledged their loyalty under section 35CA of the *Constitution Act 1902*".

10.46. Clause 3 of the Preamble emphasises, in language similar to that used in the Code of Conduct for Members, that "Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales".

10.47. Clause 6 of the Preamble provides that "To further those principles, the NSW Ministerial Code of Conduct has been established, which prescribes standards of ethical behaviour and imposes internal governance practices directed toward ensuring that possible breaches of ethical standards are avoided".

10.48. Clause 8 of the Preamble draws attention to the Schedule to the ministerial code, which "prescribes certain additional administrative and governance requirements that Ministers (and in some cases Parliamentary Secretaries) must comply with and that are directed to minimising the risk and opportunities for breaches of the Code".

10.49. Clause 9 of the Preamble provides that "[a] substantial breach of the NSW Ministerial Code of Conduct (including a knowing breach of any provision of the Schedule) may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*".

[205] See *Armagas Ltd v Mundogas SA (the Ocean Frost)* (1985) 1 Lloyds Rep 1 at 57 (House of Lords).

10.50. Clause 10 of the Preamble provides that "[t]he NSW Ministerial Code of Conduct is not intended to be a comprehensive statement of ethical conduct by Ministers. It is not possible to anticipate and make prescriptive rules for every contingency that might raise an ethical issue for a Minister. In all matters, however, Ministers are expected always to conform with the principles referred to above."

10.51. Clause 11 of the Preamble provides, "In particular, Ministers have a responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity".

10.52. Although the preamble, headings and notes are not part of the ministerial code, regard may be had to them in the interpretation of its provisions (see clause 12(1) of the ministerial code).

The ministerial code

10.53. Pursuant to clause 1, the ministerial code "applies to all current and future Ministers and Governments". Clause 3 requires a minister not knowingly to breach the law, the NSW Lobbyists Code of Conduct, or any other applicable code of conduct under the ICAC Act.

10.54. Clause 4 of the ministerial code requires a minister not knowingly to breach the Schedule to the ministerial code, and advises, "a substantial breach of the Schedule is, if done knowingly, a substantial breach of the NSW Ministerial Code of Conduct".

10.55. Clause 6 of the ministerial code requires ministers in the exercise or performance of their official functions not to act dishonestly, and to act only in accordance with what they consider to be in the public interest. That clause also requires ministers not to act improperly for their private benefit or for the private benefit of any other person.

10.56. Clause 7 of the Ministerial Code provides (original emphasis):

> *7 Conflicts of interest*
>
> *(1) A Minister must not knowingly conceal a conflict of interest from the Premier.*
>
> *(2) A Minister must not, without the written approval of the Premier, make or participate in the making of any decision or take any other action in relation to a matter in which the Minister is aware they have a conflict of interest.*
>
> *(3) A **conflict of interest** arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister's private interest could objectively have the potential to influence the performance of their public duty. Without limiting the above, a Minister is taken to have a conflict of interest in respect of a particular matter on which a decision may be made or other action taken if:*
>
> *(a) any of the possible decisions or actions (including a decision to take no action) could reasonably be expected to confer a private benefit on the Minister or a family member of the Minister, and*
>
> *(b) the nature and extent of the interest is such that it could objectively have the potential to influence a Minister in relation to the decision or action.*
>
> ***Note.** See also Part 3 of the Schedule for further requirements regarding conflicts of interest.*

10.57. Clause 9 of the ministerial code requires that ministers not improperly use public property, services or facilities for the private benefit of themselves or any other person.

10.58. Clause 11 of the ministerial code contains definitions which are applicable both to the ministerial code and the Schedule. Relevantly, they are (original emphasis):

> **conflict of interest** *has the meaning given by section 7 of this Code.*
>
> **de facto partner** *has the meaning given by section 21C of the* Interpretation Act 1987.
>
> **dishonestly** *means dishonestly according to the standards of ordinary people and known by the Minister to be dishonest according to the standards of ordinary people.*
>
> **family member**, *in relation to a Minister, means:*
>
> *(a) the Minister's spouse or de facto partner, or*
>
> *(b) a child of the Minister or of the Minister's spouse or de facto partner, or*
>
> *(c) a parent of the Minister or of the Minister's spouse or de facto partner, or*
>
> *(d) a brother or sister (including step-brother or step-sister) of the Minister, or*
>
> *(e) any other person with whom the Minister is in an intimate personal relationship.*
>
> **knowingly** *means with awareness that the relevant circumstance or result exists or will exist in the ordinary course of events.*
>
> **Minister** *includes:*
>
> *(a) any Member of the Executive Council of New South Wales, and*
>
> *(b) if used in or in relation to this Code (other than Parts 1 and 5 of the Schedule to the Code)—a Parliamentary Secretary, and*
>
> *(c) if used in or in relation to Part 5 of the Schedule to the Code—a former Minister.*
>
> **Ministerial Register of Interests** *means the register kept by the Department of Premier and Cabinet on behalf of the Premier in accordance with clauses 6, 7, 9, 11, 16 and 27 of the Schedule to the Code.*
>
> **Note.** *The Ministerial Register of Interests is a confidential register kept by the Department of Premier and Cabinet on behalf of the Premier. Its contents are made available only to the Premier and the Cabinet for the sole purpose of enabling them to better avoid and manage potential conflicts of interest. The* Government Information (Public Access) Act 2009 *provides that there is conclusively presumed to be an overriding public interest against the disclosure of the Ministerial Register of Interests.*
>
> **Parliamentary Secretary** *means a person holding office as a Parliamentary Secretary under Part 4A of the* Constitution Act 1902.
>
> **private benefit** *means any financial or other advantage to a person (other than the State of New South Wales or a department or other government agency representing the State), other than a benefit that:*
>
> *(a) arises merely because the person is a member of the public or a member of a broad demographic group of the public and is held in common with, and is no different in nature and degree to, the interests of other such members, or*
>
> *(b) comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing.*

ruling *means a ruling by the Premier, in accordance with clause 27 of the Schedule to this Code, under clause 1 (1) or (4), 2 (3), 3 (5) or 12 (2) of the Schedule.*

Schedule to the NSW Ministerial Code of Conduct

10.59. Many of the substantive matters in relation to the ministerial code are dealt with in its Schedule.

10.60. Notes in Parts 2 (Standing disclosures of interests), 3 (Conflicts of interest), 4 (Gifts and hospitality) and 6 (Enforcement) in the Schedule specify that those Parts also apply to parliamentary secretaries, and a reference to a minister in the relevant part includes a reference to a parliamentary secretary.

10.61. Pursuant to Part 2 of the Schedule, ministers were required to comply with their obligations as a member of Parliament under s 14A of the Constitution Act and the Disclosure Regulation in relation to the disclosure of their pecuniary and other interests to the Parliament (see clause 5). They were also required to provide a copy of returns made under that regulation to the premier (see clause 6(1) and clause 7(1)). Part 2 applies to parliamentary secretaries. Accordingly, Mr Maguire was required to provide a copy of any returns made under the Disclosure Regulation to the premier.

10.62. A schedule of the disclosures of current interests made by all ministers under Part 2 of the Schedule to the ministerial code is to be kept on the Ministerial Register of Interests (see clause 6(2), clause 7(2) and clause 9(1)). This register is kept by the secretary of the DPC and includes conflicts of interest disclosures. The register is to be available for inspection by all ministers at any meeting of the Cabinet or any Cabinet committee and otherwise by arrangement with the premier (see clause 9(2)).

10.63. Part 3 of the Schedule deals with conflicts of interest.

10.64. Clause 10(1) of the Schedule provides that "A Minister must promptly give notice to the Premier of any conflict of interest that arises in relation to any matter".

10.65. Clause 11 of the Schedule provides:

> *(1) A notice under clause 10 must:*
>
> *(a) be in writing, signed by the Minister, and*
>
> *(b) specify the nature and extent of the relevant interest, the matter to which it relates, and the reason why a conflict of interest arises, and*
>
> *(c) be placed on the Ministerial Register of Interests.*
>
> *(2) If during a meeting of the Executive Council, the Cabinet or a Cabinet Committee a matter arises in which a Minister has a conflict of interest the Minister must (whether or not the Minister has previously given notice to the Premier):*
>
> *(a) as soon as practicable after the commencement of the meeting, disclose to those present the conflict of interest and the matter to which it relates, and*
>
> *(b) ensure that the making of the disclosure is recorded in the official record of the proceedings, and*
>
> *(c) abstain from decision-making if required by, and in accordance with, clause 12, and*
>
> *(d) if notice of the conflict of interest has not previously been given to the Premier under subclause (1)—give such notice as soon as practicable after the meeting in accordance with that subclause.*

10.66. Clause 12 of the Schedule provides:

> ***Minister to abstain from decision-making***
>
> *(1) A Minister who has a conflict of interest in a matter must abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matter.*
>
> *(2) However, the Premier may, if satisfied that no conflict of interest arises or that any potential conflict of interest can be appropriately managed, make a ruling authorising the Minister to continue to act.*
>
> *(3) A Minister who has a conflict of interest in a matter arising during a meeting of the Executive Council, the Cabinet or a Cabinet Committee must:*
>
> *(a) abstain from participating in any discussion of the matter and from any decision-making in respect of it, and*
>
> *(b) unless the Premier (or the chair of the meeting in the absence of the Premier) otherwise approves—not be present during any discussion or decision-making on it.*

10.67. Clause 13 of the Schedule provides:

> ***Discretion to disclose and abstain***
>
> *A Minister may, if they have some other substantial personal connection with a matter or for any other reason, disclose an interest and abstain from decision-making in relation to a matter in accordance with this Part even if the interest might not comprise a conflict of interest.*

10.68. Clause 15 of the Schedule provides:

> ***Other conflicts***
>
> *This Part does not affect a Minister's duties to avoid, disclose and otherwise appropriately manage actual or perceived conflicts.*

10.69. Clause 16 of the Schedule provides:

> ***Disclosure of private benefits to other members of the Government***
>
> *(1) A Minister who is aware that a particular decision to be made or other action to be taken by that Minister could reasonably be expected to confer a private benefit on another Member of Parliament belonging to the governing political party or coalition of parties or any of their family members must give notice to the Premier of the matter before making the decision or taking the action.*
>
> ***Note.*** *A Ministerial decision that relates to another Member's electorate does not necessarily confer a private benefit on the Member if the benefit to the relevant Member only arises because the Member is a part of the relevant community and that benefit is common with, and no different in nature and degree to, the benefit conferred on the other members of the community, or if the benefit to the Member comprises only the prospect that the Minister's decision could enhance the Member of Parliament's popular standing in their community—see definition of* ***private benefit*** *in section 11 of the NSW Ministerial Code of Conduct.*

(2) The notice must:

(a) be in writing, signed by the Minister, and

(b) specify the decision to be made or action to be taken and the private benefit that is expected to be conferred, and

(c) be placed on the Ministerial Register of Interests.

10.70. Part 6 of the Schedule deals with enforcement. It provides:

26 Premier to determine sanctions

The enforcement of the requirements of this Schedule, including any sanctions for a breach, is a matter for the Premier.

Note. *While enforcement of the requirements of this Schedule, including any sanctions for a breach, is a matter for the Premier, the NSW Ministerial Code of Conduct has also been adopted for the purposes of the* Independent Commission Against Corruption Act 1988.

27 Rulings

(1) A Minister must, when applying for a ruling from the Premier, include with the application an accurate statement of all material information that is relevant to the decision whether to give the ruling. A ruling that is obtained on the basis of inaccurate or incomplete information is not effective and may not be relied upon by the Minister for the purposes of the NSW Ministerial Code of Conduct.

(2) A ruling is to be made in writing and dated, and placed on the Ministerial Register of Interests.

Note. *See clauses 1 (1) and (4), 2 (3), 3 (5) and 12 (2) of the Schedule, which provide for the Premier to issue rulings that a particular course of conduct is permitted.*

(3) A ruling is effective on and from the date it is given and continues in effect until: (a) it is revoked by the Premier, or (b) any conditions specified in the ruling cease to be satisfied, or (c) the information upon which the ruling was given changes materially.

Note. *If there is a material change of circumstances, the Minister may seek a new ruling from the Premier.*

(4) The Premier may direct that a ruling that has been sought by a Minister has effect as a ruling pending a decision by the Premier on the matter.

(5) A ruling in respect of the Premier may be given if approved by the Cabinet.

10.71. Further attention needs to be given to the ministerial code at this stage in the light of Counsel Assistings' submission that Ms Berejiklian engaged in conduct that constituted or involved a substantial breach of that code by exercising public functions in relation to grant funding promised and/or awarded to ACTA and in relation to grant funding promised and/or awarded to the RCM in circumstances where she was in a position of conflict.

10.72. Ms Berejiklian, on the other hand, submitted the following:

10.72.1. A foundational issue is whether, or in what way, clause 7 (and clause 12 of the Schedule) applies to the premier.

10.72.2. Her close personal relationship with Mr Maguire does not constitute a "private interest" within the meaning of that term in clause 7(3) of the ministerial code or under the general law concerning conflicts of interest.

10.72.3. A breach of clause 7(2) of the ministerial code, or a knowing breach of the Schedule thereto, requires awareness of the conflict of interest.

The NSW Ministerial Code of Conduct: application to the premier

Counsel Assistings' submissions

10.73. Counsel Assisting submitted that it is apparent from the provisions of the NSW Ministerial Code of Conduct – in particular, the Preamble (clause 1, clause 6 and clause 8), the ministerial code (clause 4 and clause7(2)), and the Schedule (clause 10(1), clause 11 (2)(a) and (b), clause 12(2), clause 12(3)(b) and clause 27(5)) – that the premier plays a central role in the administration of the ministerial code. This includes by being the person who may give written "approval" for a minister to take action notwithstanding a conflict of interest,[206] the person to whom notice of a conflict of interest must promptly be given[207] and the person who may make a "ruling" authorising the minister to continue to act where the premier is satisfied no conflict of interest arises or that any potential conflict of interest can be appropriately managed.[208]

10.74. Counsel Assisting acknowledged that the only provision of the ministerial code which applies in terms to the premier is clause 27(5) of the Schedule. However, they submitted that notwithstanding, the ministerial code would not be read as imposing a lower standard of conduct on the premier than other ministers.

10.75. In any event, Counsel Assisting contended that nothing relevantly turned on this issue. They pointed to the fact that the allegation relevantly being investigated is whether Ms Berejiklian 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. They submitted that even if clause 7(2) of the ministerial code (which prohibits a minister from, without the written approval of the premier, making or participating in the making of any decision or taking any action in relation to a matter in which the minister is aware they have a conflict of interest) did not apply to a premier, clause 12(1) of the Schedule (which prohibits a minister who has a conflict of interest in a matter from taking any action in relation to the matter) plainly does.

Ms Berejiklian's submissions

10.76. Ms Berejiklian acknowledged that the ministerial code applied to her while she was treasurer. Accordingly, it applied when the ACTA funding was approved on 14 December 2016. The significance of this is considered later in the report.

10.77. However, Ms Berejiklian contended that there is a real question as to whether, and if so to what extent, clause 7 and clause 12 of the Schedule impose obligations on the premier – a submission directed to her participation in decisions concerning the RCM. She submitted that there is nothing

[206] NSW Ministerial Code of Conduct, clause 7(2).

[207] NSW Ministerial Code of Conduct Schedule, clause 10(1).

[208] NSW Ministerial Code of Conduct Schedule, clause 12(2).

in clause 7 which imposes an obligation on the premier concerning their own potential conflicts of interest, because by its terms, clause 7 sets up a dichotomy between a minister and the premier. She pointed to:

10.77.1. clause 7(1), which provides that a minister must not knowingly conceal a conflict of interest from the premier (clause 7(1)); and

10.77.2. clause 7(2), which prohibits ministers from participating in decisions or taking actions where they have a conflict of interest, "without the written approval of the Premier".

10.78. Ms Berejiklian further contended that the definition of "Minister" in clause 11 of the ministerial code to include "any Member of the Executive Council of New South Wales", is displaced by the context (in effect, the contrary intention) exhibited by the dichotomy in clause 7 between a "Minister" and the "Premier". She submitted that the contrary intention is evidenced by the fact that "were the definition to be applied, the provisions of or the procedure established by [clause 7 of the ministerial code] would not appropriately work".[209]

10.79. Ms Berejiklian contended it would be a verbal nonsense to speak of the premier knowingly concealing something from themselves (clause 7(1)), or to speak of the premier giving written approval to themselves to participate in a decision or take an action (clause 7(2)). She submitted that the dichotomy between a minister and the premier erected in clause 7 required that in that clause the word "Minister" be interpreted not to include the premier.

10.80. Ms Berejiklian submitted that it could not be suggested that the omission in clause 7 of any obligations imposed on the premier was mere oversight. She pointed to other recognition of the "unique role of the Premier" elsewhere in the ministerial code, such as in clause 26 of the Schedule ("the enforcement of the requirements of this Schedule, including any sanctions for a breach, is a matter for the Premier") and clause 27(5) ("a ruling in respect of the Premier may be given if approved by the Cabinet").

10.81. Ms Berejiklian argued that, in the light of the express provision in clause 27(5) of the Schedule, it would not be open to imply into clause 7 (or any other provision of the ministerial code) a mechanism for extending its operation to the premier. She contended that where such an extension was intended, the drafters of the code have addressed it directly in that clause.

10.82. Accordingly, Ms Berejiklian argued that there is nothing in clause 7 which imposed an obligation on the premier concerning their own conflicts of interest.

10.83. Ms Berejiklian also submitted that clause 12(1) in Part 3 of the Schedule suffered from the same dichotomy as afflicted clause 7. This contention rested on the context in which clause 12 appears to be referring to the premier in contradistinction to ministers. Thus, clause 10 provides that "[a] Minister must promptly give notice to the Premier of any conflict of interest that arises in relation to any matter", while clause 12(2) provides "[h]owever, the Premier may, if satisfied that no conflict of interest arises or that any potential conflict of interest can be appropriately managed, make a ruling authorising the Minister to continue to act".

Consideration

10.84. The ministerial code is an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act. It is a form of delegated legislation, being prescribed by the Independent Commission Against Corruption Regulation 2017 ("the 2017 ICAC Regulation") for the purposes of s 9 of the ICAC Act.

[209] See *Deputy Federal Commissioner of Taxation v Mutton* (1988) 12 NSWLR 104 (at 108) per Mahoney J.

10.85. The normal purpose of delegated or subordinate legislation is to give effect to the provisions of the parent statute.[210] The ministerial code should accordingly be approached on the basis it is designed to carry into effect the express intention of the legislature in a way incidental to the execution of the ICAC Act.[211]

10.86. The general principles relating to the interpretation of Acts of Parliament are equally applicable to the interpretation of delegated or subordinate legislation.[212]

10.87. In order to construe the ministerial code, it is necessary to read its text as a whole. This does not always provide the answer, but, as said in *Project Blue Sky v Australian Broadcasting Authority (Project Blue Sky)*, it is the necessary starting point.[213] "[T]he context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed".[214] In doing so, it is necessary to recall the injunction of the plurality in *Project Blue Sky*,[215] citing Bennion on *Statutory Interpretation*[216]:

> *…there needs to be brought to the grammatical meaning of an enactment* ***due consideration of the relevant matters drawn from the context (using that term in its widest sense)****. Consideration of the enactment in its context may raise factors that pull in different ways. For example, the desirability of applying the clear literal meaning may conflict with the fact that this does not remedy the mischief that Parliament intended to deal with.* (Emphasis added)

10.88. Further, as the plurality also observed in *Project Blue Sky* (footnotes omitted):

> *[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute[45]. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole"…*
>
> *[70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.* ***Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.*** *Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which*

[210] *Allianz Australia Insurance Limited v Crazzi and Others* [2006] NSWSC 1090 at [17] per Johnson J referring to *State of New South Wales v Macquarie Bank Limited* (1992) 30 NSWLR 307 (at 320).

[211] *De Luca v Simpson and Anor* [2012] NSWSC 960 (at [80]) per Johnson J referring to *Allianz Australia Insurance Limited v Crazzi* (2006) 68 NSWLR 266 at 274; [2006] NSWSC 1090 (at [17]).

[212] *Collector of Customs v Agfa-Gevaert Pty Limited* (1996) 186 CLR 389 at 398; [1996] HCA 36.

[213] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 (*Project Blue Sky*) (at [69]) per McHugh, Gummow, Kirby and Hayne JJ.

[214] *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 (at 397) per Dixon CJ; [1955] HCA 27 cited with approval in *Project Blue Sky* (at [69]).

[215] *Project Blue Sky* (at [78]) McHugh, Gummow, Kirby and Hayne JJ.

[216] 2nd ed (1992) (at 461).

the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme. (Emphasis added)

[71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In The Commonwealth v Baume *Griffith CJ cited* R v Berchet *to support the proposition that it was "a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent".*

10.89. In this context and having regard to the principle that delegated or subordinate legislation is intended to give effect to the provisions of the parent statute, one commences with the observation that the ICAC Act applies to all public officials, as was always intended.[217] It would not give effect to the parent statute if the ministerial code excised the most senior public official in the state from its purview.

10.90. The effect of s 7(1) of the ICAC Act is that "corrupt conduct is any conduct which falls within the description of corrupt conduct in section 8, but which is not excluded by section 9". Relevantly, the effect of s 9(1)(d) is that conduct which falls within the description of corrupt conduct in s 8, is corrupt conduct if it could constitute or involve – in the case of conduct of a minister of the Crown or parliamentary secretary or a member of a House of Parliament – a substantial breach of an applicable code of conduct.[218]

10.91. Although s 9(1)(d) sits with s 9(1)(a) – (c) under the heading "Limitation on the nature of corrupt conduct", there are two important distinctions between it and the other provisions of s 9(1).

10.92. The first is that being a form of delegated legislation, as already explained, the ministerial code forms part of the scheme of the ICAC Act and should be construed in a manner which is consistent with the scheme established by, and reflected in, that Act.

10.93. The second distinction is that each of the subsections 9(1)(a) – (c) looks to an extraneous matter in requiring the identification of a relevant criminal offence, disciplinary offence and/or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

10.94. In consequence, if a finding of corrupt conduct is made in respect of conduct which it is found could constitute or involve one of the matters referred to in any of subsections 9(1)(a) – (c) (and assuming satisfaction of s 13(3A) and s 74BA), the Commission is required to include in its report a statement as to whether or not in all the circumstances it is of the opinion that consideration should be given to taking the steps referred to in subsections 74A(2)(a) – (c). Each of those subsections reflects subsections 9(1)(a) – (c) respectively.

10.95. Those steps include obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the person for a specified criminal offence, the taking of action against the person for a specified disciplinary offence and the taking of action against the person as a public official on specified grounds, with a view to dismissing, dispensing with the services of

[217] The Hon Nick Greiner, premier, treasurer and minister for ethnic affairs, Independent Commission Against Corruption Bill, Second Reading Speech Legislative Assembly, *Parliamentary Debates* (Hansard) 26 May 1988, at 676.

[218] This is also subject to the operation of s 13(3A) and s 74BA of the ICAC Act.

or otherwise terminating the services of the public official. The DPP will determine whether to pursue criminal charges and the relevant employer of the public official will consider whether to take disciplinary proceedings and/or seek to terminate the services of the public official.

10.96. As Priestley JA explained in *Greiner v ICAC* "the Act was designed to bring into the light of day facts concerning the conduct of public officials upon which others would, in appropriate cases, pass final judgment. This would be done by courts or other tribunals possessing the power to make decisions affecting the rights of citizens … The Act gave no power to the Commission to change or even pronounce upon the rights of any citizen in any legal sense. **The Commission's power is to find things out, make them public, and/or refer them to an appropriate authority; the law will then take its course**"[219] (emphasis added).

10.97. The ICAC Act did not continue in the form it took when *Greiner v ICAC* was decided. Section 9(1)(d) was inserted in 1994. Section 13(3A) was inserted in 2005, and s 74BA in 2015. The last two provisions contained constraints on the Commission's power to make corrupt conduct findings.

10.98. In the Second Reading Speech to the Independent Commission Against Corruption (Amendment) Bill, which inserted s 9(1)(d) into the ICAC Act, the Hon Garry West, then minister for police and minister for emergency services, stated:

> *The object of this bill is to amend the* Independent Commission Against Corruption Act 1988 *to expand the jurisdiction of the Independent Commission Against Corruption in relation to Ministers of the Crown and members of Parliament. Broadly speaking, the amendment would mean that the ICAC would be able to investigate an allegation that a Minister or member of Parliament had breached a code of conduct applicable to that Minister or member, if the alleged breach were potentially of a corrupt nature. Following an investigation, the ICAC would be able to make a finding of corrupt conduct against the Minister or member of Parliament, on the basis of a substantial breach of the code.*
>
> *Following the decision of the Court of Appeal in* Greiner v Independent Commission Against Corruption *concerns were expressed that the Independent Commission Against Corruption Act operated in a manner that resulted in different standards of conduct being applied to different classes of public official. In particular, there was the perception that Ministers of the Crown were beyond the reach of the ICAC … Clearly, Ministers and members of Parliament can be investigated by the ICAC when there are allegations that suggest that they may have been involved in criminal activity. However, the Court of Appeal decision showed that the other bases for corrupt conduct, namely, disciplinary offences and reasonable grounds for dismissal, could have very little practical operation in relation to Ministers and members of Parliament … the Government acknowledges that the effect of section 9 is that Ministers and members of Parliament may be less amenable to the jurisdiction of the ICAC than, say, public servants. Moreover, in similar circumstances it may be that a public servant but not a Minister or member of Parliament could be found corrupt. The Government does not accept that exactly the same standards need to be applied to every class of public official. In particular, there are important distinctions to be drawn between elected and non-elected officials based on the different manner in which they are accountable to the public. The Government nevertheless accepts that, for the purposes of the Independent Commission Against Corruption Act at least, a set of standards more analogous to that*

[219] (1992) 28 NSWLR 125 at 180.

> *applying to other public officers should apply to Ministers and members of Parliament … for the purposes of the Independent Commission Against Corruption Act, it is proposed that a ministerial code be adopted by regulation. Thus, the code will be public and subject to the scrutiny of this Parliament and disallowance by either House.*
>
> *The ICAC was established to deal with serious allegations of official corruption. That role should be maintained, and its resources should not be wasted on trivial matters. Moreover, it needs also to be borne in mind that once the ICAC has jurisdiction it has extraordinary coercive powers … The powers were not conferred lightly on the ICAC. It is the Government's view that they should not be triggered merely because allegations have been made that there is conduct that may fall within section 8 of the Act. That could be very much a matter of subjective judgment.* ***A serious test, such as that provided for by section 9 of the Act and requiring the application of objective standards, should be retained.***[220] (Emphasis added)

10.99. At the time s 9(1)(d) was enacted, s 74A was not amended to provide for the possibility of any further step being taken in respect of a finding of a substantial breach of an applicable code of conduct.[221] Thus, a finding of a substantial breach of the ministerial code (again, assuming s 13(3A) and s 74BA of the ICAC Act are satisfied) may lead to a finding that a minister or a member of Parliament has engaged in corrupt conduct. The Commission is entitled to include such a finding in its report to Parliament under s 74B(2) of the ICAC Act.

10.100. The ICAC Act reflects the legislature's intention, and the public's just expectation, that "[t]he law has always set high standards for official conduct".[222] The effect of s 9(1)(d) of the ICAC Act is that the Commission is empowered to make findings in relation to breaches by ministers of the ministerial code, public officials upon whom, and in relation to which, no others may make any further determination in consequence of a s 74A(2) statement.[223]

10.101. The Commission does not lose sight of that fact, nor does it lose sight of the fact that in light of the adverse manner in which the ICAC Act can operate, as Gleeson CJ observed:

> *It would be expected that Parliament would have provided for adverse determinations to be made by reference to objective and reasonably clearly defined criteria, so that at least people whose conduct had been declared corrupt would know why that was so, and would be in a position to identify, and, to the extent to which they were able, publicly dispute the process of reasoning by which that conclusion was reached.*[224]

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[220] NSW Legislative Assembly, *Parliamentary Debates* (Hansard), Second Reading Speech, 22 September 1994.

[221] Clause 26 of the ministerial code provides an internal mechanism to deal with any breaches, providing that "The enforcement of the requirements of this Schedule, including any sanctions for a breach, is a matter for the Premier". A note to that clause explains that "While enforcement of the requirements of this Schedule, including any sanctions for a breach, is a matter for the Premier, the NSW Ministerial Code of Conduct has also been adopted for the purposes of the *Independent Commission Against Corruption Act 1988*".

[222] *Greiner v ICAC* at 180 per Priestley JA. This is reflected in clause 1 of the ministerial code, "It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest".

[223] It should be noted, however, as explained in chapter 3 of this report, that a code of conduct adopted for the purpose of s 9 of the ICAC Act does not oust or limit a duty on members arising from the common law as enunciated in *R v Quach* and like authorities or operate to prevent any criminal offence which would contravene the code from being prosecuted: *Obeid v R 2017* (at [78]).

[224] *Greiner v ICAC* at 130.

10.102. This statement appears to be reflected in the Second Reading Speech set out above.

10.103. This legislative history provides an insight into the ambit of codes of conduct declared to be applicable for the purposes of s 9(1)(d) of the ICAC Act. They were intended to expand the Commission's jurisdiction to extend to all ministers of the Crown and members of Parliament to ensure that they were placed in a position similar to those persons the subject of s 9(1)(b) and s 9(1)(c). They should be interpreted with that legislative purpose in mind (see s 33 of the *Interpretation Act 1987* (NSW)).

10.104. It is too simplistic to contend that the ministerial code does not apply to the premier because, applying the definition to clause 7 as Ms Berejiklian submits, the procedure could not appropriately work. Rather, the adjustment, and reconciliation processes referred to in *Project Blue Sky*, must be undertaken. It is necessary, therefore, to give close consideration to the provisions of the ministerial code.

10.105. Clause 1(2) states that the ministerial code "applies to all current and future Ministers and Governments". The premier and other ministers of the Crown are appointed by the governor from among the members of the Executive Council (see s 35E of the Constitution Act). As such, that office falls within the definition of "Minister" in clause 11 of the ministerial code as including "(a) any Member of the Executive Council of New South Wales". This is consistent with the historic position under the Constitution Act as Dixon J (as his Honour then was) said in *New South Wales v Bardolph*, "In New South Wales the Premier is a Minister of the Crown known to the law".[225] As Rich J added, "the Premier in New South Wales, administers a separate department of Government known as the Premier's Department".

10.106. The clear intention of clause 1(2) of the ministerial code is that the entirety of the code applies to all who fall within the description of "Minister". That is the leading provision of the code. It reflects s 9(1)(d) of the ICAC Act which it was designed to carry into effect. This is confirmed by having regard to the Preamble as permitted by clause 12(1). All clauses of the Preamble refer to the obligations the ministerial code is intended to impose by reference to "Ministers". No distinction is drawn between the premier as a minister, and other ministers. Significantly, clause 11 of the Preamble, provides, "In particular, Ministers have a responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity".

10.107. It is notable that where the parts of the ministerial code are not to apply to a person who falls within the definition of "Minister", it says so expressly. Relevantly, the definition of "Minister" in clause 11 of the ministerial code includes, at (b) "if used in or in relation to this Code ***(other than Parts 1 and 5 of the Schedule to the Code)***—a Parliamentary Secretary" (emphasis added). This point is emphasised through the code by the Note at the commencement of the parts of the code which do apply to a parliamentary secretary (Parts 2–4 and 6), that "[t]his Part also applies to Parliamentary Secretaries, and a reference to a Minister in this Part includes a reference to a Parliamentary Secretary." Again, clause 12(1) of the ministerial code permits consideration of notes in its interpretation.

10.108. One would have expected, if Ms Berejiklian's contentions were correct, that the definition of "Minister" in clause 11 of the ministerial code would have expressly said at (a) that neither clause 7 of the ministerial code or clause 12 in Part 3 of the Schedule, both addressing conflicts of interest, applied to the premier.

[225] *New South Wales v Bardolph* (1934) 52 CLR 455 (at 507) per Dixon J (Gavan Duffy CJ agreeing); [1934] HCA 74.

10.109. Instead, clause 27(5) makes it clear that rulings in relation to the premier concerning, among other things, conflicts of interest may be approved by the Cabinet. As noted above, Ms Berejiklian referred to clause 27(5), but did not consider the work it does in the ministerial code.

10.110. "Ruling" is defined in clause 11 of the ministerial code to mean "a ruling by the Premier, in accordance with clause 27 of the Schedule to this Code, under clauses 1(1) or (4), 2(3), 3(5) or 12(2) of the Schedule".

10.111. A note to clause 27(2) (dealing with rulings to be in writing and placed on the Ministerial Register of Interests) states, "See clauses 1(1) and (4), 2(3), 3(5) and 12(2) of the Schedule, which provide for the Premier to issue rulings that a particular course of conduct is permitted".

10.112. Those clauses provide for the following rulings:

10.112.1. Clause 1(1): where [the premier] is satisfied that any security or other interest in any public or private company or business held or acquired [by the premier] is unlikely to raise any **conflict of interest**, or that any **potential conflict of interest** can be appropriately managed, a ruling that the particular interest may be held or acquired.

10.112.2. Clause 1(4): a ruling that a particular superannuation fund, publicly-listed managed fund or other trust arrangement ("fund") in which an interest is held or acquired [by the premier] meets the criteria of a diversified arms-length fund or a blind trust.

10.112.3. Clause 2(3): a ruling that approves the retention or acceptance [by the premier] of a directorship of a public or private company or any other business, where the directorship relates to a personal or family business of [the premier] and the directorship is not likely to give rise to a **conflict of interest**.

10.112.4. Clause 3(5): a ruling that approves [the premier's participation] in the employment or management of a business, where the participation relates to a personal or family business [of the premier] and the participation is not likely to give rise to a **conflict of interest**.

10.112.5. Clause 12(2): a ruling authorising [the premier] to continue to act in a matter (by making or participating in any decision or taking or participating in any action in relation to the matter) if [the premier] is satisfied that no conflict of interest arises or that any **potential conflict of interest** can be appropriately managed. (Emphasis added)

10.113. The requirement to seek a ruling in relation to each of the prohibited interests under clauses 1(1), 1(4), 2(3) and 3(5), and where a minister has a conflict of interest in a matter under clause 12(2) of the Schedule, is mandatory. As a matter of statutory construction, the requirement must also be mandatory for the premier in the same circumstances. The clear implication, having regard to clause 27(5), is that the premier is to prepare a ruling in relation to themselves under the relevant clause, but that ruling must be approved by Cabinet before it is operative. It is implicit in that process that the premier is obliged to disclose any of the matters referred to in the relevant clause to obtain Cabinet's "informed" approval of that ruling, in a way analogical to the "informed consent" a fiduciary such as a solicitor in a conflict of interest position must have obtained if they are to have a defence to an action alleging breach of fiduciary duty.[226]

[226] See by way of illustration, *Maguire & Tansey v Makaronis* (1997) 188 CLR 449 (at 466–467); [1997] HCA 23 per Brennan CJ, Gaudron, McHugh and Gummow JJ.

10.114. It must follow that, in cases such as those dealt with by clause 7, the premier is required to disclose any conflict of interest, or potential conflict of interest to the Cabinet, so that the Cabinet (other of course than the premier) can, if appropriate, approve a clause 27(5) ruling.

10.115. In *DRJ v Commissioner of Victims Rights (No 2)*,[227] Leeming JA observed, "[c]ases where a definition, or an interpretation provision, is displaced by reason of a contrary intention are often highly contestable. In part that is because the contrary intention is often claimed to emerge impliedly from the statutory context or purpose, and there is, as Mahoney JA insightfully observed, 'no simple formula for determining what is a "contrary intention" for this purpose' (see *Deputy Commissioner of Taxation v Mutton* (1988) 12 NSWLR 104 at 108). However, it is clear that discerning a contrary intention requires giving legal meaning to the statute, and hence the judge-made rules of construction must be applied as part of the process."

10.116. To paraphrase French CJ, Crennan, Kiefel and Keane JJ in *ADCO Constructions Pty Ltd v Goudappel*,[228] "a contrary intention will appear with the requisite degree of certainty if it appears 'clearly' or 'plainly' from the text and context of the provision in question that the provision is designed to operate in a manner which is inconsistent" with it applying to the premier.

10.117. In the light of the matters to which the Commission has referred, that "requisite degree of certainty" or inconsistency has not been demonstrated. Rather, the dichotomy to which Ms Berejiklian referred between a minister and the premier is illusory. It is plain that the premier is required to disclose to the Cabinet the matters in the relevant clauses of the Schedule. It requires the premier to seek the Cabinet's approval for rulings that a conflict of interest either does not arise, or can be appropriately managed, in the same circumstances in which a minister must seek a ruling from the premier about such matters.

10.118. As Gageler and Keane JJ observed in *Taylor v The Owners – Strata Plan No 11564* (footnotes omitted):

> *Statutory construction involves attribution of legal meaning to statutory text, read in context. "Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning ... But not always."* ***Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words****. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.*[229] (Emphasis added)

10.119. To give effect to clause 27(5), it is necessary to imply "words of extension" into each of the clauses to which it applies.[230] In each case, the clause clearly refers to the premier giving a minister a ruling. However, the clear effect of clause 27(5) is to imply into each clause that the premier may be the subject of a ruling.

[227] (2020) 103 NSWLR 692; [2020] NSWCA 242 (at [115]).

[228] (2014) 254 CLR 1; [2014] HCA 18 at [52].

[229] (2014) 253 CLR 531; [2014] HCA 9 (at [65]) per Gageler and Keane JJ.

[230] Ibid.

10.120. This is hardly a remarkable conclusion. What would be a remarkable conclusion is that delegated legislation expressed to apply to all "Ministers" – a definition which includes the premier, and whose empowering legislation is s 9(1)(d) of the ICAC Act, clearly intending any applicable code of conduct to apply to all ministers, parliamentary secretaries and members of Parliament – would not apply to the most senior public official in the state. In interpreting the ministerial code, the Commission is required to prefer a construction that would promote the purpose or object underlying the code (whether or not that purpose or object is expressly stated in it, or in the ICAC Act under which the 2017 ICAC Regulation to which the code is annexed was made) to a construction that would not promote that purpose or object. Such a construction is one pursuant to which the ministerial code applied to the premier, as it applies to all other ministers.

10.121. On the proper interpretation of the ministerial code and its Schedule, a minister must not, without the written approval of the premier, and the premier must not, without a ruling approved by Cabinet, make or participate in the making of any decision or take any other action in relation to a matter in which the minister, or the premier as the case may be, is aware they have a conflict of interest or potential conflict of interest as defined in clause 7(3) of the code. Implicit in this is that the premier is required to disclose that conflict of interest in order that Cabinet may consider it substantively, and either approve or reject a ruling the premier proposes. The substantive effect of the Cabinet approving a ruling the premier proposes within the meaning of clause 27(5), is that the premier obtains a ruling that a particular course of conduct is permitted as contemplated by clauses (1) and (4), 2(3), 3(5) and 12(2) of the Schedule.

10.122. As Gageler J said in *R v Independent Broad-Based Anti-Corruption Commissioner* (footnotes omitted), "[77] … any common law principle or presumption of interpretation must surely have reached the limit of its operation where its application to read down legislation plain on its face would frustrate an object of that legislation or render means by which the legislation sets out to achieve that object inoperative or nonsensical".[231] Or, to adapt what Gleeson CJ said in *Greiner v ICAC*, speaking of the applicability of s 9(1)(c) of the ICAC Act to the premier and a minister,[232] "having regard to the context, the general purpose and policy" of clause 7 and clause 12 of the ministerial code, and "its consistency and fairness", if the ministerial code does not apply to the premier, it would be "a mockery".

10.123. That would be the effect of Ms Berejiklian's submission if accepted. The clear intent of the ministerial code is that it applies to all ministers, one of whom is the premier, and that in the premier's case, clause 27(5) gives that application practical effect.

10.124. The Commission rejects Ms Berejiklian's submission that she was not required by the ministerial code to disclose conflicts of interest or potential conflicts of interest as referred to in clause 12(1) and defined in clause 7(3) of the code insofar as she participated in decisions concerning the RCM.

10.125. Before leaving this aspect of the ministerial code, it is important to note clause 15 which provides, "This Part does not affect a Minister's duties to avoid, disclose and otherwise appropriately manage actual or perceived conflicts". Accordingly, a minister, and the premier as such, is also obliged to comply with general law obligations concerning conflicts of interest.

[231] (2016) 256 CLR 459; [2016] HCA 8 (at [76]–[77]).

[232] At 143.

Conclusion

10.126. As Ms Berejiklian conceded, the ministerial code bound her as treasurer in respect of the Expenditure Review Committee (ERC) of Cabinet decision concerning the ACTA (discussed later in this report), and as the Commission has concluded, it also bound her as premier in respect of ERC and other decisions concerning the RCM.

NSW Ministerial Code of Conduct: meaning of "conflict of interest" for the purposes of clause 7(3)

10.127. Ms Berejiklian contended that Counsel Assisting have failed to identify either a "private interest" or a "public duty" known to the law and, accordingly, their analysis of the alleged conflict between her interest and duty could not be sustained. This submission entailed a detailed examination of both the concepts of "private interest" and "public duty" as used in clause 7(3).

Private interest

10.128. Clause 7 of the ministerial code provides:

> *7 Conflicts of interest*
>
> *(1) A Minister must not knowingly conceal a conflict of interest from the Premier.*
>
> *(2) A Minister must not, without the written approval of the Premier, make or participate in the making of any decision or take any other action in relation to a matter in which the Minister is aware they have a conflict of interest.*
>
> *(3) A conflict of interest arises in relation to a Minister if there is a conflict between the public duty and the private interest of the Minister, in which the Minister's private interest could objectively have the potential to influence the performance of their public duty. Without limiting the above, a Minister is taken to have a conflict of interest in respect of a particular matter on which a decision may be made or other action taken if:*
>
> *(a) any of the possible decisions or actions (including a decision to take no action) could reasonably be expected to confer a private benefit on the Minister or a family member of the Minister, and*
>
> *(b) the nature and extent of the interest is such that it could objectively have the potential to influence a Minister in relation to the decision or action.*
>
> *Note. See also Part 3 of the Schedule for further requirements regarding conflicts of interest.*

Counsel Assistings' submissions

10.129. Counsel Assisting submitted that the term "private interest" in clause 7(3) is not limited to pecuniary interests but extends to what could be described as private concerns or personal connections. They illustrated this submission by an example of a minister's attention or concern being "particularly engaged in relation to a person by reason of their personal association or connection with them – whether that association or connection be one of friendship, enmity, family relation or romantic involvement". They argued that a "private interest" for the purposes of the ministerial code may exist depending upon the circumstances.

10.130. Counsel Assisting contended that the question of whether a "conflict of interest" exists turns on whether there is a conflict of an identified kind between the public duty and the "private interest" of the minister. They submitted that for a "conflict of interest" to exist for the purposes of the

ministerial code, it is unnecessary for it to be demonstrated that any possible action could reasonably be expected to confer a private benefit on the minister or a family member of the minister.

10.131. Counsel Assisting also submitted that a "breach of public trust" for the purposes of s 8(1)(c) of the ICAC Act will be committed where a public official breaches his or her duty of loyalty by exercising public functions in circumstances where there is a real possibility of conflict between the public official's public duties and their private interest.

10.132. Counsel Assisting submitted that the duties of trustees of private trusts provide a useful analogical yardstick in assessing whether conduct of a public official amounts to a "breach of public trust" for the purposes of the ICAC Act. They observed, referring to *Boardman v Phipps* [1967] 2 AC 46 (at 123) per Lord Upjohn, that one of the fundamental duties of a private trustee (as it is of other private law fiduciaries) is the "no conflict" duty which requires a private trustee not to "place himself [or herself] in a position where his [or her] duty and interest may conflict".

10.133. While Counsel Assisting accepted that in the private trust context, the kinds of "interests" that may engage the no conflict duty may be limited to interests that are pecuniary in nature,[233] they contended that the duties associated with a "public trust" of the kind referred to in the ICAC Act should not be regarded as so limited. This was because, it was suggested, unlike a private trust which is of its nature a relationship affecting property, a public trust is one in which public officers are entrusted with functions that may affect the non-pecuniary interests of members of the public. That being so, they argued, non-pecuniary interests of public officials should be regarded as capable of creating conflicts that a public official might be required to avoid or manage.

10.134. In this way, Counsel Assisting submitted, a public officer should be regarded as committing a "breach of public trust" where they place themselves in a position where their public duty and private interest may conflict whether or not the interest involved is a pecuniary one.

10.135. Counsel Assisting submitted that, in the circumstances of this case, Ms Berejiklian's "private interest" is "as a person who was in a personal relationship with Mr Daryl Maguire" and "her private interest in the maintenance and advancement of her relationship with Mr Maguire".

10.136. Counsel Assisting also noted that even when a "conflict of interest" exists, a minister is not necessarily excluded by the ministerial code from making or participating in a decision or other action. Where a "conflict of interest" exists and can be managed, a minister may be able to continue to act despite her or his conflict. For example, where a premier has a "conflict of interest" in relation to a matter before Cabinet, her or his Cabinet can approve the premier continuing to play a role in decision-making in relation to the matter; but only if the "conflict of interest" is disclosed.

Ms Berejiklian's submissions

10.137. Ms Berejiklian submitted that:

10.137.1. her close personal relationship with Mr Maguire does not constitute a "private interest" within the meaning of that term in clause 7(3) of the ministerial code or under the general law concerning conflicts of interest

10.137.2. Counsel Assistings' submission that Ms Berejiklian's "private interest" was constituted by her "private interest as a person who was in a personal relationship with Mr Maguire", or her "private interest in the maintenance and advancement of her relationship with Mr Maguire" was a novel "private interest"

[233] Referring to *Grimaldi v Chameleon Mining NL* (No 2 (2012) 200 FCR 296 (FCAFC) at [180].

10.137.3. whether there is a conflict of interest for the purpose of clause 7(3) of the ministerial code, it is essential to identify and define – with precision – the nature of the "private interest" said to conflict with the minister's "public duty"

10.137.4. clause 7(3) requires identification of a "private interest" on the part of the relevant minister, and that in cases of conflicts of duty and interest, "it is appropriate to have regard to the nature of the interest in question and whether it is in opposition to, or in tension with, the relevant duty"[234]

10.137.5. the notion of "conflict" involves questions of degree

10.137.6. while "private interest" is not defined in the ministerial code, the term has a long history under the general law as the touchstone for the existence of a conflict of interest in public office

10.137.7. while "private interest" in clause 7(3) is not limited to pecuniary interests, the crux of the issue is what kind of non-pecuniary interests it encompasses, arguing that the concept of a non-pecuniary private interest is not unlimited and must be approached with care

10.137.8. the rationale for the extension of "private interests" to non-pecuniary interests is an acknowledgement that public officers may be placed in a position of conflict, whereby they may be influenced by a "private interest", notwithstanding that they themselves do not have a relevant pecuniary interest.

10.138. Other submissions of Ms Berejiklian have been included in the Commission's consideration of the meaning of clause 7(3).

Consideration

10.139. As Counsel Assisting submitted, the concept of a "conflict of interest" is a central concept under the ministerial code.

10.140. The Preamble to the ministerial code is set out above. Assistance can be obtained from a preamble "in ascertaining the meaning of an operative provision. The particular section must be seen in its context; the statute must be read as a whole and recourse to the preamble may throw light on the statutory purpose and object".[235] It identifies "the reason or spirit of every statute; rehearsing … the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the legislature in making and passing the statute".[236] In the case of the ministerial code, the importance of the ability to have recourse to the Preamble in interpreting its provisions is made clear by clause 12(1).[237] As its text makes plain, and as do the authorities referred to in chapter 3 of this report, in reciting the principles which underpin the ministerial code, it was not reciting anything novel,

[234] Referring to *Hylepin Pty Ltd v Doshay Pty Ltd* [2021] FCAFC 201; [2012] FCAFC 6 (at [35]).

[235] *Wacando v Commonwealth* (1981) 148 CLR 1 (at 23); [1981] HCA 60 per Mason J; See also D Pearce, *Statutory Interpretation in Australia*, 9th Edition, LexisNexis, 2022 (Pearce) at [1.42].

[236] *Brett v Brett* (1826) 3 Add 210; 162 ER 456 per Sir John Nicholl, referred to with approval in *Attorney-General v Prince Ernest Augustus of Hanover* (1957) AC 436 (at 473) per Lord Somervell; see also *Wacando v Commonwealth* (at 23) per Mason J.

[237] Note also Bathurst CJ's use of the Preamble in *Obeid v R 2017* (at [144]).

but emphasising the historical context of the ministerial code which already bound members of Parliament.

10.141. Clauses 1–6 of the ministerial code set out statements relating to standards of ethical behaviour for ministers. As is made clear by clause 10 of the Preamble, the ministerial code was not intended to be a comprehensive statement of ethical conduct by ministers. Nevertheless clause 10 makes clear that "Ministers are expected always to conform with the principles referred to above". Clause 11 provides:

> *In particular, Ministers have a responsibility to avoid or otherwise manage appropriately* ***conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity***. (Emphasis added)

10.142. The definition of "Conflict of interest" in clause 7 of the ministerial code informs the following provisions in the Schedule to the ministerial code: clause 1 (Shareholdings), clause 2 (Directorships and other positions), clause 3 (Secondary employment) and clause 4 (Divestiture at the direction of the Premier) in Part 1 (Prohibited interests) of the Schedule. A note to clause 1(2) states, "Ministers should also be mindful of the potential for any interests held or acquired by ***family members or other persons with whom they have a personal relationship*** to give rise to a conflict of interest for the Minister" (emphasis added).

10.143. The entirety of Part 3 of the Schedule addresses the issue of conflicts of interest, setting out the duty of disclosure, how disclosure is to be made and recorded, how it is to be managed, and giving ministers a discretionary opportunity, if they have "some other substantial personal connection with a matter or for any other reason", to disclose an interest and abstain from decision-making in relation to a matter in accordance with that part, even if the interest might not comprise a conflict of interest. Finally, the definition of "conflict of interest" in clause 7 applies to Part 4 (Gifts and hospitality).

10.144. As Ms Berejiklian accepted, clause 7(3) does not confine the concept of "private interest" to a pecuniary one. It is clearly capable of encompassing a non-pecuniary interest, as well as pecuniary interests. Having regard to the central role the concept plays in the ministerial code, one would not give it a narrow interpretation.

10.145. The kind of "private interest" a clause such as 7(3) might encompass, and clause 7(3)'s apparent genesis, was considered in the Bowen Report. The first term of reference for the committee was "[t]o recommend whether a statement of principles can be drawn up on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth".

10.146. The Bowen Report juxtaposed "private interests" against the "obligations of public duty". It recognised that "[b]oth pecuniary and non-pecuniary private interests may conflict with public duty".[238]

10.147. The Bowen Report addressed non-pecuniary interests as follows:

> *[2.18] Many demands directed to government do not seek to advance pecuniary interests. The concerned citizen may want a threatened species of wildlife to be saved or an historic building to be preserved. He may want the courts to punish offenders more rigorously, and so on.*

[238] At [2.16].

[2.19] ***The benefit sought may go, not directly to the person seeking to influence the decision or his immediate dependants, but perhaps to some person or group with whom he has … "religious or family affiliations"****. The officeholder who would find it abhorrent to feather his own nest by improper gifts or dubious decisions may be tempted to assist a co-religionist or a product of his old school. At very least, the suspicion that he had done so might exist.*

[2.20] Which such interests should be regulated? Earlier inquiries facing this problem have tended to look to practicality rather than to theoretical purity. The City of New York Bar Association Committee, contemplating a statute to prevent abuses, wrote:

> *Restrictions on outside economic affiliations can be written with reasonable particularity and enforced with moderate predictability; no one has yet devised a method of sorting out acquaintances, friends, relations, and lovers for purposes of a rule permitting official dealings with some and not with others. The British Royal Commission on Standards of Conduct in Public Life (the Salmon Commission) also doubted that it would be practicable to employ a statute to compel disclosure of non-pecuniary interests because "they are too nebulous to be legally codified and made subject to a criminal sanction".*

[2.21] This Committee believes that a wide range of non-pecuniary interests could *conflict with the public duty of officeholders. At least they might raise a presumption or a reasonable suspicion that they were doing so.* ***Indeed, any private interest could in some circumstances cause conflict****. Therefore, some device is necessary to decide which private interests should be regulated because of the probability that they will, in some circumstances, cause conflicts. The problem of identifying interests which should be regulated is made more difficult because often it is the context which determines whether an interest is likely to cause conflict. Absolute rules may not be possible.*

[…]

[2.23] Attempts to lay down rules in relation to non-pecuniary interests have floundered because of the problem of defining adequately an interest which may be regarded as creating an actual or potential conflict with duty. This problem of definition creates difficulties for both the officeholder bound by such rules and the authority responsible for his conduct. In the absence of any clear guidance, an officeholder may well be uncertain about his obligation to his public duty in respect of an interest. Those responsible for enforcing proper conduct in respect of that obligation may equally be uncertain as to what is proper in the circumstances.

[2.24] ***However, there is a test which the Committee believes is likely to be applied in practice by such officeholders, or those responsible for their conduct, in judging what is proper in particular circumstances: the test of appearance. Does that interest look to the reasonable person the sort of interest that may influence?***

[2.25] It may well be that inherent difficulties of definition will make any rules in respect of non-pecuniary interests less satisfactory than those in respect of pecuniary interests. Those responsible for making or enforcing rules may have to be prepared to counsel or caution rather than reprimand or punish, at least until precedent and familiarity have built up some consensus on how such rules should operate in a "grey" area. The precedents initially may draw quite arbitrary lines through the original uncertainty. Eventually its area is likely to be reduced.

[2.26] The Committee believes that, in judging whether a particular non-pecuniary interest could create conflict in certain situations, or whether rules should be laid down in relation

> *to a certain type of non-pecuniary interest,* ***the test is the likelihood that the person possessing the interest could be influenced in the independent judgment which his public duty requires be applied to the matter in hand, or that a reasonable person would believe that he could be so influenced.*** (Non-italics in original; emphasis added)

10.148. The Bowen Report's conclusion on its first term of reference was:

> *[2.45] The Committee has concluded that it would not be possible to draw up a completely comprehensive and satisfactory statement of principles on the nature of private interests, pecuniary or otherwise, which could conflict with the public duty of any or all persons holding positions of public trust in relation to the Commonwealth.* ***The difficulties of so doing are especially great as regards non-pecuniary private interests.*** *As regards pecuniary private interests, definition of principles poses fewer problems, although, as discussed, some of those remaining present difficulties of a substantial kind; practical considerations suggest that, even where pecuniary private interests which could give rise to conflict with public duty are capable of satisfactory definition, it may be desirable to limit the coverage.* (Emphasis added)

10.149. Ms Berejiklian's submissions extracted paragraphs [2.20] and [2.21] of the Bowen Report, but not [2.23]–[2.26]. She also observed that Professor Paul Finn addressed the issue of the regulation of private interests in public office in the Finn Report[239] where he stated:

> *Consistent with its general concern to secure loyalty in service, the law's preoccupation has never been with conflict of duty and interest as such. Rather, it has been with identifying those types of personal interest which, if permitted to intrude unregulated into official decision, could give rise* ***(a) to an unacceptable risk of abuse of office (because of the temptation that interest creates); or (b) to beneficiary-apprehension that such might occur.*** *Even here, as will be seen, feasibility as much as principle, has set limits to the circumstances in which, and the extent to which, regulation can reasonably be imposed.*[240] (Emphasis added)

10.150. Ms Berejiklian then submitted that Professor Finn's reference to "feasibility as much as principle" evokes the concerns addressed in the Bowen Report extracted above, concerning the need for any rule attaching to private interests to be sufficiently clear, and reasonable, in the scope of its operation. That is perhaps unsurprising, as Professor Finn, then a senior lecturer in Law at the Australian National University, made written submissions to, and gave oral evidence before, the Bowen Committee.[241] Moreover, Professor Finn's observation about feasible regulation recognises the utility of the appearance test the Bowen Report adopted which, as is apparent, finds reflection in the clause 7(3) test of the ministerial code that "the Minister's private interest could objectively have the potential to influence the performance of their public duty".

10.151. In the Commission's view, the significant point to emerge from the Bowen Report for the purposes of the allegations of conflict of interest on Ms Berejiklian's part, is that it is apparent that the definition of conflict of interest in clause 7(3) of the ministerial code is drawn from the "appearance test" set out in the Bowen Report (at [2.24] and [2.26]).

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[239] P D Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters*, Integrity in Government Project, 2nd Report, Australian National University, 1993 ("Finn Report")

[240] Finn Report at 13.

[241] See Bowen Report at 147, 149.

10.152. The code of conduct developed by the Bowen Committee, with a recommendation that it be adopted for general application to all officeholders, included the following clauses in paragraph [4.9] that are materially similar to clause 7(3) of the ministerial code:

> *3. An officeholder should avoid situations in which his private interest, whether pecuniary* ***or otherwise****, conflicts or might reasonably be thought to conflict with his public duty.*
>
> *4. When an officeholder possesses, directly or indirectly,* ***an interest*** *which conflicts or might reasonably be thought to conflict with his public duty, or improperly to influence his conduct in the discharge of his responsibilities in respect of some matter with which he is concerned, he should disclose that interest according to the prescribed procedures…*[242] (Emphasis added)

10.153. The clause 7(3) test:

> *A* ***conflict of interest*** *arises in relation to a Minister if there is a conflict between the public duty and the private interest of a Minister, in which the Minister's private interest could objectively have the potential to influence the performance of their public duty…* (Original emphasis)

picks up the key aspects of the "appearance test", being:

(a) the potential for the private interest to influence the performance of the official's public duty

(b) the objective assessment of that potential to influence the performance of the public duty.

10.154. Ms Berejiklian also relied upon a passage in the Finn Report which stated:

> *If a fiduciary was to be regulated* ***as of course*** *for possible disloyalty* ***merely on account of his or her relationships, associations, or connections with third persons or bodies*** *– e.g. a spouse, relative, school, institution, charity, political party, etc. – potentially all human contact and association would be placed under suspicion if not discouraged in some degree. Even a less all-encompassing approach based on selection of particular types of relationship considered to create an appreciable risk of bias (e.g. immediate family) was an expedient the common law did not adopt and for apparently prudential reasons:*
>
> *"no one has yet devised a method for sorting out acquaintances, friends, relations and lovers for the purpose of a rule permitting official dealings with some and not with others".*[243] (Emphasis added)

10.155. On this basis, Ms Berejiklian submitted that Counsel Assistings' submission that the term "private interest" in clause 7(3) is intended to regulate associations and connections in the nature of "friendship, enmity, family relation or romantic involvement" was "heterodox" and would involve a radical departure from the general law.

10.156. The paragraphs Ms Berejiklian's submissions extracted from Professor Finn's report concerning regulating fiduciaries for "possible disloyalty", did not include the following, which appeared in the Finn Report two paragraphs later:

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[242] Bowen Report at 31.

[243] Finn Report at 16 referring to Association of the Bar of the City of New York, Special Committee on the Federal Conflict of Interest Laws, *Conflict of Interest and Federal Service*, Harvard University Press, Cambridge, Mass., 1960, 17.

> *This general exclusion of third party relationships from risk regulation on a conflict of duty and interest basis exposes an obvious limitation in the common law's fiduciary regime.* ***In contrast, as will be seen, statutory, employment and professional/ethical regimes have been prepared to regulate on account of third party relationships.*** *In so doing they have had of necessity to make that problematic selection of "risk creating" relationships at which the common law baulked.* ***The common criterion involved in its making, as the Bowen Committee Report illustrates, is a trust-maintenance, "appearance" test: is the relationship in question one which a reasonable person would believe could influence the independent judgment of the officer-fiduciary?***[244] (Emphasis added)

10.157. Once again, Professor Finn's recognition of the necessity in the case of public officials for a trust-maintenance, "appearance" test, which moves away from the common law, echoes his acceptance of "feasible regulation" in this area. Ms Berejiklian's submission did not look at the full context of Professor Finn's statement.

10.158. Further, Counsel Assisting was not contending for regulation "**merely** on account of his or her relationships, associations, or connections with third persons or bodies" (being the reference in the Finn Report as identified by Ms Berejiklian above) (emphasis added). Counsel Assisting was identifying what may constitute a "private interest" for the purpose of clause 7(3), in respect of which its objective potential to influence the performance of the minister's public duty could be tested. As earlier noted, this is the appearance test the Bowen Report devised.

10.159. It is also the "trust-maintenance, 'appearance' test", the making of which by statutory, employment and professional/ethical regimes Professor Finn appeared to approve to overcome "an obvious limitation" in the general law referred to above. Professor Finn wrote later in his report, "if our objective is to manage conflicts there are other ways to this beyond the criminal law both in means to be adopted and in the sanctions to be imposed for non-compliance. As to means, we have the quintet of possibilities identified in the Bowen Report: prohibition, declaration, registration, authorisation and divestment and **beyond these codes of conduct**, educational measures, etc"[245] (emphasis added). As he wrote, "To be justifiable regulation must be sustained – and reasonably so – by its risk avoidance and trust maintenance purposes".[246] This is the model apparent in clause 7(3).

10.160. It is perhaps not surprising that there is not extensive "general law" about such relationships as those for which Counsel Assisting contend, because, as the Bowen Report recognised in the preamble to the code of conduct it proposed, "Officeholders may be required by the nature of public office to accept restrictions on certain areas of their private conduct **beyond those imposed on ordinary citizens**" (emphasis added). Consistently with that, clause 3 of its proposed code of conduct was that "An officeholder should avoid situations in which his private interest, whether pecuniary or otherwise, conflicts or might reasonably be thought to conflict with his public duty".[247]

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[244] Finn Report at 17.

[245] Finn Report at 41.

[246] Finn Report at 73.

[247] Bowen Report, Appendix II at 31.

10.161. Professor Finn referred to these passages in the Bowen Report, without criticism, as reflecting what he termed the "public confidence usage" – in a realm where "the language of trust" was being applied to government. He said:

> *The significance of this usage for present purposes is that increasingly it is being engrafted upon particularly the second of the two usages mentioned above, to justify regulation of conduct which, though not itself a breach of trust, may nonetheless have that appearance or tendency and thus be possibly prejudicial to public confidence in official integrity. No more is this so than in relation to conflict of interest regulation.*[248]

10.162. Further, contrary to Ms Berejiklian's submissions, it is not "heterodox" to suggest that associations and connections in the nature of "friendship, enmity, family relation or romantic involvement may constitute 'private interests'" at general law.

10.163. In *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*,[249] Owen J stated:

> *The last point I want to raise in this review of general legal principles concerning conflicts of interest relates to the phrase "personal interests". **I think it is common ground that the phrase is not confined to pecuniary interests. It extends to non-pecuniary and indirect interests.** In* Baker v Palm Bay Island Resort Pty Ltd (No 2) *[1970] Qd R 210 at 221–2, WB Campbell J said that the interest must be direct and certain and not contingent or remote. As a matter of principle I cannot see why it needs to be direct or of a contractual nature. It would be appropriate to adapt the test for a possible conflict ("real and substantial") and apply it to the identification of the interest. Mason J in Hospital Products excluded the ground of relief "when the interest of the fiduciary is remote or insubstantial". Some care needs to be taken to ensure the word "substantial" is not seen purely in quantitative terms relative to, for example, the subject matter of the transaction to which the impugned conduct relates.*
>
> *This approach accords with the statement by Judge Learned Hand in* Phelan v Middle States Oil Corporation *(1955) 220 F 2d 593 at 602, indicating that the doctrine is applied with regard to the particular circumstances. His Honour went on to say that the rule does not apply when the putative interest, though in itself strong enough to be an inducement, is too remote, or when, though not too remote, it was too feeble an inducement to be a determining motive. These comments were cited with approval by Mason J in* Hospital Products *at CLR 104; ALR 459–60; IPR 334–5 and by McHugh, Gummow, Hayne and Callinan JJ in* Pilmer *at [79].*
>
> …
>
> ***One way of ascertaining whether the interest of the fiduciary is remote or insubstantial is to ask whether the interest is such that a reasonable person would think there was a real or substantial possibility of the fiduciary being swayed by it. In this way, tests for the identification of the "interest" and for the "possibility of a conflict" would be applied bearing in mind a similar rationale.***[250] (Emphasis added)

10.164. In *Buitendag v Ravensthorpe Nickel Operations Pty Ltd*,[251] McLure P (with whom Pullin and Murphy JJA agreed) said:

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[248] Finn Report at 14–15.

[249] (2008) 39 WAR 1; [2008] WASC 239 (Bell Group) (at [4509]).

[250] Bell Group at [4508]–[4510], [4512].

[251] [2014] WASCA 29.

> *There is no merit in the appellant's claim that the conflict rule is confined to proprietary or financial interests of an employee. The conflict rule in the context of the obligations of fiduciaries was explained in* Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd *[2009] WASCA 143 [70] – [74]. A fiduciary owes a duty of undivided loyalty to his principal (in this case his employer) which requires the fiduciary to avoid a conflict of duty and interest (and a conflict of duty and duty). The court continued:*
>
> > ***A conflict of interest and duty can arise where the personal interest of the fiduciary is pecuniary or non-pecuniary, direct or indirect. A non-pecuniary interest includes an interest by way of association, whether by way of kinship or business connection [or otherwise]. Whether the interest is within the conflict rule will depend on (inter alia) the nature, intensity and duration of the association.***
>
> *Not all interests are within the conflict rule.* ***The interest must give rise to a conflict or a real or substantial possibility of a conflict****:* Hospital Products (103) (Mason J). *There are other formulations of the required connection such as "a sensible, real or substantial possibility" (*Clay v Clay *[2001] HCA 9; (2001) 202 CLR 410) and "a significant possibility" (*Chan v Zacharia *[1984] HCA 36; (1983) 154 CLR 178, 198).* ***The extension to cover a real or substantial possibility of a conflict serves at least two functions. First, it is intended to signify that not all personal interests come within the conflict rule.*** *An interest will not fall within the conflict rule if it is too remote or insubstantial:* Hospital Products (103) (Mason J).
>
> *The existence of a conflict of interest and duty (actual or otherwise) is not conditioned on proving that the fiduciary acted with the intention (purpose or motive) of advancing its personal interests:* Hospital Products *(103)*. (Emphasis added)

10.165. Again, it can be seen that the conflict rule in the context of the obligations of fiduciaries is reflected in the Bowen Report's consideration of how to address private interests. Both in the general law, and in the Bowen Report's appearance test, an objective test is used to determine whether a "private interest … might reasonably be thought to conflict with [the] public duty".[252]

10.166. In *Buitendag*, McLure P held that "the appellant had a strong personal interest and close involvement in establishing a clay target club in Hopetoun so that he could pursue his sporting interests without having to make a round trip of 360 km to Esperance", in circumstances where "the establishment of the Club was initiated and driven by the appellant and a small number of other persons to cater for their interest in a niche activity".[253] Her Honour concluded that "there was a real and sensible possibility that the appellant's **personal interest in the Club** might influence him away from the proper exercise of his duties to the respondent" (emphasis added).[254] Accordingly, the Court dismissed an appeal from the primary judge's conclusion that the appellant had a conflict of interest in making any decision, or taking any action involving the exercise of discretion, on behalf of the respondent, in relation to the respondent donating a transportable building to the club, in circumstances where the appellant arranged for the donation of his employer's property to the clay target club.

[252] Bowen Report at 31.

[253] At [56], [58].

[254] At [59].

10.167. Finally, Ms Berejiklian referred to passages in the Finn Report to the effect that "[w]here a conflict rule is intended to extend beyond family members to 'other personal relationships', it is necessary that such 'non-pecuniary interests are defined or else illustrated in such a way as makes plain that they extend to relationships with third parties (whether or not family)'".[255]

10.168. On this basis, Ms Berejiklian submitted that the conflict of interest definition in clause 7(3) of the ministerial code does not grapple with these complexities in respect of non-pecuniary personal interests but uses the "open-textured composite expression commonly deployed at general law, 'private interest'". She argued the term "should be construed in accordance with its general law meaning, which did not encompass regulation of non-pecuniary personal relationships between individuals merely by dint of the existence of a personal connection". No case is cited to support this proposition and, as *Bell Group* and *Buitendag* makes plain, the general law recognises the potential of a non-pecuniary interest to give rise to a conflict of interest. Further, this was not an approach the Bowen Committee thought necessary, even though it is plain it recognised that "private interests" included persons who were described as "lovers",[256] a term apt to describe the relationship between Ms Berejiklian and Mr Maguire.

10.169. In addition, Ms Berejiklian's submission misstates clause 7(3). It does not proscribe "non-pecuniary personal relationships between individuals **merely by dint of the existence of a personal connection"** (emphasis added). Rather, it addresses "private interests [which] could objectively have the potential to influence the performance of [the Minister's] public duty".

10.170. In a footnote, Ms Berejiklian posited that the requirement in clause 7(3) that the interest "could objectively have the potential to influence the performance of their public duty" only arises for consideration once a "private interest" known to the law has been identified. However, she argues that as clause 7(3) does not extend to non-pecuniary personal relationships, the mere existence of her relationship with Mr Maguire is not capable of constituting a "private interest" within the meaning of that term in clause 7(3) of the ministerial code.

10.171. The Commission rejects the submission that clause 7(3) does not extend to non-pecuniary personal relationships between individuals. The expression "private interest" is not defined, no doubt because, as made plain in the Bowen Report (which also did not define it in its proposed code), "of the problem of defining adequately an interest which may be regarded as creating an actual or potential conflict with duty".[257] The Bowen Report resolved that difficulty, by devising the "appearance test" reflected in clause 7(3). While "the concept of an 'interest' can be vague and uncertain", "it will take its meaning from its context".[258]

10.172. In the context of clause 7(3), the expression "private interest" is clearly capable of referring to any private interest, including non-pecuniary personal relationships between individuals. Having regard to the fact that "public confidence" is an aspect of the clause 7(3) test,[259] and is reflected in clause 1 of the Preamble to the ministerial code (and, too, having regard to the other statements as

[255] Finn Report at 71–72.

[256] Bowen Report at [2.20], citing the Association of the Bar of the City of New York committee.

[257] Bowen Report at [2.23].

[258] *Re Day* at [251] per Nettle and Gordon JJ, referring to *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at [54].

[259] See Finn Report, Appendix II (Official Trust) at 14–15.

to the standards for ministers' ethical behaviour noted in the Preamble, and reflected in the code's provisions), the term "private interest" in clause (3) of the ministerial code should not be given a narrow interpretation. The Commission rejects Ms Berejiklian's submissions to the contrary.

10.173. Finally, Ms Berejiklian also submitted that the original version of the ministerial code was enacted with the Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014 and that the Explanatory Note to that instrument described the code it enacted as "substantially the same as the Code of Conduct for Ministers of the Crown published by the Department of Premier and Cabinet in the NSW Ministerial Handbook (see Premier's Memorandum M2011-09)". The significance of this is said to be the change to the expression "private interest" in the Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014 from a 2011 Code of Conduct for Ministers of the Crown published by the Department of Premier and Cabinet in the *NSW Government Ministerial Handbook* ("the 2011 Code"). Ms Berejiklian noted that the 2011 Code (clause 3.1) described an "interest" relevantly as "a pecuniary or other personal advantage" and submitted that there was nothing in the legislative history which explained the change from this language to "private interest" upon the enactment of the code as an instrument with legislative force in 2014.

10.174. Ms Berejiklian's submission is incorrect. The Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Bill 2014 was a non-government Bill introduced in the Legislative Assembly by then opposition leader, John Robertson, on 8 May 2014, which was defeated in the Legislative Assembly on 19 June 2014. The version of the ministerial code proposed in that Bill was not the version that came to be inserted as an Appendix to the Independent Commission Against Corruption Regulation 2010 as a consequence of the enactment of the Independent Commission Against Corruption Amendment (Ministerial Code of Conduct) Regulation 2014. Contrary to Ms Berejiklian's submissions, the term "private interest" was in use in the 2011 Code (M2011-09), albeit, as in the current ministerial code, it was not defined.

10.175. The Commission concludes that the term "private interest" in clause 7(3) of the ministerial code includes non-pecuniary personal relationships between individuals.

Public duty

Counsel Assistings' submissions

10.176. Counsel Assisting submitted that as a minister of the Crown, Ms Berejiklian had a duty to act only according to what she believed to be in the public interest and the interests of the electorate,[260] and that a departure from that duty would constitute a breach of public trust.

10.177. On that basis, Counsel Assisting submitted that, having regard to the nature and strength of Ms Berejiklian's close personal relationship with Mr Maguire at all material times, the Commission should find that there was a real possibility of conflict between Ms Berejiklian's public duty and her private interest in relation to her exercise or non-exercise of public functions associated with proposals for government action that she knew were advanced by Mr Maguire. In particular, they contended there was the potential that she would be motivated by a desire to please Mr Maguire in relation to projects that she knew were advanced by him, and by a concomitant desire not to disappoint him.

[260] Referring to *Obeid v R 2017* at [79] per Bathurst CJ.

Ms Berejiklian's submissions

10.178. Ms Berejiklian submitted:

10.178.1. To assess whether there had been a conflict between her duty and her private interest, it was necessary to identify the nature of the functions and responsibilities that inhered in the public offices she held at the time of the relevant events. In other words: what was the duty?

10.178.2. That Counsel Assistings' submission as to her duty was an inaccurate, or at least an incomplete, statement of the legal duty imposed on her and an erroneous understanding of the passage from *Obeid v R 2017* cited in its support.

10.178.3. That as the term "public duty" is not defined in clause 7(3), its meaning fell "to be determined against a background of general expectations, based upon custom, convention and practice", referring to Edelman J's judgment in *Hocking v Director-General of the National Archives of Australia* (at [243]).

10.178.4. That "public duty" connotes "government carrying into effect its constitutional obligations to act in the public interest", referring to the plurality judgment in *Federal Commissioner of Taxation v Day*.[261]

10.178.5. That in *Grimaldi v Chameleon Mining NL (No 2)*[262] (a decision of the Full Court of the Federal Court of Australia addressing the obligation of loyalty governing a private fiduciary's liability to account to their own beneficiary), the Court explained the concept of "duty" in the "conflict of interest and duty" formula as "convenient shorthand" that "refers simply to the function, the responsibility, the fiduciary has assumed or undertaken to perform for, or on behalf of, his or her beneficiary".

10.178.6. That in *Howard v Commissioner of Taxation*, (which, as discussed in chapter 3, concerned the question whether the appellant was liable to income tax on equitable compensation received in satisfaction of a judgment) French CJ and Keane explained that:

> *[T]he scope of the fiduciary duty generally in relation to conflicts of interest must accommodate itself to the particulars of the underlying relationship which give rise to the duty so that it is consistent with and conforms to the scope and limits of that relationship.*[263]

10.178.7. Citing Professor Finn, that "the standards of conduct properly to be expected of a given class of officials are, first and foremost, the **standards of role**" (original emphasis), and his observation that "without properly understanding the latter we will misconceive the former. Our quest for what is meet in official behaviour is not answered simply by calling an official a public trustee or fiduciary and by assuming that this carries set consequences. It was Justice Frankfurter of the Supreme Court of the United States who pointedly noted: 'To say a man is a fiduciary only begins the analysis'."[264]

[261] (2008) 236 CLR 163; [2008] HCA 53 at [34] per Gummow, Hayne, Heydon and Kiefel JJ.

[262] [2012] FCAFC 6; (2012) 200 FCR 296 (at [179]) per curiam (Finn, Stone and Perram JJ).

[263] (2014) 253 CLR 83; [2014] HCA 21 (at [34]).

[264] P D Finn, "Integrity in Government" (1992) 3 *Public Law Review* 243 at 248, citing *SEC v Cheney Corp* 318 US 80 at 85 (1942).

10.179. Based on these propositions, Ms Berejiklian submitted that to amount to a conflict of interest under clause 7(3) of the ministerial code, it is necessary to identify the specific nature and content of the "public duty" said to conflict with the putative "private interest".

10.180. Ms Berejiklian then referred to cases said to illustrate duties which connote strict independence and impartiality: the obligations of a solicitor to give "disinterested advice" to their client,[265] and the task of investment advisers owing fiduciary duties to their clients as being to find a property for the client "in an impartial manner".[266]

10.181. From this, Ms Berejiklian proposed that equity's concern for loyalty is interwoven with the concept of bias, a concept said to be particularly relevant here, where the "conflict" said to arise from Ms Berejiklian's relationship with Mr Maguire was that she would treat him favourably or partially.

10.182. Ms Berejiklian then submitted that a treasurer or a premier does not have the same obligations of impartiality when making decisions as a solicitor or a financial adviser when advising their client, or a judge when deciding a case and that political considerations legitimately intrude. She referred in this respect to Mahoney JA's statement in *Greiner v ICAC*: "There is no doubt that, in some cases where public power is exercised, it may be exercised after taking into account a factor which is political or it may be exercised for the purpose of achieving a political object."[267]

10.183. Ms Berejiklian also referred extensively to passages from the Finn Report addressing the issue of impartiality generally, and in respect of ministers,[268] to advance the propositions that:

10.183.1. Ms Berejiklian's public duty did not require the appearance of strict independence and impartiality.

10.183.2. Ms Berejiklian's duty was to be free from "extraneous" competing influences or considerations, but political considerations, including electoral kudos, and personal associations with other members of Parliament, could not be characterised as extraneous.

10.183.3. There is no duty on the part of any minister, including the premier, to declare an interest in respect of a Cabinet decision which may affect their respective electorates and earn them "electoral kudos", whether or not the local member is a Cabinet member's political (or personal) enemy, nor where the Cabinet member has a (close) personal friendship/relationship, or a (close) political alliance – formal or informal, publicly known or undisclosed – with the local member.

10.183.4. In circumstances where Ms Berejiklian had a close personal relationship with Mr Maguire, the Commission would not find that she had a public duty to act without any regard to that personal association, when what Mr Maguire stood to gain was (at its highest) "electoral kudos". There is nothing illegitimate in a treasurer or a premier making decisions that may further the electoral prospects of a local member.

[265] *McPherson v Watt* (1877) 3 App Cas 254 (at 272).

[266] *Cook v Evatt* (No r2) [1992] 1 NZLR 676 (at 688–689).

[267] *Greiner v ICAC* at 163.

[268] Finn Report at 48–49.

Consideration

10.184. Recent authorities addressing the duties of high office holders do so by reference to the trilogy of cases directly addressing the duty of members of Parliament discussed in chapter 3: *Wilkinson v Osborne*, *Horne v Barber* and *R v Boston*. They stand for the proposition that the fundamental obligation of members of Parliament is "a duty as a representative of others to act in the public interest", a proposition recently re-affirmed in *Re Day [No 2]*.[269]

10.185. None of these historic, or contemporary, authorities suggest that this "public duty" obligation is of variable content. Rather, to the extent there is any extrapolation, it is expressed in other straightforward explanations such as, "[t]hat fundamental obligation … is the duty to serve, and, in serving, to act with fidelity and with a single mindedness for the welfare of the community",[270] and "the expectation, fundamental to representative democracy, [is that] that public power will be exercised in the public interest."[271] That is also reflected in the ministerial code which obliges all ministers to observe the same "standards of ethical behaviour and … internal governance practices directed toward ensuring that possible breaches of ethical standards are avoided" (Preamble, clause 6).

10.186. Ms Berejiklian accepted that "public duty" connotes "government carrying into effect its constitutional obligations **to act in the public interest**" (emphasis added), presumably intending "government" in that context to refer to members of Parliament, albeit by referring to the plurality judgment in *Federal Commissioner of Taxation v Day*.[272] That was a case concerning public service legislation in Australia, and the question of the deductibility by a public servant of legal expenses incurred in defending charges of misconduct under the *Public Service Act 1922* (Cth), somewhat remote from the public duty of ministers subject to the ministerial code.

10.187. Ms Berejiklian also referred to Justice Gageler's observation, writing extra-judicially, positing that "these obligations may be conceived of as akin to deeply rooted equitable duties of loyalty".[273] In that essay, Justice Gageler observed that there was "some doctrinal support for the existence of a proscriptive duty of loyalty on the part of public officers which is equitable in nature". However, his Honour added that "[a]pplication of the fiduciary principle as so expounded [by Professor Finn] to a person holding a public office gives rise to a number of interesting, overlapping and potentially quite difficult questions". In his view, "the precise incidents of the equitable duty of loyalty of a particular public officer would need to be moulded to the statutory or non-statutory arrangements under which the office might be created and regulated".[274]

[269] At [49]. See also the authorities discussed in chapter 3, including *Obeid v R 2015*, *Obeid v R 2017*, *Sneddon v State of New South Wales*, *R v Obeid (No 2)*.

[270] *R v Boston* (at 400) per Isaacs and Rich JJ.

[271] *McCloy v New South Wales*, (2015) 257 CLR 178; [2015] HCA 34 (at [36]) per French CJ, Kiefel, Bell and Keane JJ.

[272] (2008) 236 CLR 163; [2008] HCA 53 at [34] per Gummow, Hayne, Heydon and Kiefel JJ.

[273] S Gageler, "The Equitable Duty of Loyalty in Public Office", (Equitable Duty of Loyalty) in T Bonyhady (ed), *Finn's Law: An Australian Justice* (2016, The Federation Press) at 141–146.

[274] *Equitable Duty of Loyalty* at 141–142.

10.188. The difficult questions to which Justice Gageler referred must include, at least, the fact that as noted above, Frankfurter J said, "to say a man is a fiduciary only begins the analysis". That is because, as Mason J (as his Honour then was) said in *Hospital Products Ltd v United States Surgical Corporation*[275] "[t]he categories of fiduciary relationships are infinitely varied and the duties of the fiduciary vary with the circumstances which generate the relationship … In accordance with these comments it is now acknowledged generally that the scope of the fiduciary duty must be moulded according to the nature of the relationship and the facts of the case".

10.189. The duties of members of Parliament do not "vary with the circumstances which generate the relationship". They are elected by the people of NSW. That relationship is immutable.

10.190. Further, in none of the cases to which Ms Berejiklian referred has there been a statutory framework such as the ministerial code. As observed when dealing with the meaning of "private interest", the statutory context must be the starting point to determine the meaning of "public duty" in clause 7(3). Once again, the Preamble is relevant as reflecting what the draftsperson of the code took to be legal obligations to which a minister was already subject, and which the operative provisions of the code were intended to supplement.

10.191. Clauses 1–4 of the Preamble provide:

> *1 It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and* ***that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest*** [emphasis added].
>
> *2 Ministers are individually and collectively responsible to the Parliament. Their ultimate responsibility is to the people of New South Wales, to whom they have pledged their loyalty under section 35CA of the* Constitution Act 1902.
>
> *3 Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity, in compliance with the rule of law, and to advance the common good of the people of New South Wales.*
>
> *4 Ministers acknowledge that they are also bound by the conventions underpinning responsible Government, including the conventions of Cabinet solidarity and confidentiality.*

10.192. As can be seen, these statements reflect the judicial statements as to the public duty of members of Parliament to which the Commission has referred. This is repeated in clause 6 of the ministerial code which provides:

> *A Minister, in the exercise or performance of their official functions, must not act dishonestly,* ***must act only in what they consider to be the public interest****, and must not act improperly for their private benefit or for the private benefit of any other person.* (Emphasis added)

10.193. Clause 7, addressing conflicts of interest set out above, deals expressly with conflicts between a minister's "public duty" and "private interest".

[275] [1984] HCA 64; (1984) 156 CLR 41 (at 102); referred to with approval in *Clay v Clay* (2001) 202 CLR 410; [2001] HCA 9 at [46] per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ.

The Bowen Report

10.194. Having regard to the Commission's conclusion that it is apparent that the definition of conflict of interest in clause 7(3) of the ministerial code, and in particular the test for whether a conflict exists, is drawn from the "appearance test" set out in the Bowen Report (at [2.24] and [2.26]), it is relevant to have regard to how that report considered the issue of "public duty", which it was required to address by its first term of reference, in relation to "persons holding positions of public trust".

10.195. The Bowen Report's terms of reference also specified for the purpose of that category of persons ministers, senators and members of the House of Representatives (who were collectively referred to in the report as "Members of Parliament"). The Bowen Committee's terms of reference drew a distinction between ministers and Members of Parliament, which the committee found there to be an advantage in maintaining.[276]

10.196. The Bowen Committee noted that "the public duty of a Member of Parliament has been the most fully elaborated, commencing over a century ago with a judicial statement (which referred to a member of the House of Lords): 'In the framing of laws it is his duty to act according to the deliberate result of his judgment and conscience, uninfluenced, as far as possible, by other considerations, and least of all by those of a pecuniary nature'".[277]

10.197. In the Bowen Committee's view, *Wilkinson v Osborne* and *Horne v Barber* extended the duty of a member of Parliament to be independent to "'watching on behalf of the public all the acts of the Executive'. It was stated that he 'must be free to exercise those powers and discretions [entrusted to him] … in the interests of the public unfettered by considerations of personal gain or profit'."[278] There was a further extension of the member's duty in *R v Boston* "to preserve his independence of judgment … [in] the representation of constituents in dealings with the executive".[279]

10.198. While the Bowen Committee recognised the reality of members of Parliament being members of political parties, it emphasised that "the constraints of private interest" should be avoided, and, too, "that there should exist some guidelines to prevent **any possible** conflict of interest"[280] (emphasis added).

10.199. The Bowen Committee accepted that members of Parliament who are not ministers exercised influence in a number of ways, however, it distinguished that influence from that of ministers of whom it said, "Because they have direct access to the means of power – the preparation of legislation, **the allocation of funds in the budget**, and the application of general policies to particular cases – **Ministers' public duty makes demands upon them of a higher order than is the case with Members**"[281] (emphasis added).

[276] Bowen Report at [2.2]–[2.3].

[277] Bowen Report at [2.8], referring to Bayless Manning, "The Purity Potlatch: Conflict of Interests and Moral Escalation", reprinted from *Federal Bar Journal 24* (1964) in Arnold J. Heidenheimer (ed), *Political Corruption: Readings in Comparative Analysis*, Holt, Rinehart and Winston, New York, 1970, 309, 311.

[278] Bowen Report at [2.8], referring to *Wilkinson v Osborne* at 98–99, per Isaacs, J and *Horne v Barber* at 500–501, per Isaacs J, and 501–502 per Rich J.

[279] Bowen Report at [2.8] referring to *R v Boston* (at 400–403) per Isaacs and Rich JJ.

[280] Bowen Report at [2.10]–[2.11].

[281] Bowen Report at [2.12]; Mahoney JA said the same of the premier and ministers in *Greiner v ICAC* at 175 referred to below.

10.200. Lee J reflected this reasoning in *R v Jackson and Hakim*, when he said, "We live, and are fortunate to live, in a democracy in which members of Parliament decide the laws under which we shall live and cabinet ministers hold positions of great power in regard to the execution of those laws. A cabinet minister is under an onerous responsibility to hold his office and discharge his function without fear or favour to anyone, for if he does not and is led into corruption the very institution of democracy itself is assailed and at the very height of the apex".[282]

Public trusts

10.201. As observed in chapter 3 (when dealing with Ms Berejiklian's submissions concerning the meaning of "public trust"), in *Hocking v Director-General of the National Archives of Australia* Edelman J made it clear that his references to private trust law did not mean private trust concepts should be uncritically applied in other contexts. In support of the statement in *Hocking* that "a member of Parliament has a duty to act with fidelity and with a single-mindedness for the welfare of the community",[283] his Honour was citing the latest in time of the trilogy of cases decided early in the 20th century concerning the duty members of Parliament owe to the public, *R v Boston*.[284] His Honour also referred in this respect to the passages in *Re Day*[285] in which all members of the High Court again referred approvingly to this fundamental obligation of members of Parliament.

10.202. When dealing specifically with the issue of official misconduct, Professor Finn emphasised the importance of recognising "that public offices are in fact 'trusts'. **While the officer might own the office, the official function itself exists, not for the officer's benefit, but for that of the public** [emphasis added]. Significantly definitions of a 'public officer' which endure to this day emphasise the public's concern or interest in the official function itself. Representative of these definitions is the one most commonly used now in judicial decision: a public officer is – 'an officer who discharges any duty in the discharge of which the public are interested'".[286] As Professor Finn later observed:

> *Officials entrusted with public power received that power not for their own benefit, but for the benefit of (in the interests of) the public. Given that purpose, the resultant relationship between the official and the public (whose interests the official thus had power to affect) was itself conceived of as one of trust – trust in the sense that, as a consequence of the empowering of an official, the public was obliged to rely upon, but entitled to expect, that official to exercise his or her office in the interests of the public. Elaborated upon below, this will be referred to as the "power and obligation" usage.*[287]

10.203. Further, and contrary to Ms Berejiklian's submissions, Professor Finn explained how private trust concepts had been translated into the area of public trusts. He observed that the "premise [of public trusteeship] is that officials exist to serve the interests of the public. And if **its purpose**

[282] NSW Court of Criminal Appeal, 23 June 1988, unreported, at 1.

[283] At [243].

[284] (1923) 33 CLR 386; [1923] HCA 59; see also *Wilkinson v Osborne* (1915) 21 CLR 89; [1915] HCA 92 and *Horne v Barber* (1920) 27 CLR 494; [1920] HCA 33.

[285] At [49] per Kiefel CJ, Bell and Edelman JJ0 [179] per Keane J, and at [269] per Nettle and Gordon JJ.

[286] Finn Report, Appendix II at 5 referring to *R v Whitaker* [1914] 3 K.B. 1283 (at 1296).

[287] Finn Report, Appendix II at 14.

is to exact a disinterested and loyal service of those interests, its actual concern is with conduct which should be taken to be incompatible with such service. Hence its preoccupation has been to define what constitutes disloyal service – an abuse of public office (a breach of trust)"[288] (emphasis added). Thus, "[the] regulatory role … is the burden of the trust obligation of officials. Its rationale lies in this rather obvious consideration: given the public purpose for which power and position are given to an official, **the public is entitled to expect that these will be used for that purpose and not to some other end and the public is, in consequence, entitled to be protected against such 'other use'**. Put shortly, loyalty in service is exacted by proscribing disloyalty"[289] (emphasis added). Professor Finn made it clear that he was not espousing for the "public sector", "any less exacting standards than those imposed on private sector fiduciaries".[290]

10.204. However, while the duties of public officials to respect their "public trust" obligations can be seen to reflect the obligations of fiduciaries bound by private trust concepts, as Lord Diplock made clear in *Town Investments Ltd v Department of the Environment*:

> *… "trust" is not a term of art in public law and when used in relation to matters which lie within the field of public law the words "in trust" may do no more than indicate the existence of a duty owed to the Crown by the officer of state, as servant of the Crown, to deal with the property for the benefit of the subject for whom it is expressed to be held in trust, such duty being enforceable administratively by disciplinary sanctions and not otherwise.*[291]

10.205. The High Court referred to this passage from Lord Diplock's speech with approval in *Bathurst City Council v PWC Properties Pty Ltd*.[292] The High Court also accepted "that an obligation assumed by the Crown, even if it be described as a trust obligation, may be characterised as a governmental or political obligation rather than a 'true trust'".[293]

10.206. Sir Gerard Brennan also reflected this premise when he wrote extra-judicially that "[i]t has long been established legal principle that **a member of Parliament** holds 'a fiduciary relation towards the public' and 'undertakes and **has imposed upon him a public duty and a public trust'. The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee**"[294] (emphasis added; footnotes omitted).

[288] Finn Report, Appendix II at 17.

[289] Finn Report, Appendix II at 18–19.

[290] Finn Report, Appendix II at 22–23.

[291] [1978] AC 359 (at 382); see also Lord Simon of Glaisdale (at 397).

[292] (1998) 195 CLR 566; [1998] HCA 59 (at [47]) per Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[293] Ibid at [63].

[294] Sir Gerard Brennan (2013) Presentation of Accountability Round Table integrity Awards Canberra 11 Dec 2013 (Accountability Round Table Address).

10.207. The Commission rejects Ms Berejiklian's submissions that her public duty as expressed in clause 7(3) of the ministerial code did not embody a duty to act only according to what she believed to be in the public interest and the interests of the electorate. Rather, as the authorities demonstrate, and as the Bowen and Finn reports illustrate, the proposition that Ms Berejiklian had a duty to act only according to what she believed to be in the public interest and the interests of the electorate, formed part of the "background of general expectations, based upon custom, convention and practice",[295] in which the ministerial code was legislated. The "public interest" concept is reflected in the Preamble, as well as in clause 6.

10.208. The Commission also rejects Ms Berejiklian's submission that her public duty did not require the appearance of strict independence and impartiality, and, accordingly, her public duty permitted her to take into consideration, without disclosure, her personal association with Mr Maguire when what Mr Maguire stood to gain was (at its highest) "electoral kudos". It is inconsistent with clause 7(3), as well as with the principles discussed above. It is also at odds with Ms Berejiklian's submissions, when dealing with the appearance test in clause 7(3), that consideration should be given to the "inherent strength and importance of the public duties that Ms Berejiklian was exercising" and "[t]he obvious gravity of those [public duties of a treasurer or a premier], including duties associated with the allocation of public funds". In that context, she submitted that a person exercising those roles "would not easily be influenced by the personal romantic relationships of the office holder".

10.209. The issue of what constitutes "public duty" in clause 7(3) should not be confused, as Ms Berejiklian's submissions appear to, with the question of whether any particular relationship Ms Berejiklian had with another person "could objectively have the potential to influence the performance of their public duty". As is manifest, that issue is determined on a case-by-case basis.

10.210. However, as explained below, in the Commission's view, Ms Berejiklian could not make a decision for the unacceptable reason of electoral advantage for anyone, whether or not Mr Maguire.[296] All ministerial decisions must be made in the public interest or pursuant to statutory power. This reflects the fundamental principle of "public trust" that the function of ministers (as with all public officials) is "to serve the interests of the public".[297]

Electoral considerations

10.211. The ministerial code does recognise that electoral considerations can be taken into account in ministerial decisions. Thus, the definition of "private benefit" in clause 11 excludes "a benefit that … comprises **merely** the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing" (emphasis added).[298]

10.212. However, Ms Berejiklian's reference to Mahoney JA's statement in *Greiner v ICAC* that "[t]here is no doubt that, in some cases where public power is exercised, it may be exercised after taking into account a factor which is political or it may be exercised for the purpose of achieving a political object..." was selective. His Honour continued:

[295] *Hocking v Director-General of the National Archives of Australia* (at [243]).

[296] See *Greiner v ICAC* at 164 per Mahoney JA.

[297] Finn Report, Appendix II at 17.

[298] See also Note to Schedule, clause 16 (Disclosure of private benefits to other members of the Government).

> ***The issue is whether the way in which the political factor (the desire to secure a by-election, to reward a friend or the like) was taken into account in this case is acceptable.*** *It is therefore necessary to examine more closely the nature and the relevance of the political factor and the way in which it has been treated in the cases.*
>
> …
>
> *What is here in question is the exercise of executive or administrative power. The position there is different. As I have indicated,* ***the ends for which public power may be exercised legitimately are limited by the law****. There is a conceptual difference between the factors which may be taken into account in the exercise of a public power and the objectives which may be sought to be achieved by the exercise of it. However, it is not necessary to pursue that difference. The two may, for present purposes, be treated together.*
>
> *Public power, for example, to appoint to a public office must be exercised for a public purpose, not for a private or political purpose.* ***In some cases, it may be proper to take into account in the exercise of that power a political factor. That is so, in such cases, because such factors are, by the intendment of the legislature or the law, accepted as proper to be taken into account in that way.*** *Thus, if in the determination of wage levels, the relevant legislation requires that a wage consensus reached between government and employers or employees be taken into account, that consensus may be taken into account notwithstanding that the purpose of the consensus was or included the achievement of party political objectives.* ***It does not follow that, for example, the place where a public facility is to be built may be selected, not because it is the proper place for it, but because it will assist the re-election of a party member.***[299] (Emphasis added)

10.213. As Mahoney JA made clear, the circumstances in which a political factor may be taken into account in exercising a public power are those permitted by "the intendment of the legislature or the law". For that to be the case, however, the electoral advantage must be incidental to an otherwise proper exercise of power.

10.214. Professor Finn made a similar point when he described party and electoral considerations as "likely to affect the standard of impartiality to be expected of ministers". As he made clear, "[a]s to the latter-party and electoral considerations – there is no certain measure here as to when preference and favouritism becomes undue," describing a "'corridor of uncertainty' where official power may, or may appear to be, exercised with considerations of party and electoral advantage in mind". Like Mahoney JA, Professor Finn emphasised that "**provided ministerial action does not conflict with the positive requirements of the law and is open to public scrutiny**, the leeway allowed is circumscribed at least by the admittedly unpredictable prospect of public or parliamentary censure and by community expectations"[300] (emphasis added).

10.215. Two English cases demonstrate how decisions made to advantage a political party have been held to be invalid.

10.216. *Bromley London Borough Council v Greater London Council* concerned steps taken to give effect to a promise in an election for the Greater London Council ("the GLC") to cut bus and tube fares by 25%. The GLC issued a precept to the councils of all London boroughs to levy a supplementary rate, of a particular number of pence in the pound, to enable the GLC to finance by a grant to the

[299] At 163–164.

[300] Finn Report at 48–49.

London Transport Executive the cost of the reduced fares. The precept was held to be *ultra vires* and invalid both by the Court of Appeal and the House of Lords.[301]

10.217. Section 1 of the GLC's enabling Act empowered it "to develop policies, and to encourage, organise, and where appropriate, carry out measures, which will promote the provision of integrated efficient and economic transport facilities and services for Greater London". In the Court of Appeal, Oliver LJ held that:

> …***the object of general policy cannot I conceive, be an object arbitrarily selected by the council for reasons which have nothing to do with the functions which it is required to perform under the Act*** *– for instance, the provision of free travel for members of a particular political party or social group. It must be an object of general policy which the council is empowered to adopt under Section 1, that is to say an object for the promotion of an integrated efficient and economic transport system.*[302] (Emphasis added)

10.218. In the House of Lords, Lord Wilberforce said:

> *…it makes no difference on the question of legality (as opposed to reasonableness…) whether the impugned action was or was not submitted to or approved by the relevant electorate: that cannot confer validity upon* ultra vires *action.*

10.219. *Porter v Magill*[303] was another case of a decision made by an administrator held to be invalid because it was made to confer an advantage on a particular political party. In that case, a council dominated by Conservatives resolved to sell 500 of its houses, with a target minimum number of 250 sales in certain marginal wards, because it believed houseowners were more likely than tenants to vote Conservative. The auditor of the council found that the wilful misconduct of the council leader and her deputy, the promoters of the scheme to sell the houses, had caused the council loss, by selling the houses for less than their market value. The auditor ruled that, under a particular provision of the English local government legislation, they were liable to make good the loss the council had thereby suffered. The auditor's decision was upheld in the House of Lords.

10.220. Lord Bingham of Cornhill held that "[p]owers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party. Support for this principle may be found in *R v Board of Education* [1910] 2 KB 165, 181 where Farwell LJ said: 'If this means that the Board were hampered by political considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby'".[304]

10.221. Lord Bingham continued:

> *Elected politicians of course wish to act in a manner which will commend them and their party … to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration.* ***Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support***

[301] [1983] 1 AC 768.

[302] At 784–785.

[303] [2002] 2 AC 357; [2001] UKHL 67.

[304] At [19].

> ***of the electorate and thus strengthen their electoral position***. *The law would indeed part company with the realities of party politics if it were to hold otherwise.* ***But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party***.[305] (Emphasis added)

10.222. Sir Gerard Brennan also quoted this passage from Lord Bingham of Cornhill's speech, in his Accountability Round Table Address, and continued:

> *Public fiduciary duties depend for their content on the circumstances in which power is to be exercised. The obligations cast on members of Parliament and officers of the Executive Government are many and varied* ***and the law takes cognizance of the realities of political life, but asserts and, in interpreting statutes, assumes that the public interest is the paramount consideration in the exercise of all public powers*** *…*
> *True it is that the fiduciary duties of political officers are often impossible to enforce judicially – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty.* ***Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry "whatever it takes" is not consistent with the performance of fiduciary duty.***
> (Emphasis added)

10.223. Sir Gerard Brennan's observations are reflected in the ministerial code.

10.224. It is apparent from these decisions, and Sir Gerard Brennan's observations, that it will be a breach of public trust for a public official to exercise an official function informed only by a desire to enhance a person or a party's popular standing. That is because public officers are conferred with public functions "as if on trust" for the benefit of the state. A member of Parliament is not entitled, in the exercise of their official functions, to take decisions in the political interests of the government of the day whether or not that is "in the interests of the community and the interests of the public".

10.225. To the extent the ministerial code contemplates that electoral considerations may be taken into account, it is notable that that effect must be an incidental one ("comprises **merely** the hope… etc") (emphasis added). That is to say, one consequence of "the manner in which a particular matter is dealt with". The overriding manner in which a particular matter is dealt with is in a manner ministers "consider to be the public interest" (clause 6).

10.226. This is consistent with the statements referred to above, to the effect that while electoral considerations can be given some weight, nevertheless all decisions must be exercised either in the interests of the public, or when acting pursuant to statute, for the purpose for which the power was conferred.

10.227. It will not be in the public interest if the reason for dealing with a particular matter is because, applying the clause 7(3) test, one of the decision-makers has an undisclosed conflict of interest arising from a close personal relationship with a local member whose electorate benefits from the matter. Thus, the fact of Ms Berejiklian's relationship with Mr Maguire is clearly relevant to the questions of whether Ms Berejiklian breached the ministerial code by failing to declare that relationship when exercising her official functions in relation to ACTA or the RCM, even if one effect of those decisions was to bestow "electoral kudos" on him.

[305] [2002] 2 AC 357, [2001] UKHL 67 at [21].

10.228. The Commission rejects Ms Berejiklian's submissions to the contrary.

The "potential to influence the performance of their public duty"

10.229. Next, Ms Berejiklian submitted that Counsel Assistings' posited private interest did not objectively have the potential to influence the performance of her public duty.

10.230. She contended that "our system of parliamentary democracy and responsible government has always made the basal assumption" that a "relationship" such as a Cabinet minister having a significant affection or enmity for a local member "could not affect the lawfulness of the Minister's decision-making, notwithstanding that a decision may affect the local member or his or her electorate". No convention or authority was cited for this bald proposition.

10.231. Ms Berejiklian argued that clause 7(3) "should not be construed so as to make that outcome [that is, a finding of corrupt conduct] turn upon the possibly individualistic opinions of an administrator whose conclusions are not subject to appeal or review on the merits".[306]

10.232. Ms Berejiklian submitted that Counsel Assistings' submission for the purpose of applying the "appearance test" in clause 7(3) that "where a Minister is close friends with a person", that relationship of friendship "could objectively have the potential to influence the performance of the Minister's public duty", erred in failing to accommodate the high public duties which are at issue, placing significant weight on the "nature and strength" of Ms Berejiklian's close personal relationship with Mr Maguire; but without any recognition of or regard to the inherent strength and importance of the public duties that Ms Berejiklian was exercising. She argued that comparison is necessary for any objective evaluative assessment of whether the fact of the relationship could have had the potential to influence the exercise of public power.

10.233. Ms Berejiklian submitted further that it should not lightly be found that such a form of private interest has the potential to influence the performance of the public duties of a treasurer or a premier. She contended that the obvious gravity of those duties, including duties associated with the allocation of public funds, would not easily be influenced by the personal romantic relationships of the office holder, citing Judge Learned Hand's statement in the fiduciary context that, the conflict rule will not be infringed when the putative interest "was too feeble an inducement to be a determining motive".[307]

10.234. Ms Berejiklian submitted that it is antithetical to the beneficial aspects of parliamentary democracy and responsible government to regard officeholders as *prima facie* incapable of exercising power in ways that they appreciate may please or displease persons they know and like and persons they know and dislike. She contended that such considerations are beyond the jurisdiction of this Commission.

10.235. Finally, on this issue Ms Berejiklian submitted that her relationship with Mr Maguire should not be held to have occupied that special category of relationships that the law regards as objectively having "the potential to influence the performance of [her] public duty". Without referring to the facts of the relationship, she argued that the better view was that, in all of the circumstances, and viewed objectively, there was no such potential in the present case.

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[306] Referring to *Greiner v ICAC* (at 145) per Gleeson CJ.

[307] *Phelan v Middle States Oil Corporation* [1955] USCA2 324; (1955) 220 F (2d) 593 at 602–603; quoted with approval by Mason J in *Hospital Products Ltd v United States Surgical Corporation* (at 104).

Consideration

10.236. The Commission rejects Ms Berejiklian's submission that it does not have jurisdiction to determine whether the circumstances of her relationship with Mr Maguire were such that, applying the appearance test in clause 7(3), she was required to disclose it when making decisions about ACTA and the RCM.

10.237. The ministerial code is an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act. The Commission is required by s 9(1)(d) to determine whether conduct found to be "corrupt" for the purposes of s 8 "could constitute or involve" a substantial breach of that code. To determine that issue, the Commission has to undertake an investigation of the circumstances of the relationship, and the decisions in which Ms Berejiklian participated, measured against the provisions of the ministerial code.

10.238. The passage in Gleeson CJ's judgment in *Greiner v ICAC* to which Ms Berejiklian referred was followed by his Honour's statement that "[f]urthermore, the legislative history of the statute shows that it was Parliament's intention that the test be objective and that determinations should be made by reference to standards established and recognised by law".

10.239. That is the exercise in which the Commission is required by s 9(1)(d) to engage. It does not involve applying "individualistic opinions", but applying (and if necessary, interpreting) the objective test in clause 7(3).

10.240. That test does not entail the Commission forming *a priori* views, as Ms Berejiklian contends, that officeholders are *prima facie* incapable of exercising power in ways that they appreciate may please or displease persons they know and like and persons they know and dislike. It is the ministerial code which requires ministers to exercise public power in a manner free from conflicts of interest, in order that the electorate can be satisfied of both "the actuality and appearance of Ministerial integrity" (Preamble, clause 11).

10.241. As Counsel Assisting submitted, the law, practice and procedure relating to conflicts of interest and duty proceeds on an assumption of the possibility of human frailty – an assumption that human decision-makers may be susceptible to a range of influences, both conscious and subconscious.[308] The ministerial code proceeds on the assumption that ministers, too, may suffer from the possibility of human frailty.

10.242. Ms Berejiklian's submissions were made in the abstract without engaging in the evaluative exercise which she appeared to accept clause 7(3) of the ministerial code entails as to whether her relationship with Mr Maguire constituted a "private interest" for the purposes of clause 7(3) and whether it was of such a nature and extent to have the objective potential to influence her performance of her public duty.

10.243. That evaluative exercise is undertaken when dealing with the decisions in which Ms Berejiklian participated in relation to ACTA and the RCM.

[308] See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 (at [8]) per Gleeson CJ, McHugh, Gummow and Hayne JJ.

The requirement of awareness or knowledge under the NSW Ministerial Code of Conduct

Background

10.244. This section of the report turns on the meanings of the words "knowingly" and "aware" in clause 4 and clause 7(2) of the ministerial code.

10.245. It will be recalled from earlier in this chapter that the structure of the ministerial code is that there is a Preamble, then the ministerial code and finally the Schedule.

10.246. Clause 8 of the Preamble explains that the Schedule "prescribes certain additional administrative and governance requirements that Ministers (and in some cases Parliamentary Secretaries) must comply with and that are directed to minimising the risk and opportunities for breaches of the Code".

10.247. Clause 9 of the Preamble states that "[a] substantial breach of the ministerial code (including a knowing breach of any provision of the Schedule) may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*". It is virtually repeated in clause 4 of the ministerial code which provides:

> *A Minister must not **knowingly** breach the Schedule to the NSW Ministerial Code of Conduct. Accordingly, a substantial breach of the Schedule is, if done **knowingly**, a substantial breach of the NSW Ministerial Code of Conduct.* (Emphasis added)

10.248. Clause 7(2) provides:

> *A Minister must not, without the written approval of the Premier, make or participate in the making of any decision or take any other action in relation to a matter in which the Minister is **aware** they have a conflict of interest.* (Emphasis added)

10.249. "[K]nowingly" is defined in clause 11 to mean:

> *…with **awareness** that the relevant **circumstance or result** exists or will exist in the ordinary course of events.* (Emphasis added)

10.250. That definition applies "unless the context otherwise requires" (see clause 11, NSW Ministerial Code of Conduct; see also s 6 of the *Interpretation Act 1987*).

10.251. In addition to these clauses, the words "aware" and "knowingly" are used in the ministerial code and its Schedule as follows:

"Knowingly" (all references are to the ministerial code)

10.251.1. Clause 3 (Compliance with the law):

> *A Minister must not **knowingly** breach the law, the NSW Lobbyists Code of Conduct, or any other applicable code of conduct under the* Independent Commission Against Corruption Act 1988. (Emphasis added)
>
> ***Note.** There are a range of laws which apply to Ministers in their capacity as public office holders, including: misconduct in public office, which is a common law offence—see* R v Quach *[2010] VSCA 106;* Blackstock v The Queen *[2013] NSWCCA 172; bribery,*

which is a common law offence—see R v Allen *(1992) 27 NSWLR 398;* R v Glynn *(1994) 33 NSWLR 139; Part 4A of the* Crimes Act 1900, *which establishes certain statutory offences relating to the receipt or soliciting of corrupt commissions; the* Election Funding, Expenditure and Disclosures Act 1981, *which establishes a number of electoral offences; the* State Records Act 1998 *and the* Government Information (Public Access) Act 2009, *which create certain offences relating to record keeping and access to government information.*

10.251.2. Clause 5 (Lawful directions to the public service):

*A Minister must not **knowingly** issue any direction or make any request that would require a public service agency or any other person to act contrary to the law.* (Emphasis added)

10.251.3. Clause 7(1) provides:

*A Minister must not **knowingly** conceal a conflict of interest from the Premier.* (Emphasis added)

"Aware" (all references are to the Schedule)

10.251.4. Clause (1)(3)(b) (Shareholdings), Part 1 (Prohibited interests):

*(3) A Minister may retain, acquire and hold an interest in a superannuation fund, publicly listed managed fund or other trust arrangement (fund) if … (b) the Minister is not **aware** of the particular investments of the fund…* (Emphasis added)

10.251.5. Clause 16 (Disclosure of private benefits to other members of the Government):

*(1) A Minister who is **aware** that a particular decision to be made or other action to be taken by that Minister could reasonably be expected to confer a private benefit on another Member of Parliament belonging to the governing political party or coalition of parties or any of their family members must give notice to the Premier of the matter before making the decision or taking the action.* (Emphasis added)

10.251.6. Clause 21 (Gifts or hospitality to others):

(1) A Minister must take all reasonable steps to ensure that none of their immediate family members or Ministerial office staff are offered or receive gifts or hospitality in circumstances that:

(a) could reasonably be expected to give rise to a conflict of interest, or …

*(2) A Minister who becomes **aware** of any such gift or hospitality must promptly disclose it in writing to the Secretary of the Department of Premier and Cabinet.* (Emphasis added)

Counsel Assistings' submissions

10.252. Counsel Assisting submitted that a question of construction arises as to what, precisely, a minister must be "aware" of or "know" before clause 7(2) of the ministerial code is breached or a substantial breach of the Schedule to the code is regarded as having been done "knowingly".

10.253. They contended that, on that question of construction, the Commission should adopt, by analogy, the approach referred to by Jordan CJ in *R v Turnbull*,[309] on which basis, for a minister to be "aware" that they have a conflict of interest or "knowingly" breach the Schedule substantially,

[309] (1943) 44 SR (NSW) 108 (at p 109).

it would be unnecessary for the minister to know of and understand the definition of "conflict of interest" in the ministerial code. Instead, it would be sufficient that the minister was aware of the facts constituting the ingredients necessary to constitute a conflict of interest.

10.254. Similarly, for a substantial breach of the Schedule to be done knowingly, it would be unnecessary for the minister to know that their conduct constituted, in law, a substantial breach of the Schedule. Knowledge of the facts that constituted the substantial breach of the Schedule would suffice.

10.255. Counsel Assisting contended that this approach to the construction of the ministerial code was consistent with the maxim that ignorance of the law is no excuse and was also an approach that would promote the objects of the code as disclosed, in particular, by clause 1 and clause 11 of the Preamble.

10.256. Counsel Assisting argued that a construction that would permit a minister to avoid responsibility under the ministerial code by being ignorant of its provisions or misunderstanding them would not advance those objects. It would mean that the ministerial code would not be breached where a minister was ignorant of its provisions even where they knew of circumstances which, in order to "exhibit the highest standards of probity", required them to take or not to take a particular course of action.

10.257. Counsel Assisting submitted that such a construction would also substantially defeat the objective element of the definition of "conflict of interest" in the ministerial code. It would mean that a person who knew of circumstances that, objectively, could have the potential to influence the performance of the minister's duty, yet took action anyway, would escape responsibility under the ministerial code if it could not be shown that the minister, subjectively, knew that their private interest would, objectively, be seen to have the potential to influence the performance of the minister's duty. Counsel Assisting contended that this would be an absurd result and that a construction of the ministerial code that would lead to such a result should not be adopted.

10.258. Nevertheless, Counsel Assisting submitted that they did not contend that a minister's state of mind in relation to the ministerial code was irrelevant to the Commission's functions. They submitted that the Commission would be more likely to conclude that corrupt conduct amounts to serious corrupt conduct (s 74BA of the ICAC Act) and to make a corrupt conduct finding if it was satisfied that a minister knew that they had a responsibility to take or refrain from taking some action under the ministerial code but refused to do so. Conversely, the Commission would be less likely to conclude that corrupt conduct amounted to serious corrupt conduct and to make a corrupt conduct finding in relation to a minister if it was satisfied that a minister reasonably, but erroneously, believed that the course of action that she or he took was not inconsistent with the ministerial code.

Ms Berejiklian's submissions

10.259. Ms Berejiklian referred to the proscription in clause 7(2) of the ministerial code of "a Minister making or participating in a decision in relation to a matter in which the Minister is **aware** they have a conflict of interest" (emphasis in submissions) which she submitted was analogous to the requirement in clause 4 of the ministerial code that a substantial breach of the Schedule to the ministerial code does not constitute a breach of the code unless done "knowingly". She submitted that, contrary to Counsel Assistings' submissions, this "requires **awareness** by the Minister that they have a conflict of interest" (original emphasis).

10.260. Ms Berejiklian also referred to *R v Turnbull* and *He Kaw Teh v R*[310] to argue that the "well-established principle" as to knowledge of all the facts constituting the ingredients necessary to make an act criminal would, for the purpose of clause 7(2) and in accordance with its terms, require awareness on the minister's part that (as per the definition of conflict of interest in clause 7(3)) there was a conflict between the public duty and private interest of the minister in which the minister's private interest could objectively have the potential to influence the performance of their public duty.

10.261. Ms Berejiklian argued that it was insufficient – and in any event was firmly disputed – that she knew of the facts that meant (as Counsel Assisting submitted) that she had a conflict of interest in relation to the ACTA or RCM proposals. The factual issues concerning whether Ms Berejiklian substantially breached the ministerial code are dealt with later in this report.

Consideration

10.262. Principles concerning the construction of the ministerial code have been set out in dealing with the question whether it applies to the premier. It is necessary to state further principles relevant to the issue of the meaning of "knowingly" and "aware" in that context.

10.263. The words "knowingly" and "awareness" both appear in the definition of "knowingly" in clause 11 of the ministerial code.

10.264. The "function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of definition, are found in the substantive part of the statute under consideration, they are to be understood in the defined sense — or are to be taken to include certain things which, but for the definition, they would not include."[311]

10.265. Thus, "a definition only has whatever effect is given to it by the substantive provisions of the defining Act".[312] The "only proper course is to read the words of the definition into the substantive enactment and then construe the substantive enactment – in its extended or confined sense – in its context and bearing in mind its purpose and the mischief that it was designed to overcome".[313] The principles of interpretation earlier referred to mean that the same approach should be taken to the interpretation of the ministerial code.

10.266. Compliance with provisions concerning conflicts of interest is of key importance in the ministerial code. Clause 11 of the Preamble provides, "Ministers have a responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity". Clause 7 in the ministerial code deals extensively with "conflicts of interest", while almost all clauses in the Schedule also address conflicts of interest. The focus on conflicts of interest is no doubt because of the "actual or apparent risks posed to the integrity of official decision making, by the personal interests of public officers".[314]

[310] (1985) 157 CLR 523; [1985] HCA 43.

[311] *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628 (at 635); [1966] HCA 74 per Barwick CJ, McTiernan and Taylor JJ; see also *Kelly v The Queen* (2004) 218 CLR 216; [2004] HCA 12 (at [84]) per McHugh J; *Allianz Australia Insurance Limited v GSF Australia Pty Limited*; (2005) 221 CLR 568; [2005] HCA 26 (at [12]) per McHugh J.

[312] *Coates-Kelly v New Zealand* [2022] FCAFC 131 (at [74]) per Logan, Abraham and O'Sullivan JJ.

[313] *Kelly v The Queen* (at [103]) per McHugh J; see also *Deputy Federal Commissioner of Taxation v Mutton* (at 108) per Mahoney JA.

[314] P D Finn, *Abuse of Official Trust Conflict of Interest and Related Matters*, Integrity in Government Project, 2nd Report, Australian National University, 1993 at 3–4.

10.267. Turning to the text, the immediate context of "aware" in clause 7(2) is clause 7(1), stating that a minister "must not knowingly conceal a conflict of interest from the Premier" and clause 7(3) which requires that the question whether there is a conflict of interest be determined objectively.

10.268. When the definition of "knowingly" is read into clause 7(1), it provides "[a] Minister must not with awareness that the relevant circumstance or result exists **or will exist** in the ordinary course of events conceal a conflict of interest from the Premier" (emphasis added). In that context, this would appear to require the minister having knowledge of the circumstances which may give rise to a conflict of interest, or that such facts have led to the result, or may lead to the result, that the minister has a conflict of interest. In other words, the minister is required to disclose those circumstances and/or the result to the premier. However, it is not for the minister subjectively to determine whether they have a conflict of interest. That exercise is to be undertaken objectively as clause 7(3) makes clear.

10.269. That is not to say a minster's actual knowledge is irrelevant. That appears to be the function of the use of the word "aware" in clause 7(2). That awareness could arise in at least two ways: either by being self-evident; or by the minister disclosing the circumstances, and/or the result of circumstances, to the premier (or to the Executive Council, Cabinet or a Cabinet committee) (see Schedule clause 11(2)) and the premier and/or those present at the relevant meeting then determining on the clause 7(3) objective test whether the minister has a conflict of interest.

10.270. Clause 7(3) identifies an objective test to determine whether there is in fact a conflict of interest. It is a form of a definition provision. The first sentence speaks in neutral language as to when "a conflict of interest arises in relation to a Minister…". In contrast to clause 7(1) and clause 7(2), it does not use language of knowledge or awareness. Applying the first sentence to determine whether a conflict of interest had arisen would turn on whether a reasonable person with knowledge of a minister's "public duty" and "private interest" would conclude that the latter "could objectively have the potential to influence the performance of their public duty".

10.271. No doubt the reason the first sentence of clause 7(3) is so expressed is because the question whether there is a conflict of interest should be determined objectively. That is because others will have to determine its significance, not merely the minister. Examples of such people include the premier, who may be called upon to determine how such a conflict of interest should be dealt with (Schedule, clause 1(b)), and also those present at a meeting of the Executive Council, the Cabinet or a Cabinet committee at which a minister (including the premier) may first disclose the conflict of interest (Schedule, clause 11(2)) and who may have to determine how to manage the situation (Schedule, clause 12(2) and (3)). Assessing the nature and quality of the conflict of interest would also have to be determined objectively, and at arm's length from the apparently conflicted minister.

10.272. The objective nature of the exercise is reinforced by what Ms Berejiklian accepts is the non-exclusive deeming provision in the second sentence of clause 7(3).

10.273. As the identification of a conflict of interest turns on an objective test, it is apparent in the Commission's view that a like approach should be taken to the meaning of the words "aware" and "knowingly" in clause 7(1) and clause 7(2). In other words, as Counsel Assisting submitted, it would be sufficient that the minister knew all the facts constituting the ingredients necessary to constitute a conflict of interest, without subjectively knowing they constituted a conflict of interest. To paraphrase Gibbs J in *Consul Development Pty Ltd v DPC Estates Pty Ltd*,[315] "it would not be just that a [minister] who had full knowledge of all the facts could escape [a conclusion that there was a conflict of interest] because his own moral obtuseness prevented him from recognizing an impropriety that would have been apparent to an ordinary man".

[315] (1975) 132 CLR 373 (at 398); [1975] HCA 8.

10.274. This approach is consistent with the common law's approach to issues of knowledge in the criminal law context. As was explained in *Lordianto v Commissioner of the Australian Federal Police*, "the basal concept of the criminal law [is] that a person does not need to know that the conscious act constituting an offence with which the person is charged is forbidden by law. This is so notwithstanding the common law presumption that *mens rea*, or 'a knowledge of the wrongfulness of the act', is an essential ingredient in every offence".[316]

10.275. In like terms, clause 6, clause 8(2), clause 9 and clause 10 of the ministerial code all turn on whether a minister has acted "improperly" in their respective contexts. That, too, in the Commission's view involves an objective test. As Brennan, Deane, Toohey and Gaudron JJ said in *R v Byrnes* in the context of breaches of s 229(4) of the South Australian *Companies Code*, "impropriety does not depend on the alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of ethical conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position or circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused."[317] As is apparent, in particular from the last sentence, even in a case of abuse of power such as under consideration here, motive is relevant, but not consciousness of impropriety in the sense for which Ms Berejiklian contends.

10.276. Clause 4 applies the requirement of "knowingly" to a breach of the Schedule to the ministerial code. No doubt this is done because the Schedule prescribes administrative and governance requirements (Preamble, clause 8), some of which may be of a minor nature. The Commission is of the view that "knowingly" in clause 4 should also be understood in the sense it has explained in respect of clause 7. Construing "knowingly" in that context as Ms Berejiklian submits would require the minster to "know" that they are committing a substantial breach of the Schedule. It strains principles of construction of the ministerial code to suggest that a minister could effectively be a judge in their own cause as to whether they have substantially breached the ministerial code. Yet, that is the literal implication of Ms Berejiklian's submission.

10.277. Whether there has been a substantial breach of the ministerial code is an ultimate question which it is clearly either for the premier to consider (who can sanction ministers who breach the code (clause 26)) or for the Commission to consider in determining whether there has been a substantial breach of the ministerial code for the purposes of s 9(1)(d) of the ICAC Act.

10.278. These conclusions are consistent with the necessity to interpret the ministerial code as intended to give effect to the ICAC Act. In the most immediate context, it is clear from its text that the test s 9(1)(d) requires the Commission to consider is intended to be an objective standard. That accords with the legislative history of the provision recounted when dealing with Ms Berejiklian's submissions that the ministerial code does not apply to a premier, including the fact that s 9(1)(d) clearly is intended to remedy the problem revealed in *Greiner v ICAC* that there was no objective standard by which to assess the conduct of ministers and members of Parliament.

[316] (2018) 337 FLR 17; [2018] NSWCA 199 (at [155] per Beazley P and Payne JA, McColl JA agreeing; see also *R v Turnbull* (at 109) per Jordan CJ; *He Kaw Teh v The Queen* (1985) 157 CLR 523 (at 582); [1985] HCA 43 per Brennan J; *Farm Transparency International Ltd v New South Wales* [2022] HCA 23; (2022) 96 ALJR 655 at [24]–[25] per Kiefel CJ and Keane J; at [140]–[143] per Gordon J.

[317] (1995) 183 CLR 501 (at p 514); [1995] HCA 1.

10.279. But even if Ms Berejiklian's submissions about the meaning of "knowingly" and "aware" are correct, consistently with what Mahoney JA said in *Greiner v ICAC*,[318] in the absence of direct evidence, a minister's knowledge or awareness for the purpose of clause 4 and clauses7(1) and 7(2) of the ministerial code can be inferred or imputed to the minister depending on the circumstances.

The meaning of "partial" in s 8(1)(b) of the ICAC Act

10.280. "Partial" is not defined in the ICAC Act. Ms Berejiklian took issue with how Counsel Assisting submitted the term should be interpreted for the purposes of s 8(1)(b) of the ICAC Act.

Counsel Assistings' submissions

10.281. Counsel Assisting submitted that partiality for the purposes of s 8(1)(b) of the ICAC Act is constituted by "the advantaging of a person for an unacceptable reason" – that is, preference "for a reason which the law or the rules of the contest" do not allow.[319]

10.282. Counsel Assisting argued that the "unacceptable reason" need not be the sole reason for preferment, nor was it necessary for it to be demonstrated that the "unacceptable reason" was controlling in the sense that the impugned conduct would not have been engaged in but for the taking into account of the unacceptable reason before conduct could be regarded as "partial" for the purposes of the ICAC Act. This was because, in their submission, conduct engaged in by a public official for a reason which the "law or the rules of the contest" do not allow is properly regarded as lacking integrity (see s 2A, ICAC Act) or probity whether or not the public official also has other, acceptable, reasons for engaging in the conduct. They argued that the Commission should adopt a construction of "partial" that promoted the integrity objects of the ICAC Act by not limiting the field of conduct that is capable of being regarded as "partial" by reference to a "sole purpose", "but for" or any other test.

10.283. Insofar as the mental element of "partial" conduct is concerned, Counsel Assisting referred to Gleeson CJ's statement in *Greiner v ICAC* that "there is room for argument as to the necessary mental element required to bring conduct within some of the provisions of s 8 [of the ICAC Act]".[320] They argued that, having regard to the context in which the word "partial" appears in the ICAC Act ("dishonest or partial"), "partial" conduct should be construed only to encompass conscious preferencing (whether or not dishonest) or what in another context might be described as actual (as opposed to ostensible or apparent) bias. On this approach, exercising official functions in circumstances that raise a possibility or apprehension of unconscious bias or unacceptable preferencing may, depending on the circumstances, constitute a breach of public trust (s 8(1)(c) of the ICAC Act) but not partiality.

10.284. Turning to the issue of whether the public official must know that one or more of the reasons why they are preferring a particular person is an unacceptable reason, Counsel Assisting referred to Mahoney JA's statement in *Greiner v ICAC*, that the term "partiality" when used in the ICAC Act:

[318] At 162.

[319] *Greiner v ICAC* (at 162) per Mahoney JA.

[320] At 144.

> *…involves not merely a consciousness of the fact of preference; it involves the additional element of actual or imputed appreciation that what was being done was, in the context in which it was done, done for a reason that is unacceptable.*[321]

10.285. Counsel Assisting submitted that while Mahoney JA did not address the circumstances in which an appreciation of the identified kind would be imputed, Gleeson CJ said that for conduct to constitute "corrupt conduct", it is not necessary for the person engaging in the conduct to "think it was corrupt".[322]

10.286. Accordingly, Counsel Assisting contended that the correct view was that, for conduct to be "partial" for the purposes of the ICAC Act, it is unnecessary for the person engaging in the conduct to know that they were preferring a person or interest for what Mahoney JA described in *Greiner v ICAC* as an "unacceptable reason". They argued that to require otherwise would be to introduce a requirement of knowledge not found in the statutory text and would be inconsistent with the maxim that ignorance of the law is no excuse, a proposition they submitted appeared to be the basis of Gleeson CJ's view referred to in the previous paragraph. They also submitted that to construe the term "partial" as being contingent on the putative wrongdoer knowing that the reason for their preferment was unacceptable would give the term "partial" in s 8(1)(b) of the ICAC Act little work to do given that a knowing preference for a reason that a person knew to be unacceptable would ordinarily be dishonest and thus fall within s 8(1)(b) in any event.

10.287. Counsel Assisting added that to take this approach did not mean that, in considering whether conduct amounts to "corrupt conduct" on the grounds of partiality, it was irrelevant to consider the state of mind of the person who engaged in the impugned conduct in relation to the acceptability or otherwise of the reason for preferment. Thus, they submitted that if a public official preferred a person or interest for a reason that they honestly and reasonably believed to be an "acceptable" one in the relevant sense, it was unlikely that such conduct would constitute "corrupt conduct" within the meaning of the ICAC Act.

10.288. However, Counsel Assisting also submitted that there was no obvious reason why the Commission's jurisdiction to investigate "corrupt conduct" should not be capable of being enlivened by, for example, an allegation that a public official had engaged in the conscious preferment of a person or interest for a reason that was, or in circumstances that were, regarded as so unacceptable that preferment for that reason constituted a "disciplinary offence" (s 9(1)(b)), a substantial breach of an applicable code of conduct (s 9(1)(d)) or conduct that would cause a reasonable person to believe that it would bring the integrity of Parliament into serious disrepute (s 9(4)), even if it could not be said that the public official actually knew that the preferment was for an unacceptable reason.

10.289. On the basis of these principles, and the evidence set out later in this report in relation to ACTA and the RCM respectively, Counsel Assisting submitted the Commission should find that Ms Berejiklian engaged in conduct constituting or involving the partial exercise of official functions in connection with funding promised and awarded to ACTA and the RCM by exercising public functions influenced by the existence of her close personal relationship with Mr Maguire or by a desire on her part to maintain or advance that relationship.

[321] At 162.

[322] At 140.

Ms Berejiklian's submissions

10.290. Ms Berejiklian made four fundamental submissions:

10.290.1. There was no "partial" exercise of her functions.

10.290.2. A finding of partial conduct must relate to a duty to act impartially.

10.290.3. A finding of partial conduct must involve consciousness of wrongdoing.

10.290.4. Any partial conduct was not a substantial breach of the ministerial code.

There was no "partial" exercise of Ms Berejiklian's functions

10.291. Ms Berejiklian submitted that allegations of conduct in contravention of s 8(1)(b) of the ICAC Act involve actual partiality and that a mere appearance or perceived partiality or risk of partiality is not sufficient.[323] She contended that the evidence before the Commission was not capable of supporting a finding of partiality ("the partiality issue").

10.292. Like Counsel Assisting, Ms Berejiklian looked to the limited judicial interpretation given to the term "partial" in *Greiner v ICAC*. She relied on Gleeson CJ's statement in *Greiner v ICAC* that "[a]t the very least, having regard to the statutory context (a definition of corruption in an Act aimed at suppressing official corruption), the references to partial and impartial conduct in s 8 must be read as relating to conduct where there is a duty to behave impartially".[324]

10.293. Ms Berejiklian quoted extensively from Mahoney JA's reasons in *Greiner v ICAC*, including a passage in which his Honour set out what he described as the five elements of "what is involved in partiality of the present kind". Ms Berejiklian relied in particular on what she described as Mahoney JA's fifth point to submit that, contrary to Counsel Assisting's submissions that the unacceptable reasons need not be the sole or "controlling" reason in the sense that the impugned conduct would not have been engaged in "**but for** the taking into account of the unacceptable reason",[325] his Honour's view was that "the preference was given not for a purpose for which, in the exercise of the power in question, it was required, allowed or expected that preference could be given, **but for** a purpose which was, in the sense to which I have referred, extraneous to that power". (Emphasis added)

10.294. Ms Berejiklian submitted that a "but for" test is "integral to the concept of partiality, properly construed, just as the "but for" improper purpose test is integral to the wilful misconduct element of the offence of misconduct in public office".[326]

10.295. Ms Berejiklian also relied on Mahoney JA's first and second points about partiality and Grove J's decision in *Woodham v Independent Commission Against Corruption* (*Woodham*),[327] to submit that a key requirement for any finding of partiality under s 8 is a "comparison between the person granted the so-described 'partial' treatment and treatment of other persons in relevantly identical circumstances".

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[323] Ms Berejiklian contended this submission accorded with Counsel Assistings' approach.

[324] At 144; see also Mahoney JA at 162.

[325] At 161.

[326] Referring to *Maitland v R* (2019) 99 NSWLR 376; [2019] NSWCCA 32 at [72] and [84].

[327] (1993) 30 ALD 390.

10.296. Accordingly, Ms Berejiklian submitted that "the essence of partiality lies in treating like cases differently", and that "[t]o act partially is to be inconsistent in one's actions, without any objective and relevant reason for so acting".

10.297. Ms Berejiklian also contended that the fundamental need for comparison in this context was analogous to the High Court's statement that the application of s 51(ii) and s 99 of the Commonwealth Constitution "involves a comparison", referring to *Fortescue Metals Group Ltd v The Commonwealth (Fortescue Metals)*.[328]

10.298. On these bases, Ms Berejiklian submitted that, given the allegation in this investigation was that she treated Mr Maguire partially (in the sense of preferring projects that he propounded in the hope of "maintaining or advancing their relationship") the relevant comparison would need to be between her treatment of Mr Maguire and other local members propounding projects in their electorate.

10.299. She contended that there was a dearth of evidence as to how she treated other local members in relevantly the same position as Mr Maguire, for example, Cabinet results on projects supported by Mr Maguire, as compared with other local members. She referred to the evidence she gave that she did not accord Mr Maguire treatment that she would not have given to other local members, which she suggested was not "seriously challenged".

10.300. Ms Berejiklian submitted that there was some anecdotal evidence as to how she treated Mr Maguire when compared to others, which was contrary to the conclusions as to partiality advanced by Counsel Assisting. In this respect, she pointed to the fact that the consistent reaction to the revelation that she and Mr Maguire were in a close personal relationship was one of shock. She submitted that not a single witness gave evidence that they perceived any personal relationship of substance between them, and that no one who dealt directly with them perceived any partiality whatsoever, even with the benefit of hindsight. She also submitted that her duties of public office did not oblige her to "quarantine" the influence of her personal relationship with Mr Maguire from her professional decision-making processes.

Partiality issue – consideration

Does s 8(1)(b) require a comparative test?

10.301. As noted above, Ms Berejiklian's submissions placed great weight on Mahoney JA's reasons in *Greiner v ICAC* to support the submission that a key requirement for any finding of partiality under s 8(1)(b) of the ICAC Act is a comparison between the person granted the so-described "partial" treatment and treatment of other persons in relevantly identical circumstances.

10.302. This submission requires a close reading of Mahoney JA's reasons in *Greiner v ICAC*.

10.303. In that case, when Mahoney JA came to consider the meaning of "partial" in s 8(1)(b), his Honour first made some general observations about the mischief with which the ICAC Act was intended to deal, which he described as "clear: it is related to the fairness, efficiency and effectiveness of the machinery of executive government". His Honour made it clear his reasons were confined to the issue in the case, namely, "matters pertinent to the appointment to office in the civil service".[329]

[328] (2013) 250 CLR 548; [2013] HCA 34 at [103] and [112] per Hayne, Bell and Keane JJ, [202] per Kiefel J. Section 51(ii) confers power on the Commonwealth Parliament to legislate with respect to "taxation; but so as not to discriminate between States or parts of States". Section 99 provides that the Commonwealth shall not "give preference to one State or any part thereof over another State or any part thereof."

[329] At 158–159.

His Honour then considered three aspects of appointment to the civil service which he said "have long been of concern: whether the appointee will be competent to carry out the duties of the office; whether he/she will be the best person for it; and whether the method of appointment is fair".[330] The latter issue appears to have included the early recognition "that there was 'mischief' in those having public power using that power to influence appointment or promotion within the civil service".[331]

10.304. His Honour considered that "by its proscription of partiality … the Parliament sought to … prevent the misuse of public power". While his Honour recognised that "public power may be misused in a way which will involve a criminal act … the proscription of partiality seeks to deal with matters of a more subtle kind", than, for example, the proscription on bribery in s 8(2)(b).[332] His Honour continued:

> *Power may be misused even though no illegality is involved or, at least, directly involved. It may be used to influence improperly the way in which public power is exercised,* ***for example, how the power to appoint to the civil service is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve. This apparently legal but improper use of public power is objectionable not merely because it is difficult to prove but because it strikes at the integrity of public life: it corrupts. It is to this that "partial" and similar terms in the Act are essentially directed.***
>
> ***It is wrong deliberately to use power for a purpose for which it was not given: partiality is a species of this class of public wrong.*** *Public power has limits in addition to those imposed by the terms on which it is granted. Legislation may, in granting power, impose limits as to the circumstances in which it may be exercised or the mode of its exercise. But there are in addition limits upon the ends for which it may be exercised. Where the power is a statutory power, the objectives which a Minister or public official may seek to achieve by the exercise of it are to be derived from the construction of the Act or instrument by which it is given: see* Water Conservation and Irrigation Commission (NSW) v Browning *(1947) 74 CLR 492;* John Fairfax & Sons Ltd v Cojuangco *(1987) 8 NSWLR 145;* O'Sullivan v Farrer *(1989) 168 CLR 210.* ***But even where the power derives from an office, for example, the office of Minister, that power must be exercised to achieve only the appropriate public purposes. If a Minister or officer exercises a public power merely to, for example, comply with the wishes of a political party, an employer or a trade union official, that exercise of power, though apparently within the terms of the legislation or office, is wrong and may constitute a crime.***[333] (Emphasis added)

10.305. Against the background of those observations, his Honour considered the meaning of "partial" in s 8. He set out the five elements on which Ms Berejiklian relied. However, again, his Honour made it clear that these five elements were intended to indicate "what is involved in partiality of the present kind",[334] that is to say, what was involved in that case, being appointment to office in the civil service.

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[330] At 159.

[331] At 160.

[332] At 160.

[333] At 160–161.

[334] At 161.

10.306. In a further qualification to his list of five elements, Mahoney JA observed that:

> *In describing partiality in this way**, I am conscious that exceptions, qualifications and expectations may be necessary for the application of the term in particular cases.** Thus, the form of "contest" to which I have referred envisages a situation in which persons or interests have competing claims to, for example, the benefit of a statutory favour, the exercise of a discretion, the receipt of a gift or even a personal favour…*
>
> *The form of the advantage conferred may also vary. Thus, the advantage may be seen in the actual decision, that is, the decision to award a position, a benefit or the like: the advantage may lie in the award of it to one rather than another. **But the advantage may lie merely in the process leading to the exercise of a power or the grant of a benefit**. A person may be preferred by being put in a position of advantage in the process leading to the decision to award an office or, indeed, by the mere fact of being brought into the contest as one of the contending parties…*
>
> *Ordinarily, there will be no partiality if there be no duty to be impartial. Thus, if the conduct be that of one who may indulge his preferences or idiosyncrasies, partial would not ordinarily be a term applicable to a choice made by that person. At least, that is not the present sense of the term. If the system of government accepts the "spoils to the victor" basis for appointment to public office, the award of a civil service or other office for political purposes is not in this sense partial.*
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> ***Partiality involves, in my opinion, the advantaging of a person for an unacceptable reason.** It is to this to which most attention was directed in argument, in one form or another. Preference is not, as such, partiality. A person may be preferred for a reason which the law or the rules of the contest allow. **Partiality involves essentially that there be a preference for a reason which is in this sense not acceptable.***
>
> *And, finally, the preference must involve not merely the consciousness of preferring and the intention to prefer but, in the relevant sense, an appreciation of the fact that the selected person has been preferred for an unacceptable reason … **The use of the term in s 8 involves the vice of doing what is administratively wrong with a consciousness that it is wrong … It is not necessary for present purposes to attempt a definitive analysis of the vice involved in this aspect of partiality.** But, as here used, the term involves not merely a consciousness of the fact of preference; **it involves the additional element of actual or imputed appreciation that what was being done was, in the context in which it was done, done for a reason that is unacceptable.***[335]
> (Emphasis added)

10.307. As is apparent when Mahoney JA's reasons are set out more fully, his Honour's five elements analysis was not intended to limit the term "partial" in s 8 to cases involving a contest between the person granted the so-described "partial" treatment and treatment of other persons in relevantly identical circumstances. It involved, in his Honour's view, "the advantaging of a person for an unacceptable reason … a preference for a reason which is in this sense not acceptable". A misuse of public power in an appointment to the civil service being that with which *Greiner v ICAC* was concerned was a genus of this class of misuse.

[335] At 161–162.

10.308. *Woodham*, to which Ms Berejiklian also referred, does not take the matter any further. In that case, Ron Woodham sought judicial review of a section of a report the Commission had prepared following an investigation into the conduct of public officials, and in particular prison officers and police officers, in relation to, among other matters, the use of informers, prisoners and indemnified persons to assist the investigation and prosecution process. The gravamen of the allegations against Mr Woodham were that he gave a prisoner, Mr Cavanough, assistance in the form of two letters – one to the chair of the Corrective Services Commission, and one to Mr Cavanough's solicitors – in anticipation of a sentencing hearing in return or as a reward for giving evidence. The letters outlined in substance the information and assistance which Mr Cavanough had given without disclosing his involvement in criminal activity at Parklea Prison.[336]

10.309. Mr Woodham complained about the statement in the Commission's report that his conduct in writing the letters involved the partial exercise of official functions (s 8(1)(b), ICAC Act) and the misuse of information acquired in the course of those functions (s 8(1)(d)).

10.310. Grove J, who heard the application, appears to have upheld Mr Woodham's application on a number of bases. For present purposes it is sufficient to refer to the issue concerning partiality upon which Ms Berejiklian relied. In that part of his reasons, Grove J set out Mahoney JA's "five elements" from *Greiner v ICAC*. On the basis of that extract, his Honour concluded that "there was no preference between Cavanough and any other prisoner either directly or by preparing letters which would be any different from what would have been done **in respect of any other prisoner in identical circumstances**" (emphasis added).

10.311. Ms Berejiklian submitted that this was part of the *ratio decidendi* in *Woodham*.

10.312. While that may be the case, the Commission does not accept that, with respect, Grove J's reasons reflect the limitations Mahoney JA expressly placed on his analysis of partiality, making it clear that his "five elements" analysis was confined to the facts before the Court. A stream cannot rise higher than its source.

10.313. Ms Berejiklian also relied upon a statement by McLachlin CJ in *R v Boulanger* that "[p]artiality" denotes an "unfair bias in favour of one thing … compared with another" (citing *The New Oxford Dictionary of English* (1998)).[337] When taken in context, it is clear this passage does not assist Ms Berejiklian either. *R v Boulanger* concerned the accused, a director of public security, who asked the officer in charge of a case concerning a car accident involving his daughter to prepare a second, more complete accident report. The supplementary report led to the conclusion that his daughter was not at fault, with the result that the accused did not have to pay an insurance deductible of $250. He was convicted of the offence of breach of trust by a public officer under s 122 of the Criminal Code on the basis that he had used his office to obtain a personal benefit.[338]

10.314. The Supreme Court of Canada upheld his appeal against conviction. The fifth element of the statutory offence was that "the accused acted with the intention to use his or her public office for a purpose other than the public good, for example, a dishonest, partial, corrupt, or oppressive purpose". In dealing with the element of *mens rea*, McLachlin CJ considered, "as a check … whether Mr Boulanger's intention rose to the level of culpability traditionally required by the

[336] *Woodham* at 4, 5–6.

[337] [2006] 2 SCR 49 at [65] (Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ concurring).

[338] Section 122 is the Canadian statutory form of the common law offence of "Breach of Trust by a Public Officer": P D Finn, *Integrity in Government*, (1992) 3 PLR 243 at 245, or what is now conventionally referred to as misconduct in public office.

common law for the offence of breach of trust — for example, whether he acted for a dishonest, partial, corrupt or oppressive purpose".

10.315. While McLachlin CJ concluded that "[d]ishonesty, corruption and oppression were clearly not made out", her Honour was equivocal about the element of partiality in which respect she said, "[n]or, **arguably**, was partiality" (emphasis added). After referring to *The New Oxford Dictionary of English* definition set out above, her Honour observed, "Mr Boulanger's intention was to have Constable Stephens **make a complete report, not to skew it in one direction or another**"[339] (emphasis added). It is clear that her Honour did not regard the dictionary definition as requiring two or more persons or interests having competing claims in which a preference is given to one person or interest that is not given to another. Rather, her Honour was contemplating that partiality in that case could be constituted by Mr Boulanger having procured a report which was skewed in favour of his daughter's case, leading to her being advantaged/given preference for an unacceptable reason.

10.316. That approach to partiality is consistent with one of the meanings given to "partial" in *The Shorter Oxford Dictionary*, "Prejudiced or biased in someone's favour; Favourably disposed, kindly, sympathetic".[340]

10.317. This approach also accords with that taken in the Queensland Criminal Justice Commission's report: *Gocorp Interactive Gambling Licence: Report on an Advice by R W Gotterson QC* (1999) ("the Gotterson Report"), a report Ms Berejiklian relied upon on the issue of whether consciousness of wrongdoing is an element of s 8(1)(b) of the ICAC Act, albeit not on this point. In that report, Mr Gotterson concluded that "[t]he apparent source of the definition of official misconduct in s 32(1) of the *Criminal Justice Act 1989* (Qld) is found in ss 8(1) and 9(1) in Part 3 of the *Independent Commission Against Corruption Act 1988* (NSW)".[341]

10.318. When dealing with the meaning of the word "impartial" in s 32(1)(a) of the Criminal Justice Act, Mr Gotterson set out the definition of "partiality" in *The Oxford Dictionary*:

> *Inclined antecedently to favour one party in a cause or one side of the question than the other; unduly favouring one party or side in a suit or controversy, or one set or class of persons rather than another; prejudice; biased; interested; unfair.*

10.319. Mr Gotterson noted that "[t]hese meanings … include, but are not limited to, conduct involving preference for one of two or more competing interests." He disagreed with what he regarded as Mahoney JA's view in *Greiner v ICAC* that for there to be partiality, two or more interests need to be in competition. Rather, he suggested that "in light of the dictionary definition, to require that invariably there be competing interests for there to be partiality may limit the scope of the word unduly".[342] As is apparent from the above, the Commission agrees with this conclusion, although not, with respect, with Mr Gotterson's reading of Mahoney JA's reasons.

[339] At [65].

[340] Oxford University Press (1977) at 1518.

[341] Gotterson Report.

[342] Gotterson Report.

10.320. The Commission is also of the view that the meaning given to "discriminates" in *Fortescue Metals* does not assist with the meaning of "partial" in s 8(1)(b) of the ICAC Act. There the High Court was dealing with two statutory schemes, one of which prohibited the Commonwealth from discriminating between states or parts of states, while the other prohibited the Commonwealth from "giv[ing] preference to one State or any part thereof over another State or any part thereof". The statutes expressly required a comparative exercise, as too did the legislation considered in *Street v Queensland Bar Association*,[343] the ultimate source of the passage in *Fortescue Metals* on which Ms Berejiklian relied.

10.321. Section 8(1)(b) should be considered in the context and purpose of the ICAC Act, not statutory schemes directed to objects other than "investigat[ing], expos[ing] and prevent[ing] corruption involving or affecting public authorities and public officials" (s 2A(A)(i), ICAC Act).

Comparative test issue – conclusion

10.322. To repeat, it is necessary "to construe the relevant provision so that it is consistent with the language and purpose of all the provisions" of the ICAC Act.[344]

10.323. The Commission's principal function is investigation. Section 13(1) of the ICAC Act establishes the Commission's investigative jurisdiction,[345] and provides:

> *(1) The principal functions of the Commission are as follows –*
>
> *(a) to investigate* ***any*** *allegation or complaint that, or* ***any*** *circumstances which in the Commission's opinion imply that:*
>
> *(i) corrupt conduct, or*
>
> *(ii) conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or*
>
> *(iii) conduct connected with corrupt conduct,*
>
> *may have occurred, may be occurring or may be about to occur…*
>
> (Emphasis added)

10.324. Part 3 of the ICAC Act deals with "Corrupt conduct", for which purposes s 7(1) provides that "corrupt conduct is any conduct which falls within the description of corrupt conduct in section 8, but which is not excluded by section 9". In the report considered in *Greiner v ICAC* the Commission explained:

> *…to say conduct falls within s 8 is not enough. That and the following section form a composite whole. Section 8 is a mere entry point. Having entered, it is necessary to cross the barrier which s 9 represents.*[346]

[343] (1989) 168 CLR 461; [1989] HCA 53, which considered s 92 and s 117 of the Constitution.

[344] *Project Blue Sky* (at [69]), applied *ICAC v Cunneen* (at [31]) per French CJ, Hayne, Kiefel and Nettle JJ.

[345] See *Duncan v ICAC* (2015) 256 CLR 83; [2015] HCA 32 (at [3]) per French CJ, Kiefel, Bell and Keane JJ.

[346] Quoted by Gleeson CJ at 137.

10.325. Ms Berejiklian's contention that the term "partial" in s 8(1)(b) requires a comparative test is not supported by its text. The heading of s 8 is "General nature of corrupt conduct". Like all the subsections in s 8(1), s 8(1)(b) directs attention to "**any** conduct of a public official or former public official that constitutes or involves…", in this case "the dishonest or partial exercise of **any** of his or her official functions" (emphasis added). These are not words of limitation but direct attention to a broad range or, to use Priestley JA's expression in *Greiner v ICAC*, cast a "very wide net" over potential corrupt conduct to identify conduct the Commission should investigate.[347] Indeed, the subsections of s 8 overlap and also the paragraphs within the subsections,[348] no doubt to ensure no conduct slips through the cracks.

10.326. There is no indication that the framers of s 8(1)(b) were directing their attention merely to incidents of partiality in an appointment to public office, or, more generally, partiality as between identified individuals, or classes whose comparative merits are amenable to analysis. It is directed to "any conduct…". Like the language of s 9, the language of s 8(1) is "unconfined".[349] None of the s 8(1) subsections permit of closed categories.[350]

10.327. The term "partial" is undefined no doubt because of the broad range of misconduct or, to use Mahoney JA's expression, "misuse of public power" by public officials which may fall within its reach.[351] Without being exhaustive, such misconduct/misuse could range from making a conscious decision which gives a benefit to a project for which a person close to the public official decision-maker advocates, to those for which Ms Berejiklian contends, namely, where the decision gives preference to one out of an identifiable class of, in effect, competitors for the same benefit.

10.328. In *Greiner v ICAC,* Priestley JA emphasised the Commission's investigative function, as follows:

> *[T]he Act was designed to bring into the light of day facts concerning the conduct of public officials upon which others would, in appropriate cases, pass final judgment. This would be done by courts or other tribunals possessing the power to make decisions affecting the rights of citizens … The Commission's power is to find things out, make them public, and/or refer them to an appropriate authority; the law will then take its course.*[352]

10.329. His Honour explained that:

> [Section 8] *as a whole is intended to cast a very wide net. The principal unifying idea is that* ***in the interest of honest and impartial exercise of official functions by public officials any conduct adversely affecting such exercise is prima facie to be regarded as corrupt.*** *This idea appears in par (a) of subs (1) and the opening words of subs (2) …*

[347] At 182.

[348] *Greiner v ICAC* at 182 per Priestley JA.

[349] See Gleeson CJ's observation about s 9 in *Greiner v ICAC* at 142.

[350] In contrast, and consistent with Priestley JA's analysis of the inter-relationship between s 8 and s 9, in *Greiner v ICAC* (at 142), Gleeson CJ accepted a submission that "the framers of s 9(1)(c) appear to have been directing their attention primarily to the case of an official who is liable to be dismissed for cause, and concerning whom there could arise a triable question as to whether the dismissal was on reasonable grounds".

[351] As with the offence of misconduct in public office; see *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 (at [69]) per (Mason NJP); *R v Quach* (at [15]).

[352] At 180.

> *It may be arguable that the whole of the conduct covered by the subsections is criminal in its nature: see P D Finn, "Public Officers: Some Personal Liabilities" (1977) 51 ALJ 313 at 315-316. However, this is irrelevant to the main purpose of the Act;* ***its prime aim is plainly to bring a broad area of conduct, detrimental to the public interest, within the investigative reach of the Commission. The concern is the public interest, irrespective of technical categories.***[353] (Emphasis added)

10.330. Priestley JA then examined the interaction of s 8 and s 9 observing:

> *The Act, having broadly stated the area of corrupt conduct in s 8, then proceeds to specify the area's boundaries in s 9. Conduct within s 8 is not corrupt conduct for the purposes of the Act unless it could constitute or involve one of the following three descriptions … There would be difficulties in understanding from s 8, looked at alone, what are the boundaries of its area; this is because of the vagueness of some paragraphs in it: for example, par (a) of subs (1), "… conduct … that could adversely affect … indirectly … the honest or impartial exercise of official functions", and par (x) of subs (2), "matters of the same or a similar nature to any listed above," (which presumably means in the preceding twenty-three paragraphs).* ***So, a view of s 9(1) which immediately comes to mind is that that subsection is intended to reduce the possible uncertainties created by s 8 by overprinting the partially unmapped boundaries of the section with lines known to the law; s 9 seems plainly to go on the footing that criminal and disciplinary offences are capable of definite statement, and an ordinary reader of the subsection would expect the third paragraph to fall into the same class.*** *There are two immediate reasons for thinking this, in addition to what the ordinary mind is led to expect by the structure of the subsection … It would be strange if the two chief paragraphs of the subsection which will deal with nearly all (or all) of the instances actually arising, should provide objective tests, (as they obviously do), and the last, precautionary, paragraph, which if ever used at all, will be used on a minute number of occasions compared to the others, should provide a different kind of test, which would leave a gap in the firm line par (a) and par (b) are quite clearly intended to help draw around s 8. The tail does not usually wag the dog.*[354] (Emphasis added)

10.331. Gleeson CJ also held that s 9 provided for an objective test, as earlier noted, observing that to be in accordance with its legislative history.[355]

10.332. Like s 8(1)(c) of the ICAC Act, s 8(1)(b) is one of the three categories of misconduct which "define the nature of improbity of public officials in the exercise of official functions which the ICAC Act conceives to be anathema to integrity in public administration".[356] In *ICAC v Cunneen* the majority construed "adversely affects" in s 8(2) in a manner which was "more consonant with the language of s 2A and s 9 in that it embraces offences which could affect the integrity of public administration and excludes those which could not".[357]

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[353] At 182, 183.

[354] At 184.

[355] At 145, referring to the history he had set out at 142.

[356] See *ICAC v Cunneen* (at [46]) per French CJ, Hayne, Kiefel and Nettle JJ.

[357] *ICAC v Cunneen* (at [46]).

10.333. A like approach should be taken to the interpretation of the term "partial" in s 8(1)(b). It should be construed in a manner consonant with the Commission's objectives in s 2A(a) of "promot[ing] the integrity and accountability of public administration" and "investigating, exposing and preventing corruption involving … public officials" (s 2A(a)(i)), as well as its investigative function in s 13(1). Thus, s 8(1)(b) should be interpreted widely or broadly to give effect to its purpose, rather than read down, be cast in rigid narrow terms or given an "unduly narrow operation" which would be the consequence of accepting Ms Berejiklian's submissions on the necessity for a comparative exercise for there to be partiality.[358]

10.334. The Commission concludes, without being exhaustive, that a public official's conduct can be characterised as "partial" for the purposes of s 8(1)(b) if it involves the conscious advantaging or preferencing of another person, and the public official appreciated, or should have appreciated that, in the circumstances, the advantaging or preferencing was "for an unacceptable reason".

10.335. Furthermore, it is fallacious to suggest that Ms Berejiklian's conduct in relation to projects for which Mr Maguire advocated could be compared to her conduct towards other members of Parliament. They could not be "true comparator(s)" in circumstances where it can be tolerably assumed they were not in a close personal relationship with her.

10.336. Ms Berejiklian's submission that her duties of public office did not oblige her to "quarantine" the influence of her personal relationship with Mr Maguire from her professional decision-making processes cannot be countenanced. It flies in the face of her obligation to act in the public interest, according to good conscience, uninfluenced by other considerations, and to exercise public power "to achieve only … appropriate public purposes".[359]

10.337. In its report on its *Investigation into the conduct of Ian Macdonald, John Maitland and others* (Operation Acacia), the Commission rejected as fundamentally wrong a submission by counsel for Mr Maitland that "if friendship or loyalty had been Mr Macdonald's motivation, it would not amount to corrupt conduct". The Commission said:

> *If a Cabinet minister makes a decision to benefit an individual, being motivated by friendship or loyalty, he is doing so partially and not in discharge of his duty to the state to act impartially. Mr Kirk's submission implies that a Cabinet minister can make decisions to benefit his personal friends merely because he likes them. This is an absurd proposition.*[360]

10.338. The Commission also rejected a submission that "a minister may decide to allocate an EL [(mining) exploration licence] directly to a mate, or grant an EL to a mate for the substantial reason that that person is the minister's mate" saying "[a] decision so made would constitute an exercise of power for an improper purpose".[361]

10.339. As Campbell J said in *Jansen v Regina*, "it is notorious that doing a friend a favour may be a most insidious form of corruption".[362]

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[358] As was done, for example in *Herscu v The Queen* (1991) 173 CLR 276 at 281–283; [1991] HCA 40 per Mason CJ, Dawson, Toohey and Gaudron JJ; see also at 287 per Brennan J.

[359] *Re Day (No 2)* at [49], referring to *Wilkinson v Osborne* (1915) 21 CLR 89 at 98–99 per Isaacs J; see also at 94 per Griffith CJ [1915] HCA 92; *Greiner v ICAC* (at 161) per Mahoney JA; see also the authorities discussed in chapter 3, Common law.

[360] Operation Acacia Report (at 107).

[361] Operation Acacia Report (at 109).

[362] [2013] NSWCCA 301 (at [11]), Basten JA and Price J agreeing.

Does s 8(1)(b) require a "but for" test?

10.340. Ms Berejiklian also relied on Mahoney JA's reasons in *Greiner v ICAC* to support her submission, contrary to that of Counsel Assisting, that a "but for" test is integral to the s 8(1)(b) concept of partiality. As her submissions recognised, on her approach a test held to satisfy the mental element of the common law offence of misconduct in public office should also be an element of s 8(1)(b). The common law offence of misconduct in public office was not referred to in *Greiner v ICAC*. Indeed, that a "but for" test was the necessary mental element for the purposes of this offence was not settled in NSW until the Court of Criminal Appeal decision in *Maitland v R*; *Macdonald v R*.[363] As that decision made plain, the "but for" test for which Ms Berejiklian contends is a causation test.[364]

10.341. The language of s 8(1)(b) does not support the inclusion of a causation test that impugned partial conduct would not have been engaged in "but for" an unacceptable reason. As Counsel Assisting submitted, such an interpretation would not promote the integrity objects of the ICAC Act but, rather, would limit the field of conduct which would fall within its terms.

10.342. For the reasons given in the previous section, s 8(1)(b) should be interpreted widely or broadly to give effect to its purpose, rather than read down, be cast in rigid narrow terms or given an "unduly narrow operation".

10.343. The limiting effect of adopting a "but for" test at the s 8(1)(b) stage can be gauged by considering the wide range of conduct Mahoney JA contemplated might fall within the rubric of "partial" in s 8(1)(b). It clearly went beyond misconduct in public office because it extended to a misuse of power in which "no illegality is involved, or, at least, directly involved", to "influenc[ing] improperly the way in which public power is exercised; or it may be used to procure, by the apparently legal exercise of a public power, the achievement of a purpose which it was not the purpose of the power to achieve".[365]

10.344. Moreover, the interaction between s 8 and s 9 of the ICAC Act is that conduct which is within s 8, and is not excluded by s 9, is corrupt conduct for the purposes of the Act (s 7). It would be a curious interpretation of s 8(1)(b) if a "but for" test was a necessary element of a finding that a person acted partially for its purposes, and then, assuming the analysis was whether the conduct could constitute or involve the offence of misconduct in public office for the purposes of s 9(1)(a), the Commission would have to consider the "but for" test again to determine whether the s 8 conduct was excluded by s 9.

10.345. Ms Berejiklian's submission would also limit the operation of s 9. Once again, for the purposes of s 9(1)(a), there may be a wide range of criminal offences going beyond misconduct in public office but in respect of which the mental element differs from a "but for" test. There would be a tension between s 8 and s 9 if the Commission had to consider a different mental element at each stage.

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[363] (2019) 99 NSWLR 376; [2019] NSWCCA 32 at [84], [87].

[364] See *Maitland v R*; *Macdonald v R* (at [66]) referring to counsel for Mr Macdonald's submission that in circumstances where counsel contended the Crown needed to prove that Mr Macdonald was "working deliberately towards the improper granting of the benefit", the proper test was that the improper purpose had to be "dominant in the sense that the impermissible purpose was causative" in that "but for its presence, the power would not have been exercised".

[365] At 160.

10.346. Similarly, importing a "but for" test into s 8(1)(b) could conflict with the question of whether there has been a "substantial breach of an applicable code of conduct" for the purposes of s 9(1)(d). As is apparent from what has been considered in relation to the requirement of awareness and knowledge in relation to the ministerial code, it has its own mental "elements", and the test for whether it operates so that the s 8 conduct is not excluded, turns on whether it has been substantially breached, to which analysis any mental element would be relevant.

10.347. That conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.[366]

10.348. It is a more harmonious construction of the interaction of s 8 and s 9 to have regard to Priestley JA's view of s 8 as *prima facie* capturing as corrupt "any conduct adversely affecting the honest and impartial exercise of official functions" and s 9 as proceeding "on the footing" that the matters it addresses "are capable of definite statement".[367] On this approach, it is more consistent with the context and purpose of the ICAC Act for issues such as any mental element of a criminal or disciplinary offence, dismissal matter or breach of an applicable code of conduct to be considered at the s 9 stage rather than to incorporate a prescriptive mental element into the s 8(1)(b) question.

10.349. Bearing in mind that s 8 is an "entry point", it will give best effect to the purpose and language of s 8(1)(b) and s 9 if the former provision is not subject to a "but for" test, and any requisite mental element is considered at the s 9 stage.

10.350. Ms Berejiklian's submission to the contrary is rejected.

A finding of partial conduct must relate to a duty to act impartially

10.351. Next, Ms Berejiklian submitted that a finding of partial conduct must relate to a duty to act impartially ("the duty issue").

10.352. In *Greiner v ICAC*, Gleeson CJ said "having regard to the statutory context (a definition of corruption in an Act aimed at suppressing official corruption), the references to partial and impartial conduct in s 8 must be read as relating to conduct where there is a duty to behave impartially".[368] Mahoney JA was somewhat more equivocal, observing that: "Ordinarily, there will be no partiality if there be no duty to be impartial".[369] Priestley JA did not address the issue.

10.353. Counsel Assisting did not directly address this issue. However, they did submit that Ms Berejiklian had a public duty to act only according to what she believed to be in the public interest. A duty to act impartially is implicit in that obligation.

10.354. Ms Berejiklian submitted that Gleeson CJ and Mahoney JA's statements made it clear that a finding of partial conduct must relate to a duty to act impartially. However, she went beyond that proposition, contending that great care must be taken in identifying the precise nature of any such duty.

366 *Project Blue Sky* (at [70]).

367 *Greiner v ICAC* at 182, 184.

368 At 144.

369 At 62.

10.355. Ms Berejiklian sought to contrast the situation in *Greiner v ICAC*, which concerned an appointment constrained by a statutory requirement for appointment on the basis of merit, with a treasurer or premier's treatment of projects supported by local members as being a field of decision-making – not unlike voting on bills in Parliament[370] – where she argued there are manifold considerations that may legitimately be brought to bear, with such considerations being exceptionally difficult to "unpick" from illegitimate considerations.

10.356. On this basis, Ms Berejiklian criticised what she described as the attempt by Counsel Assisting (in the submissions referred to above) to elide the difference between the making of personal appointments to office (which she accepted generally do involve a duty of impartiality) and decisions concerning grant allocations (where she contended the application of such a duty is more problematic).

10.357. As earlier discussed, the overriding obligation of members of Parliament is to act in the public interest. Mahoney JA made that clear in the passage extracted in the previous section when he pointed out that the public power vested in members of Parliament must be exercised to achieve only the appropriate public purposes, not a private or a political purpose. The corollary was that "[i]f a Minister or officer exercises a public power merely to, for example, comply with the wishes of a political party, an employer or a trade union official, that exercise of power, though apparently within the terms of the legislation or office, is wrong and may constitute a crime".[371]

10.358. As Mahoney JA also observed in that passage, "[l]egislation may, in granting power, impose limits as to the circumstances in which it may be exercised or the mode of its exercise. **But there are in addition limits** upon the ends for which it may be exercised" (emphasis added). In the latter respect, his Honour referred to authorities in which it has been held that apparently unlimited statutory discretionary powers are "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view".[372]

10.359. The same point as Mahoney JA made in these passages from *Greiner v ICAC* will apply to decisions to allocate grants to projects supported by local members. If they are made because of favouritism or partiality to the local member, or to advance the interests of a political party rather than in the public interest, that constitutes official misconduct.[373] As Mahoney P observed in an address delivered to the 1996 Annual Supreme Court Judges Conference illustrating the point he made in *Greiner v ICAC*:

> *A power may be exercised by an official to achieve a purpose which is not the purpose for which the power was given to the official. Thus, a power … is given to locate a public facility (a factory, an airport, a school). It is exercised, not predominantly to locate the facility in the best place suited to achieve its purpose but to attract voters to a particular area or to*

[370] Referring to a rhetorical question Gleeson CJ posed in *Greiner v ICAC* (at 144), "[Section 8] applies, for example, to Members of Parliament in relation to voting in Parliament. What does the concept of partiality mean when applied to them?"

[371] At 160–161.

[372] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 504–505; [1947] HCA 21 per Dixon J; *John Fairfax & Sons Ltd v Cojuangco* (1987) 8 NSWLR 145; *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; [1989] HCA 61 per Mason CJ; Brennan, Dawson and Gaudron JJ.

[373] See Question of Law Reserved (No 2 of 1996) (1996) 67 SASR 63, (at 6–5) per Doyle CJ, referring to P D Finn, *"Official Misconduct"* (1978) 2 Criminal Law Journal 307 (at 308); see also *"Official Misconduct"* at 319.

> *avoid alienating voters who otherwise would vote in a particular way. A* ***town planning power is exercised not to secure the best planning result, but to benefit a friend, an organisation or a political party. An official is given power to allocate money to encourage, for example, cultural activities. He distributes the money to persons or bodies apt to support a particular political party – or to procure that they do so.*** *A power is given to delineate the boundaries of a municipality or a city.* Prima facie *the power is given for the purpose of ensuring that local government purposes are achieved to the greatest extent and in the best way.* Prima facie*, to exercise power so as to secure control of a council by a political party is to exercise the power for a purpose for which it was not given.*[374] (Emphasis added)

10.360. It is apparent that Mahoney JA did not observe the same concerns might arise in identifying the disqualifying purpose as Ms Berejiklian mooted might occur. Nor have the numerous cases in which courts have considered whether public decision-makers have acted within, or beyond, statutory and/or public power.

10.361. The necessity for members of Parliament to focus on serving the public interest in exercising their powers, and not exercise them for "extraneous reasons" is also reflected in the cases concerning the common law principles of the public trust obligations of public officers discussed in chapter 3. Briefly, in *Sneddon v State of New South Wales*, Basten JA and Meagher JA both referred to the duty of members of the NSW Parliament to serve with fidelity for the welfare of the community.[375] And in *Question of Law Reserved (No 2 of 1996),* Doyle CJ quoted with approval Paul Finn's statement that "official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him".[376]

10.362. As the court observed in *R v Borron*, the question is not "whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description, fear and favour may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment".[377]

10.363. It is ill conceived to seek to deconstruct the duty to act impartially and to contend for differing duties depending on the treasurer or premier's particular exercise of public power as Ms Berejiklian seeks to do. The concept of a duty to act impartially insofar as it relates to a member of Parliament sits within the overriding obligation of such a person to maintain the public trust and to act in the public interest. That is an obligation which, subject to statute as Mahoney JA explained in *Greiner v ICAC*, imposes a duty to act impartially, that is, always to exercise the power for the purpose for which the public power was granted. While as set out earlier in this report there may be occasions when a member of Parliament can, for example, take electoral considerations into account in making a decision, that may not be the principal reason for the decision. The overriding consideration is that the decision must be in the public interest.

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[374] Mahoney D, *"The Criminal Liability of Public Officers for the Exercise of Public Power"* (1996) 3 TJR 17 at 20.

[375] At [62] and [218] respectively, citing *R v Boston*.

[376] (1996) 67 SASR 63, at 64–65, referring to Paul Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307 at 308.

[377] (1820) 3 B & Ald 433, 434; 106 ER 721, 721.

The duty issue – conclusion

10.364. Ms Berejiklian's submissions suggesting the duty to act impartially may differ depending on the context are rejected.

A finding of partial conduct must involve consciousness of wrongdoing

Counsel Assistings' submissions

10.365. Counsel Assisting submitted that having regard to the context in which the word "partial" appears in s 8(1)(b) of the ICAC Act ("dishonest or partial"), "partial" conduct should be construed only to encompass conscious preferencing (whether or not dishonest) or what in another context might be described as actual (as opposed to ostensible or apparent) bias. They also contended that for conduct to be "partial" for the purposes of the ICAC Act, it is unnecessary for the person engaging in the conduct to know that they are preferring a person or interest for what Mahoney JA described in *Greiner v ICAC* as an "unacceptable reason".

Ms Berejiklian's submissions

10.366. Ms Berejiklian submitted that a finding of partial conduct must involve consciousness of wrongdoing ("the conscious wrongdoing issue").

10.367. Ms Berejiklian adopted Mahoney JA's statement in *Greiner v ICAC* that partiality "in s 8 involves the vice of doing what is administratively wrong with a consciousness that it is wrong .... the term involves not merely a consciousness of the fact of preference; it involves the additional element of actual or imputed appreciation that what was being done was, in the context in which it was done, done for a reason that is unacceptable".[378]

10.368. Ms Berejiklian also relied on a passage in the Gotterson Report in which, after referring to Mahoney JA's reasons in *Greiner v ICAC* concerning "partiality" in s 8(1)(b) of the ICAC Act, Mr Gotterson said of s 32(1) of the *Criminal Justice Act 1989* (Qld):

> *To act in a manner that is not impartial – paragraph (b)(i) – the repository of the function or power or authority must be conscious that an individual is being advantaged or disadvantaged, intend that the individual be so advantaged or disadvantaged,* ***and also appreciate that the advantage is being conferred, or the disadvantage is being inflicted, for an unacceptable reason.***[379] (Emphasis added)

10.369. Ms Berejiklian submitted that Mr Gotterson's statement was the approach to be taken in considering whether conduct is "partial" for the purposes of s 8(1) of the ICAC Act, particularly having regard to the serious consequences of a finding of corrupt conduct. It is apparent that, in this respect, her submission is that it is necessary to find actual subjective consciousness on the part of the repository of the function or power or authority that the advantage is being conferred, or the disadvantage is being inflicted, for an unacceptable reason.

10.370. Next, Ms Berejiklian submitted that the Commission should reject Counsel Assistings' submission "urging the Commission not to apply Mahoney JA's reasoning, and instead to proceed on the basis that there is no mental element to 'partial' conduct under the ICAC Act". While she accepted Counsel Assistings' reference to Gleeson CJ's statement in *Greiner v ICAC* that "for conduct to be 'corrupt' it is not necessary for the person engaging in the conduct to 'think it was corrupt'",

[378] At 162.

[379] Gotterson Report at 9–10.

Ms Berejiklian contended that this was "quite different to the necessary mental element which inheres in the concept of partial conduct under the ICAC Act". She relied on Jordan CJ's analysis in *R v Turnbull* of what she described as the basal difference between a *mens rea* requirement on the one hand, and the "ignorance of the law is no excuse" maxim.

10.371. Ms Berejiklian also submitted that the Commission should reject Counsel Assistings' "surplusage argument" that Mahoney JA's approach gave the term "partial" in s 8(1)(b) "little work to do", because a knowing preference for an unacceptable reason would ordinarily be dishonest and therefore fall within s 8(1)(b) in any event. Ms Berejiklian accepted that "[c]onduct involving a knowing preference for an unacceptable reason may occur without any 'dishonest' conduct" which was the situation in *Greiner v ICAC*, where the Commission found the conduct of Mr Greiner and Mr Moore involved partiality, but there was no finding of any "dishonest" conduct within s 8(1)(b). Ms Berejiklian submitted that while in many cases the concepts of "partial" and "dishonest" conduct may overlap, nothing in the construction favoured by Mahoney JA rendered either term otiose.

10.372. Ms Berejiklian submitted that Mahoney JA's analysis in *Greiner v ICAC* should be applied such that, in order to make a finding of partiality for the purpose of s 8(1)(b), the Commission would have to be satisfied of "not merely the consciousness of preferring and the intention to prefer but, in the relevant sense, an appreciation of the fact that the person has been preferred for an unacceptable reason".

10.373. Ms Berejiklian contended that the first part of that test – requiring "the consciousness of preferring and the intention to prefer" – was not satisfied on the evidence. She argued that even if the ACTA and RCM projects had been preferred to others for an impermissible reason (a proposition she resisted, and for which she asserted there was no evidentiary foundation), the evidence neither directly nor by rational inference supported a finding that Ms Berejiklian consciously preferred or had the intention to prefer Mr Maguire; that is, to give him favourable treatment over his Parliamentary colleagues for an unacceptable reason. This, and other factual issues concerning issues of partiality in fact, are considered later in the report.

Conscious wrongdoing issue – consideration

10.374. Contrary to Ms Berejiklian's submissions, Counsel Assisting did not submit that the Commission should proceed on the basis that there is no mental element to "partial" conduct under the ICAC Act. Rather, their submission was that "partiality" encompasses "conscious preferencing (whether or not dishonest) or what in another context might be described as actual (as opposed to ostensible or apparent) bias". Where Counsel Assisting and Ms Berejiklian's submissions parted company is on the question of whether partiality also involves "conscious wrongdoing", which on Ms Berejiklian's submissions requires a subjective appreciation "that the advantage is being conferred, or the disadvantage is being inflicted, for an unacceptable reason".

10.375. In *Greiner v ICAC*, the Commission found that, notwithstanding that both Mr Greiner and Mr Moore believed that what was being done was in all respects lawful, their conduct involved the partial exercise by public officials of official functions such that they had engaged in corrupt conduct within the meaning of s 8(1)(b) of the ICAC Act. Gleeson CJ and Mahoney JA found no error of law in that finding. Their reasons for so doing require careful examination. Priestley JA did not expressly address the issue although, as already discussed, he did analyse the interaction of s 8 and s 9 of the ICAC Act.

10.376. Gleeson CJ set out the Commission's reasons for its conclusion at some length. They included insofar as Mr Greiner was concerned:

10.376.1. That Mr Greiner knew that the method of appointment was unorthodox.

10.376.2. That it could not be concluded that Mr Greiner saw himself, or would be seen by a notional jury, as conducting himself contrary to known and recognised standards of honesty and integrity.

10.376.3. That Dr Metherell was appointed to a Senior Executive Service position as a result of a process which was not impartial.

10.376.4. That the appointment involved, to Mr Greiner's knowledge, a desire on Mr Moore's part to help a friend, as well as political advantage to the government, and prospectively to Mr Greiner personally.

10.376.5. That the appointment involved filling a senior public service position otherwise than on a competitive merit basis, in a way which favoured Dr Metherell over all other applicants.

10.376.6. That the Commission did not conclude that at the time, Mr Greiner knew or believed that he was doing anything corrupt, but that he saw it as a smart political move.

10.376.7. That Mr Greiner's proposed set of actions was deeply flawed in principle.

10.376.8. That Mr Greiner sanctioned the appointment of a man who had become a political opponent, without interview, with a view to a change in the composition of the Legislative Assembly which would favour the government, Mr Greiner's party and Mr Greiner personally.

10.376.9. That it was not to point either that the appointment was to be announced publicly or to say that Dr Metherell was capable of doing the job.[380]

10.377. The Commission also accepted that Mr Moore neither knew nor believed that he was doing anything corrupt, at any time, but concluded for like reasons to those given in relation to Mr Greiner, that Mr Moore's conduct involved the partial exercise of his official functions.[381] In addition, the Commission said:

> *Indeed the case is somewhat more clear in Moore's case than in Mr Greiner's.* ***The Premier knew that his Minister for the Environment was actuated by friendship for Metherell, but only Moore knew the extent of that as a motivating force, and it was considerable.*** *He went beyond ensuring that Metherell was not precluded from consideration for a senior public service position by reason of his controversial Parliamentary career.* ***Moore favoured his friend so as to ensure he got the job. It is about as good an example as one could imagine of official functions being exercised in a manner which was positively partial.***[382] (Emphasis added)

[380] At 134, 138–139.

[381] At 140.

[382] At 140.

10.378. Having set out these reasons, Gleeson CJ observed that the Commissioner was "undoubtedly correct in putting to one side any suggestion that the conduct of the plaintiffs was not corrupt simply because they did not think it was corrupt".[383]

10.379. Mr Greiner and Mr Moore both argued "that on the facts as found by the Commissioner, the case could not possibly fall within s 8 and the Commissioner must have made some implied error of law in his interpretation and application of the section, in particular, bearing in mind his findings as to the state of mind of the plaintiffs and Mr Humphry concerning Dr Metherell's appointment".[384]

10.380. Gleeson CJ rejected that submission. His Honour did not embark upon a detailed analysis of s 8, but noted, as set out above, that "the references to partial and impartial conduct in s 8 must be read as relating to conduct where there is a duty to behave impartially". His Honour also observed, "[t]here is also room for argument as to the necessary mental element required to bring conduct within some of the provisions of s 8". However, his Honour held that "[e]ven if the Commissioner's reasoning on s 8 were affected to a degree by error of the kind attributed to him by the plaintiffs, the Commissioner's findings of fact, in my view, were such that it was well open to him to conclude that the case came within the section".[385]

10.381. In his Honour's view, "[g]iving full weight to the Commissioner's findings as to their subjective honesty and their belief that they were complying with the law, nevertheless … **Mr Greiner and Mr Moore found themselves in a position where there was a conflict between duty and interest.** This, I believe, is included in what the Commissioner meant when he said, 'there was no genuine merit selection'. **In numerous areas of the law, with which the Commissioner would be perfectly familiar, the law refuses to countenance decision-making with a personal interest in the outcome.** In the practical and political circumstances of Dr Metherell's appointment, Mr Greiner and Mr Moore would have required the powers of detachment of anchorites to give proper consideration to Dr Metherell's comparative merit … At the very least, the case seems to fall within s 8(1)(a)"[386] (emphasis added).

10.382. Mahoney JA also found no error in the Commissioner's conclusion that the conduct of Mr Greiner and Mr Moore involved partiality.[387] His Honour addressed the issue of the mental element of s 8 in somewhat greater detail than Gleeson CJ.

10.383. His Honour observed that the ICAC Act "is concerned with the exercise of public power [and] [i]t is intended by it to restrain the improper exercise of such power".[388] He identified the "mischief" with which the Act was intended to deal as "related to the **fairness**, efficiency and effectiveness of the machinery of executive government"[389] (emphasis added).

[383] At 140.

[384] At 144.

[385] At 144.

[386] At 144–145.

[387] At 165.

[388] At 151; this conclusion is consistent with earlier cases such as *R v Rye Corporation Justices* (1752) Say 26; 96 ER 791, in which it was recognised that "a 'partial' (as distinct from a dishonest) exercise of public power could attract liability"; see *Investigating Corruption* (at [11.200]).

[389] At 158.

10.384. Insofar as appointment to office in the civil service was concerned, his Honour held that "by its proscription of partiality, the Parliament … [was] concerned to prevent the misuse of public power".[390] His Honour then made the observations set out above concerning the subtlety with which "[p]ower may be misused even though no illegality is involved or, at least, directly involved **[including] to influence improperly the way in which public power is exercised**"[391] (emphasis added).

10.385. Like Gleeson CJ, Mahoney JA held that "ordinarily, there will be no partiality if there be no duty to be impartial" and added that "[p]artiality involves … the advantaging of a person for an unacceptable reason … Preference is not, as such, partiality. A person may be preferred for a reason which the law or the rules of the contest allow. **Partiality involves essentially that there be a preference for a reason which is in this sense not acceptable**" (emphasis added).

10.386. As earlier noted, in Mahoney JA's view, partiality involved "not merely the consciousness of preferring and the intention to prefer but, **in the relevant sense**, an appreciation of the fact that the selected person has been preferred for an unacceptable reason … the term involves not merely a consciousness of the fact of preference; **it involves the additional element of actual or imputed appreciation that what was being done was, in the context in which it was done, done for a reason that is unacceptable**"[392] (emphasis added).

10.387. Mahoney JA concluded that what was done by Mr Greiner and Mr Moore was partial in this sense. They adopted a "stratagem or manoeuvre" devised by Mr Humphry at their request which "involved giving a preference or preferences to Dr Metherell [who] **was brought into consideration for each of the two offices by Mr Greiner and Mr Moore in circumstances in which he would not otherwise have been considered for either of them**".[393] His Honour was of the view that "[t]hey knew they did not bring Dr Metherell forward for appointment for the good of the civil service. They **knew or must have known** that to do it to reward a friend or a relation would be unacceptable."[394] (Emphasis added)

10.388. Mr Greiner and Mr Moore had argued that their conduct in preferring Dr Metherell was acceptable because they did it for a "political reason". Mahoney JA rejected this submission. As earlier observed, in his Honour's view, in "the exercise of executive or administrative power … the ends for which public power may be exercised legitimately are limited by the law [and] [p]ublic power, for example, to appoint to a public office must be exercised for a public purpose, not for a private or a political purpose … **It does not follow that, for example, the place where a public facility is to be built may be selected, not because it is the proper place for it, but because it will assist the re-election of a party member**"[395] (emphasis added).

[390] At 160.

[391] At 160.

[392] At 162.

[393] At 162–163.

[394] At 163.

[395] At 162, 163–164.

10.389. Having rejected the "political reason" as a justification, and bearing in mind the Commission's findings as to Mr Greiner and Mr Moore's "subjective honesty and their belief that they were complying with the law", it is apparent from the passages emphasised in the previous paragraphs, that in Mahoney JA's view, if actual "appreciation that what was being done was, in the context in which it was done, done for a reason that is unacceptable" could not be established, then considering the facts objectively, knowledge of acting for an "unacceptable reason" could be imputed to them. On this basis, Mahoney JA held that it was open to the Commission to conclude that their conduct involved partiality.[396]

10.390. The consequence is that both Gleeson CJ and Mahoney JA held that considering the facts objectively, a consciousness that what they had done was unacceptable, that is, "wrong", could be imputed to Mr Greiner and Mr Moore. Each determined on the Commission's findings of fact objectively that it was open to the Commission to conclude that Mr Greiner and Mr Moore acted for an improper purpose, that is to say that there was impropriety in the decision-making process in that there was no genuine merit selection.

10.391. Thus, it is apparent from both analyses, and contrary to Ms Berejiklian's submissions, that actual knowledge or consciousness of the unacceptable reason for preferment was not necessary for Mr Greiner and Mr Moore's conduct to satisfy s 8(1)(b). That would, if identified, suffice, but if not, it could be imputed to them on an objective assessment of the facts.

10.392. The application of an objective test is consistent with the Court of Appeal's conclusion in *Duncan v ICAC* that a finding that conduct was corrupt because it "could adversely affect, either directly or indirectly," the performance of an official function under s 8(2) required "an objective assessment of the capacity of particular conduct to affect the exercise of an administrative function, which in essence was a factual question for the Commission".[397]

10.393. As Priestley JA observed in *Greiner v ICAC* in relation to the interaction of s 9(1)(a) – (c) (as the ICAC Act then stood), it would be strange if s 8(2), which is the chapeau to a list of specific activities that also constitute corrupt conduct (and is expressed in very similar terms to s 8(1)(a)) should provide for an objective test and the leading paragraphs of s 8(1) (which both overlap with s 8(2) and with each other[398]) do not.

10.394. That is also the approach the Commission has historically taken. In its April 2001 *Report on an Investigation into Matters Rising from Ministerial Statement to the Legislative Assembly*, the Commission said the following about "state of mind" issues concerning "partiality" in relation to the performance of official functions:

> *[A] decision which favours a person may be regarded as "partial" but should not come within s 8(1) simply because it is "wrong" in administrative law terms or negligent in a civil law sense. In considering s 8 the ICAC takes into account the state of mind of each person whose conduct is in question. The ICAC considers whether there was an actual or imputed appreciation that what was being done was, in the context in which it was done, carried out for a reason which was unacceptable (see Mahoney JA in* Greiner v ICAC *(1992) 28 NSWLR 125, at 162).* ***This does not, however mean that simply because a person does not at the relevant time believe that his or her conduct is corrupt***

[396] At 162.

[397] [2016] NSWCA 143 (at [682]) per Basten JA (Bathurst CJ agreeing).

[398] *Greiner v ICAC* (at 182) per Priestley JA.

> ***the ICAC is precluded from making an adverse finding*** *(see Gleeson CJ at 140). Apart from dishonest conduct, conduct beyond negligence, not amounting to dishonesty in the accepted meaning of the term, may be conduct within s 8(1) of the ICAC Act if, for example, it amounts to reckless disregard of indicators of dishonest or partial behaviour by others.* ***Conflict between an official's duty and his personal interest is also significant.*** *Emphasis was placed on this latter aspect by Gleeson CJ in* Greiner v ICAC *(at [144 – 145].*[399] (Emphasis added)

10.395. A conclusion that the term "partial" in s 8(1)(b) does not require conscious (that is, only actual subjective) preferment for a reason which was unacceptable is consistent with the context in which the term appears, alongside the term "dishonest". It is clear that "dishonest" is to be given its objective meaning, namely, referring to conduct which would be considered dishonest by ordinary, decent people, whether or not the putative offender realised that his or her conduct was so considered.[400] An objective test should also be applied in determining whether a person has engaged in the "partial" conduct for which s 8(1)(b) of the ICAC Act provides.

10.396. It should also be recalled that at the time *Greiner v ICAC* was decided, s 9(1)(d) was not part of the ICAC Act. As noted above, the Second Reading Speech to the Independent Commission Against Corruption (Amendment) Bill 1994 stated it was intended to provide for the application of objective standard, as did the existing provisions of s 9. Even if, which the Commission does not accept, Mahoney JA's remarks could be read as requiring subjective consciousness of wrongdoing, it is improbable his Honour would reach the same conclusion in the different statutory context, particularly taking into account the scheme of the ICAC Act as Priestley JA explained. That scheme has also been substantially altered by s 13(3A) and s 74BA, which provide yet further measures to overprint s 8 and s 9 and emphasise the "mere entry point" which s 8 constitutes.

10.397. To interpret the term "partial" in s 8(1)(b) to require only actual subjective consciousness of preferment for a reason which was unacceptable, in the sense for which Ms Berejiklian contends, would limit the ambit of the provision. On her test, s 8(1)(b) would impose a higher test for a matter to constitute "partial exercise of official functions" than the test imposed by s 9(1)(d) in relation to whether a minister of the Crown or a member of Parliament has substantially breached an applicable code of conduct. Such a limitation is also contraindicated by the language of s 8(1)(b) directing attention to "any conduct", without the addition, for example, of an adjectival word such as "intentional", which would clearly import a subjective test.[401]

10.398. As the Hon Peter Hall KC has written, "It will be an unusual case where a public official whose conduct is being investigated by the ICAC voluntarily admits to having had knowledge that what he or she was doing when exercising an official function was wrong."[402]

10.399. The Commission is also of the view that, having regard to the context in which the word "partial" appears in s 8(1)(b), Ms Berejiklian's reliance on *R v Turnbull* is misplaced. That case concerned the distinction between a requirement of *mens rea* for a criminal offence and the maxim that "ignorance of the law is no excuse".

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[399] See *Investigating Corruption* at [11.205].

[400] *Duncan v ICAC* (at [376]–[378]) per Bathurst CJ; at [430] per Beazley P; at [636] per Basten JA.

[401] *Duncan v ICAC* (at [636]) per Basten JA.

[402] *Investigating Corruption* (at 699).

10.400. Section 8 of the ICAC Act does not create criminal offences. Rather, it is s 9(1)(a) which refers to a "criminal offence", as being one of four possibilities that "corrupt conduct … could constitute or involve" in the process of the Commission being able to make a corrupt conduct finding. It is in that context that any requirement of *mens rea* may arise, depending on the criminal offence. And in that context, too, *mens rea* can of course be inferred from the circumstances.[403]

Conscious wrongdoing – conclusion

10.401. The Commission rejects Ms Berejiklian's submission that s 8(1)(b) requires only actual subjective consciousness of preferment for a reason which was unacceptable. Clearly, if a person in her position admitted that was the purpose for which they acted, that would, as Counsel Assisting submitted, be a factor in a finding of corrupt conduct for the purposes of s 8(1)(b) of the ICAC Act. However, absent an admission of such consciousness, it is open to the Commission to impute an appreciation that what was being done, in the context in which it was done, in the exercise of official functions was being done for a reason which was unacceptable.

10.402. The factual issues concerning whether Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions in connection with funding promised and awarded to ACTA and the RCM, by exercising public functions influenced by the existence of her close personal relationship with Mr Maguire or by a desire on her part to maintain or advance that relationship, are addressed later in this report.

Substantial breach of the ministerial code

10.403. Counsel Assisting submitted that, in context, the concept of a "substantial" breach, as referred to in s 9(1)(d) of the ICAC Act, would appear to be a reference to a breach that is not insubstantial or trivial.

10.404. It is not apparent from her submissions whether Ms Berejiklian challenged this proposition, however, she did submit that, in the particular circumstances of the present case, involving no pecuniary benefit to Mr Maguire or anyone associated with Ms Berejiklian (nor otherwise involving any misuse of office by Mr Maguire), and in which the relevant decisions were principally made by the government (not, for instance, stand-alone decisions by Ms Berejiklian) that any breaches did not meet the "substantial" threshold.

10.405. In the Commission's 2004 report, *Investigation into conduct of the Hon J. Richard Face,* the Commission addressed the approach it took to the issue of a substantial breach of an applicable code of conduct, in that case the code of conduct adopted for members of the Legislative Assembly on 8 September 1999 as follows.[404]

10.406. First, it explained that the meaning of the word "substantial" arose in *Tillmanns Butcheries Pty Limited v Australasian Meat Industry Employees' Union (Tillmanns Butcheries)*, in which Deane J said:

> *The word "substantial" is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase "substantial loss or damage", it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size.*[405]

[403] *R v Boulanger* (at [57]).

[404] At 53.

[405] (1979) 42 FLR 331 (at 348).

10.407. Secondly, the Commission referred to *Director of Public Prosecutions v Losurdo*, where the NSW Court of Appeal observed that "it needs to be remembered that 'substantial' is a word which may vary in its meaning depending upon the context in which it is used and the subject matter in relation to which it is to be applied". After considering authorities, including *Tillmanns Butcheries*, the Court said:

> *These cases emphasise that there is no point in endeavouring to ascertain the meaning of the word "substantial" by reference to a number of synonyms. The word is an ordinary English word and must be given its ordinary meaning in the context in which it appears.*[406]

10.408. Thirdly, the Commission referred to its September 2003 report to the Speaker of the Legislative Assembly concerning the members' code of conduct, *Regulation of Secondary Employment for Members of the NSW Legislative Assembly,* in which it addressed the approach it took to the issue of a substantial breach of that code, as follows:

> *The ICAC's assessment of what constitutes a "substantial" breach of the Code will depend on the facts and circumstances of each particular case. The word "substantial" is given its natural and ordinary meaning.* The Shorter Oxford English Dictionary *defines "substantial"* inter alia *"as being of ample or considerable amount, quantity or dimensions; having weight or force or effect, not of imaginary, unreal or apparent only". Similarly the Butterworths Australian Legal Dictionary defines the term as "being real or of substance, as distinct from ephemeral or nominal; in a relative sense, considerable".*
>
> *The ICAC is of the view that the meaning should also be considered in the overall context in which the term is used. The Preamble to the Code refers to the responsibility of MPs to perform their duties with honesty and integrity, respecting the law and the institution of Parliament. What constitutes a "substantial" breach will also be influenced by which clause of the Code a Member is alleged to have breached. For example a single instance of a breach of clause 2 (which deals with bribery) may amount to a "substantial" breach, whereas a single instance of a breach of clause 4 (dealing with the use of public resources) may not be regarded as a "substantial" breach. Other factors to consider may include the amount of money or value of gifts involved, whether the conduct could also amount to a criminal offence, the nature and extent of a failure to declare a conflicting interest and the assessment of that conduct by other Members.*[407]

10.409. The Commission considers the same approach should be taken to the question of whether there is a substantial breach of the ministerial code.

10.410. The question of whether Ms Berejiklian's conduct involved a substantial breach of the ministerial code will be considered in the circumstances of each impugned decision.

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[406] (1998) 44 NSWLR 618 (at 622).

[407] Independent Commission Against Corruption, *Regulation of secondary employment for Members of the NSW Legislative Assembly*: *Report to the Speaker of the Legislative Assembly*, September 2003, 25; see also P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures* (2nd ed, 2019) at [11.360]–[11.365].

Chapter 11: The Australian Clay Target Association (ACTA)

The Treasurer has requested this be brought forward and has indicated an inclination to support the proposal. – Yogi Savania

The Australian Clay Target Association

11.1. The Australian Clay Target Association (ACTA) was founded in 1947. In 2016, it described itself as "the peak shooting body for clay target shooting within Australia". In 1997, the national executive decided to move its national office from Melbourne to Wagga Wagga, and establish the Wagga Gun Club site as a national shooting ground. Its overall objective is to develop, promote and encourage the recreational sport of clay target shooting, an important part of which was the development of training facilities for all ACTA disciplines.

11.2. Between 2012 and 2018, the period the subject of the Commission's investigation in relation to ACTA, Mr Maguire was a patron of the NSW Clay Target Association (NSWCTA), a state affiliate of ACTA.

11.3. From at least 2012, Mr Maguire had been advocating on behalf of ACTA to secure government funding to develop the infrastructure at ACTA's Wagga Wagga grounds. That advocacy came to a head in 2016 and culminated in a grant awarded by the Expenditure Review Committee (ERC) of Cabinet of $5.5 million to ACTA. Mr Maguire regarded himself as "the principal proponent within government" for the projects advanced by ACTA and the RCM (as to the latter see further below) in and around 2016 to 2018. In turn, Tony Turner, the CEO of ACTA, from 2013 until 18 December 2018, regarded Mr Maguire as, in effect, ACTA's "champion within government". When the wheels of government were running slowly, his first port of call would be to ring Mr Maguire and say, "What do I do?"

11.4. As revealed by the following account of the circumstances in which the grant referred to above was made, ACTA's application to the Office of Sport in January 2016, entitled "World Championships 2018 National Ground Development" ("the ACTA proposal"), for such funding was initially rejected outright in March 2016 because the funding amount sought exceeded the maximum amount available under the Office of Sport's then grant programs. By the end of 2016, however, the Office of Sport had funded the preparation of a business case for the ACTA proposal, and the ERC determined to approve the $5.5 million grant out of a Regional Growth–Environment and Tourism Fund (RGETF). The RGETF had not yet formally been opened for public application, the criteria for it had not yet been approved by the ERC and, when approved, applications required a two-stage process the ACTA proposal was never required to undertake. The ERC approval was subject to conditions, one of which was the finalisation of a satisfactory

business case. The government also funded the preparation of that second business case. Ms Berejiklian was a member of the ERC which approved the ACTA grant. She did not disclose her relationship with Mr Maguire when she participated in that decision.

Funding applications

2012 application for funding

11.5. Before focusing on the events of 2016, it is pertinent to consider the history of ACTA's applications for government grant funding prior to that time.

11.6. As at 2012, ACTA's facilities accommodated "Down the Line (DTL) American Skeet" and "Sporting Field" ranges, neither of which were Olympic event ranges.

11.7. On 9 August 2012, Mr Maguire wrote to the then minister for sport and recreation, the Hon Graham Annesley, seeking a meeting with the minister, the Hon George Souris (the then minister for tourism, major events, hospitality and racing), the then ACTA CEO, Chris Gibson, and himself, in relation to the development of the national grounds.

11.8. According to Mr Maguire's letter, the purpose of the proposed meeting was to discuss ACTA's aim to build an international standard clay target facility capable of holding events conducted at the Olympic and Commonwealth Games. Such construction, Mr Maguire's letter advised, would also allow Australia Cups, World Championships and selection trials to be conducted on the national grounds.

11.9. In anticipation of a meeting to be held on 20 September 2012, to discuss this funding application, Paul Doorn, the executive director of sport and recreation at the Office of Communities, Sport and Recreation/NSW Sport and Recreation/Office of Sport from May 2012 to April 2017, drafted a briefing note to Mr Annesley, dated 11 September 2012.

11.10. Mr Doorn's briefing note recorded that since 2009, ACTA had received 27 funding grants totalling $306,500. He pointed out that ACTA was a member body of Australian International Shooting (AIS), which had been awarded $20,000 under the former International Sporting Events Program to host the 2011 International Shooting Sport Federation (ISSF) World Cup in Sydney. He also noted that whilst no specific amount was being sought in Mr Maguire's letter, the scale of the proposed development meant that any funding application was likely to exceed funding available under existing programs.

11.11. Mr Doorn gave evidence that Mr Maguire's letter arrived fairly early in his role as the executive director, and also at a time when part of his responsibility was managing ex-Olympic venues. One of the challenges the agency responsible for sport and its successors had following the Sydney 2000 Olympic Games was being able to develop a business case or develop enough revenue to be able to maintain the facilities as they were for the Olympic Games, as the users would expect. Thus, the presence of an Olympic-standard shooting facility in Greater Sydney that was used for the 2000 Sydney Olympics raised a question for him as to whether any further Olympic-standard shooting facilities should be built elsewhere in NSW. In circumstances where the Sydney International Shooting Centre (SISC) had at least additional capacity to run events, including international shooting events, acceding to the ACTA application in his opinion would have been a duplication of facilities, and not a good use of public funds. Mr Doorn told the Commission that he was sure he "would have given that advice to the minister's office".

11.12. It appears that at the meeting on 20 September 2012, ACTA said it was asking for $1.2 million in government funding for its project. This was the subject of a further briefing note to Mr Annesley which Mr Doorn approved on 23 October 2012. This briefing note specifically identified the SISC as the "NSW funded shooting complex" noting that the ISSF supported "Olympic legacy venues … to ensure that these venues are used for all World Cup and World Championship events". It observed that the SISC was "supported heavily by Australian International Shooting Limited (AISL) for the AISL Australia Cup Series and all major ISSF events and all International ISSF Olympic qualifying competitions including the ISSF World Cup Series and National Championships". It also pointed out that the ISSF supported Olympic legacy venues and endeavoured to ensure that these venues are used for all World Cup and World Championship events.

11.13. The ministerial briefing note was critical of ACTA's application for several reasons. First, it pointed out that the AISL Australia Cup Series allowed athletes to compete in three shooting disciplines all conducted at one complex to consolidate the cost of referees and travel. In contrast, the ACTA proposal only provided for one discipline to be conducted. Secondly, the ministerial briefing opined that ACTA's economic impact statement included ambitious forecasts for revenue and competitor numbers, which exceeded what the SISC had historically achieved when it hosted multidisciplinary events for AISL. Thirdly, it pointed out that to conduct only one event as ACTA proposed would lead to "prohibitively high" event costs.

11.14. Finally, the ministerial briefing noted that "The amount [ACTA sought] exceeds any funds available through Sport and Recreation grants programs or existing budget allocation". Nevertheless, in accordance with a direction from the minister on 16 October 2012, Mr Doorn noted that an Office of Communities, Sport and Recreation funding request would be put to NSW Treasury (Treasury) but commented that "a low priority will be given to the project".

11.15. At the time this ministerial briefing was written (and throughout Mr Doorn's work at the Office of Communities, Sport and Recreation/NSW Sport and Recreation), agencies annually put forward bids for projects of interest through the Treasury process in the hope that they would be funded as part of a budgetary process known as New Policy Proposals (NPPs). NPPs were essentially bids or requests put to Treasury by departments for funding for the following year. NPPs were required to be ranked by priority. Nominating a project of interest did not guarantee funding; rather, it just put it into the mix for the State Budget process. An NPP that was given a low priority was unlikely to be funded by Treasury.

11.16. The ACTA NPP was put forward in the Office of Communities, Sport and Recreation (Sport and Recreation)'s list of funding priorities for 2013–14. As predicted, it was unsuccessful in receiving funding. Mr Annesley wrote to Mr Maguire on 3 July 2013 advising him of that outcome.

2014 application for funding

11.17. On 23 April 2014, Stuart Ayres was appointed minister for sport and recreation, a position he held until 2 April 2015 when the title of his ministry was changed to minister for sport. He held that position until premier Mike Baird's retirement on 23 January 2017. He was re-appointed as minster for sport on 30 January 2017 by then premier Ms Berejiklian.

11.18. On 9 July 2014, Mr Maguire wrote to Mr Ayres on behalf of ACTA seeking funds to "build an international standard clay target capable of holding events ... which are included at the Olympic and Commonwealth games". He further advised the minister that "this would also allow Australian Cups, World Championships and selection trial [sic] to be held at the facility". The cost of this proposed project was $375,000 for equipment and $825,000 for construction and implementation costs.

11.19. Mr Ayres replied on 27 August 2014, advising that the request to Treasury for recurrent funding for this project for 2013–14 "was not part of the Treasurer's budget announcement in 2013 which meant that funds had not been made available". He also advised Mr Maguire of a new study which sought to receive feedback in relation to where grassroots facilities in NSW could be improved in order to establish a data base of sporting infrastructure, identify gaps in the provision of sporting infrastructure and to develop an assessment framework that would allow new projects to be prioritised. He said that he had written to local councils and state sporting organisations, including ACTA, to assist in the collection of relevant information and that ACTA would have the opportunity to submit proposals that it believed should be considered as part of this study.

11.20. The study to which Mr Ayres referred was called "The Future Needs of Sport Infrastructure Study" ("the FNOSI study"). It was set up by the Office of Communities, Sport and Recreation to be able to verify the process it used to get proposals from state sporting bodies to enable it to rank project proposals.

2016 application for funding

11.21. On 27 January 2016, Mr Maguire again wrote to Mr Ayres, on this occasion enclosing an ACTA proposal entitled "World Championships 2018 National Ground Development" dated 1 January 2016. Mr Maguire also advised Mr Ayres that he had "approached" the treasurer (then Ms Berejiklian).

11.22. Mr Maguire described his conduct in approaching Ms Berejiklian as "standard procedure", explaining "I would have written to a number of ministers from time to time. Depended who was in the cluster. We all did it. The more doors you knock on, the more letters you write, the better your chances of securing something." However, he agreed that it was "possible" he had approached Ms Berejiklian directly with a view to lobbying her and that at least during the period from 2015 to 2018, he had closer and more regular available contact with Ms Berejiklian than he would have had available to him in relation to other ministers.

11.23. The ACTA proposal advised that ACTA was planning to build a new clubhouse/national administration office complex on its national ground prior to the World Trap Championships to be held in March 2018 ("the 2018 World DTL Championships") at the national ground. The ACTA costed the works for which it sought funding at $6.1 million but noted it had committed $1.2 million to the project.

11.24. The proposal also noted the involvement of the NSWCTA, of which it will be recalled Mr Maguire was a patron, in the following terms:

> *The New South Wales Clay Target Association* ***(NSWCTA) is supportive of the development of the National ground confirming they will continue to hold their State Titles at the National Ground and will also use the National Ground as their official Head Quarters.*** (Emphasis added)
>
> *It is anticipated that most National Championship* [sic] *will be held at the National Ground with the New South Wales CTA (The largest State for memberships) conducting their State Championships and Development camps. The standard of the facility will be of such a high standard that Clubs and Associations will naturally use the facility on a more frequent basis.*

11.25. Mr Turner gave evidence during a compulsory examination that ACTA had secured the 2018 World DTL Championships by May 2013. Part of his responsibility as CEO was to secure funding for a new clubhouse/conference centre prior to the event and also to run the championships.

11.26. Mr Maguire's 27 January 2016 letter was referred to the Office of Sport to prepare a response. Sharon Power, the executive services coordinator in the Office of Sport, drew it to Mr Doorn's attention, because she remembered that he had dealt with "something like this" previously. He confirmed her recollection was correct, and that it had been "put it up as a NPP and … was knocked back". He also remarked that it was "before FNOSI".

11.27. At the time the ACTA proposal was received, the NSW Government was pursuing its own World Cup bids for the SISC. Mr Doorn believed funding the ACTA proposal would weaken the Office of Sport's own proposals to host such events. This led to a "competitive tension from [his] perspective". This was because there was a potential for the NSW Government and ACTA to be applying for the same grant to run the same kinds of event. He asked rhetorically, "why would you invest … in a facility when you've already got a facility that could host that event?" Mr Doorn agreed with Counsel Assisting's proposition that "you might actually spend a whole lot of government money and the only thing that you achieve is moving benefit in effect from a facility somewhere in one place of the state to moving it to another place in the state".

11.28. Ms Power prepared a memorandum dated 18 February 2016 concerning Mr Maguire's letter and the ACTA proposal for Matt Miller, the Office of Sport chief executive. Mr Miller approved it on 23 February 2016. The memorandum noted the history of Mr Maguire's unsuccessful representations for funding on behalf of ACTA and the January 2016 application and advised:

> *[the ACTA project] has not been included in the 2016/17 New Policy Proposals being put forward to Treasury.*
>
> *Wagga Wagga Council is participating in the Future Needs of Sport Infrastructure Study however, the [ACTA project] has not been identified as one of their priorities.*

11.29. Mr Doorn said that as far as he recalled, at the time it was received, the ACTA proposal was, and remained, "a low-priority project". Indeed he said, having regard to Ms Power's memorandum, that it held that status both within the NSW Government bureaucracy and within the Wagga Wagga City Council.

11.30. Mr Ayres replied to Mr Maguire on 14 March 2016, advising, "The project falls outside the scope of current Sport and Recreation funding programs, as the funding amount sought is in excess of the maximum amount available under current grant programs". He reiterated his 2014 advice that the application to Treasury for recurrent funding for ACTA for the year 2013–14 was not successful. He noted that "Sport and Recreation receives many requests for assistance from across NSW for a diverse range of projects and programs, unfortunately it is not possible to meet all requests for assistance."

11.31. Mr Maguire wrote back to Mr Ayres on 24 March 2016. He asked if consideration could be given to the minister meeting Mr Turner. He again attached a copy of the ACTA proposal of January 2016.

11.32. On 3 April 2016, Mr Turner advised the ACTA national executive meeting that Mr Maguire was continuing efforts to obtain a meeting with Mr Ayres "regarding funding support".

11.33. On 29 April 2016, Mr Turner was invited to attend a meeting to be held on 18 May 2016 with Mr Ayres' chief of staff, Chris Hall, and Marc Landrigan, Mr Ayres' sports policy advisor. He forwarded the email advising of the meeting to Mr Maguire, thanked him for organising it and asked if he would be attending. On 3 May 2016, Maguire asked his staff to advise the minister's office he too would be attending the meeting. As events transpired, the meeting was attended by Mr Maguire, Mr Turner and ACTA president Robert Nugent. According to the minutes of an ACTA national executive meeting, at the 3 May 2016 meeting the ACTA "proposal was presented to the Minister for Sport Mr. Stuart Ayres through his Chief of staff and treasury staff [and] has been submitted directly to the Treasurer".

11.34. On 30 May 2016, Mr Turner wrote to Mr Maguire attaching a series of costs and projections detailing the benefit of the ACTA proposal to Wagga Wagga. Mr Maguire replied on the same day, "Great work, I am going to the Premier with the package, see if I can get a one-off cheque to get this done." The premier at this time was Mr Baird.

11.35. On 14 June 2016, Mr Turner wrote to Mr Maguire seeking an update on progress as he was to attend a full executive meeting shortly and wanted to be able to provide a report on the ACTA proposal, "if possible, a positive one". Mr Maguire replied, informing Mr Turner he had taken the proposal to the premier and Mr Ayres directly. He advised Mr Turner that "our best opportunity is poles and wires funds which have not been opened for applications yet, think that will be around October". Mr Maguire also stated he had spoken with the Hon John Barilaro, the treasurer (then Ms Berejiklian), and the finance minister (then the Hon Dominic Perrottet) in relation to the project, adding, "They were in Wagga last week so I took them past to see the site".

11.36. Mr Ayres was not part of that contingent. However, some time before August 2016 he visited the ACTA site during a tour of Wagga Wagga. Mr Ayres could not recall whether there had been any interaction or correspondence with his office prior to this visit, though he thought there "may well have been". It seems most probable that the visit was a product both of the ACTA meeting with Mr Hall and Mr Landrigan, as well as Mr Maguire's personal representations to Mr Ayres.

11.37. Mr Ayres said his visit to the ACTA premises took place during a visit to Wagga Wagga to make announcements for other funding grants. Mr Maguire accompanied him on the visit to the ACTA premises. Mr Ayres said that it was during this visit that he formed the view for a number of reasons that the ACTA project "had a lot of merit". Those reasons included the upcoming World DTL Championships event to be hosted there in 2018, that it was a regional project for a national association, the location was good for a shooting event, they had a good relationship with their neighbours, there was the prospect of the clubhouse having multipurpose uses and there would have been an opportunity to drive additional visitor-economy benefits to that region as well, the latter observation being based on "experience".

11.38. Nevertheless, Mr Ayres said he would have wanted to "validate" his view that those kinds of benefits would likely be achieved through the use of government money. In this respect he would have wanted an appropriate business case, undertaking some further analysis as to the potential benefits of spending government money. At no stage did he think the government needed to fund this proposal to counteract the Shooters, Fishers and Farmers Party in regional NSW.

11.39. Despite there being an Olympic-standard shooting facility available in Sydney, Mr Ayres took the view that the regions must be provided for.

Government funds the first business case

11.40. Towards the end of the 2015–16 financial year, on 17 June 2016 (about a month after the meeting between the ACTA representatives and Mr Maguire, and Messrs Landrigan and Hall) Mr Miller wrote to Mr Doorn and John Egan (the director of facility, strategy and planning at the Office of Sport) seeking a brief "which proposes project options as below so the Minister can sign off and arrangements put in place for agreements before 30 June". This appears to have been an effort to spend unallocated funding monies before the end of the financial year, or, in the vernacular, to "look around … hollow logs" to see whether there are unexpended funds that might be able to be expended before the end of the financial year.

11.41. In a briefing note dated 29 June 2016, endorsed by Mr Doorn and approved by Mr Miller, Mr Ayres was advised that as at 22 June 2016, the Office of Sport had $2.4 million available to support sport facility projects. These funds were "uncommitted funds … available to support a number of sport facility projects that selected State Sporting organisations and Councils have identified as a priority under the Future Needs of Sport Infrastructure Study (FNOSIS)". The briefing note indicated that a list of suitable projects was attached. ACTA was identified as recommended to receive a total of $40,000 to develop a business case. This was approved by Mr Ayres. According to Mr Egan, the Office of Sport would not fund a project worth $6.1 million without a proper business case. He identified the figure of $40,000 as the amount to allocate for the business case by asking the Office of Sport's asset management team the rough figure for a business case of this nature, who said $40,000 was an average spend for one.

11.42. Mr Doorn said it was not standard practice for the government to fund, in effect, the preparation of an application by a sporting organisation seeking substantial money for a building project, including a business case. It did happen from time to time, but it was rare.

11.43. Mr Egan also said that for the Office of Sport to fund a business case was "unusual". This was because "under our grant program we don't provide money to fund feasibility studies or business cases, so whether it's the Regional Infrastructure Fund or the Greater Sydney Fund or any of the other ones we administer". Rather, the Office's expectation was that the applicant for funding "provides the business case of [sic] the feasibility study to us, and that they fund it out of their own money". Although "over the years people have written in to the different ministers and said could we have funding for a business case [o]ur stock standard answer in all the ministerial letters is that the Office of Sport does not provide funding for feasibility studies and business cases". He said that the difference in relation to the ACTA proposal was that "the Minister wished to fund a business case".

11.44. In addition to his views about the low priority to be accorded to the ACTA proposal generally, Mr Doorn recollected that one of the challenges with the ACTA project was the lack of information or a lack of detail about the proposal. However, he said that that money would not have been spent on a low-priority project, even if it was only $40,000 to put together a business case, unless such a proposal had at least some political support within the ministerial office of the then minister, Mr Ayres.

11.45. Mr Ayres agreed that he wished to fund the ACTA business case. He disagreed with Mr Egan's view about the "stock standard answer", although he accepted that he did not recall "all of the forms of correspondence that would have gone back". However, he did agree that the Office of Sport "would have had our standard piece of correspondence when people were …

seeking funding [for a business case] to direct them back towards the funds that were available for people to make application to".

11.46. Mr Ayres said the decision to allocate $40,000 to ACTA to fund a business case was "to determine whether we could take it forward as a proposal to government". There were three things about the ACTA proposal in his view which gave it sufficiently high priority that it should get money as distinct from many other proposals that could have been the subject of funding. They were the strong advocacy by Mr Maguire for a sustained period of time, the fact that Mr Ayres had visited the site and was confident that the project could be delivered and the fact of the World Championship event in 2018. Mr Ayres walked back somewhat from these three reasons later in his evidence (albeit only to the extent of re-ordering their priority), in particular, the emphasis he had placed on Mr Maguire's advocacy, saying "[T]he most important factor about this project proceeding is that I determined it had merit". Nevertheless, while he thought the ACTA proposal had merit, "it needed greater research or a business case behind it for [him] to feel confident enough to take that project forward".

11.47. Mr Ayres was asked why the government would fund a business case rather than the proponent. He told the Commission, "[A]t the time I actually thought we were approving funds of the Office of Sport to conduct that business case". It was put to Mr Ayres that as a matter of general practice, if a private organisation wanted money from the government, it would usually be required, at its own cost, to demonstrate to the government that the money should be paid. Mr Ayres told the Commission that was a "case-by-case process". While he accepted that the key information was the department's advice, he said, "obviously I have the ability to direct those funds".

11.48. Thus, in Mr Ayres view, it was ultimately a matter for him as minister to decide where uncommitted funds went, whether or not they had been identified as a priority in the FNOSI study. He could not recollect whether the Office of Sport had a position one way or another as to spending the substantive money in relation to building the clubhouse facility.

11.49. On 3 August 2016, Mr Ayres replied to Mr Maguire's letter of 24 March 2016. He asked Mr Maguire to pass on his thanks to ACTA for showing him around their venue on his visit to Wagga Wagga. He confirmed that he had approved funding of $40,000 to ACTA to assist in the preparation of a business case to support ACTA's funding request for the project and advised that he "look[ed] forward to receiving their Business Case in the near future".

11.50. Mr Maguire claimed credit for the decision to fund the ACTA business case. He said it was a product of him being a "serial pest" in "[bringing] the minister to meet and actually visit onsite and see for himself the plans, view what Clay Target [sic] proposed and the reasons why so he understood the project, and, and agreed with me that there was terrific benefit for the community in it. So that's what happened. I pestered them till, and brought them here, and I'd show every minister that visited here, every one of them."

11.51. The ACTA funding was drawn from the Office of Sport's recurrent budget ($15,000) and the Sport and Recreation Fund (a grant fund administered by the Office of Sport) ($25,000).

11.52. Mr Ayres agreed that, of all the projects that received funding at the end of the 2015–16 financial year, the ACTA proposal was the only one that received funding for a business case.

The ACTA business case

11.53. On 12 September 2016, Mr Turner wrote to Mr Ayres on behalf of ACTA, enclosing the ACTA business case. He thanked the minister for providing funding for it and stated, "The figures used in the study are very conservative to ensure we have provided a balanced study of the minimum

benefits and not overstating [sic] our case". He enclosed a 40-page business case developed by GHD on behalf of ACTA.

11.54. The business case outlined the ACTA proposal for the development of a large clubhouse/conference facility and associated infrastructure at the existing ACTA facility in Wagga Wagga. At that time, the ACTA national ground was located at Tasman Road and the ACTA national office was located adjacent to the national ground in Copland Street. The proposal was to create a club house with a restaurant, up to 900-seat conference facility and integrated offices and a new main entrance on Copland Street.

11.55. The ACTA business case stated that "ACTA proposes to invest $1.2 million of its accumulated funds for this proposal and propose[s] to obtain the remainder of funds required from the Australian Government". It noted that the "total upgrade has been budgeted at $6.1 million," but elsewhere the figure $6,678,024 appeared against the heading "Net cost".

11.56. The ACTA business case explained under the heading "Cost Benefit Analysis", that the "methodology employed in this report is a rapid Cost Benefit Analysis (CBA)". It added that "The CBA model aims to capture the most significant measurable benefits and costs, but given the limited timeframe, resources and information available, not all benefits/costs relevant to the project have been measured and included". Among the economic benefits considered was "Additional tourism–the value of additional tourism to the Wagga Wagga LGA brought about by the project". This was among the considerations which led to the conclusion that the benefit-cost ratio (BCR) of the ACTA proposal was 2.31. As Michael Toohey, a director in the Office of Sport, said in his evidence, a BCR analysis has to look at the effect of a project from the perspective of the state economy, not the local economy.

11.57. In Box 2, headed "Decision criteria", the ACTA business case explained the BCR as "the ratio of the present value of the incremental benefits of the project case to the present value of the incremental costs of the base case" and said, "Projects with a BCR greater than one have net benefits to society over the appraisal period". A BCR greater than one means that the benefits to the state outweigh the cost to the state. If the BCR is less than one, it is costing the state more money than the benefit it is receiving from the expenditure of funds.

11.58. The effect of the ACTA business case assessing the BCR of the ACTA proposal at 2.31 was that the benefits to the state were assessed as 2.31 times more than the cost of funding the project over the lifecycle of the asset.

11.59. Mr Ayres regarded the ACTA business case as sufficient to support a proposal for funding. He regarded the BCR of 2.31 as a "strong result", albeit "on the optimistic side". Nevertheless, he saw the BCR as "the main justification for why [he wanted] to continue advancing this project". He said that he regarded the author of the ACTA business case, GHD, as a reputable organisation which had done work for the Office of Sport previously. He thought the BCR gave him the validation he was looking for so that he could take forward a proposal to either the ERC or a future budget submission.

11.60. Mr Ayres could not recall whether he asked the Office of Sport either directly or indirectly through his advisers as to their views on the quality or satisfactory nature or otherwise of the ACTA business case, nor whether he asked for or received any advice as to whether the ACTA business case had been prepared in accordance with Treasury guidelines.

The due diligence of the proposal

11.61. As a matter of ordinary practice before a submission is prepared for Cabinet or a committee of Cabinet, the relevant government department undertakes "policy planning, project management, research, data collection, analysis, impact assessment and targeted consultation". Mr Toohey described such work as the "quality control process" and "the due diligence of the proposal".

11.62. As the discussion below will demonstrate, and as Mr Ayres agreed, these important processes were not undertaken in relation to the ACTA proposal. This was because he did not feel it was required as he "had a business case that had a BCR of 2.3 and supported a project that I thought was meritorious". Mr Ayres made that decision himself, without, as far as he recalled, any advice from his agency, the Office of Sport, or Treasury.

11.63. Having formed this view, Mr Ayres asked his chief of staff to have a Cabinet minute prepared to take the ACTA proposal to an ERC meeting before the end of the year.

11.64. Mr Ayres decided to place the ACTA proposal before the ERC rather than putting it forward as a "new policy proposal" through ordinary budget processes because of what he perceived as time limits for the construction of the project having regard to the fact that the 2018 World Championships were looming large. He also saw increased prospects of success by putting the ACTA proposal forward through a process separate from the "sea of projects by multiple ministers" that would be put forward in the course of preparing the next State Budget. He did not accept that it was unusual to put a proposal of $5 million or so for a single project before the ERC – "not at all".

11.65. On 26 October 2016, Mr Hall sent Mr Doorn an email saying, "As discussed can we get an ERC minute to build this facility in Wagga?". Mr Doorn replied, "Got it". Mr Doorn never really understood the urgency in the minister's office asking for the ERC submission, although he assumed at the time that the office had been given an opportunity to place the ACTA proposal on an ERC agenda and the necessary papers had to be prepared quickly.

11.66. The next day, on 27 October 2016, Office of Sport employee Geoff Taylor sent Mr Doorn and others in the Office of Sport an email asking them to send him any new policy proposals by 4 November. Mr Doorn forwarded the request to colleagues Michael Bangel, Mr Toohey and Mr Egan, and advised them of his current list of five potential NPPs, one of which was ACTA. Mr Doorn said he did this notwithstanding the previous day's exchange because his experience was that "just because something's on the agenda of an ERC … sometimes they, they don't make it past being placed on the agenda". Accordingly, continuing the NPP process was "having a bet both ways". He observed that "the NPP is about forecasting money that might be built into the state's budget for the following year, whilst an ERC minute might be around seeking funds that might be available here and now".

11.67. On 2 November 2016, Philip Dean, who was apparently responsible for records management in the Office of Sport, sent Mr Doorn an email in regards to the "new proposal Clay Target". He advised Mr Doorn that "This was submitted as a grant funding application for 2013-14 funding (not last year and earlier than I thought); It was rated lowest of 15 proposals that year and not funded."

"Fancy a challenge?"

11.68. On 14 November 2016, Mr Hall telephoned Mr Doorn and asked the Office of Sport to develop a submission urgently for the ERC requesting funds for the upgrade to ACTA's club house and site in Wagga Wagga. He explained that the minister's office was "trying to secure a slot in the ERC forward agenda–date TBC". In emailing Mr Hall's request to his colleagues, Mr Doorn noted that "We have previously recommended that this issue be dealt with in NPP process for 2017/18 budget. Apparently, the announcement of the Invictus Games to be hosted in Sydney has ACT [ACTA] excited that they may be able to host this event at their site. (FYI–our own Sydney International Shooting Centre was the host for the clay target shooting discipline at the Sydney 2000 Olympics)."

11.69. The idea that ACTA may have been able to host the Invictus Games in some respect appears to have emerged from an article in the Wagga Wagga newspaper, *The Daily Advertiser*, the previous day, on 13 November 2016, entitled "Wagga will bid to host the Invictus Games' clay target shooting event". It reported that Mr Maguire had "revealed the city will bid to host an Invictus Game event in 2018". It also reported Mr Maguire as saying, "I spoke to the Premier who told me to 'go hard'". Mr Baird had no recollection of that conversation, but agreed it was possible Mr Maguire had raised it with him and that he would have been supportive if the concept was "There's an event and we want to bid for it".

11.70. Mr Maguire forwarded a copy of the article to Mr Ayres, Ms Berejiklian (to her direct email address, not her public facing one), Mr Hall and Gavin Melvin in the premier's office at 7.41 am on 14 November 2016 with the subject line: "City shoots for Invictus Games, we need our building to hoste [sic] it". At 8.02 am he sent it to Mr Hall again, on this occasion with the subject line "The clay target article, we need some action and funds ASAP". Mr Maguire agreed that his conduct in sending the article to so many people was reflective of his behaviour as a "serial pest".

11.71. Mr Doorn said he could not recall why Mr Hall asked that the Office of Sport act urgently but surmised that it may have been because of the necessity prior to a matter being considered at the ERC that it be circulated to Treasury and Cabinet colleagues.

11.72. On 15 November 2016, Mr Doorn forwarded his email to Mr Toohey with the remark, "Fancy a challenge? MO [minister's office] has requested a draft ERC submission today!" The email attached the ACTA business case.

11.73. Mr Toohey had worked in government for all his professional career. He had worked in Treasury, and the Department of Premier and Cabinet. He was seconded to the Office of Sport as a director in October 2016. He reported to Mr Doorn. He held an Executive Master of Public Administration and a Graduate Diploma in Public Sector Management from Curtin University.

11.74. There were a number of aspects of the ministerial request to prepare an ERC submission within a short period of time which Mr Toohey regarded as out of the ordinary.

11.75. First, according to Mr Toohey, it was "extremely unusual" to be asked to develop an ERC submission in a day. Rather, in the ordinary course it would take some weeks to develop such a submission, including undertaking the due diligence of the proposal. Mr Doorn shared Mr Toohey's view that such preliminary work is ordinarily done before preparing an ERC submission, and that it would not be possible to do such work if asked to prepare an ERC submission in a day.

11.76. Mr Toohey found out in the days after he started working on the ERC submission that the ACTA proposal was said to be relevant to bringing the Invictus Games to Sydney and also for the DTL World Championships in 2018. However, he learned that it was not relevant to the DTL event as that had already been secured by ACTA at the Wagga Wagga site. Accordingly, it could not be said that the upgrade of the facilities that ACTA proposed was needed for the

DTL Championships. Nevertheless, there was a timing risk in that if construction would not be completed in time, it would potentially compromise the hosting of the event.

11.77. Mr Toohey described the "bigger claim" of ACTA hosting the Invictus Games as "imaginative" having regard to the fact that the Invictus Games did not include any shooting events. In any event, as he ascertained after undertaking the enquiry flagged in his 15 November 2016 response to Mr Doorn, the Invictus Games were to be held within the Sydney metropolitan area.

11.78. Secondly, neither Mr Doorn nor Mr Toohey understood why there was such urgency to have an ERC submission prepared about the ACTA proposal. Though the reason for the urgency was not explained, the need for urgency was, however, clearly conveyed by the minister's office.

11.79. Thirdly, Mr Toohey said that an ERC submission seeking approval of funding is an exception or alternative to pursuing funding by way of a new policy proposal. This view reflected the ERC procedural and operational rules which are set out later in this chapter.

11.80. Mr Toohey's response to the gauntlet Mr Doorn threw down was to reply to Mr Doorn within the hour, "Sure…", which reflected his view, "I'll do my best but it's an unusual thing I'm being asked to do." He continued "I think the ERC sub should be for funds for an independent feasibility study, prelim business case etc. I can't see that funds would be allocated on the basis of the attached business case. Do you want to canvass with the EDs [executive directors] and we can sort out who does what?"

11.81. Mr Toohey's observation reflected a "NSW Cabinet System diagram" which outlines steps to be taken outside eCabinet and inside eCabinet for a submission to be placed before Cabinet or a committee of Cabinet for decision. Nigel Blunden, who was Mr Baird's director of strategy, and his senior adviser when Mr Baird was treasurer, explained that eCabinet is the electronic document management system that deals with Cabinet submissions and submissions to committees of Cabinet. He said that the NSW Cabinet System diagram reflected the common practice that was taken to submissions that went to the ERC for consideration.

11.82. The NSW Cabinet System diagram sets out times allocated to various stages of the submission process, such as "Outside eCabinet, Pre-draft, Policy planning, project management, research, data collection, analysis, impact assessment, targeted consultation." Inside eCabinet, the "Proposal" also goes through a number of steps: "Draft Submission Stage, Comments on Draft (min 5 days), Final Submission Stage, Coordinated Comments (min 2 days)" and "Lodgement, (min 6 days before the meeting." Following the comments on the draft submission, the diagram allowed for a redrafting of the submission to take into account draft comments. Mr Blunden said the staged process that involves interagency comments before anything gets before the Cabinet or a committee of Cabinet allowed other agencies adequate time to comment on a proposal.

A purported business case

11.83. Mr Toohey described the ACTA business case as "purport[ing]" to be such. This was because none of what he described as work essential to the preparation of a cabinet submission, such as the due diligence of the proposal as set out in the NSW Cabinet System diagram, had occurred to what he thought was the standard level of thoroughness.

11.84. Mr Toohey concluded from his first impressions that the ACTA business case did not "stack up" for several reasons, all of which were material matters:

- there was no project plan, so the Office of Sport had no idea of how long the project would take to deliver

- there was no real design work, only an aerial map of the area where the proposed building was going to be built so there was no basis to know whether or not the projected $6.7 million construction cost was correct
- there was no risk or options analysis which was standard work to substantiate the costs[408]
- he was not aware of any competitive process around the selection of the site insofar as what was being provided was a conference facility: that is, no comparison of whether greater or lesser economic benefit may flow to the state from constructing a new conference facility with public funds in (say) Albury as distinct from Wagga Wagga – such testing should be part of the options analysis and the ACTA business case
- the economic analysis was somewhat optimistic, and it did not make sense: it was based on an influx of tourism particularly from international tourism but it was talking about one international event every 12 years
- it did not comply with key sections that Treasury policy around business cases expected
- there was no way of knowing whether the costs were robust as the ACTA business case did not comply with Treasury policy in this respect
- there was an assumption that travellers would be staying longer without any change to the event calendar which did not seem to follow from the fact of an upgraded clubhouse alone
- there was no basis upon which to assess the accuracy of the costs, nor any indication of whether the $6.7 million factored in a contingency fee
- there was no indication as to who would pay for operational and maintenance expenditure costs
- there was no indication of how the project was to be managed, nor any assessment of the risk that it could be delivered at all or at least on time, so as to be able to determine whether it was a feasible project
- he estimated costs within the ACTA business case were internally inconsistent (variously $6.1 and $6.7 million).

11.85. Mr Toohey further told the Commission that the ACTA business case was focused on benefits to Wagga Wagga, and the assumptions underlying it appeared to be based on conferences already taking place elsewhere in Wagga Wagga so as to amount to "cannibalising local events", such that it may not have accurately conveyed net benefits even at the level of the local economy – which in any event was not the correct method to calculate the BCR. Rather, (as earlier indicated) that analysis had to be undertaken by reference to the benefit to the state economy.

11.86. In short, in Mr Toohey's opinion, the ACTA business case was not of sufficient quality or rigour to support a grant of the many millions of dollars that were being sought. He regarded it as providing "scant and inadequate information that didn't meet the NSW Government's own standards and policies". He could not understand why the ACTA proposal was being pursued "on such a flimsy basis".

[408] Mr Toohey's view concerning the absence of an options analysis was consistent with the NSW Government "Guide to Cost Benefit Analysis" as in force at March 2017 which states that a cost benefit analysis from which a BCR might be derived "should canvass a range of realistic options. It is not sufficient to assess only a single option. The challenge is to specify and shortlist a realistic set of alternative options". Although that policy and guidelines paper did not exist at the time that the business case was prepared, similar guidelines did exist to similar effect: see, for example, NSW Treasury, Economic Appraisal Principles and Procedure Simplified (TPP 07-6) at [6.2] and NSW Treasury, NSW Government *Guidelines for Economic Appraisal* (TPP 07-5) at [4.2].

11.87. When shown Mr Toohey's reply to his 15 November 2016 email, Mr Doorn said it confirmed his recollection "that we were lost for the, the detail about the [ACTA] project". He shared Mr Toohey's view that the project could not be supported on its underlying merits – "it didn't stack up". He understood the argument advanced by ACTA to be predicated on increased tourism into the regions but, as might be expected of the Office of Sport, they "weren't experts on regional tourism" and from a sporting facility perspective, there "certainly wasn't enough benefit from … what [the Office of Sport] could see".

11.88. It would have been consistent with Mr Doorn's practice at the time to relay the view the Office of Sport had formed about the ACTA proposal to "the minister's office … because that would then structure the way in which we would present a recommendation or the language we used in a Cabinet submission". The advice would have been to the effect that "the quality of the information available to the Office of Sport as at November of 2016 was not of a sufficient quality as should properly support funding for the building project". He would be conveying that information to both his chief executive, and he and the chief executive when they met with the minister and the minister's office would be having those discussions with them as well.

11.89. In summary, the Office of Sport adopted the position that "additional support information" should first be obtained before committing to funding the ACTA proposal due to its view that the information available at the time that the ERC submission was being drafted was not of sufficient quality or detail to support a building project of the magnitude sought. Its position was that the ACTA proposal:

- was seen as a low-priority project, having been ranked lowest priority in the 2013–14 new policy proposals
- had not been identified as a priority as part of the FNOSI study
- was not supported by a business case of sufficient quality or detail as would support capital expenditure of the magnitude proposed
- did not take into account that there was already an existing Olympic standard shooting facility in the Greater Sydney area with which it would compete for events.

11.90. Despite its concerns, the Office of Sport continued to assist with getting the ACTA proposal before the ERC. Mr Doorn was questioned by Counsel Assisting about this assistance in the face of the strong opposition to the proposal within his department:

[Counsel Assisting]: *Would you regard it in your experience as a career limiting move to in effect continue to give advice to the minister to the effect that, well, we think this is a bad idea?*

[Mr Doorn]: *Yeah, I think there comes a point in time where you, you would, yeah, I think that using that language, you've been given a task by the minister. You've had the robust discussion in either minister's meetings or whether it's to do with in briefing notes and then the time comes to present the information,* ***you would present the information that's going to be proactive, allow the minister to achieve his policy objectives and in this case trying to find a way to get that funded.***

[Q]: *Is that language that you're prepared to adopt in answer to my question a career limiting move?*

[A]: *Oh, yes. No, no. Yeah, no. I mean I, I'm not suggesting it's a sackable offence or anything like that, but one of the things you've*

got to do as a senior public servant is ride that balance between giving frank and fearless advice, and then once, once that's gone, you would then say okay, well, I've given, if the decision is to still progress then we're going to clearly make our best endeavours to support the policy objectives of the government.

[Q]: ***Because ultimately the minister as the elected individual rather than the agency representative has to make the decisions in relation to issues of this kind.***

[A]: *Yeah, correct, correct.*

(Emphasis added)

11.91. Having taken up Mr Doorn's "challenge", Mr Toohey began drafting an ERC submission for the ACTA ERC proposal. It ultimately went through seven iterations until approved to go before the ERC just before that meeting took place.

A flimsy basis for funding

11.92. The first ERC draft, produced on 15 November 2016, reflected Mr Toohey's concerns about the paucity of detail in the ACTA business case. It proffered two alternative courses of action: either that the ERC allocate $500,000 to the Office of Sport to engage consultants to prepare a feasibility study and business case for the ACTA clubhouse/conference facility; or that the ERC approve the allocation of $6.7 million to the Office of Sport to develop the facility. The draft pointed out that "In the absence of a feasibility study and because capital cost estimates have not been market tested, it is unlikely that they are within the levels of robustness recommended in NSW Treasury's *Guidelines for Capital Business Case*". Among other recommendations, it proposed that the ACTA should enter a formal commitment with the Office of Sport to work with Infrastructure NSW to confirm, through market testing, the capital cost of the project to the level of robustness required in Treasury's *Guidelines for Capital Business Cases* and to review the ACTA business case prior to going to market for the delivery of the facility.

11.93. Mr Doorn's recollection was that this first draft would have been used "to have a discussion with the minister's office". This was not an uncommon sort of dialogue – "there would always be consultation." However, that involving the ACTA "was a little bit more iterative than others, that were … a bit more cut and dry". The need for more discussions arose from "whether the minister or the minister's office were asking for the money straight upfront, or whether or not it was sort of more [the Office of Sport's] position to, to seek … additional support information". The interaction with the minister's office can be seen by people such as Mr Ayres' chief of staff, Mr Hall, making amendments to drafts of the ACTA ERC submission.

11.94. Mr Doorn's recollection was that he pushed for a feasibility study as Mr Toohey had put in the first draft in his discussions with the minister's office because of his view that the information available as at November of 2016 was not of a sufficient quality or detail to support funding in the amount sought for a building project. However, it is apparent that that advice was not accepted because a second draft also produced on 15 November 2016 did not contain the feasibility option. Mr Doorn said this "would have been based on feedback and advice from the minister's office as to which option to go for".

11.95. Later that day, Mr Toohey had a conversation with Mr Doorn, the sense of which was that the minister's office "wanted to allocate the funds and get it going, and that it was somehow related to hosting events in either later 2017 or 2018".

11.96. Mr Ayres told the Commission that whilst he did not recall receiving advice that a feasibility study ought to be undertaken, he was of the view that the ACTA business case was adequate.

11.97. On the evening of 15 November 2016, Mr Doorn sent Mr Hall and Mr Landrigan an email with the second draft ERC submission attached. He told them, "It's been a bit of a mad scramble here this afternoon to pull together a draft ERC submission regarding the Clay Target shooting facility in Wagga" and wrote "If you are comfortable with where this is heading, we can complete the remaining sections tomorrow (or tonight if you are desperate!)". He also asked if they had a date for the ERC yet.

11.98. The second draft recommended that the ERC:

> *Approve the allocation of $6.7m in 2016/17 to the Office of Sport to provide a grant to the Australian Clay Target Association (ACTA) for the development of a large clubhouse/ conference facility and associated infrastructure at their existing facility in Wagga Wagga, NSW subject to: a. confirmation of the ACTA cost estimates through a competitive tender process b. development of a project delivery plan c. ACTA undertaking to meet all on* [sic] *ongoing maintenance and operational costs and any capital costs for the facility that are greater than $6.7m.*

11.99. The ACTA business case contained different figures for the projected project costs. At one point the total upgrade was budgeted at $6.1 million, but on the following page, the capital and maintenance cost in nominal terms was about $6.678 million or about $6.53 million with a 7% discount rate applied. Mr Toohey regarded the variation in figures as "one of the problems with the quality of the document". He decided that "for the sake of the Cabinet submission and the financial risk to government, [he] was better off using the most expensive cost that was cited. So [he] proposed that the funding was on the worst-case scenario in the absence of any independent advice to the contrary."

11.100. On 16 November 2016, Mr Toohey sent Mr Doorn a third ERC draft. This reduced from $6.7 million to $5.5 million the amount it was recommended the ERC allocate to the ACTA project. The reduction was the consequence of Mr Toohey having confirmed that the ACTA was going to contribute $1.2 million towards the capital costs of the facility.

A date for the ERC meeting?

11.101. On 16 November 2016, Mr Nicolai Meulengracht, the director of executive services in the Office of Sport, sent an email in apparent reply to Mr Doorn's email of 14 November 2016, albeit that he not been a direct recipient of that email. Mr Meulengracht was the main conduit from the Office of Sport looking after the process of submissions into the Cabinet process, including ERC submissions. He advised Mr Doorn:

> *Note that if the Minister wants something to go on the ERC agenda outside the six-monthly* ***input to Cabinet forward agenda process****, he needs to write a letter to the Treasurer requesting that and reasoning why this is urgent and unavoidable. We can draft the submission, sure, but it can't be progressed to ERC until the Treasurer has approved it as a future agenda item. This might be an opportunity to buy some time and not get too involved in drafting a submission until there is some certainty that it can even go to ERC. I'd be happy to get our DLO started on drafting such a letter for the Minister, but I won't do anything until you say so.* (Original emphasis)

11.102. On 22 November 2016, Zach Bentley, an adviser within Ms Berejiklian's office who was employed in the NSW Government whip's office when Mr Maguire was the government whip, prepared a briefing note for Ms Berejiklian. The briefing note was entitled "Australian Clay Target Association – ERC" and identified the "Issue" to which it related as follows:

- *Minister Ayres's office has developed a submission for ERC's consideration.*
- *they would like the matter to be dealt with by ERC this year, in order for the Australian Clay Target Association (ACTA) to commence capital works in the 2017 financial year and have them completed by January 2018 in time for the world clay target championships.*

11.103. Under the heading "Background", Mr Bentley noted the following matters:

> *1.2. This issue came to head* [sic] *during a discussion I had with Daryl last week, prior to him meeting with you.*
>
> *1.3. Daryl informed me he had been in discussions with Stuart's office for months. They only discussed the issue with us after Daryl raised in* [sic] *late last sitting week.*
>
> *1.4. They have drafted a submission for lodgement.*
>
> *1.5. Armine* [Nalbandian][409] *advises the only possible date is 14 December.*

11.104. A week before Mr Bentley's briefing note was the week commencing 14 November 2016, the day the Office of Sport was asked to urgently prepare an ERC submission in relation to the ACTA proposal.

11.105. Ms Berejiklian told the Commission that she did not recall meeting with Mr Maguire in mid-November 2016 regarding the ACTA proposal but accepted the possibility that such a meeting took place. She agreed that it was not within Mr Maguire's power to put forward a Cabinet submission as Cabinet submissions could only be put forward by ministers. She further accepted that Mr Maguire had had discussions with Mr Bentley and her with a view to getting her to give a request or direction that the ACTA matter be placed on the ERC agenda.

11.106. On 2 December 2016 at 4.08 pm, Mr Bentley sent the following email to Ms Nalbandian:

> *Subject: Wagg* [sic] *Wagga Clay Target Shooting*
>
> *The Treasurer has requested this issue be put on the agenda for the ERC meeting on 14 December.*

11.107. On the same day, at 4.09 pm, Mr Bentley sent Mr Hall and Mr Landrigan an email referring to the same subject which he copied to Ms Nalbandian asking, "Please upload submission. ERC will deliberate on 14 December."

11.108. Mr Bentley told the Commission that based on the briefing note of 22 November 2016 and the email of 2 December 2016, "the Treasurer would have approved" the ACTA funding request be put on the ERC agenda.

11.109. Mr Landrigan forwarded Mr Bentley's 2 December email to a Ms Little in the minister's office with the request, "Please action". Mr Doorn in turn forwarded the email chain to Mr Meulengracht and Mr Toohey asking them to action the request.

[409] As at December 2016, Armine Nalbandian was a deputy chief of staff and policy director for Ms Berejiklian and was Ms Berejiklian's director of the ERC.

11.110. Mr Toohey understood the advice that the treasurer had asked that the ACTA submission be put on the agenda for the ERC meeting on 14 December as a "political desire to get this finalised in December 2016".

11.111. Ms Berejiklian agreed that to have a matter put on an ERC meeting agenda urgently would require the intervention, or at least the agreement, of the treasurer. She said that she presumed that she was asked by her office and agreed for the ACTA proposal to be placed on the ERC agenda. She agreed that, as treasurer, it was for her to determine which matters were placed on the ERC agenda (subject to any countermanding by the premier of the day).

11.112. On Saturday, 3 December 2016, Mr Toohey sent an email to Mr Meulengracht attaching the ACTA ERC submission and advising:

> *The attached version has been approved by the Minister's Office for lodging. As you can see, the Treasurer has approved this to go to ERC on 14 December. Attached is the submission and a document that needs to be attached when lodged. Given the timeframe requested by the Minister, this has not been reviewed by Treasury, DPC or other agencies. As noted in the submission the draft lodgement stage will be the forum for agency consultation.* ***Paul and I appreciate that this is not standard procedure.*** *This has not been submitted to Blair for release.* (Emphasis added)

11.113. At that stage, the draft ERC submission had not been subject to any interagency consultations or opportunities to comment. The lack of compliance with "standard procedure" was because the ACTA ERC submission was being fast forwarded directly to the lodgement stage, rather than undergoing a draft and final submission stage.

11.114. The reference to "Blair" was to Blair Comley, then the secretary of the Department of Premier and Cabinet (DPC). In the ordinary course, the DPC secretary approved all Cabinet and committee papers lodged into the Cabinet secretariat process.

11.115. On 5 December 2016, Mr Meulengracht sent an email entitled "Hasty ERC submission: Wagga Wagga Clay Target Shooting" forwarding Mr Toohey's 3 December email to "@OoS (Office of Sport) EMS Ministerials Mailbox" and Andrew Rode (at DPC). The email was copied to Mr Toohey, Sally Walkom in the DPC Cabinet Liaison Unit, and Caroline Dixon and Jeff Lewis in the Office of Sport. Mr Meulengracht stated:

> *Attached is an ERC submission for hasty progression re. a business case for upgrading the Clay Target Association (ACTA) clubhouse and conference facility in Wagga Wagga. In the email trail below, you'll see that it has been agreed for consideration on 14 December as per the direct request from the Minister for Sport to the Treasurer. Also note that there has not been any external consultation which would need to be part of the eCabinet consultation process.*

11.116. Mr Meulengracht asked the recipients to give effect to lodging the submission proposal in eCabinet. He also asked Ms Dixon to "please check if Matt [Miller] is ok to progress" but commented, "I suspect he is already across this from conversations with MO [the minister's office] and Paul [Doorn]".

11.117. Mr Toohey forwarded Mr Meulengracht's email to Kent Broadhead, a principal policy officer, Skills Social Policy Group, in DPC, with the remark, "Will give you a ring". Later, at 12.42 pm on 5 December 2016, Mr Broadhead sent an email to Myles Foley, director finance and governance and chief financial officer in DPC, headed "ERC submission–Clay Target Facility in Wagga Wagga" stating:

> *We understand that Minister Ayres has agreed with the Treasurer that a submission seeking $5.5 million for a Clay Target Association in Wagga Wagga be considered by ERC on 14 December. There'll be a one stage process only.*
>
> *The current rec is:*
>
> *i)* ***Approve*** *the allocation of $5.5m in 2016/17 to the Office of Sport to provide a grant to the Australian Clay Target Association (ACTA) for the development of a large clubhouse / conference facility and associated infrastructure at their existing facility in Wagga Wagga, NSW subject to:*
>
> a. *confirmation of the ACTA cost estimates through a competitive tender process*
>
> b. *development of a project delivery plan*
>
> c. *ACTA undertaking to meet all on ongoing maintenance and operational costs and any capital costs for the facility that are greater than $5.5m*
>
> ***Are you comfortable that these words are clear that supplementation is being sought, given that neither OoS or DPC has funding for this?***
>
> (Emphasis added)

11.118. Mr Ayres interpreted the first sentence of Mr Broadhead's email as "our officers interacting with each other, not me and the Treasurer". He agreed it was possible he had had "a direct discussion and agreement with Ms Berejiklian to have it on the agenda", and possible that he did not. He could not recall one way or the other. The effect of there being only a "one stage process" was that "a stage where it would be circulated amongst departments" was by-passed.

11.119. Mr Foley forwarded Mr Broadhead's email to Yogi Savania, an acting director of the Premier and Cabinet Branch in the Industry and Services Division of Treasury at 6.12 pm on 5 December 2016. At 6.48 pm, Mr Savania forwarded Mr Foley's email to Mr Bentley, and asked if he had any background on the submission and if he could please call him the next day to discuss. He also forwarded it to Enrico Sondalini, his executive director, and advised him he would seek Treasury's views about the submission the next day.

Busy days

11.120. At 8.04 am on 6 December 2016, Olivia Graham, an assistant policy officer in the social policy group in the DPC, sent Mr Meulengracht an email which she copied to Mr Broadhead in relation to the ACTA matter. She advised, "DPC's Chief Financial Officer has reviewed the submission and recommended a change to the wording of the recommendation to make it more specific." She asked Mr Meulengracht to amend the submission to reflect the suggestion.

11.121. At 8.20 am on 6 December 2016, Mr Broadhead sent an email to Mr Blunden, who as earlier noted was Mr Baird's director of strategy. He was also the sports adviser to the premier at the time. The email stated:

> *Nigel*
>
> *DPC understands that Minister Ayres has agreed with the Treasurer* [then Ms Berejiklian] *that the attached draft submission be listed for ERC on 14/12/16. I wanted to confirm that the Premier's Office was aware of the item and whether there were any specific views.*

The submission seeks $5.5 million to assist the Australian Clay Target Association upgrade the Wagga Wagga Clay Target Shooting Facility in time for the 2018 World Down the line championships and for ongoing regional benefits. There are some concerns regarding the business case and planning, so it is proposed that the funding be contingent upon firmer market based costing and project planning.

11.122. Mr Blunden forwarded Mr Broadhead's email to Mr Hall (Mr Ayres' chief of staff) and Joshua Pearl (who worked in the treasurer's office) at 9.30 am asking, "Gents–are we aware of this one? News to me. Seems like a lot of $$$". Mr Hall replied at 9.40 am advising, "Yes we are aware of this. Wagga Wagga is pushing the barrow on this. We send [sic] we would send it to ERC and let them decide." Mr Pearl replied at 9.59 am, "Yes we are aware. Currently scheduled for ERC for the 14 December."

11.123. Mr Blunden told the Commission his initial view about the ACTA matter was that it should not be put on the ERC agenda until the ACTA business case was finalised. His understanding was that in the ordinary course, working in Mr Baird's government and in Mr Baird's office, things like finalising a business case would be done in advance of a matter getting before Cabinet or a committee of Cabinet. He said the "prudent approach" was to have "a fully rigorous business case against the proposal to put to [a] committee of Cabinet".

11.124. This view was reflected in an email Mr Blunden sent to Mr Hall and Mr Pearl at 10:15 am on 6 December 2016 saying, "Let's hold this one till the business case is finalised and do it once. DPC will go back to agencies. Thanks." Mr Hall replied, "We have the business case."

11.125. On 6 December 2016 at 11.26 am, Mr Bentley forwarded a copy of the draft ACTA ERC submission to Mr Savania. Soon after, Mr Savania sent an email to Josh Milner, a policy officer in Treasury, who reported to him. The Office of Sport and sport policy fell within the broader Premier and Cabinet cluster in Treasury. Accordingly, Mr Savania's team was responsible for budgetary, financial and policy matters for the cluster and the agency.

11.126. Mr Savania asked Mr Milner to try to get his hands on the business case referred to in the submission. He added, "I spoke to Zach [Bentley] re this. The Treasurer has requested this be brought forward and has indicated an inclination to support the proposal." Mr Savania said that given the time that had lapsed since the event, he did not have much of a recollection about the conversation he had with Mr Bentley or the exact time he had it. However, he said his statement to Mr Milner in his email "would be reflective of the conversation".

11.127. Ms Berejiklian agreed that before the ERC meeting of 14 December 2016 she indicated to NSW Treasury her support for the ACTA proposal, although she said that she could not recall whether that would have been before or after she received NSW Treasury advice about it. She said it was not uncommon to do so as attempts were made before every meeting to try to ascertain what people's positions were on various things to make the meeting run as smoothly as possible.

11.128. At 11.57 am on 6 December 2016, Mr Broadhead, sent an email to Mr Meulengracht and Ms Graham which he copied to Mr Toohey and the @OoS EMS Ministerials Mailbox. Its subject was "ERC submission–Clay Target Facility in Wagga Wagga". He stated, "Nic [Meulengracht] and Michael [Toohey] We've had some significant feedback on the submission from the Premier's Office. Could one or other of you please give me a call urgently?"

11.129. At 2.14 pm, Sharon Paudel, emailing from the @OoS EMS Ministerials Mailbox, informed Mr Toohey that "I spoke to Kent [Broadhead] at DPC since Nic is not here today. It may be best to talk directly to him to understand DPC's concerns. Also, Matt [Miller] has since approved the Submission document so it is ready for Secretary approval now. I will send it through shortly."

11.130. At 12:47 pm on 6 December 2016, Mr Broadhead sent another email, on this occasion to Mr Doorn and Mr Toohey, and copied it to Mr Meulengracht and Ms Graham. He advised:

> *As discussed, the Premier's Office has questioned why the Wagga Wagga Clay Target Facility submission could not be delayed until the new year, to allow time for market testing of costings and project planning to be completed.* ***The submission does not make a clear case as to why it requires approval before Christmas, although discusses the broad 2018 construction deadline.***
>
> *If these matters can be addressed fully in time for the submission to be lodged, the Premier's Office appears broadly OK for the submission to proceed to the 14th, noting the extremely shortened timeframes. Without this, it is likely that the Premier would seek that the item be moved to next year to allow the issues to be addressed anyway.*
>
> *Minister Ayres office may wish to discuss the priority of the item direct with the Premier's Office. We are able to move the item though the DPC approval process depending on the outcome of any discussions.* (Emphasis added)

11.131. At 2.27 pm on 6 December 2016, Mr Toohey sent an email to the @OoS EMS Ministerials Mailbox which he copied to Mr Meulengracht and Mr Doorn, advising Ms Paudel, "Paul and I spoke to Kent. Will send you through his reply. The MO needs to speak to the Premier's Office."

11.132. At 3.40 pm on 6 December 2016, Mr Doorn forwarded Mr Broadhead's 12.47 pm email to Mr Landrigan and copied it to Mr Hall.

11.133. At 4.31 pm on 6 December 2016, Mr Landrigan emailed Mr Hall asking, "Was there any deadlines for the funding that would make this a bad outcome?"

11.134. On 7 December at 4.07 pm, Mr Toohey emailed Mr Landrigan (copying the email to Mr Doorn), apparently forwarding a copy of the ACTA ERC submission to Mr Landrigan at Mr Doorn's request.

11.135. On 7 December 2016 at 5.24 pm, Mr Landrigan sent Mr Blunden an email in which it appears he sought to summarise the ACTA ERC submission, as well as attach that document to the email. Among other matters, the email explained "ACTA intend to commence construction in 2017 with completion by January 2018 in time for the World Down-The-Line (DTL) Clay Target Championships in March 2018 … **Due to the urgency with the Championships in March 2018** and the absence of a feasibility study and because capital cost estimates have not been market tested…" (original emphasis). Mr Landrigan then set out a series of formal commitments with the Office of Sport that the ACTA ERC submission proposed ACTA undertake.

11.136. On 8 December 2016, Mr Landrigan sent Mr Toohey and Mr Doorn an email in relation to the ACTA bid advising, "I am advised that PO [premier's office] is happy for this to progress. Can we try again with DPC?" Mr Blunden accepted that this email "more likely" reflected his "call", although he could not recall how, despite the view he had expressed on 6 December 2016 about the need for a robust business case, that view was not ultimately the one the Premier's Office adopted.

11.137. On 9 December 2016, there were still issues with how the ACTA ERC submission was expressed. Mr Toohey was communicating with Treasury to formulate conditions to go into the ACTA ERC submission, such that if they were not complied with by ACTA the grant monies could not be delivered, with the intention of safeguarding the government's interest.

11.138. On the same day, Alex Meyering, a senior policy officer in Cabinet Liaison, forwarded to Mr Meulengracht Treasury advice that it "did not approve the QA, and would like the Final sub to be rejected". The impasse appeared to be the fact that "the recommendation mentions the funds are a grant in 2016-17, yet the Financial Impact Statement states that it is a capital expense in 2017-18. This needs to be rectified and returned ASAP." Debate also revolved around whether the word "allocation" should be changed to "appropriation".

11.139. Treasury's advice that the ACTA submission should be rejected was also forwarded on 9 December 2016 to Mr Bentley and copied to Mr Milner. On 12 December 2016, Mr Milner forwarded the advice to Mr Savania.

11.140. Mr Toohey's reaction was that he "just want[ed] this finished, is it really going to be material to the difference" and that "There was enough pressure getting this finished as it was." A sense of his frustration can be seen from the email he sent to Mr Landrigan on 9 December 2016 at 1.19 pm, copied to Mr Doorn, Mr Milner, Mr Meulengracht and Ms Hodson in which he advised, "Treasury are happy with the updated Financial Impact table. The Rec was refined following consultation with DPC and Treasury and makes it clear that OoS is seeking new funding which needs to come via DPC" and asked, "Please let me know if there's more I can do to help." At 1.55 pm on 9 December he sent an email to Mr Landrigan asking "Marc – can the MO please advise if they are ok with the Sub so that the e-cabinet process can be formally initiated?" Mr Landrigan advised him to proceed.

11.141. On 12 December 2016 at 2.39 pm, Mr Milner sent an email to Mr Toohey which he copied to Mr Savania asking whether Mr Toohey knew "the status of the Wagga Submission following the amendments we discussed on Friday? At this stage we still haven't received anything through eCabinet". Mr Toohey replied, "Approved by the MO to go [to eCabinet]. There were no further changes to the version after getting your input (thanks again) DPC wanted some minor changes which made no material difference to what we had already agreed so that's the end of that. Cab Sec have told us that this is to be lodged in e-cabinet so I'm on the back of the people here to get on with it. If you need to start drafting advice, the version I sent out with your changes should be fine."

11.142. At about 3 pm on 13 December 2016, Mr Meyering sent an email to Ms Paudel and the @OoS EMS Ministerials Mailbox advising, "The submission Development of sporting Infrastructure at the Australian Clay Target Association facility in Wagga Wagga (SC0999-2016) was cleared by the DPC Secretary yesterday afternoon and by Ayres's office soon after that. The submission was circulated last night as a final for one day of comment, closing today (COB 13/12/2016). The submission will be lodged this afternoon after the comments have closed."

11.143. Lodging the final ACTA ERC submission one or two days before the ERC meeting was well outside the ordinary timeframes for dealing with an ERC submission. In May 2017, Daniel Blacker, an executive officer in what had become the Regional NSW Group (a unit within the DPC) briefed Gary Barnes, by then deputy secretary of the Regional NSW Group, as to the history of the ACTA proposal. Mr Blacker observed in this respect, "Late ERC agenda added ~12/13 December 2016 (i.e. the proposal didn't go through the normal 2-stage 6-week cabinet submission process)".

11.144. Mr Ayres was not a member of the ERC but was the proponent minister in relation to the ACTA proposal. He could only participate in the ERC's deliberations if invited to do so in relation to a proposal for which he was the proponent. It is customary for ministerial staff to provide a proponent minister with speaking notes which set out key matters to raise if the minister is called into such a meeting.

11.145. As a matter of practice, it would ordinarily be the agency which would prepare a first draft of speaking notes for a meeting of Cabinet or a committee of Cabinet.

11.146. On Monday 12 December 2016 at 9.41 am, Jane Little, the department liaison officer in Mr Ayres' office, sent an email to the @OoS EMS Ministerials Mailbox asking for advice as to "when the MO should be receiving speaking points for ERC on Clay Target Shooting", and reminding the recipients, "The meeting is on Wednesday". The email was forwarded to Mr Toohey with a copy to Mr Doorn.

11.147. Speaking points or notes are "meant to be a simple sort of concise summary of what the proposal was about and the benefits of the proposal". Mr Toohey prepared a draft of what were described as "Suggested Speaking Points/Notes" the contents and accuracy of which were endorsed by Mr Doorn. Mr Toohey forwarded the "cleared" speaking points to the @OoS EMS Ministerials Mailbox at 2.17 pm on 12 December 2016.

11.148. Mr Toohey said it was uncommon in his experience for the agency speaking notes to be changed or amended at the ministerial office level. Mr Doorn agreed that it was not custom or practice for the speaking notes to be amended, otherwise than stylistically, at the ministerial office level because the content has been approved by the bureaucracy.

11.149. The ERC meeting was due to commence at 4 pm on 14 December 2016. At 2.28 pm, Mr Landrigan emailed a document described as "ERC Talking points" to Mr Hall. The document was not prepared by Mr Toohey but appeared to build on the document he had prepared. Mr Toohey's understanding was that the changes were made in the minister's office. It is apparent that elements of the ERC Talking points had been set out in the email Mr Landrigan sent to Mr Blunden on 7 December 2016.

11.150. The following passage in the ERC Talking points (which did not appear in Mr Toohey's draft or in the email Mr Landrigan sent Mr Blunden on 7 December 2016) was highlighted in yellow:

> *Note: If asked the Australian Clay Target Association has advised that the World Down-The-Line (DTL) Clay Target Championships in March 2018 will continue in Wagga Wagga even if the upgrade is not completed.*

11.151. On the first page the ERC Talking points stated, "The Australian Clay Target Association intends to commence construction in 2017 with completion by January 2018 in time for the World Down-The-Line (DTL) Clay Target Championships in March 2018." On the following page, the document continued, "**Due to the urgency with the Championships in March 2018** and the submission and business case have not been subject to any agency consultation or independent review…" (original emphasis).

11.152. Mr Ayres said it was standard practice to have speaking/talking points "so you could quickly read over them and refresh your memory". Had he been invited into the ERC meeting, he would have put forward the "urgency with the championships in March, 2018" of the ACTA proposal. His recollection was that he waited outside the ERC meeting room ready to be called or not called. He ultimately did not have to go in, and was told the ACTA submission had passed the ERC by someone who came out of the room to tell him he did not need to go in.

Risky business

11.153. On or around 12 December 2016, Mr Blunden prepared a "robust, forthright" memorandum about the ACTA proposal for then premier Mr Baird. Its preparation appears to have commenced on 8 December 2016, the day the premier's office advised it was "happy" for the ACTA proposal "to progress". Mr Blunden said the advice addressed questions around the urgency of the proposal, the fact that in his view there was an inadequate business case or BCR put against it and that "we should ask for it to be further developed before this was considered".

11.154. The advice was headed, "Wagga clay target shooting (Nigel)" and commenced,

> *As Joel Goodsen famously said, sometimes you gotta say WTF.*[410]

11.155. These words reflected Mr Blunden's view that the ACTA proposal went "against all of the principles of sound economic management", of "ensuring that before public money is spent, there's a sufficient analysis to indicate the level of the benefit to the state by the state spending money [and] of spend[ing] taxpayers' money wisely". In many respects this echoed the views expressed by those at the Office of Sport involved with the ACTA ERC submission and their view that the ACTA business case did not "stack up" and their interactions with the minister's office advising of their views to this effect.

11.156. Mr Blunden's advice made it clear that he was somewhat incredulous that the ACTA proposal was being brought forward in the state it was in. He told the Commission that he saw it as neither a sensible, well-founded economic decision nor could he see a justification as a matter of political strategy.

11.157. The advice went on to say:

- *This minute asks for $5.5m for the Australian Clay Target Association to develop a large clubhouse and conference facility in Wagga.*
- *The estimated total cost of the upgrade is $6.7m. The shooter dudes have graciously put up $1.2M;*
- *commence construction in 2017*
- *completion by January 2018 in time for the World Clay Target Champs in March 2018.*
- *It's to be known as the Maguire International Shooting Centre of Excellence.*

11.158. Mr Blunden said that the last bullet point was a reference to Mr Maguire "pushing the barrow on this … being the person advocating for the upgrade … the principal advocate within government". He also agreed in response to counsel for Mr Barilaro, that one interpretation could be that "that the ministries both wanted Mr Maguire to look good, they wanted to give him credit in the electorate".

11.159. The memorandum continued:

- *Business case claims the new facility will generate a NPV of $12.4m with a BCR of 2.31*
  - *Increased tourism accounts for 97% of forecast benefits (so it's suss)*
  - *The business case has not been subject to any independent review*
  - *There's no feasibility study*

[410] An allusion to Tom Cruise's character, Joel Goodsen's, statement in the movie "Risky Business".

11.160. The absence of an independent review of the business case was a reference to the fact that the ACTA business case was effectively done by the proponent for the grant, whereas "what we required was an independent business case that would judge it with a bit more scrutiny and rigour". The absence of a feasibility study was a significant factor as to whether, at least in Mr Blunden's view, the ACTA submission should be supported or not within the ERC. In his experience working in the Baird Government, an independent analysis of the kind he identified would be ordinarily expected in relation to a building grant program in the millions of dollars. He was not aware whether any government agency had at any time suggested that a feasibility study be prepared.

11.161. Mr Blunden's memorandum continued:

- *The capital costs haven't been market tested*
- *Costs, revenue and demand are based on the clay shooters & Wagga council's numbers*
  - *They claim the new centre will also be used at other times for conferences etc*

- *The business case doesn't ask operating and maintenance costs…. YET.*

11.162. Mr Blunden said that the fact the business case did not ask for operating and maintenance costs was of concern to him because, once the capital expenditure is made, there will be recurrent costs in the maintenance of the asset and a question arises as to who can and will meet those costs.

11.163. The memorandum continued:

- *[The Office of] Sport want to make the funding contingent on the clay shooters committing to;*
  - *Market testing the capital costs of the project to the level of robustness required by Treasury*
  - *Delivering the thing by January 2018, with any increased costs being borne by shooters*
  - *Meeting the operating and maintenance costs for the facility.*
- *But fear not, the CEO of clay shooting Australia has **verbally** advised they will take on the financial and delivery risks and ongoing costs of the facility.*

  (Original emphasis)

11.164. The memorandum concluded:

> *They should go away, test the assumptions, verify the business case and then come back when it's solid.*
>
> *(this was suggested and it was taken off the agenda, but Daryl fired up and Gladys put it back on)*
>
> ***Recommendation:** oppose. Gladys and Ayres want it. No doubt they've done a sweetheart deal with Daryl, but this goes against all of the principles of sound economic management. At the very least, let's target our marginal seats. Not one of our safest.* (Original emphasis)

11.165. Mr Blunden agreed that "oppose" meant to oppose in the ERC meeting. He could not recall what he intended by the phrase "sweetheart deal" but said he "meant no inference of anything improper". In his view, as at 2016, the seat of Wagga Wagga was regarded as a safe seat for the Coalition. He said that even if he had been of the view Wagga Wagga was a marginal seat, the ACTA proposal would have been assessed in the same manner to ensure that there was a benefit to the state.

11.166. Mr Blunden agreed that he had suggested that the ACTA proposal be removed from the ERC agenda. He said that he could not recall how he became aware that "Daryl fired up" – it may have been through a direct approach by Mr Maguire, or it may have been relayed to him by someone else (more likely relayed). He could also have written "was unhappy", reflecting the fact he learned Mr Maguire "expressed some concern that it wasn't on the agenda and that it was urgently needed to be on the agenda". He made the assumption that Ms Berejiklian had "put it back on" as he had "seen it back on the agenda for the ERC meeting on 14 December".

11.167. Mr Blunden told the Commission that he inferred Ms Berejiklian wanted the ACTA matter to proceed because "her office had put it on the agenda". In this respect his belief was that Ms Berejiklian wanted the ACTA matter to proceed in a substantive sense. He drew the same conclusion about Mr Ayres, because "[a]s the proponent minister it would be unlikely to put something forward to ERC if you weren't advocating for it".

11.168. Mr Blunden described his "overwhelming concern" as being "the urgency of this" as well as "the absence of … a rigorous BCR". He said, "We apply the same scrutiny to projects across the state, regardless of what electorate they're in but it was just a case of is this really the most appropriate expenditure of $5.5 million of taxpayers' money."

11.169. Mr Blunden described Mr Maguire as "a very enthusiastic member for parliament. He was advocating strongly for his electorate for projects like this. He would be in my ear regularly about getting the Premier to come and visit Wagga." However, he questioned whether the ACTA proposal was a government priority as it "didn't stand out as anything particularly special that was a requirement, and particularly with the lack of a, a rigorous BCR". He did not understand why the ACTA proposal was "something that required such an urgent decision 11 days before Christmas". It was a matter that he agreed stood out in his mind as one he remembered.

The Expenditure Review Committee

11.170. The role of the ERC is to assist Cabinet and the treasurer in framing the fiscal strategy and the budget for Cabinet's consideration, driving expenditure controls and monitoring financial performance, and considering proposals with financial implications brought forward by ministers. It is the only committee of Cabinet that can recommend any new spending or revenue proposals to Cabinet.

11.171. The procedural and operations rules for the ERC state:

> *Generally all funding decisions for recurrent and capital proposals, including new proposals, should be considered in the Budget process by ERC.* ***If a proposal is submitted for consideration outside the Budget process, the Minister will consult with the ERC Chair to reach agreement that the matter can be listed****. The Minister will need to demonstrate the proposal is:*
>
> - *unavoidable;*
> - *unforeseeable;*

- *genuinely urgent and cannot be considered in the Budget process; and*
- *cannot be accommodated within existing resources*

[…]

The treasurer is the chair of the ERC. The treasurer determines the order of proceedings, and summarises the decisions made for recording by the note takers.

[…]

(Emphasis added)

11.172. In the ordinary course it is up to the treasurer as to what goes on the agenda for a particular ERC meeting. However, both the premier and the treasurer can put something on or take it off the ERC agenda. Nevertheless, as a general practice, it is the treasurer who runs the ERC.

The ERC meeting – 14 December 2016

The ACTA submission

11.173. On 14 December 2016, the members of the ERC included, relevantly, the premier, Mr Baird, the deputy premier, Mr Barilaro and the treasurer, Ms Berejiklian.

11.174. The ACTA submission that went before the ERC was dated 12 December 2016. It recommended that the ERC:

Approve the expenditure and appropriation of $5.5m in 2016/17 to the Office of Sport, via the Department of Premier and Cabinet, to provide a grant to the Australian Clay Target Association (ACTA) for the development of a large clubhouse/ conference facility and associated infrastructure at their existing facility in Wagga Wagga, NSW subject to

a. confirmation of the ACTA cost estimates through a competitive tender process

b. development of a project delivery plan

c. ACTA undertaking to meet all ongoing maintenance and operational costs and any capital costs for the facility that are greater than $5.5M.

11.175. The NSW Treasury advice did not agree with the ACTA recommendation to the ERC. It recommended that the ACTA ERC submission not be supported as "a net benefit to the State [had] not been adequately demonstrated". Mr Savania said in this respect that "[a]s custodian of the ERC agenda, it would be the Treasurer's prerogative to bring forward any item for ERC consideration, and to indicate support for any proposal. However, given the Westminster system of governance, the arm's-length relationship between Treasury and the Treasurer's Office is always maintained". Ms Berejiklian observed that NSW Treasury's opposition to the ACTA recommendation to the ERC was its default position on matters such as this.

11.176. The key reasons Treasury identified for its position were:

1.6. The analysis undertaken by GHD indicates a BCR of 2.31 and a net present value of $12.4 million for the project, with increases in the local visitor economy accounting for 97% of the forecast benefits. ***However, the analysis is inconsistent with Treasury economic appraisal guidelines.***

> *1.7. These forecast benefits are reliant upon an increase in the local visitor economy through an increase in visitors to Wagga Wagga. As the majority of these visitors are likely to be from within NSW, the inclusion of these benefits in the economic analysis is inconsistent with the NSW Government Guidelines for Economic Appraisal (TPP07-5).* ***Based on this, Treasury is unable to accurately assess the economic benefits arising from the project from a State perspective.***
>
> *1.8.* ***The nature of the project, with its localised benefits and limited ability to draw additional visitors from interstate and overseas, means that a net benefit to the State from the additional $5.5 million in expenditure is very unlikely. The main benefit from a State perspective would be an international shooting event every 12 years.*** (Emphasis added)

11.177. In the event the ERC decided to support the grant, Treasury recommended that it should be funded from within the cluster and include the conditions identified in the submission. It also recommended that the first recommendation in the ERC submission be amended to read:

> *Approve a grant of $5.5 million in 2016/17 to the Australian Clay Target Association (ACTA) for the development of a large clubhouse/conference facility and associated infrastructure at their existing facility in Wagga Wagga subject to:*
>
> *a. Funding being offset within the cluster*
>
> *b. ACTA independently confirming, through market testing, the capital cost of the project*
>
> *c. The development of a project delivery plan*
>
> *d. ACTA managing and bearing the risk of the development approval process for the upgrades to the facility*
>
> *e. ACTA committing to deliver the facility by January 2018, including meeting any cost increases above $6. 7 m for the delivery of the facility*
>
> *f. ACTA undertaking to meet all ongoing maintenance and operational costs and any capital costs for the facility that are greater than $5.5m.*

The ERC meeting

11.178. During Mr Baird's premiership, there was a standing agenda item at the commencement of each meeting of Cabinet or a committee of Cabinet for the declaration of interests. The convention was that at the start of a meeting, any declaration of interest would be called for. Mr Baird expected that his ministers would declare any conflict of interest they had in relation to any agenda items being considered by Cabinet or a committee of Cabinet.

11.179. Mr Barilaro said that members of committees, such as the ERC, can seek advice from the DPC prior to a meeting as to whether it is appropriate or necessary to declare a particular interest. In addition to the opportunity members had to declare a relevant interest at agenda item one, they could do so at any time during the meeting itself.

11.180. Ms Berejiklian agreed that during her time as a minister, the first agenda item at the start of any meeting of Cabinet or a committee of Cabinet was the declaration of conflicts. She also agreed that as premier and minister, she had attended scores and scores, hundreds and hundreds, perhaps thousands of meetings of Cabinet and committees of Cabinet. She said it had never occurred to her during any of the agenda items in those scores or hundreds of meetings that it may have been desirable, if not required, to make a declaration regarding her relationship with Mr Maguire.

11.181. Mr Baird said that Ms Berejiklian was present throughout the discussion of the ACTA ERC submission during the ERC meeting and did not declare a conflict. Ms Berejiklian accepted that was the case.

11.182. Mr Baird gave evidence that the support or otherwise of the treasurer for a particular agenda item was a significant factor in Mr Baird's mind as premier as to whether that item should receive his support in the ERC. Nevertheless, he read in detail every single Cabinet paper that was put before him. He did not just rely on the advice he was given. He would also take into consideration departmental advice, advice from those within his ministerial office and the support or otherwise of his ministerial colleagues. Mr Baird's understanding was that the ACTA project had general support from all members of the ERC, including Ms Berejiklian. This included supporting the proposition that additional work had to be done in respect of the proposal.

11.183. Mr Baird recalled receiving Mr Blunden's "robust" advice. He accepted that Mr Blunden did not think that the ACTA proposal was a particularly good proposal in terms of its merits. Mr Baird shared Mr Blunden's concerns that there was still some work to do in relation to determining the merits or otherwise of the ACTA proposal and that the preference was that that work was done before there was a final decision. Mr Baird said the position he took at the ERC meeting was that expressed in Mr Blunden's advice, "They should go away, test the assumptions, verify the business case and then come back when it's solid."

11.184. Mr Baird's view was that the government would constantly look for opportunities to support regional NSW so that if there was a World Championship event of substance that had material economic benefit, that was something that the government would consider seriously. Nevertheless, the government needed to see the facts, the details and the analysis that supported that. He would have supported anything that was positive in a regional context clearly on the basis of the work being done and the benefit being clear. While he accepted that towards the end of 2016 within the Coalition there was a perception which he understood that the Coalition was out of touch with regional voters, he did not believe it.

11.185. The deputy premier, Mr Barilaro, was present at the ERC meeting of 14 December 2016. He was appointed deputy premier on 15 November 2016. He was appointed to the ERC at the same time but had been to a handful of ERC meetings prior to that date. He recalled that Ms Berejiklian was present at the ERC meeting. He said that "often if the Premier and the Treasurer [were] supportive of an agenda item, you would get consensus support from the rest of your ERC members".

11.186. In addition to being deputy premier from 15 November 2016, Mr Barilaro was the minister for regional development from April 2015 until 23 January 2017, when Mr Baird resigned. From 30 January 2017 until 2 April 2019, he was minister for regional NSW, then minister for regional NSW, industry and trade until he resigned from Parliament on 5 October 2021. The regional NSW ministry included portfolios such as regional tourism and regional development, and the Regional Growth–Environment and Tourism Fund (RGETF).

11.187. During the ERC meeting, the proposition that the ACTA funding should be sourced from the RGETF (which was a new fund at the time) arose because the ACTA ERC submission did not identify a source of funding. Accordingly, when the ACTA proposal was "booked" against the RGETF, that was a fund for which Mr Barilaro was responsible.

11.188. Mr Barilaro also said that as deputy premier, he would put significant weight on the view of the treasurer or the premier in relation to a particular agenda item before either Cabinet or a committee of Cabinet. He recalled conversations both during the meeting and after the ERC

decision (the latter being requests for updates) about the ACTA proposal in which Ms Berejiklian participated and, as he understood it, was supportive of it. The requests for updates may have been because Ms Berejiklian had been asked by the Member for Wagga Wagga. He did not regard those conversations as untoward.

11.189. With the benefit of years of experience on the ERC, Mr Barilaro appreciated that it was unusual for a source of funding for the ACTA ERC submission not to be identified in the submission. It was usual to identify a source of funding in an ERC submission, because it was always difficult to get anything up in the ERC without that. He also found that "not having a source of funding and the expediency of the process to get [the ACTA] item to ERC … [was] not uncommon but it would have been an unusual practice". Usually there was a lead time during which the draft submission would be put online in the eCabinet system, departments would be able to make any commentary on it and that would take two or three weeks. He did not know why the ACTA proposal was dealt with so expeditiously.

11.190. Mr Barilaro also regarded it as unusual to have a stand-alone item for $5.5 million like the ACTA proposal as an item on the ERC agenda. The scheme of the ERC was to deal "with issues of tens of millions of dollars, hundreds of millions of dollars, if not billions". In addition, he said the RGETF did not need an ERC decision to have something booked against it. Normally, such an item would have been brought to the ERC as part of either a budget bid or part of program funding – in this case the RGETF – comprising a batch of projects that would have been brought to ERC for signoff.

11.191. Ms Berejiklian's evidence was that it was possible she indicated her support for the ACTA ERC proposal before she received Treasury advice. She first said that top of her mind at that time would have been the Orange by-election and potential repercussions on that front. This was a reference to the Orange by-election on 12 November 2016, at which the National Party lost a seat to the Shooters, Fishers and Farmers Party. Nevertheless, Ms Berejiklian said that this would not necessarily have been why she indicated her support to Treasury in relation to this item. She could not remember. She suspected she supported the ACTA ERC proposal because it was "regarded as a project which would raise our stocks in the regions and would also demonstrate to the community that we were cognisant of providing jobs and tourism opportunities", however, she could not remember if this was the reason. Rather, she was speculating.

11.192. When asked not to speculate, Ms Berejiklian said that the only matter she distinctly recalled was the Orange by-election and the need to demonstrate to rural and regional communities that the NSW Coalition Government had not abandoned them. She said, "this was regarded as perhaps a way in which we would support a section of the community who would change their opinion that we'd turned our back on the bush". Ms Berejiklian advanced a number of other reasons as to why she may have supported the ACTA ERC proposal, notwithstanding Treasury advice to reject it as a net benefit to the state had not been adequately demonstrated, but accepted these reasons were all speculation on her part.

11.193. Ms Berejiklian agreed that – at least partly – the thinking was that the Coalition had lost a seat to the Shooters, Fishers and Farmers Party and therefore it was a good idea to spend money on something to do with people who like shooting.

11.194. Ms Berejiklian said that the fact that the ACTA proposal was being advanced by Mr Maguire "could have been a consideration" in her decision to support the ACTA ERC proposal. She acknowledged, during a compulsory examination, that there was "no doubt Mr Maguire was a strong advocate for this project and so there would be a strong assumption by all of us that this would benefit him locally, politically because it was a project supported by a large part of his constituency".

11.195. Counsel Assisting submitted that the weight of the evidence was that Ms Berejiklian participated in the ERC meeting of 14 December 2016 and was supportive of the ACTA agenda item. There can be no doubt that that was the case and, as Counsel Assisting also submitted, Ms Berejiklian did not deny those matters and, by virtue of having had her recollection refreshed by being shown documents relating to the ERC decision, appeared largely to accept them to be true.

The ACTA decision – non-disclosure of Ms Berejiklian's relationship with Mr Maguire

11.196. None of Ms Berejiklian's colleagues at the ERC meeting at which the ACTA decision was made, Mr Ayres, members of her staff or the public officials closely involved with the process leading to the ERC ACTA decision and its subsequent implementation were aware of her relationship with Mr Maguire until it was disclosed at the First Public Inquiry.

Mr Baird

11.197. Mr Baird thought Ms Berejiklian's relationship with Mr Maguire should have been disclosed to himself as premier, at the time that he held that office and she was treasurer, in terms of good practice and the concept of executing a public function in the context of potential private interests.

11.198. Mr Baird said that what may have occurred, had the relationship been disclosed, would depend on when and how it was disclosed. Had it been disclosed prior to the ERC ACTA meeting, that is to say, been known for some time, in terms of the decision-making process "you certainly take into account the capacity to actually manage that potential conflict of interest". He thought the treasurer may have attended the meeting but maybe not participated in the discussion about the ACTA proposal. However, had the relationship been revealed at the meeting, Mr Baird thought the treasurer should have been excluded.

11.199. Mr Baird said that knowledge of the relationship was an additional piece of information for every ERC member who was considering the ACTA proposal. He would have wanted to make sure that there could be no suggestion rightly or wrongly that putting forward the ACTA proposal or support for it was affected by that potential conflict of interest. Failure to disclose the relationship meant the other ERC committee members were unable to manage it.

11.200. Mr Baird expressed these views, while also acknowledging that had the relationship been disclosed prior to the meeting, given his view of Ms Berejiklian's integrity and commitment to public service and public interests, he thought that any potential conflict of interest could have been managed.

11.201. Mr Baird said that prior to the disclosure of Mr Maguire and Ms Berejiklian's relationship at the 2020 public inquiry, he had no idea that they were in such a relationship, that to his observation, Ms Berejiklian did not treat Mr Maguire any differently from the way she treated any of her other parliamentary colleagues and did not in her conduct, or decision-making, act in a partial or biased way in relation to any matters concerning Mr Maguire or the seat of Wagga Wagga.

Mr Barilaro

11.202. In Mr Barilaro's view, had the members of the December 2016 ERC meeting been aware of the relationship between Ms Berejiklian and Mr Maguire, most members "would have done everything differently". It would have changed the course of events in relation to how they managed the process, though not necessarily the outcome. Thus, it would have affected the way the ACTA item would have been debated, who would have been in attendance, and if there was a process or another approach in dealing with what would have been a perceived conflict of interest. In his view, had Ms Berejiklian declared a conflict of interest, he believed she would have excused herself from the debate, and "that in itself would have protected many of us in relation to the decision-making".

11.203. In Mr Barilaro's opinion, Ms Berejiklian's absence from the ERC ACTA meeting would have given the other members of the ERC "a level of comfort that we could have the conversation and debate around the item and we would have made a decision about supporting the item … it could have gone either way or we would have put in place other processes to manage the conflict".

11.204. Mr Barilaro said that quite how the issue would have been managed exactly would have been something that would require some advice and some consideration at the time. He adhered to evidence he gave in a compulsory examination that had he known how the item came on the agenda and been aware of the relationship between Ms Berejiklian and Mr Maguire, he would not have supported the ACTA agenda item, and he believed his colleagues would not have supported it either, and therefore it would not have been supported. This would have been an aspect of managing the issue. It did not mean that "we wouldn't have supported the agenda item or, or the project because that should have been assessed on its own merits".

11.205. Mr Barilaro also adhered to evidence he gave in a compulsory examination to the effect that if he had known of the relationship, and if an allocation for the ACTA proposal had been made against the RGETF, he "would have reversed the process, the applicant would have come directly to me, the fund, the person that ran the fund that had governance over the fund, we would have put them through a process to see a business case and then we would have submitted to ERC as a lump sum … one of many other projects in the normal practice".

11.206. Mr Barilaro advanced two views as to whether the ACTA project would have been funded if Ms Berejiklian had not been part of the approval process. On the one hand, he said he believed the ACTA proposal "still would have got approval, but that would have been a cleaner way to have managed the issue if we knew there was a relationship between the Treasurer at the time and Mr Maguire".

11.207. On the other hand, focusing on that "parallel universe, where the process is reversed", Mr Barilaro said ACTA would have had to pay for its own business case, and been put through a competitive process during which equally deserving, or perhaps more deserving, projects may have been identified and funded rather than the ACTA proposal.

Mr Ayres

11.208. Mr Ayres said that had he been aware Ms Berejiklian was in a personal relationship with Mr Maguire at the time he was involved in the ACTA proposal, he would have been concerned that a conflict may need to be managed, a matter for which the ministerial code provided.

11.209. Mr Ayres said that he could not see how Ms Berejiklian or Mr Maguire derived any private benefit from the ACTA project, so he did not think there was a conflict around the ACTA decision. Nevertheless, he thought it would have been a prudent course of action for Ms Berejiklian to declare her relationship to the premier, so that any actions to avoid or manage conflicts could have been taken. Such a conversation could have addressed the question whether Ms Berejiklian should recuse herself in relation to the ACTA decision.

11.210. Mr Ayres added that had he known Ms Berejiklian was in a relationship with Mr Maguire, he would have asked her whether any conflicts needed to be managed. He would also have raised that issue in the ERC meeting (had he been invited into the meeting) if he had not been informed as to how that conflict was going to be managed.

Mr Blunden

11.211. Mr Blunden said that as the premier's director of strategy, he was meant to know about things like whether Ms Berejiklian was in a close personal relationship with Mr Maguire, if it had an impact on proposals being put forward, with a view to avoiding a perception of a conflict of interest. Mr Blunden said, "I'm meant to know about those things in my job and I had no idea". In answer to Counsel Assisting's question of how he was supposed to find out about such things, Mr Blunden responded, "You talk to people", agreeing that there is "a lot of gossip" at Parliament House.

11.212. Mr Blunden said that had he been aware of the personal relationship between Ms Berejiklian and Mr Maguire in 2016 at the time the ACTA proposal was being considered, he believed he would have sought advice from somebody, maybe the DPC, as to whether there may have been a conflict of interest involved.

11.213. In addition, Mr Blunden said that had his office known that information, they "would have viewed any approach from the member for Wagga Wagga in a vastly different way … in that we would have perhaps suspected ulterior motives in some of the things he was putting forward". Mr Blunden said that had he known about the existence of the relationship, he suspects it would have had an impact on the advice he gave Mr Baird. His advice would still have been based on the merits of the proposal but he would have taken into consideration the "potential of, you know, perceived conflict" and that would have been reflected in his advice. He described the information about the relationship as "an element that I should have informed the Premier about if I'd known about it".

11.214. Mr Blunden agreed with Counsel Assisting's proposition that there would be a concern as to the potential political risk or cost of the existence of the relationship emerging at some point in time if it was not otherwise public and whether that might put any questions on the decision-making function.

11.215. Mr Blunden accepted that he was not an expert on the ministerial code. He was of the view that he did not believe the relationship between Ms Berejiklian and Mr Maguire was a conflict of interest because he was not aware whether Mr Maguire had raised the ACTA proposal directly with Ms Berejiklian. However, he thought it was fairly apparent that there was a perception that there could be a conflict, albeit he would defer on that question to someone with expertise in the ministerial code. He thought there could have been decisions made by the treasurer or her office for procedures to make decisions at arm's length when Mr Maguire was making representation, that is to say, to allow the decision-making processes to take their course, but Ms Berejiklian might have to exclude herself from those processes. An example in relation to the ACTA proposal might have involved the premier making the decision as to whether it went on the ERC agenda, rather than the treasurer.

Mr Barnes

11.216. Mr Barnes has significant experience in regional infrastructure in NSW. Between 14 December 2016 and 31 March 2017, Mr Barnes was deputy secretary, economics, skills and regional development within the Department of Industry, and as such supported ministers Anthony Roberts, in the economic and industry development portfolio area, and Mr Barilaro in the skills and regional development areas. At that time, Mr Barnes described his team as the office of regional development team. At all times, Mr Barnes' team was responsible for dealing with the ACTA proposal.

11.217. On 1 April 2017, the DPC established the Regional NSW Group (Regional NSW), on its transfer from the Department of Industry to the DPC. Therefore, on 1 April 2017, Mr Barnes officially became the deputy secretary of Regional NSW within the DPC, although Mr Barnes stated that practically speaking, this arrangement commenced in late January 2017. Since April 2020, Mr Barnes has been the secretary of the department of Regional NSW.

11.218. Mr Barnes gave evidence that he first became aware of the existence of a close personal relationship between Ms Berejiklian and Mr Maguire in 2020, when someone drew his attention to the evidence Ms Berejiklian was then giving before this Commission. He said that had he been aware of that information at the time he was involved in the ACTA and/or RCM projects (as to which see chapter 12), he would have discussed the matter with the secretary of his department and perhaps taken advice. While he was not completely au fait with the ministerial code, from a public service perspective, it would have meant that he would immediately have had to discuss whether there were issues in relation to the matters with which he was dealing.

11.219. Knowledge about the close personal relationship that Ms Berejiklian had with Mr Maguire would have caused Mr Barnes, and those in his team responsible for dealing with the ACTA proposal, to reflect on whether the mechanisms for the management of the processes were appropriate. While Mr Barnes said that both projects would still have been dealt with on their merits, in the case of the ACTA proposal, it may have led to a different course of action albeit that it was endorsed by the ERC and therefore it had broad support.

Chris Hanger

11.220. As at 19 December 2016, Chris Hanger was the director – funding and infrastructure within the Department of Industry. On 9 May 2017, Mr Hanger became an executive director at Regional NSW within the DPC. He agreed that had he known about the personal relationship between Mr Maguire and Ms Berejiklian at the time he dealt with the ACTA and the RCM proposals, he would have done things differently. He said, "you would put in place ways of identifying and managing conflicts of, potential personal conflicts of interest". Practically, that meant he would have notified his senior manager, who would have been Mr Barnes, and discussed with him the best way to manage that conflict.

Mr Doorn

11.221. Mr Doorn said that if he had known that Ms Berejiklian and Mr Maguire were in a close personal relationship from at least about the time of the 2015 election or slightly after or thereabouts, that would most definitely have had an impact on what he did in relation to the ACTA proposal. He explained that there are "very clear rules in public sector land for, you know, involvement or not disclosing conflicts of interest".

11.222. Mr Doorn said that the first thing he would have done would have been to notify his secretary, the head of his government agency, and then ultimately that would be drawn to the attention of organisations like the Commission. He agreed that the information was something in the nature of a red flag.

Mr Toohey

11.223. Mr Toohey said that had he known about the personal relationship between Ms Berejiklian and Mr Maguire he would have expressed his concerns initially through the executive structure and into the minister's office to say that he thought the personal relationship was problematic. If that had not produced any meaningful response, he would have escalated it up to the secretary of the DPC, and if that had not produced any result, which he was very confident it would have, he would have raised it directly with the Commission.

11.224. Mr Toohey expanded on his concerns in this respect as follows:

> *Why were we, why were we pushing a grant, anyway, a, an allocation of funds through to a local member based on such scant and inadequate information that didn't meet the NSW Government's own standards and policies … it was not a matter of government policy and*

> *to someone that was in a personal relationship with the Treasurer. I, I can't see how that's anything but a conflict of interest and I think, and that … the concerns that were raised by the Premier's Office, at least as reported to me, I, I didn't have any direct experience, were valid, like, what was the rush? Why were we doing this and why were we pursuing it on such a flimsy basis?*

11.225. Counsel Assisting submitted that Mr Toohey's statement in this respect should be treated with a degree of caution as it involved comment on a hypothetical scenario in respect of which the witness had the benefit of being able to exercise hindsight. Nevertheless, they contended that the evidence demonstrated that, had Ms Berejiklian taken the steps that they argue she was required by the ministerial code to take in relation to the ACTA proposal, it is likely to have been treated differently. Indeed, it may not have been included on the 14 December 2016 ERC agenda at all and, if it had been, it may not have been the subject of a favourable decision.

11.226. The same can be said of all the evidence about what those involved with the ERC ACTA decision would have done had they known about Ms Berejiklian and Mr Maguire's relationship. Accepting that hindsight evidence should be approached with a degree of caution, it can be said of all those involved in making the ERC ACTA decision, that their evidence reflected that of politicians experienced with the operation of the ministerial code, its injunction concerning their respective responsibilities "to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity", as well as of the particular provisions dealing with reporting and managing conflicts of interest.

11.227. The members of the public sector who gave evidence about these issues also demonstrated at various levels a consciousness of the issues of dealing with and managing conflicts of interest such as to assist in determining the plausibility of their explanations of what they would have done had they been aware of Ms Berejiklian and Mr Maguire's relationship.

11.228. Mr Toohey's evidence reflects that consciousness with great clarity. It was apparent from the outset of his involvement with the preparation of the ACTA submission to the ERC that he queried the utility of that process having regard to the "flimsy" business case on which the ACTA based its grant application. The Commission accepts his evidence as to what he would have done had he known about the relationship at the time he became involved in that exercise.

11.229. The Commission also accepts the evidence of the other witnesses outlined above as to what they would have done had they known about the relationship. In that event it is clear Ms Berejiklian would not have been able to participate either in placing the ACTA proposal on the agenda or participating in the actual ACTA decision. It is most probable the first issue would have been left to Mr Baird. In the light of the robust advice he received from Mr Blunden, it seems unlikely it would have been added to the 14 December 2016 ERC meeting.

11.230. Mr Barilaro's evidence supports the proposition that if the RGETF had been identified as the likely source of funding, he would have insisted that it be treated as an application in the ordinary course for that funding. On that basis it would have had to go through the two-step process of first submitting an expression of interest and, only if successful at that stage, proceeded to the stage where it would have been invited to submit a business case.

11.231. Having regard to the previous unsuccessful applications for funding ACTA had made, it appears highly probable that the ACTA application would not have advanced beyond the expression of interest stage.

The ERC decision

11.232. The ERC made the following decision with respect to the ACTA funding proposal:

> *i)* ***Approved*** *expenditure of $5.5 million in 2016/17 to the Office of Sport, to provide a grant to the Australian Clay Target Association (ACTA) for the development of a large clubhouse/conference facility and associated infrastructure at their existing facility in Wagga Wagga, NSW subject to:*
>
> > *a) confirmation of the ACTA cost estimates through a competitive tender process;*
> >
> > *b) development of a project delivery plan; and*
> >
> > *c) ACTA undertaking to meet all ongoing maintenance and operational costs and any capital costs for the facility that are greater than $5.5 million.*
>
> *ii)* ***Approved*** *that the grant in Recommendation (i):*
>
> > *a) should be sourced from the Regional Growth–Environment and Tourism Fund (the Fund) and comply with criteria to access the Fund;*
> >
> > *b) is subject to the finalisation of a satisfactory business case, noting that this can be approved by the Treasurer following Infrastructure NSW assurance processes linked to the Fund; and*
> >
> > *c) should be capped at $5.5 million, with risks associated with project costs to be carried by the ACTA.*

11.233. The approvals in paragraph (i) were those set out in the 12 December 2016 ERC submission. The approvals outlined in paragraph (ii) were added during the ERC meeting on 14 December 2016.

Consequences of the ERC ACTA decision

11.234. The ERC ACTA decision was seen by those involved in its implementation as meaning the government was behind the proposal.

11.235. Mr Barilaro said that "anything that goes through the Expenditure Review Committee has the imprimatur of the government of the day". In his view, such would be the understanding at the level of political offices and at an agency level. He gave evidence that "the public service, the agencies that are involved, execute the decision of the ERC … they know that the government of the day is supportive".

11.236. Mr Barnes said that it was:

> *pretty clear to* [him] *that the project, having received an allocation through ERC in December 2016, was something that government wanted to see happen to deliver on the undertakings that had been conveyed to the Wagga community and the clay target community of interest.*

11.237. Mr Hanger understood the ERC decision to indicate "significant support" for the ACTA proposal. It was not simply a funding "reservation" (that is, a "hold" on certain funds rather than a positive decision to spend) but an approval of expenditure (albeit subject to conditions). He took it as "a positive indication that the government wanted this … project supported".

Surprised it was funded

11.238. Mr Doorn found out about the ERC decision on 15 December 2016 from Mr Landrigan. He passed the message on to Mr Toohey, saying, "I understand from Marc that the ERC submission for the ACTA project was supported in ERC, but dependent on a business case with further detail on costings being submitted back to ERC". Mr Doorn said he was "somewhat relieved" that the ERC support for the ACTA proposal was dependent on the business case because effectively the Office of Sport's argument had been that "there needed to be a few more checks and balances and … that the business case needed further detail and costings being submitted". He agreed that he meant by that the kind of checks and balances one would ordinarily expect to be performed before any ERC submission.

11.239. Mr Doorn said the Office of Sport was surprised the ACTA proposal was funded because, from its perspective, there were a number of reasons why they thought it did not "stack up". Those reasons included the fact that previously the ACTA proposal was at the bottom of the new policy proposals in the 2013 and 2014 list, it was not supported by the Wagga Wagga City Council as part of the FNOSI study, it was not supported by a business case of sufficient detail and quality as would justify, at least in his view as a public official with experience in this area, an expenditure of the order of $5.5 million and there was already an existing shooting facility in Greater Sydney which was of Olympic standard. In his view, the Office of Sport could not support the ACTA proposal from a sporting-facility perspective as there certainly was not enough benefit from what it could see. As can be seen, this view was shared by those in the Department of Industry who assumed responsibility for the ACTA proposal following the ERC decision.

11.240. From a political perspective, Mr Doorn thought the points in favour of the ACTA proposal could be about getting people to travel to regional NSW, and the fact there was a lot of correspondence, and a push from Mr Maguire. There was no discussion from the minister's office about it being a good idea to look after people interested in shooting given the level of political support or otherwise of the Shooters, Fishers and Farmers Party. This evidence has to be viewed in the context that Mr Doorn said that if political factors were informing the minister's office, they were not conveyed to him.

The Regional Growth–Environment and Tourism Fund

11.241. The legislative basis of the RGETF, from which the ERC said the ACTA proposal was to be funded, was the *Restart NSW Fund Act 2011*. That Act was assented to on 1 September 2011. It created the Restart NSW Fund which was intended to "set aside funding for and secure the delivery of major infrastructure in New South Wales … to be used to build essential infrastructure with the specific mandate to grow economic productivity in New South Wales".[411]

11.242. More explicitly, the object of that Act as explained in s 3 was to "establish the Restart NSW Fund for the purpose of setting aside funding for and securing the delivery of major infrastructure projects and other necessary infrastructure". The Restart NSW Fund was established by s 6 which set out its purpose as follows:

> *(1) The purpose of the Fund is to improve economic growth and productivity in the State, and for that purpose:*
>
> *(a) to fund major infrastructure projects, and*

[411] Restart NSW Fund Bill 2011, NSW Legislative Council, *Parliamentary Debates* (Hansard), Second Reading Speech, 23 August 2011.

(b) to fund infrastructure projects that will improve:

(i) public transport, and

(ii) roads, and

(iii) infrastructure required for the economic competitiveness of the State (including the movement of freight, inter-modal facilities and access to water), and

(iv) local infrastructure in regional areas that are affected by mining operations, and

(v) hospital and other health facilities and services, and

(vi) workplaces for law and justice officers, teachers, nurses and other staff providing services to the public.

(2) In this section, a reference to ***funding a project*** *includes a reference to funding the planning, selection, implementation and delivery of the project.*

(Original emphasis)

11.243. Mr Baird agreed that the Restart NSW Fund established pursuant to s 6 of the Restart NSW Fund Act was a special fund that was set up to receive money from what was sometimes colloquially referred to as "asset recycling", such as the lease of electricity assets, sometimes referred to as the "poles and wires" monies. That asset recycling or privatisation created a fund of approximately $32 billion. During the March 2015 election, the Coalition announced that $300 million from the "poles and wires" monies would be set aside for a regional tourism and environment fund. It was that promise which was to be given effect by the RGETF. It was, in effect, a sub-fund or a part of Restart NSW.

11.244. Pursuant to s 8(a) of the Restart NSW Fund Act, payments could be made from the Restart NSW Fund of any money approved by the minister on the recommendation of Infrastructure NSW to fund all or any part of the cost of any project that the minister was satisfied promoted a purpose of the fund. At all material times the "minister" for the purposes of s 8(a) was the treasurer.

11.245. At the time of the ERC ACTA decision, the RGETF was a "new fund". It was established to increase tourist visitation to regional NSW. Preparation for the development of a Regional Growth Investment Framework to inform recommendations to the NSW Government for the target profile and criteria for public regional growth investment, including the RGETF, commenced in late 2015.

11.246. However, Mr Barilaro's recollection was that it was not until around May or June 2016 that the government started preparing the criteria or guidelines in relation to the RGETF. At the time of the 14 December 2016 ERC meeting, the RGETF guidelines were still in draft, and a competitive process for accessing the RGETF was still being worked through. The guidelines were approved by the ERC on 1 March 2017. The first competitive round of the RGETF opened in mid-March 2017.

11.247. Although the Coalition had announced that the RGETF would be funded to the extent of $300 million, not all of those funds were available in the first round. Rather, $100 million was available through the initial round of funding and minimum grants were $500,000. Applicants for funding had to submit an expression of interest which was assessed against the criteria and projects were then shortlisted to progress to the detailed application stage. At that second stage, applicants were required to submit a completed cost benefit analysis (CBA) that demonstrated a BCR higher than 1.0.

11.248. Ninety-five per cent of the applications for RGETF funding were put through the competitive, two-stage process described in the RGETF guidelines. However, a very small number were put forward by the government that did not go through that competitive process, but still had to go through the process of getting evaluated through BCRs, to demonstrate a whole benefit to the state.

11.249. The majority of RGETF funding went through "competitive grounds based programs" which were almost always over-subscribed, according to Mr Hanger. He agreed that funding out of the RGETF that had not been subject to a competitive process was "relatively unusual". Mr Barnes also confirmed that the RGETF was a "competitive fund with rounds that people can apply to" but that on occasions – a "handful … two or three", ACTA being one – the government made allocations or reservations from those funds without a competitive process. The ERC decision to allocate $5.5 million from the RGETF to the ACTA project meant the latter was a "carve out" from the available RGETF funds and would not be part of an open, competitive round and therefore would not have to undergo a two-step process.

Infrastructure NSW

11.250. Infrastructure NSW was established in 2011 to, amongst other things, act as a mechanism through which the government could be given independent expert professional analysis and advice about infrastructure projects for the purposes of the Restart NSW Fund.

11.251. James (Jim) Betts, the CEO of Infrastructure NSW between June 2013 and April 2019, explained that Infrastructure NSW was created by the government to demonstrate "that its arm's length infrastructure advisory body was holding the ring and ensuring that Restart funds because they came from – largely from privatisations were being appropriately allocated".

11.252. Infrastructure NSW took the view that to justify a drawdown on the Restart NSW Fund for a new piece of infrastructure, almost without exception, that piece of infrastructure should be demonstrated to have a BCR greater than 1 when assessed within the economic appraisal framework overseen by Treasury. This required analysis suggesting that the benefits to the state would be more than the cost of a particular proposal. Determining whether the BCR was greater than 1 when assessed as required, necessitated a satisfactory business case.

11.253. For major projects, Infrastructure NSW was responsible for an infrastructure investor assurance regime where it would bring in independent experts to test the robustness of the cost benefit methodology that sat within business cases being presented by other agencies to government.

11.254. However, the situation was different in relation to "the much smaller programmatic spend", which was emerging from things like the RGETF, which were often well below the threshold of $10 million or indeed $100 million, which Infrastructure NSW's legislation directed it towards. In relation to those smaller programs, Infrastructure NSW did not conduct the actual BCR assessment, nor as follows, did it prepare the underlying analysis. Rather, it relied on the advice of committees or multi-agency committees, which included Treasury, that were the overseers of programs such as the RGETF, to ensure that relevant CBA had been undertaken, that it was robust and that it complied with Treasury's stipulated methodology. That would be the principal basis on which Mr Betts would be prepared to make recommendations to the treasurer to make payments from the RGETF. It would have been the exception rather than the rule that Infrastructure NSW commissioned its own supplementary CBA.

11.255. Nevertheless, even in the case of the smaller programs, one of the things that Infrastructure NSW would do before recommending that the treasurer pay monies out of a Restart NSW Fund was to satisfy itself that the funding would promote a purpose of the relevant fund.

11.256. Mr Betts said that Infrastructure NSW would frequently receive proposals from third parties outside government which would purport to show very favourable BCRs. However, Infrastructure NSW would always ensure that those proposals were interrogated by appropriate experts within agencies such as Treasury or the DPC, which oversaw the programs from which the government funding was going to be sourced. Infrastructure NSW would often reject proposals on the basis that the CBA simply did not withstand scrutiny.

11.257. Mr Betts also commented that:

> *[T]he officials operating within the Department of Premier and Cabinet and officials operating within Treasury may be susceptible to informal direction from the Premier or from the Treasurer from time to time. So having an arm's length body like Infrastructure NSW which would have, there would have had to have been formality about the direction issued to us had a minister sought to influence our decision making, provided an additional degree of assurance even if only on the basis of perception.*

11.258. This observation about the desirability for arm's length decisions accorded with the concerns of Mr Baird and Mr Barilaro in particular about the perception of a decision being a political one if a conflict of interest were not declared in the ERC.

"Talk Daryl off the ledge"

11.259. Mr Ayres agreed that, based on the conditions attached to the ERC ACTA approval involving funding being sourced from the RGETF for which the criteria had not yet been approved, it would have been more prudent not to announce the ACTA grant until the criteria for the RGETF were approved by the ERC.

11.260. On 21 December 2016, the ERC ACTA decision became available on eCabinet. The previous afternoon, Ms Berejiklian's office gave Mr Landrigan the draft decision. He shared that information with Mr Ayres and Marie Scoutas (Mr Ayres' deputy chief of staff) in the first email in what became an email chain to which he attached the ERC decision. He stated:

> *1. Grant should be sourced from the Regional Growth Environment and Tourism Fund and comply with the criteria to access the fund (I am advised the criteria has not been approved by ERC yet).*
>
> *2. Is subject to finalisation of a satisfactory business case (current business case is not acceptable).*
>
> ***Treasurer's office say to follow the proper process the grant won't be able to be announced until the criteria for the Fund is approved by ERC (early next year) and the business case is approved by the Treasurer following INSW assurance processes.***
>
> *Marie, were you saying before the Deputy Premiers office have been allocating projects to this Fund already? Do we deal direct with the DPs* [Deputy Premier]*'s office or are they trying to kill this project?*
>
> (Emphasis added)

11.261. Mr Ayres responded:

> *Project is legit.*
>
> *Perhaps Gladys and I need to write to Daryl.*

11.262. Ms Scoutas observed, "Project is a solid one but someone should talk Daryl off the ledge", to which Mr Ayres replied, "**He just wants to know what the process is … if we can't explain it to him how can he communicate with his electorate**" (emphasis added). Ms Scoutas responded:

> *If the money is coming from somewhere else,*
>
> *And that is the reason he needs another business case,*
>
> *But essentially it is now approved by government,*
>
> *Cant* [sic] *we give him something to announce?*
>
> *Or is there a risk this will still unravel? Feels to me like we are just ticking boxes and if it was* [name redacted] *he would have announced it yesterday.*

11.263. Mr Landrigan pointed out:

> *But it hasn't been approved.*
>
> *The ERC decision refers it to the Regional Growth Environment and Tourism Fund and says a satisfactory business case needs to be done and it needs to satisfy the criteria for the Fund. The treasurers* [sic] *office also told me the criteria for the Fund hasn't been approved by ERC yet, not expected at ERC till early next year.*
>
> *Has the DP started announcing grants from this Fund yet?*

11.264. When asked why he wrote "perhaps Gladys and I need to write to Daryl", Mr Ayres' evidence was that she was the treasurer and he was the minister, and "We've made a decision at ERC, this project is no longer being funded out of the Office of Sport. I think it's a reasonable thing that the Treasurer and myself would inform the local member how a project that's been, appropriated funds by ERC is going to proceed … I think I'm just working on the fact that Gladys is the treasurer at this particular point in time and the ERC has resolved that, has, had approved those funds and also put some additional conditions on them".

11.265. In terms of the remark about "talk[ing] Daryl off the ledge", Mr Ayres surmised that as Ms Scoutas was covering off media at this particular point in time, Mr Maguire had had some interactions with her, and Mr Maguire wanted to do something. He agreed that the "ledge" was a metaphor for Mr Maguire making an announcement of the kind that the treasurer's office said would be inconsistent with what they described as "proper process".

11.266. As to the reference to Ms Berejiklian and himself writing to Mr Maguire in the context of Mr Landrigan's query as to whether "the DPs [sic] office … are trying to kill this project?", Mr Ayres conceded that it was "plausible" and "plausible but highly unlikely" that they would write to Mr Maguire on their respective letterheads in order to show that the ACTA proposal had the backing of two senior ministers to avoid any risk that the deputy premier's office was try to kill the project.

11.267. The following day, on 22 December 2016, Mr Landrigan sent an email to Jenny Davis of Infrastructure NSW asking, "Are you able to advise where this is up to? Has it gone to the Industry team? The Deputy Premiers [sic] Office called me to find out if they need to give their Department a hurry up on this?"

11.268. On 23 December 2016, Mr Barilaro's chief of staff Fiona Dewar advised Mr Landrigan, "I have spoken with Darryl [sic] and our agency. Darryl [sic] is good to go ahead with the announcement, and our agency has provided the resources to review the business case and assist with the material INSW needs." Mr Landrigan forwarded that email to Ms Davis on 3 January 2017, the day after Mr Maguire announced the funding decision.

A presumptive announcement

11.269. Mr Maguire said he could not recall how he became aware of the ERC ACTA decision. He was equally vague about his understanding of its terms. Pressed, he said that at the time he issued the media release referred to in the following paragraph, his understanding of the status of the $5.5 million grant was that "the government had agreed to partner with Clay Target and that the money would flow with some paperwork. I can't recall there ever being strings attached to it."

11.270. On 2 January 2017, Mr Maguire issued the following media release:

> *NSW GOVERNMENT PARTNERS WITH AUSTRALIAN CLAY TARGET ASSOCIATION*
>
> *Member for Wagga Wagga Daryl Maguire MP today announced $5.5 million in NSW Government funding for the Australian Clay Target Association Headquarters located in East Wagga Wagga.*
>
> *This funding will be used to build a new Administration, club and function centre that will not only benefit the Association, but will also provide a facility for local and regional organisations catering for large functions and conferences.*
>
> *Mr Maguire said the improvements will deliver a multipurpose facility with amenities that will double the current capacity of the Headquarters, creating ample space to accommodate up to 650 people for a dining function and up to 1,200 people for a conference.*
>
> *The upgrades will be completed in time for the International Clay Target Shooting Federation World DTL Championships to be held in Wagga Wagga in 2018. This event is set to attract around 800 shooters worldwide and will be broadcast from Wagga Wagga.*
>
> *Mr Maguire is thrilled with the announcement, saying it will put the Wagga Wagga Headquarters in a good position to lobby to host future Olympic trials at the local facility as well as other national and international championships.*
>
> *President of the Australian Clay Target Association, Mr Robert Nugent said "the Association would like to thank Mr Maguire for his tireless work as a Member for Wagga Wagga. With his support, this project will consolidate the ACTA's future in Wagga Wagga". Mr Nugent also acknowledged the support of Wagga Wagga City Council.*

11.271. On the same day, Mr Maguire sent two emails to Ms Berejiklian's private email address containing links to two stories about the ACTA funding published in *The Daily Advertiser*. The first email was headed "Good News" and linked to an article titled "Convention centre to attract large-scale events to Wagga". The second email, sent about four minutes after the first, was headed "All good", and linked to another *Daily Advertiser* article apparently headed "Convention centre to be built". Mr Maguire said he sent the first email to Ms Berejiklian because he "was probably very happy that this was happening, sharing the good news".

11.272. There was no reference in Mr Maguire's media release to the conditions the ERC had imposed on the ACTA funding.

11.273. Mr Maguire's media release came to the attention of those in the Office of Sport who had been involved with drafting of the ACTA ERC submission. Mr Doorn remembered being surprised that there was a public announcement by Mr Maguire that funding had been "granted or received or approved" and confused because the project had been handed over from Mr Doorn's office, then funded so quickly.

11.274. Mr Toohey was also surprised the ACTA funding was announced as a fait accompli. He thought the ACTA funding was "a long way off being guaranteed", and that Mr Maguire's announcement was trying to wedge the funding being guaranteed ahead of a process that he thought was important to make sure that funds were protected. In his view, the announcement was premature and would interfere with the proper consideration that needed to occur to make sure that the project would be delivered.

11.275. Mr Toohey said that such an announcement might be able to put some pressure on the bureaucracy to cause the funding to actually flow in circumstances where all that had happened at that point in time was an agreement to expend money or a decision to expend money but subject to certain conditions. In his view, once an announcement of a project such as Mr Maguire's was made, it was "very, very hard then for the government … to do anything but to deliver the clubhouse". In addition, had the ACTA fallen short of funding (a possibility in his mind in the absence of information as to whether the ACTA was capable of delivering the project), "that government would have had to bail it out, and that's at the expense of something else".

11.276. The ERC ACTA decision was made on 14 December 2016. Shortly after, on 19 December 2016, Mr Hanger became the director, funding and infrastructure within the Department of Industry. His group was working with Infrastructure NSW in regard to the RGETF. He and his group became involved in finalising the satisfactory business case, securing approval by the treasurer of the day, and attempting to satisfy Infrastructure NSW assurance processes linked to the RGETF. He said that as the ERC ACTA decision had identified that it was looking for a business case to be developed, it was a high priority for his agency.

11.277. Mr Hanger said Mr Maguire's media release did not tell the full story because it did not refer to the conditions to which the ACTA grant was subject. However, he said that a media release such as Mr Maguire's added to the priority and attention that as a matter of practice would be adopted to a project of this kind, because it could be seen that there was high-level political support from the ERC decision, and further the public being told about the project but not about the conditions. He said that a media release of the kind issued by Mr Maguire (that is, one that fails to specify conditions attached to the funding) "makes our job more challenging" and "adds pressure" in circumstances where it is presumed that the project enjoys a high level of political support as a consequence of an ERC decision.

11.278. Mr Maguire's announcement also caused consternation in the Regional NSW office in Wagga Wagga. Albury City Council asked Margaret O'Dwyer, the regional manager for the south west in the Office of Regional Development, under what program ACTA had received funding and whether her department provided ACTA with funding to undertake a business plan. Ms O'Dwyer observed that there was always a little bit of rivalry between Wagga Wagga and Albury, so her enquirer "was just wondering under what program they were funded, because that's quite often the case, you know did Albury miss out on something that they could've applied for, it's that type of a question. But also, she was wondering whether the NSW Government had funded the business case for the application."

11.279. Mr Baird said it would be not unreasonable to announce a decision made by the government, but making it clear, if it be the case, that the approval was subject to appropriate analysis by way of a business case or other additional work.

11.280. Mr Ayres initially said that in his view, the ACTA proposal was in a reasonable position to be announced after the ERC ACTA decision. Having had his attention drawn to correspondence which indicated that the criteria for the RGETF (from which it was to be funded) had not yet been approved by the ERC, Mr Ayres agreed that it would not be proper process to announce the grant at that time.

Regional NSW takes over

11.281. As a result of the wording of the ERC ACTA decision, and its specification of the RGETF as the funding source for ACTA, responsibility for progressing the ACTA funding was shifted from the Office of Sport to Regional NSW. At that time, deputy premier Mr Barilaro (as minister for regional development) was the portfolio minister and, from 23 January 2017, Ms Berejiklian, as premier, was the cluster minister.

11.282. On 16 December 2016, Mr Hall advised Mr Miller (the chief executive of the Office of Sport) that the ERC had determined that the ACTA business case had to be reviewed or redone (he was unclear which) by Infrastructure NSW so that it could qualify for funding from the RGETF. Mr Hall asked that all the supporting material for the proposal be sent to Mr Betts.

11.283. On 19 December 2016, Mr Doorn forwarded to Mr Betts the ACTA business case, its letter to Mr Ayres seeking support for the proposal and the ACTA ERC submission. He also advised Mr Betts that there were "no independent reviews, feedback from agencies etc on the proposal". Mr Doorn forwarded the email chain to Mr Toohey, remarking, "FYI ... looks like its now up to I.NSW".

11.284. Mr Betts forwarded Mr Doorn's email to, among others, Ms Davis, from Infrastructure NSW, advising her that "Gary Barnes agreed that we could use Stuart Webster and team to assess this proposal, and provide feedback to the proponent where required. It could be a candidate for advance funding from the Regional Growth Etc Fund."

11.285. Mr Webster was the head of the Investment Appraisal Unit (IAU), one of the units Infrastructure NSW relied upon to interrogate third-party grant proposals. The IAU originally fell within the Department of Industry, however, it was moved into the DPC following machinery of government changes in April 2017.

11.286. According to Mr Barnes, following the ERC decision and the deputy premier accepting the lead on the project, his Office of Regional Development team would have taken carriage of the ACTA initiative. Mr Barnes asked Mr Hanger, who had knowledge of regional infrastructure and an effective working relationship with Mr Barilaro's office, and Jane Spring, who had recently been transferred from Jobs NSW to an executive director role in his group, to involve themselves "upfront" in the ACTA project.

11.287. Mr Barnes' primary inference about the ACTA project was that it was "quite an unusual project, having been quite a small project but gone through ERC". In the main, projects like these went up as part of a program of decisions. He and his team gave the ACTA project particular priority in their portfolio of work because of their understanding of the political imprimatur sitting behind the project. That understanding was an inference principally drawn from the fact that the ERC made an approval decision, not a reservation, in relation to the project.

11.288. On 20 December 2016, Adam Nir, a senior analyst in the IAU in the NSW Department of Industry, advised Mr Webster that he had been through the ACTA material and agreed with Mr Webster's assessment that the business plan's economic assessment was flawed. He set out the main reasons for reaching that conclusion, including that "the cost/benefit analysis

is performed from a Wagga Wagga perspective (rather than the State perspective that the Department and Treasury take)". Mr Webster forwarded Mr Nir's email to Ms Davis with the advice, "Adam has provided a short critique of the Wagga Clay target project proposal below. I have also scanned the document, and advise that the GHD 'CBA' is in my opinion unusable for the purposes of fund allocation." Two days later, Mr Webster emailed Ms Davis again saying, "have heard that INSW may need a CBA on this after all. Can you please advise? We could get started the week beginning the 9 January, but it would be desirable to send the proponent our data requirements in the meantime so that it might be waiting for us on return."

11.289. The ERC's condition to provide grant funding to ACTA subject to the "finalisation of a satisfactory business case" was seen by Mr Barnes as the "immediate task" to which Regional NSW was required to direct its attention. Mr Barnes understood this to be necessary as he agreed the CBA analysis contained in the initial GHD business case was "utterly non-compliant with NSW Treasury guidelines".

11.290. On 13 January 2017, Mr Toohey briefed Ms Spring, Mr Webster and Alex Akopyan (a senior manager, investment appraisal, economic skills & regional development in the NSW Department of Industry) about the ACTA project. They agreed that as GHD had prepared a business plan for ACTA, Mr Toohey would arrange "support" for ACTA to further engage GHD or another consultant to improve the quality of the business plan to allow better assessment. Mr Webster's team was to provide "the usual guidance to the consultant on what is required to allow better assessment".

11.291. On 13 January 2017, Laura Clarke, Mr Barilaro's deputy chief of staff, emailed Ms Spring (copying in Mr Barnes and Peter Minucos) suggesting "a catch up next week, and I can introduce you to Peter Minucos who has recently joined our office. Peter will be looking after the regional development/regional infrastructure space". Ms Spring responded with a mooted meeting time and added, "I look forward to meeting Peter and working with him". Mr Barnes forwarded the email chain to Mr Hanger on 16 January 2017, the day the meeting was to take place, with the instruction "Need to inject yourself into this one". The effect of this statement was effectively to delegate to Mr Hanger the supervision of the running of the ACTA project on behalf of the Department of Industry. From that stage, Mr Barnes left the ACTA matter to Mr Hanger and Ms Spring, albeit that they reported to him.

11.292. Mr Minucos was a political staffer in Mr Barilaro's office. Mr Barnes understood that the deputy premier's chief of staff brought Mr Minucos in to provide assistance with economic and regional infrastructure. He commenced there in January 2017, as a senior policy adviser with a particular focus on regional infrastructure and regional development. He had commenced his post-graduate career at NSW Treasury as a financial analyst. He was familiar with economic appraisals and Treasury guidelines for such appraisals, and he had previously worked in Treasury. He recalled becoming aware of the ERC ACTA decision early in his time with Mr Barilaro's office, sometime in January 2017. This presumably occurred at the meeting Ms Clarke arranged with Ms Spring.

11.293. Mr Minucos also saw the ERC decision as demonstrating governmental support for the ACTA proposal. After he became aware of the ERC decision, he asked for updates from the department just to see what was happening in that regard because it was an item in his portfolio. This was apparently because the ERC decision identified the source of the ACTA funding from one of the Restart funds, which were under the aegis of the deputy premier, Mr Barilaro, and because it concerned a regional matter.

11.294. According to Mr Minucos, his experience and role were relevant to the next steps in the ACTA process. He saw his role as "generally to help improve the clarity around the process and the understanding about the process to regional New South Wales".

An early visit

11.295. Soon after Ms Berejiklian became premier on 23 January 2017, she visited Wagga Wagga on 10 and 11 February 2017. Ms Berejiklian agreed that this was one of her early visits to a regional area as premier. Mr Maguire assisted in organising the trip. The DPC prepared briefing notes for her trip to provide "a summary of key achievements delivered by the NSW Government within the Wagga Wagga Electorate and known emerging/contentious regional issues". Under the heading, "Issues impacting the Wagga Wagga Electorate", the summary noted:

> *NSW Government funding for facilities upgrade for the Australian Clay Target Association*
>
> *In December 2016 it was reported (Wagga Wagga Daily Advertiser) that the NSW Government is providing $5.5 million for the construction of a convention centre as part of the development of the Australian Clay Target Association at Wagga Wagga. This is presumptive, the Government has asked for evidence of the business case before the project can be considered by Infrastructure NSW for funding.*

11.296. During this visit to Wagga Wagga, according to her itinerary, from 1.30 to 1.50 pm Ms Berejiklian visited the 1 Simmons Street site which the RCM was seeking to acquire as premises for its relocation from its historic site at Charles Sturt University (CSU) in Wagga Wagga. Mr Maguire arranged that visit and accompanied Ms Berejiklian to the site where they met Dr Andrew Wallace, the chair of the RCM, and discussed the proposals for the RCM. The RCM issue is discussed further in the next chapter.

Government funds the revised business case

11.297. The "support" arranged for ACTA to improve the quality of its business plan came in the form of funding for the preparation of the revised business case from the Office of Regional Development. Mr Barnes said he directed that support be given even though it was "unusual" and "atypical". He did so for "consistency" in circumstances where the Office of Sport had funded the initial (albeit deficient) business case. He agreed that one factor that influenced his decision to make a direction for funding of the further business case was the fact that the ERC had approved expenditure, albeit subject to conditions.

11.298. As time progressed, it was obvious to Mr Barnes that the deputy premier's office was being asked to follow up and provide advice on the carriage of the ACTA project and where it was at. He thought the requests for follow-ups and where things were up to were coming out of the premier's office to the deputy premier, but he thought the deputy premier's office was keen for the project to move forward as well.

11.299. The task of securing GHD's further services was assigned to Ms O' Dwyer in the Wagga Wagga office. On 17 January 2017, she asked Mr Webster and Mr Akopyan to advise what GHD needed to include to strengthen the business case so that it would meet NSW Treasury guidelines for capital business cases. Mr Akopyan's succinct response was that "The main item missing from the current business case is the rationale for government involvement: it is not clear why supporting the project would be a benefit to the State of NSW".

11.300. On 2 February 2017, Ms O'Dwyer contacted Mr Turner by email and advised him that Infrastructure NSW had asked that her office "take the lead on the ACTA project to upgrade the club house and inclusion of a conference centre at Wagga Wagga. It was determined that an independent business case needs to be prepared to provide additional assessment of the project". She sought to organise a meeting with Mr Turner to discuss "the additional requirements".

11.301. Mr Turner forwarded the email to Mr Maguire and asked him, "Is this request for another business case study in addition to the one presented." Mr Maguire replied, "Gday, yes this is the BS they go on with because the funds come from a different bucket of money, Tourism instead of sport. Just keep focused on your time frames and progress, marg will look after the study and get the boxes ticked". Soon after, Mr Turner advised Mr Maguire of arrangements with Ms O'Dwyer for a meeting, and Mr Maguire replied, "Very good proceed they will sort out the BS".

11.302. GHD was again engaged to prepare the revised business case for which its fee was $26,950 (including GST) charged to the DPC. Taken with the $40,000 the Office of Sport advanced to ACTA for the first business case, the effect was that the government entirely funded ACTA's business cases supporting its application for public monies to construct its new premises.

11.303. Arranging for GHD's quote for the revised business case to be accepted took some time and does not appear to have been finalised until late February 2017. On 6 March 2017, Mr Turner emailed Mr Maguire advising him of this and expressing concern that "any possible delay will not allow us to finish the project in me [sic, should be "time"] for the original purpose, that of the World Championships". Mr Maguire forwarded the email (which was the whole chain going back to Ms O'Dwyer's first contact with Mr Turner) to Ms Berejiklian stating, "Typical of our bullshit government".

11.304. Mr Maguire also forwarded Mr Turner's email to Mr Barilaro's chief of staff, Ms Dewar, saying, "Fiona, I told him to proceed, while our gov engages in with more BS!" Ms Dewar replied on 7 March 2017, advising Mr Maguire, "Peter Minucos from the Deputy Premier's Office has spoken to Turner and the Dept to work through it."

11.305. On 31 March 2017, Ms O'Dwyer sent Ms Spring and Mr Hanger an email which she copied to Mr Akopyan. She said she was unsure who was "taking this project on now". She reminded the recipients of the history leading to Mr Barnes advising that the Office of Regional Development would fund an update to the original GHD plan which had now been received and which she attached to her email, and asked, "What happens next?". Mr Akopyan appears to have forwarded the revised business case to Mr Nir for his review. Mr Nir in turn showed it to Mr Webster who emailed those in the email chain as follows:

> *Aleks has shown me the GHD business case. The CBA it contains is utterly non-compliant with NSW Treasury guidelines. I was under the impression that we did not ask them to do a CBA, just produce a business case that contained certain information that would enable my guys to do a CBA. Given that the document does seem to contain such data and that its CBA is unusable, I suggest that Alek's team (very quickly) produces a CBA based on the GHD document. I will need to confirm with Aleks, but this could probably be done next week.*
>
> *In terms of next steps, I am no wise* [sic] *than Margaret. Given that the Regional Growth Tourism and Environment Fund has been launched and EoI* [expression/s of interest] *are due soon (6 April), perhaps it can be considered as an EoI.*

11.306. The IAU then undertook a CBA of the ACTA revised business case. It concluded that based on that business case, but also using NSW Treasury guidelines and testing items such as expected tourism benefits against published data, it estimated that the ACTA project would represent a net cost to the referent group of approximately $653,000 and achieve a BCR of 0.88 over the assessment period of 25 years.

11.307. The effect of the IAU analysis was that the benefits to the state of spending money on the ACTA project were less than the costs of doing so. The practical effect was that money would not be available from the RGETF because one of the requirements for money coming out of the RGETF, like any fund forming part of Restart NSW, was demonstration of a BCR of 1 or more than 1.

11.308. On 12 April 2017, Mr Turner sent an email to Mr Maguire giving him an update on the planning progress for the new building. He also asked, "Do you have any information on the Business case study that was provided by GHD in relation to the grant. We are now close to having to pay some large expenses and the Board are anxious to sign off to access the grant." Mr Maguire forwarded the email to Ms Dewar saying, "Fiona, it's getting rather urgent" and she replied, "I have asked Peter Minucos to follow this up."

11.309. Later that day, Mr Minucos sent an email to Mr Maguire advising that he had unsuccessfully tried to contact both him and Mr Turner. He told Mr Maguire:

> *I spoke with the Treasurer's Office about this one today … The funding commitment has been made by Government, that much is done. There are a few intricacies involved in whether it is Environment & Tourism Fund or other funding – being ironed out by Treasury and INSW. But the funding has been committed by ERC and I have raised with Treasurer's Office today that the expenditure is happening on the ground and we need to deliver, so they are now active on it.*

11.310. Mr Maguire forwarded the 12 April 2017 email chain to Mr Turner.

11.311. Mr Hanger forwarded the IAU analysis to Ms Davis on 19 April 2017. He "also sent this to Peter Minucos in DPO [deputy premier's office] as he was asking". Mr Minucos said he would have been inquiring because the ERC ACTA decision was in his portfolio of Regional NSW and Infrastructure, and it was his job to understand what was happening in that portfolio.

11.312. On the same day, Ms Davis forwarded to Mr Minucos the 16 to 19 December email chain following the ERC decision in which the Office of Sport sent to Mr Betts the GHD business case, the ACTA letter to Mr Maguire seeking support for the proposal and the ERC submission. She also sent Mr Minucos Mr Webster's email to her of 20 December 2016 setting out his and Mr Nir's opinions of the ACTA business case.

The revised business case is reviewed – again

11.313. At some stage after the revised business case was reviewed by the IAU and assessed as having a BCR of 0.88, Mr Minucos contacted Mr Hanger and told him that they "needed to revisit the business case". Mr Hanger understood that request to come from the premier's office and the premier. This was because of a range of conversations at that time which indicated that the premier and the premier's office were particularly interested in this project. The way in which it had come forward and the speed at which his agency needed to procure the business case following that ERC decision indicated to those involved in the agency a strong interest out of that office regarding the project.

11.314. Mr Barnes did not agree that it was "typical" practice to revisit business cases where a project achieved a BCR in the order of 0.8. His evidence was that it happened "from time to time" in such cases as where there was a particular desire to stimulate the economy, for example looking at projects in times of drought. While he regarded 0.88 as "numerically close" to a BCR of 1, he indicated that the microeconomists who worked in the IAU would often tell him that bridging even a small gap from 0.9 to 1.0 could be a difficult thing to do.

11.315. Mr Minucos' recollection was that he got involved with the ACTA business case because Ms Dewar told him that even though the ERC decision had been made in December 2016, there had been no progress by April 2017. He said she asked him to look into it and see what was happening. Mr Minucos believed Ms Dewar's request may have followed a call from Mr Maguire as to what was happening, and he would have been asked to call him back and explain the process to him.

11.316. Mr Minucos agreed that he saw his role in relation to the ACTA proposal as doing "everything [he] could to turn it from commitment to an actual flow of money". His direct involvement did not commence until around the middle of April 2017, although he may have been aware of the ERC ACTA decision prior to then. He saw the ACTA proposal as having "political backing" due to the decision of the ERC in December 2016, which he saw as "the ultimate support".

11.317. Mr Minucos formed the view that the September 2016 ACTA business case "was deficient and couldn't be used to access Restart funding". This was because it used an incorrect methodology which could not be used to demonstrate the benefits to the state of NSW. It focused on Wagga Wagga as the community of interest whereas to access Restart funding, the community of interest needed to be the state of NSW.

11.318. Mr Minucos agreed – "at a cursory glance" – with the main issues concerning the ACTA business case as identified by Mr Nir:

- The cost/benefit analysis is performed from a Wagga Wagga-perspective (rather than the state perspective that the Department of Industry and Treasury take).
- Gross revenues from additional events are included as project benefits (rather than as producer and labour surpluses).
- Gross operating costs from additional events are included as project costs (rather than as producer and labour surpluses).
- No allowances for displacement of existing businesses has been made.

11.319. Mr Minucos became involved with dealing with the concerns that Mr Nir identified as being inadequacies or material that was needed as a minimum to conduct a CBA. This appears to have occurred around the time of the IAU report that the BCR for the ACTA proposal was 0.88. He was tasked to "get a business case compliant so it could be reviewed" as the requirement "for an amended business case … had not been completed yet, so the process wasn't, the steps weren't happening".

11.320. On 20 April 2017, Mr Minucos spoke to Mr Maguire and Caleb Paul of GHD. According to the email he sent Mr Maguire the same day, Mr Minucos told Mr Maguire that "we need GHD to add an annex to the business plan to demonstrate the net benefits to NSW from the non-shooting events/conferences". Mr Minucos forwarded to Mr Maguire the email he had sent Mr Paul in which he explained how Mr Paul could prepare an annexure to the revised business plan which "would allow the cost benefit analysis to identify the expenditure brought into the State, the benefit of which can be added to the BCR (like it already is for the shooting)". While he explained to Mr Paul the methodology of what was required, Mr Minucos said he did not provide the content of any revised business case GHD might prepare.

11.321. On 24 April 2017, Mr Paul sent Mr Minucos an email advising him, "Please find attached the information you requested. Please consider this memorandum an annexure to the business plan previously submitted by GHD." On 26 April 2107, Mr Minucos replied to Mr Paul suggesting some minor edits (which he provided), then explaining how Mr Paul should provide an estimate on the number of interstate visitors to the potential conferences and setting out what a sensitivity analysis might look like based on the figures Mr Paul had given Mr Minucos in conversation. Mr Paul returned an amended memorandum the same day.

11.322. On 8 May 2017, Mr Minucos asked Mr Paul to forward the new business case (with an appendix that demonstrated the new conference capabilities) to Mr Hanger and Ms Davis. Mr Paul complied with this request on 9 May 2017, forwarding to them the whole email chain commencing with Mr Minucos' email to Mr Paul on 20 April 2017 as well as the new business case.

11.323. On 9 May 2017, Mr Hanger forwarded the revised case to Mr Webster and Mr Akopyan (copying the email to Mr Barnes among others) for review with the observations:

> *DPO asked GHD to review and update the Wagga Wagga Clay shooting business plan to include more of the expected benefits of the conference centre – updated report attached. Can you please assess this updated business plan and advise if this project will provide an economic benefit to NSW. Happy to talk through if any questions and if you can let me know how long your review will take so I can manage DPO expectations that would be great.*

11.324. Mr Hanger understood the genesis of the further work on the ACTA business case between 19 April 2017 and 9 May 2017 to have followed Mr Minucos' intervention. It was dealt with wholly and solely within the deputy premier's office, particularly by Mr Minucos, rather than being dealt with at the agency or departmental level in the ordinary way.

11.325. Mr Barnes replied "hmmmm" to Mr Hanger's 9 May 2017 message. This was something people who worked with Mr Barnes would know was an expression of frustration and/or disappointment that that engagement was not happening through Mr Hanger's area, but from someone in the deputy premier's office.

11.326. The ACTA proposal was a standalone item on the schedule for the DPC executive team meeting that Mr Barnes regularly attended. This was because, as Mr Barnes indicated, they were being asked for updates on this project "more than any other project". The DPC executive team meeting was a fortnightly meeting between the premier and the executive team.

11.327. As part of one of those fortnightly briefings of the premier, on 10 May 2017, Mr Barnes sent an email to Sarah Cruickshank (copied to Mr Hanger), Ms Berejiklian's chief of staff, subject heading "wagga clay pidgeons" [sic]. He told her:

> *Hey Sarah: As you might have heard, the initial BCR on this project came back well shy of 1.0 which presents a problem as decision was to carve out of restart. Chris Hanger has asked for further info from GDH* [sic] *and they have now provided so we are having economists do another updated CBA.*
>
> *Back-up position will be to take from the new Local Infrastructure fund (think it's now called Stronger Country Communities) which comes from Confund* [Consolidated Fund] *so won't require BCR in assessment criteria.*
>
> *I believe Treasurer signed the out of session "delegated" decision yesterday that gives effect to the new regional infrastructure funds and $s and should be making way to your office. When this is signed let me know and I will advance a request for reservation from this new fund to DP so we can have this as a back-up in case BCR remains below the magic mark.*
>
> *Have briefed Fiona around the this* [sic] *back-up plan.*

11.328. Mr Barnes was canvassing the possibility of having to fund the ACTA project from funds other than the RGETF because of his view that the ERC decision to fund the ACTA project had "some standing" because it was an "approval", not a "reservation". Accordingly, he thought that it would be prudent for the public sector to look at other options if indeed government were to proceed with this project but could not attach money to it through the RGETF.

11.329. In due course, the IAU undertook an analysis of the revised business case which produced a positive BCR of 1.1. On 23 May 2017, Mr Barnes sent an email to Ms Dewar and Clive Mathieson (the deputy chief of staff in Ms Berejiklian's office) forwarding the IAU's revised analysis which was to be read in conjunction with, and as an addendum to, its April 2017 Australian Clay Target Association Facility Cost Benefit Analysis.

11.330. Mr Barnes remarked in his email, "Pls note the attached. With extra info now over bcr 1. Chris is now completing paperwork for insw. Local member will be happy." Mr Barnes said he wrote about Mr Maguire in those terms because he understood Mr Maguire would have been making life pretty difficult for both Ms Dewar and Mr Mathieson with his requests for information and it would be a bit of a relief that, with the ACTA project having the capacity to be funded, those enquiries would cease.

11.331. Mr Mathieson was one of a number of people Mr Barnes had been updating and communicating with about the ACTA project. He had regional responsibilities in the premier's advisory staff.

11.332. If the ACTA project had not achieved a BCR of greater than 1, it would likely have required a further decision at the level of the ERC to fund it, which may have involved it being subject to a competitive process, or "normal practice".

11.333. On 10 May 2017, Mr Turner sent an email to Mr Maguire advising he "Received a call today in relation to the grant, paper work is being prepared". However, on 30 May 2017, he advised Mr Maguire that he had "not heard or seen anything regarding the Grant since that email." Mr Maguire forwarded that email to Ms Dewar, who in turn sent it to Mr Minucos and Mr Barnes. Later that day, Mr Minucos sent Mr Maguire an email advising that he had updated Mr Turner as to the positive economic appraisal, that Infrastructure NSW was due to receive the economic appraisal that week and "we will look to fast track the approval process over the ensuing couple of weeks – it is a matter of INSW and ERC meeting to provide approval".

11.334. On 30 May 2017, Mr Barnes sent an email to Mr Hanger, copied to Ms Dewar, Mr Minucos and Mr Mathieson. He advised that the ACTA and another project were to be funded from the RGETF. He asked Mr Hanger to send a letter to Mr Betts "requesting that the ACTA project be funded asap and not through the two step process". This was to remind Mr Betts that this was one of a few projects that was happening outside of that competitive process. This flowed from the ERC decision where it was approved with conditions which allowed the ACTA project to be funded under a one-step non-competitive process as opposed to the usual two-step competitive process. The adoption of a one-step process in relation to RGETF funding occurred in only about three or fewer cases. Mr Minucos replied and said, "I'll speak to Treasurer's Office now and pass on that INSW are expected to recommend that reservation + allocation". Mr Barnes confirmed Mr Minucos' understanding, adding, "The Wagga one will require an agreement to allow INSW to move outside of the guidelines which is a two-step process. I think the ERC will facilitate this."

11.335. Mr Barnes also shared the good news with Ken Gillespie (the NSW Regional Infrastructure Coordinator) on 30 May 2017, saying:

> *Ken: Two things*
>
> *Barra and I are meeting with Prem next Monday. I want to commit to her that I will pull out all stops to deliver for her, Barra and the Govt. I will also commit to working effectively with you and your team (you know that)*
>
> *Wagga Clay Pigeons – The Prem might think that my team has been sitting on this for a year but we only received in* [sic] *just before Xmas and because Wagga guys had engaged GHD who did original business case and CBA they weren't back til Feb and they were hopeless. The funding source was to be the Regional Growth Environment and Tourism Fund (which had its Guidelines approved in March 2017). Original appraisal from our guys in March was a 0.7 BCR. In the interim we agreed to hold it against Confund as we knew this needed to be funded if we couldn't get them compliant with Restart. We worked with GHD again in April/ May and last* [sic] *appraisal finally got them over the line.*

Mr Gillespie was a person Mr Barnes knew was communicating with the premier and, while he reported through the secretary of DPC, on occasions gave the premier updates about how things were going right across the board in terms of regional infrastructure. Mr Barnes wanted to make sure that Mr Gillespie understood that his department did not have carriage of the ACTA project until effectively very late in 2016. He identified "Wagga Clay Pigeons" in this email – as opposed to the myriad of matters within his portfolio area – because, as he understood it, the project was of particular interest to the premier. He wanted to demonstrate that he could deliver the ACTA project for the premier, the deputy premier and the government within the law. The reference in Mr Barnes' email to agreeing to hold the ACTA funding against Confund was a backup option in circumstances where there was perceived to be political imprimatur behind the project.

Consternation in the public sector

11.336. Both Mr Barnes and Mr Hanger became aware of a level of apparent political interest in the ACTA project both from the premier, Ms Berejiklian's office and the deputy premier, Mr Barilaro's, office. They perceived the latter political interest to be manifest at least in part in Mr Minucos' involvement in the ACTA revised business case.

Mr Minucos' role

11.337. Mr Minucos agreed that in his experience, the kind of involvement he had engaging with GHD about the structure of the business case would be dealt with at an agency level rather than at a political staffer level. He justified his involvement on the basis that it was not political but was in regard to the methodology with which he had experience. The work he did in explaining to GHD how to prepare a sensitivity analysis, and suggesting edits to the memorandum the firm forwarded to him, was done by him independently, rather than in conjunction with the agency staff.

11.338. Mr Barnes became aware that Mr Minucos had inserted himself into a process that typically would have been something over which public sector employees would have taken control. He was not pleased about that. In his view, Mr Minucos was involving himself in something that was not typically the domain of ministerial office staffers and working "almost directly with [GHD] to further augment the revised business case" that the Office of Regional Development had put forward for appraisal. This was inappropriate in circumstances where Mr Barnes' department had procured the work from GHD and it would have been the normal practice for engagements with a consultant that it had appointed to happen through the public sector, not from someone in the deputy premier's office.

11.339. Mr Barnes expressed his concern about Mr Minucos' role as someone from the deputy premier's office involved in the preparation of the ACTA business case because of a desire, at least on Mr Barnes' part, to avoid any suggestion of political influence in the preparation of a business case, as well as to ensure that the quality of the additional information that was being sought was consistent with the people who were in the team and had carriage of the work.

11.340. In Mr Barnes' view, it would have been far better from a governance perspective for any ideas for improvement of the business case that Mr Minucos had to be directed to Mr Hanger, and if Mr Hanger agreed that some of the things that were being suggested were relevant, then Mr Hanger's team could have put it to the consultant, rather than it going directly from the deputy premier's office.

11.341. Mr Barnes raised his concerns about Mr Minucos' involvement at the time with Ms Dewar, the deputy premier's chief of staff, to suggest that this was not the best way to conduct business. He recalled being advised, in effect, that Mr Minucos would be told to "pull his head in" and work through Mr Hanger. Mr Minucos said he could not recall an issue being raised with him as

to the appropriateness or otherwise of him, as a political adviser, making direct contact with the consultant, as opposed to doing it through the agency, although he accepted it was possible there was such a conversation.

11.342. Like Mr Barnes, Mr Hanger was concerned to avoid any suggestion that there was political pressure in obtaining the answer to the critical BCR question or at least the preparation of a satisfactory business case in relation to the ACTA project, particularly in circumstances where he could see it was being dealt with at almost the highest level of government, a committee of Cabinet level. He agreed with Ms Davis' assessment that this project was being dealt with in an unusual way.

11.343. Mr Hanger described Mr Minucos as heavily involved in the development of the ACTA project, in particular the advice back to the GHD consultants in regard to the addendum to the original business case.

11.344. Mr Hanger saw the way that Mr Minucos, as someone in a ministerial office, was involved in procuring an addendum to the ACTA business case as "peculiar". He agreed that ordinarily the process of procuring a satisfactory business case from an unsatisfactory business case, or providing any advice to a consultant regarding that matter, would happen at the departmental or agency level rather than at the political staffer level. He was unsure why Mr Minucos was getting involved.

11.345. In his experience as a long-time public official with responsibility for the procurement of infrastructure, and like Mr Barnes, Mr Hanger said he would expect that if the political adviser had insights or observations around a business case, that would go back to the department and the department would engage directly with the consultant.

11.346. Counsel Assisting submitted that notwithstanding the description in evidence of the role of Mr Minucos in the further revision of the GHD business case as "peculiar", "inappropriate" and a "disappointment", the evidence did not rise to a level which would support the making of any adverse findings against Mr Minucos. Rather, they submitted Mr Minucos' involvement was an important part of the "peculiar" circumstances in which a further revision of the GHD business case was procured, but not one that would warrant making any adverse findings against Mr Minucos. The Commission accepts that submission.

The premier's office

11.347. Mr Barnes also became aware that the ACTA project was the subject of a lot of questions at the political level, predominantly from both the deputy premier's office and the premier's office. He tried to keep people "at the political level" with that interest "in the loop". While Mr Barnes agreed that the grant was for a small figure in the context of the NSW Budget as a whole, he understood the ACTA project to be the subject of "a lot of interest" from both offices. It was one of a small number of projects that, he agreed, had "a particular focus or priority at the political level", including from the premier's office. One of the reasons that the ACTA project was given particular priority within Mr Barnes' agency was that Mr Maguire was an advocate for it, and Mr Maguire was someone in respect of whom he understood the premier had an ear. In his view, the ACTA project was one "amongst a few others that stood out as taking up a fair bit of our time".

11.348. Mr Barnes gained this impression, not from talking to either Ms Berejiklian or Mr Barilaro directly, but from discussions with various staff with whom he dealt in Ms Berejiklian's office, who gave him the impression that the premier had an interest in the ACTA project. Both the premier's office and the deputy premier's office asked Mr Barnes for regular updates about it. In his experience, the frequency of those requests was atypical.

11.349. Mr Barnes' primary point of contact was in the deputy premier's office, and they had indicated to him in around March/April 2017 "that they were being, if you like, hassled from the Premier's Office and that no doubt Mr Maguire was hassling them". Mr Barnes said that he inferred that potentially Mr Maguire could have been hassling the premier herself as well. Mr Barnes understood that the principal source of the requests for updates was the premier's office, albeit through the deputy premier's office because the deputy premier had the running of the project. He assumed from those interactions that Ms Berejiklian had a particular interest in the ACTA project.

11.350. However, Mr Barnes also learned from someone in the premier's office that Ms Berejiklian had a high regard for Mr Maguire, a regard he again attributed to the fact that there were only a small number of Liberal Party regional members and that from time to time she took his counsel on regional matters.

11.351. Mr Barnes met with Ms Berejiklian every two weeks along with other deputy secretaries and the secretary. He would report progress within the Regional Growth Fund's work to her on those occasions. Although he could not recall having spoken directly to Ms Berejiklian about the ACTA project, it was mentioned in the set of dot points about things the department wanted to update the premier, which it had to provide a week before the meeting. These updates were part of reassuring government that the matters which were important to it were moving.

11.352. The updates were provided to Ms Berejiklian's office using a template Ms Berejiklian had used when she was the minister for transport and brought across in her role as premier. The ACTA project was the subject of its own item in the template as opposed to a page on which 52 projects were put together as part of a single item because of Mr Barnes' understanding that the premier's office and the premier had an interest in being updated on this particular project.

11.353. As has been noted, like Mr Barnes, Mr Hanger's understanding was that the interest in the ACTA project being pushed was coming out of the premier, Ms Berejiklian's office. The conversations which led Mr Hanger to form that opinion were with Mr Barnes, and staffers in Mr Barilaro's office. Mr Hanger also said that "[T]he way in which it had come forward and the speed at which we needed to procure the business case following the ERC decision all indicated to us strong interest out of that office [the premier's] in regards to the project".

11.354. Mr Hanger also understood from his conversations with Mr Barnes and Mr Minucos that the particular interest from the premier's office was that of the premier, Ms Berejiklian. The way in which the ACTA project was brought to his attention as a priority project indicated to him that this was not just casual interest from an adviser in the premier's office. He was not told support for the project at the political level was connected to a desire by the government to demonstrate support for regional electorates, particularly after the outcome of the Orange by-election toward the end of 2016.

11.355. Ms Berejiklian agreed that it was possible that she gave that indication to people within her office or department that the ACTA project was one in which she signalled interest. She said that she did not recall one way or the other. She further agreed that it was possible that she had conversations with Mr Barilaro, subsequent to the ERC ACTA decision of 14 December 2016, in which she indicated her support for the ACTA proposal. She also could not recall, or at least, it did not stick out for her, whether the ACTA project was one about which Mr Maguire kept her up to date from time to time – although, again, she agreed it was possible this had occurred.

11.356. Ms Berejiklian said she could not remember what, if anything, she did as a consequence of Mr Maguire sending an email to her direct work email address on 6 March 2017 in which he excoriated the fact that ACTA was being required to prepare a further business case as

"Typical of our bullshit government". She said she could have taken some steps but, again, could not recall one way or another. Ms Berejiklian also could not recall whether she did anything as a result of the IAU assessment of the ACTA business case as having a BCR less than 1 such as request that further work be done on the business case with a view to assessing or demonstrating whether or not the benefits to the state would exceed the cost, but, again, agreed it was possible she had asked that the analysis be revisited. In the latter respect, Ms Berejiklian observed that it would not have been unusual to have supported something which was towards 1, and not 1, or a project which did not have positive return because there may be other factors why the government thought there was a good reason to proceed.

The revised BCR qualifies for funding approval

11.357. On 1 June 2017, Mr Hanger wrote to Mr Betts advising in relation to the ACTA project:

> ***The Department's Investment Appraisal Unit (IAU) has assessed the updated business case provided by ACTA for the development of a large clubhouse/ conference facility and associated infrastructure at their existing site in Wagga Wagga following a request by the Premier*** [emphasis added]. *The project is requesting $5.5M from the NSW Government. The project achieves a benefit cost ratio of 1.10 and project benefits to NSW of $535,000, at a 38% displacement assumption over the 25 year assessment period.*
>
> *Can INSW review the attached ACTA CBA Addendum Final (attached))* [sic] *and, if INSW believes the project meets the criteria for the RGETF, recommend the project to the Treasurer for a funding allocation of $5.5M from the RGETF.* (Underlining in original)

11.358. Ms Berejiklian accepted that it was possible that she made the request referred to in Mr Hanger's letter, although she said that she did not remember doing so.

11.359. On 5 June 2017, Infrastructure NSW sent a briefing note to the treasurer, Mr Perrottet, recommending that he approve an allocation of $5,500,000 from an existing reservation in the Restart NSW Fund for the development of infrastructure in Wagga Wagga by ACTA. The recommendation was also made that this allocation be made from the remaining (unallocated) reservation of $11.5 million from the 2014–15 budget reservation for regional tourism infrastructure.

11.360. It is apparent from the briefing note that Infrastructure NSW did not undertake an independent analysis of the ACTA proposal. It relied on the advice of committees or multi-agency committees, which included Treasury, that were the overseers of programs such as the RGETF, to ensure that the relevant CBA had been undertaken, that it was robust and that it complied with Treasury's stipulated methodology.

11.361. In the ACTA case, Infrastructure NSW's advice to the treasurer was on the basis that the IAU within the DPC had reported that the project had a BCR of 1.1, which was appreciably less than what was claimed in the initial submission from ACTA.

11.362. Infrastructure NSW's recommendation did not identify the purpose of the Restart NSW Fund that was considered to be promoted by the allocation of funding for the ACTA proposal (see s 6, Restart NSW Fund Act). In response to a notice requiring Infrastructure NSW to produce a statement of information, including as to the criteria used to approve the funds, Infrastructure NSW said that it:

> *believes the relevant criterion for the project was section 6(1)(b)(iii) of the* [Restart NSW Fund] *Act* – infrastructure required for the economic competitiveness of the State (including the movement of freight, inter-modal facilities and access to water[)] – *on the basis that the project would promote increased tourism visitation to Wagga Wagga*.

11.363. Counsel Assisting submitted that although direct evidence of the request from the premier referred to in Mr Hanger's 1 June 2017 letter to Mr Betts is not before the Commission, the Commission should find that such a request was made by Ms Berejiklian personally (albeit communicated indirectly to Mr Hanger). Ms Berejiklian accepted that it was possible that she made such a request although she said that she did not remember doing so. They also submitted that a finding that Ms Berejiklian did make such a request is consistent with the evidence as to Ms Berejiklian's interest and involvement in the ACTA proposal, and with the unchallenged evidence of Mr Hanger that he understood from communications with either the deputy premier's office or his immediate superior, Mr Barnes, that the request was made by the premier herself. (Mr Hanger being someone who presented as a highly credible and reliable witness.)

11.364. The Commission accepts Counsel Assistings' submission. The fact of Ms Berejiklian's intervention is consistent with her conduct in relation to the ACTA proposal since 2016 when she had ensured it was placed on the ERC agenda and indicated she was inclined to support it. It is also consistent with the impressions Mr Barnes and Mr Hanger formed when dealing with the ACTA proposal that it had "a particular focus or priority at the political level", including from Ms Berejiklian's office.

"heads up ... Wagga "

11.365. On 20 June 2017, Mr Barnes sent an email to Mr Mathieson, subject heading, "heads-up ... Wagga", advising:

> *Clive: Fiona asked me to follow up with INSW where the Wagga Clay target project is up to as the local member has asked. INSW advised this morning that the paperwork has been with Treasurer since 2 June. (can imagine he has been quite busy). Once signed the draft deed and accompanying letter will go out from INSW.*
>
> *Just wanted you in the loop given Premier's interest.*

Mr Mathieson replied, "Good one. Thanks for the update…".

11.366. Mr Barnes sent that email both because of his knowledge that Mr Maguire was continuing to make requests and enquiries concerning the ACTA project and also because of the view he had formed "some months previously" that the premier herself had a particular interest in the project, hence his comment to Mr Mathieson. He did not infer that upon becoming aware of the ERC ACTA decision itself – which he viewed as conveying political imprimatur generally given that it was unusual for a project the size of ACTA to go to the ERC as a standalone – but came to the view over time.

11.367. On 3 July 2017, Mr Turner sent an email to Mr Minucos (copied to Mr Maguire) asking whether there had been any further developments concerning the provision of the grant to ACTA, and advising timing was critical, and of the prospects of delay in the construction if the funds were not received shortly. Mr Minucos' response, if any, is not recorded. Mr Maguire replied, "Gday tony, my contacts said Cabinet signed the funding on Thursday."

11.368. The continuing delay appears to have come about because of other conditions attached to the ERC ACTA decision such as the necessity that there be confirmation of the ACTA cost estimates through a competitive tender process and putting a funding deed in place.

This can be seen from an email from Ms Davis dated 8 July 2017 seeking to address these issues, which she commenced by remarking, "This project is unusual – the ERC minute approved it before we had ever heard of it, subject to conditions including an unconditional recommendation … Our recommendation doesn't need to go back to ERC, but it does need the Treasurer to approve it, and to do that Ziggi [Lejins, director – capital analysis in Treasury] needs to provide a brief about all the conditions including competitive tendering to confirm the cost estimate."

11.369. Whatever Mr Maguire may have been told, the formal approval of the ACTA funding by the then treasurer, Mr Perrottet, did not occur until 9 August 2017. The funding was to come from the RGETF as that was what was originally endorsed by the ERC.

11.370. Mr Minucos ceased to hold the role of senior policy advisor in Mr Barilaro's office in September 2017.

Mr Maguire and ACTA – "champion within government"

11.371. It is apparent that Mr Maguire was, to the knowledge of Ms Berejiklian, the principal proponent within government of the ACTA proposal.

11.372. Mr Maguire was a long-term supporter of ACTA and was regarded by senior members of ACTA as, in effect, its "champion within government". The strength of Mr Maguire's affiliation with the organisation is also apparent, as previously noted, from the fact that he was a patron of the NSW Clay Target Association.

11.373. Mr Maguire agreed that he was a vociferous advocate for building projects advanced by ACTA, adopting the "pain in the arse" characterisation attributed to him by Mr Barilaro. He acknowledged that he had a long-term association with ACTA and that he was the principal proponent within government for projects advanced by ACTA between at least 2016 and 2018.

11.374. Mr Barilaro described Mr Maguire as "a dog with a bone" who "really didn't let go" in respect of projects he was seeking to advance. He otherwise described him as "probably top of the bunch in his advocacy and … the aggressiveness of it all".

11.375. Mr Ayres described Mr Maguire as being "at the forward end" of being "particularly pestiferous" (an adopted phrase), "particularly around his own projects, but by no means out of the ordinary".

11.376. Mr Barnes agreed that he understood Mr Maguire was a vociferous advocate for the ACTA project.

11.377. Ms Berejiklian also agreed that Mr Maguire was a vociferous advocate for projects in Wagga Wagga, describing him as "extremely active". She agreed that Mr Maguire was a significant supporter of the ACTA proposal – noting that he "made it known to everybody" – and recalled him as being the "principal proponent".

ACTA – epilogue

11.378. The construction of the ACTA facility was completed in time for the World DTL Championships in March 2018. Mr Maguire had kept encouraging ACTA to "build it bigger … with a view of getting government money to build a building in respect of which there could be a revenue stream for the private organisation". This was part of a theory on his part that projects such as ACTA's (as will be apparent in chapter 12) "all need revenue streams, and you only get a chance to build them once, do it well, and do it right". The fact that this involved using government funds to procure a revenue stream for private organisations did not appear to perturb him.

11.379. On 24 March 2018, Mr Maguire attended the opening night of the World DTL Championships at the ACTA facility. He and Ms Berejiklian spoke the next morning when she called him to wish him a happy birthday. It is apparent from the conversation that he had sent her a photograph of the opening event. The following exchange took place:

MAGUIRE:	*Did you see how many people there were there Glad?*
BEREJIKLIAN:	*Yeah heaps.*
MAGUIRE:	*Oh you got no idea. The hall –*
BEREJIKLIAN:	*Mm.*
MAGUIRE:	*– I said to them you should have built it bigger. It was packed with people.*
BEREJIKLIAN:	*But the good news is they'll have other functions there right?*

11.380. As the construction of the ACTA facility progressed, the ACTA cut the original plan down to two offices to make the actual conference facility area bigger – perhaps in response to Mr Maguire's suggestion. The original plan had been a building that would have had more substantial office facilities, a conference area/dining area and a hall of fame. The ultimate construction did not have a separate area for a hall of fame and the ACTA offices are still on Copland Street.

ACTA – Ms Berejiklian's submissions

11.381. Many of Ms Berejiklian's submissions support propositions by reference to isolated facts. It would repeat the preceding analysis unnecessarily to set out all the contextual factors relevant to the issues. The following deals with Ms Berejiklian's submissions by reference to key facts but should be understood in the light of what has been discussed above.

The proponent

11.382. Ms Berejiklian submitted that while Mr Maguire may have been a vociferous advocate of the ACTA proposal, it was the minister for sport, Mr Ayres, who was the proponent minister and then deputy premier, Mr Barilaro, after the ERC decision.

11.383. It can be accepted that Mr Ayres was the proponent minister. It was his department which advanced the ACTA proposal even though, as has been explained, the departmental officers who were responsible for preparing the ERC submissions were essentially opposed to it until the point that continuing to debate the issue with the minister became a possible career-ending prospect.

11.384. Mr Barilaro could not be described as a proponent minister. The effect of the wording of the ERC ACTA decision, which specified the RGETF as the funding source, was that responsibility for progressing the ACTA funding was shifted from the Office of Sport to Regional NSW. At that time, Regional NSW was a unit within the DPC in respect of which then deputy premier Mr Barilaro (as minister for regional development) was the portfolio minister. The evidence is that the departmental officers within Regional NSW who were responsible for implementing the ERC ACTA decision perceived Ms Berejiklian to be supportive of it. Mr Barnes understood this to be because Mr Maguire was an advocate for it, and Mr Maguire was someone in respect of whom he understood the premier "had an ear".

11.385. The reality is, as the foregoing analysis reveals, that as he accepted, it was Mr Maguire who was the principal proponent within government for projects advanced by ACTA between at least

2016 and 2018. Ms Berejiklian agreed that Mr Maguire was a significant supporter of the ACTA proposal – noting that he "made it known to everybody" – and recalled him as being the "principal proponent".

11.386. As the tenor of Ms Berejiklian's submission is that it was Mr Ayres who was the effective cause of the ERC ACTA decision, it is apposite to reiterate that it was Ms Berejiklian who was responsible for the ACTA proposal coming before the ERC meeting. The urgency with which the ERC submission was prepared and became an item on the agenda despite the Cabinet protocols has also been explained. It was Ms Berejiklian who ensured the ACTA proposal was listed for the 14 December 2016 ERC meeting and, according to Mr Blunden's note, not just once, but twice after it was apparently removed from the agenda, "Daryl fired up and Gladys put it back on".

The Orange by-election

11.387. Ms Berejiklian submitted that the loss of a National Party seat at the Orange by-election to the Shooters, Fishers and Farmers Party was part of the reason she was supportive of the ACTA proposal. That was her evidence, but she also accepted that the fact that the ACTA proposal was being advanced by Mr Maguire "could have been a consideration" in her decision. The Orange by-election, or a perception that the Coalition was out of touch with regional voters, were not factors that troubled Mr Baird or Mr Ayres.

The presumptive announcement

11.388. Ms Berejiklian submitted that Mr Maguire's presumptive announcement of the ERC ACTA decision was irrelevant to the allegations against her as there was no evidence that she was involved in it or influenced by it.

11.389. There is no doubt Ms Berejiklian knew about the media release in which there was no reference to the conditions the ERC had imposed on the ACTA funding. The day it was published, Mr Maguire sent two emails to her private email address containing links to two stories covering his media release about the ACTA funding published in the *Daily Advertiser*.

11.390. Also, the briefing notes for her trip to Wagga Wagga within three weeks of becoming premier were critical of the media release, describing it as presumptive, because the government had asked for evidence of the business case before the project could be considered by Infrastructure NSW for funding.

11.391. It is clear Ms Berejiklian was aware of the media release both directly from Mr Maguire's emails, and of the criticism of his conduct in effect as presumptive from her briefing notes for her trip to Wagga Wagga. As the departmental officers involved with the ACTA proposal said, such an announcement can, in effect, embarrass the government to have to come up with the funds the local member has announced, unconditionally, will be forthcoming.

11.392. The evidence is cogent that Ms Berejiklian favoured the ACTA proposal as already discussed and took steps to ensure its business case was re-visited which ultimately led to it achieving a BCR satisfactory for Infrastructure NSW to approve its funding.

The merits of the ACTA proposal

11.393. Ms Berejiklian submitted that the merits of the ACTA proposal had little, if any, rational bearing on the allegations against her in relation to this proposal.

11.394. She submitted that it was not only unavailable on the evidence but also beyond the function or role of this Commission to make any concluded finding as to the merits of the ACTA proposal (or the RCM proposal); that is the function of the elected government. She contended that especially in circumstances where the proposal was actively promoted by the relevant minister (Mr Ayres), and it was the subject of a unanimous ERC decision, there was simply no utility in the Commission dredging through, and making findings on, historical concerns of departmental officers who may have been sceptical as to the merits of the proposal.

11.395. The Commission rejects this submission. It would be remiss of the Commission in the exercise of its functions if it did not investigate all aspects of the ACTA proposal. It has not itself determined the proposal's merits. It has taken the evidence of those who were at the coal face, both politically and administratively, in it finally being approved. It is part of the Commission's investigative role to analyse that evidence and reach conclusions as to whether that evidence demonstrates that any corrupt conduct occurred during, or connected to, that process. The merits of a proposal to award $5.5 million to the development of private infrastructure in an electorate with whose local member the then treasurer was in a close personal relationship are demonstrably germane to the investigation.

11.396. Ms Berejiklian dealt in some detail with the process by which the ACTA proposal was placed on the ERC agenda. She highlighted the evidence as to the urgency of the proposal leading to it being placed on the last ERC agenda of the year (and the fact her staff had told her of this), the fact that the proposal ultimately received a BCR of just over 1 and Mr Ayres' views about the merits of supporting a shooting facility in an industrial area of Wagga Wagga.

11.397. The fact is that Mr Maguire also had input as he had a formal meeting with Ms Berejiklian in the week before 22 November 2016. Moreover, after the item was apparently taken off the agenda, she reinstated it when Mr Maguire "fired up". Ms Berejiklian submitted her support of the proposal was not a reference to supporting it because of their close personal relationship but because he was the local member. The Commission does not accept that Ms Berejiklian's feelings for Mr Maguire had no influence on her support for the ACTA proposal.

11.398. As to herself, Ms Berejiklian submitted that her causing the proposal to be placed on the ERC agenda did not equate to unqualified endorsement by her of its merits. However, as the evidence indicates, around 6 December 2016, after the proposal had been put on the 14 December ERC agenda, Ms Berejiklian had "indicated an inclination to support the proposal". She also said the ERC decision was unanimous. But both Mr Baird and Mr Barilaro said that the support of the treasurer for an ERC proposal was influential on its outcome.

11.399. Ms Berejiklian also said the decision was subject to conditions. That is the case. That was almost inevitable in the light of Treasury opposition (it said the business case analysis was inconsistent with Treasury economic appraisal guidelines and it was unable to accurately assess the economic benefits arising from the project from a state perspective), and the terms of the ERC submission, which recommended that ACTA should enter into a formal commitment with the Office of Sport to "independently confirm, through market testing, the capital cost of the project to the level of robustness required in NSW Treasury's Guidelines for Capital Business".

The premier's support for the proposal

11.400. Ms Berejiklian submitted that there was no direct evidence that she had a "particular interest" in the ACTA proposal following the ERC decision. She contended that the indirect bases for the inference expounded in that respect by Counsel Assisting were no more than second-hand assumptions made by departmental officers (principally Mr Barnes). Ms Berejiklian accepted that

it was possible that she asked the IAU to assess the updated ACTA business case as Mr Hanger wrote in his letter to Infrastructure NSW on 1 June 2017.

11.401. The Commission rejects this submission. The departmental officers at the frontline after the ERC ACTA decision were the best observers of how the ACTA proposal progressed to a successful conclusion. To their observation, there were unusual aspects of that process, which have been outlined, including critical aspects of the process being taken over by a political staffer who assisted GHD to re-write the ACTA business case which led to it satisfying the BCR criterion. In addition, the ACTA proposal was a standalone item on the schedule for the DPC executive team meeting that Mr Barnes regularly attended. As Mr Barnes said, the departmental officers were being asked for updates on this project "more than any other project".

Factual findings summary

11.402. Counsel Assisting submitted that the Commission should find that when treasurer, and then premier, in relation to the ACTA proposal and in circumstances where she knew that Mr Maguire was the "principal proponent" for that proposal, Ms Berejiklian took action where she:

11.402.1. caused the ACTA proposal to be included on the agenda for the ERC meeting of 14 December 2016

11.402.2. supported the ACTA proposal in the ERC meeting of 14 December 2016

11.402.3. communicated her support for and interest in the ACTA proposal to NSW Treasury staff, at least one ministerial colleague (Mr Barilaro) and staff within her office

11.402.4. caused steps to be taken by staff from her office to follow up on the progress of the ACTA proposal following the ERC ACTA decision, including by communicating a request that the initial BCR calculation of 0.88 by the IAU be revisited.

11.403. Those submissions are supported by the evidence as analysed above, and the Commission so finds.

11.404. The Commission also finds that there is no evidence to suggest that Ms Berejiklian declared a conflict of interest at any time during the course of exercising any of these official functions in connection with the ACTA proposal. Ms Berejiklian was expressly asked and confirmed that she did not declare her relationship with Mr Maguire during the ERC meeting that made the ERC ACTA decision. As outlined above, none of Mr Baird, Mr Barilaro or Mr Ayres was aware of the relationship, nor were any of the departmental officers engaged with the process whereby the ACTA proposal ultimately obtained funding.

Breach of public trust

Section 8(1)(c), ICAC Act

11.405. Section 8(1)(c) of the ICAC Act provides that corrupt conduct is any conduct of a public official or former public official that constitutes or involves a breach of public trust.

11.406. Counsel Assisting submitted that the Commission should conclude that Ms Berejiklian engaged in conduct constituting or involving a breach of public trust by exercising official functions in relation to funding promised and/or awarded to ACTA. They submitted that it is a breach of public trust for the purposes of s 8(1)(c) of the ICAC Act for a public official to exercise such functions in

circumstances where there is a real possibility of conflict between the public official's public duties and her or his private interest. They noted that as a minister of the Crown, Ms Berejiklian had a duty to act only according to what she believed to be in the public interest.

11.407. Ms Berejiklian submitted that this formulation rested on the freestanding positive duty which she had argued was not open on her proscriptive/prescriptive analysis, which is considered in chapter 3 where the Commission rejected Ms Berejiklian's argument in this respect.

11.408. Ms Berejiklian also sought to illustrate the fallacy she attributed to Counsel Assistings' submissions by suggesting that on such a formulation, each and every time a holder of public office exercises their functions, they have a legally enforceable obligation to perform an intellectual process whereby they positively satisfy themselves that they are acting in the public interest, and that that might then be the subject of investigation and findings by the Commission. She contended it was beyond the jurisdiction and role of this Commission to impugn her evaluative assessment of the allocation of public funds in the public interest.

11.409. The Commission rejects this submission. The duty of members of Parliament to act in the public interest is clearly identified in the cases discussed in chapter 3. As there explained, as a member of Parliament, Ms Berejiklian had a duty to act only according to what she believed to be in the public interest uninfluenced by other considerations.[412] Ms Berejiklian was acting not only as a minister, but as treasurer of the state. She was bound by the ministerial code which, while reflective of that duty identified in chapter 3, is concerned with the even more important obligations on ministers (as well as their obligations as members of Parliament) to pursue the public interest to the exclusion of any other interest.

11.410. In the present context, that obligation is reflected in the first clause of the Preamble to the ministerial code: "It is essential to the maintenance of public confidence in the integrity of Government that Ministers exhibit and be seen to exhibit the highest standards of probity in the exercise of their offices and that they pursue and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest". That proposition is reflected in the other provisions of the Preamble, for example (and again relevant to the present context), the "responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity". Clause 6 of the ministerial code expressly imposes a duty on ministers "…in the exercise or performance of their official functions … [to] act only in what they consider to be the public interest, and [they] must not act improperly for their private benefit…".

11.411. The Commission also rejects Ms Berejiklian's jurisdictional submission that public officials should not have to establish before the Commission (or a court) that they specifically satisfied themselves that a decision was in the public interest, and that to have to do so was "fundamentally at odds with the allocation of functions and responsibilities in our system of responsible government".

11.412. There is no doubt in the Commission's view that ministers are required to perform the intellectual process Ms Berejiklian derides concerning decisions being in the public interest – in the light of the ministerial code, it should be second nature to them. The necessity to investigate whether a public official satisfied themselves that a decision was in the public interest is an intrinsic part of the Commission's jurisdiction. In the present context, it is a consequence of the Commission's obligation to investigate whether Ms Berejiklian substantially breached the ministerial code.

[412] *Re Day (No 2)* at [49], referring to *Wilkinson v Osborne* (1915) 21 CLR 89 at 98–99 per Isaacs J; see also at 94 per Griffith CJ [1915] HCA 92; *Greiner v ICAC* (at 161) per Mahoney JA; see also the authorities discussed in chapter 3, Common law.

11.413. Section 8(1)(c) is one of three categories of misconduct "in s 8(1) [that] … define the nature of improbity of public officials in the exercise of official functions which the ICAC Act conceives to be anathema to integrity in public administration".[413] This is in the context that "the [ICAC] Act is directed towards promoting the integrity and accountability of public administration in the sense of maintaining probity in the exercise of official functions".[414]

11.414. Counsel Assisting referred to principles relating to conflicts of interest which have been considered in chapter 10 in the context of assessing Ms Berejiklian's submission about conflicts of interest for the purposes of the ministerial code. For convenience, the principles which Counsel Assisting particularly raised at this juncture are repeated.

11.415. Counsel Assisting submitted that having regard to the nature and strength of Ms Berejiklian's close personal relationship with Mr Maguire at all material times, the Commission should find that there was a real possibility of conflict between that private interest and Ms Berejiklian's public duty in relation to her exercise or non-exercise of public functions associated with proposals for government action that she knew were advanced by Mr Maguire, such as the ACTA proposal.

11.416. They contended that by reason of her close personal relationship with Mr Maguire, there was a possibility that Ms Berejiklian would be influenced in the exercise of her official functions by the incidents of her relationship with Mr Maguire and, in particular, by a desire to please him in relation to projects that she knew were advanced by him (and a concomitant desire not to disappoint him).

11.417. Counsel Assisting drew attention to Ms Berejiklian's evidence denying this proposition during her examination in the Second Public Inquiry by her senior counsel, Sophie Callan SC:

[Ms Callan:]	*Ms Berejiklian, as Treasurer and Premier of New South Wales, what do you say to the suggestion that you had a private interest, namely a close personal relationship with Mr Maguire, including a deep emotional attachment to him, which objectively had the potential to influence the performance of your public duties?*
[Ms Berejiklian]:	*I completely reject that suggestion. Every decision I have made in public life has been in the interests…*
[Assistant Commissioner]:	*Ms Berejiklian, you're being asked about this particular situation, not about your general commitment to public life. You're being asked about the relationship between yourself and Mr Maguire.*
[Ms Berejiklian]:	*That was always separate to my public responsibility. What I felt for him was completely separate to what I did in terms of executing my responsibilities and I stand by that ever so strongly.*

11.418. Counsel Assisting submitted that Ms Berejiklian's evidence on this topic missed the point. They observed that Ms Berejiklian's counsel's question correctly recognised that the question of whether Ms Berejiklian had a private interest of a kind that could cause a conflict of interest and duty to arise was a matter to be determined objectively. They also observed that the law, practice and procedure relating to conflicts of interest and duty proceeds on an assumption of the

[413] *ICAC v Cunneen* at [46].

[414] *ICAC v Cunneen* at [59].

possibility of human frailty – an assumption that human decision-makers may be susceptible to a range of influences, both conscious and subconscious. They added that, relatedly, identifying and managing conflicts of interest plays an important role in probity – it minimises the risk that a public official may be, or may be seen to be, influenced by any consideration other than the pursuit of the public interest.

11.419. Counsel Assisting submitted that, even if it were accepted that what Ms Berejiklian felt for Mr Maguire "was completely separate to what [she] did in terms of executing [her] [public] responsibilities", it would not follow that Ms Berejiklian had not engaged in conduct constituting or involving a breach of public trust. Rather, the test to be applied as to whether there was a relevant conflict of interest in the sense that term is used in clause 7(3) of the ministerial code is an objective one.

11.420. Applying that test, Counsel Assisting submitted that the Commission should conclude that Ms Berejiklian engaged in conduct that constituted or involved a breach of public trust by taking the action referred to in the factual finding summary above in connection with the ACTA proposal in circumstances where there was a real possibility of conflict between her public duties and her private interest as a person who was in a close personal relationship with Mr Maguire.

11.421. To assess this submission, it is necessary to consider how to characterise Ms Berejiklian's relationship with Mr Maguire for the purposes of clause 7(3) of the ministerial code which, as set out in the previous chapter, deals with when a conflict of interest arises in relation to a minister.

11.422. It is relevant to note that "[o]fficial misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him."[415] In other words, the inquiry with which s 8(1)(c) is concerned in the present contest is into corruption in public administration.

11.423. The Commission has concluded that the term "private interest" in clause 7(3) of the ministerial code includes non-pecuniary personal relationships between individuals which are objectively capable of influencing the exercise of public duties. For the reasons that follow, the Commission has concluded that Ms Berejiklian's relationship with Mr Maguire should be so characterised. It constituted a "private interest" for the purposes of the ministerial code.

11.424. As Counsel Assisting submitted, Ms Berejiklian was not ignorant of her obligations in relation to potential conflicts of interests. Rather, she was cognisant of them, ordinarily astute to comply with them and took a cautious approach to her obligations in that respect.

11.425. There is a tension between what Ms Berejiklian said in evidence she understood of her disclosure obligations in relation to Mr Maguire and how the evidence suggests she otherwise sought to fulfil her obligations.

11.426. Ms Berejiklian first claimed that her understanding of a conflict of interest was that it "related to some personal benefit" to her as the minister. She gave an example that the building of a hospital would be of no benefit to her as it would be a community asset and she would "gain nothing but political support".

[415] PD Finn, "Official Misconduct" (1978) 2 *Criminal Law Journal* 307 (at 308), approved in *Question of Law Reserved (No. 2 of 1996)* 88 A Crim R 417 (at 418) per Doyle CJ and by Sir Anthony Mason NPJ (with whom all members of the Court agreed) in *Shum Kwok Sher v Hong Kong Special Administrative Region* (2002) 5 HKCFAR 480; [2002] HKCFA 30 at [80].

11.427. As Counsel Assisting submitted, this limited view did not accord with Ms Berejiklian's practice in relation to disclosures of conflicts of interest, or with the correct approach to such matters. For example, she took the following steps in relation to potential conflicts of interest during her ministerial career:

11.427.1. In 2013, Ms Berejiklian declared an interest to Cabinet and abstained from discussions regarding the appointment of a particular individual to a government board "due to attendance with [that individual] at functions".

11.427.2. In 2017, Ms Berejiklian made a disclosure under the NSW Ministerial Code of Conduct to the effect that two of her cousins were then employed in the NSW public service.

11.427.3. In 2018, Ms Berejiklian made a declaration of interest to Cabinet in relation to a particular Liberal Party supporter in relation to a potential appointment of that person to a government advisory board.

11.427.4. In 2019, Ms Berejiklian declared to Cabinet that a particular person proposed to be appointed to a government board was "known to [her]".

11.428. It is apparent from this list that Ms Berejiklian understood conflicts of interest in a broader sense than that which she originally explained to apply also to possible benefits to a third party. In this context, Ms Berejiklian expressed the view that an appointment "is a personal benefit to somebody because they gain status … from that position" whereas a community project was "for the community".

11.429. Ms Berejiklian said that when considering whether to make any disclosures of her relationship with Mr Maguire to her colleagues within the ERC, she would take into account that the only benefit she saw flowing to a local member (such as Mr Maguire) in relation to a community project for the community was "a rise in popularity". The distinction she stated she made was: is the person going to get a benefit which is not necessarily a community benefit? On the category of appointments, Ms Berejiklian claimed that she and others would "overcompensate" in order to ensure that "there is no perception … of any bias".

11.430. In relation to her cousins, Ms Berejiklian's evidence as to the "personal benefit" she apprehended they might receive because of the exercise of any of her functions associated with them was:

> *…I would have been concerned that they may be treated in a particular way or that they may, or, or it might be assumed that they're getting favour because they're related to me.*

11.431. Ms Berejiklian agreed that a reason for her disclosure in that case was that she wished to avoid any suggestion that any decision-making function in which she was involved may have acted by way of a favour to her cousins. As Counsel Assisting submitted, that evidence is incongruent with her evidence that she did not feel the need to disclose her relationship with Mr Maguire.

11.432. Ms Berejiklian sought to draw the distinction that her cousins "were paid a salary to work in [public sector] agencies … for which, at certain times, [she] may have had authority or responsibility". However, the perceptions Ms Berejiklian identified in relation to them are the same sort of perceptions that underpin the appearance test in clause 7(3) of the ministerial code – in short, favouring a person for an unacceptable reason: relationship rather than merit. The Commission does not accept that Ms Berejiklian did not make the same connection in relation to Mr Maguire as she claims she did in relation to her cousins. She must have realised that, viewed objectively, her close personal relationship with Mr Maguire would be perceived as posing a conflict between her public duty to act at all times in the public interest, and her private interest in maintaining her relationship with him.

11.433. It is significant that after Ms Berejiklian became premier, she turned her mind to disclosing a possible conflict of interest in respect of her cousins who had been employed in the NSW public service since before she became a minister in 2011. The ministerial code became an applicable code of conduct for the purposes of the ICAC Act in 2014. If Ms Berejiklian turned her mind to the significance of her position vis-à-vis her cousins after 23 January 2017, it is improbable she would not have considered her position vis-à-vis Mr Maguire.

11.434. Mr Maguire was also entitled to a salary as a member of Parliament, as well as an "additional salary" by reason of Ms Berejiklian's appointment of him as a parliamentary secretary. Those salaries were dependent upon Mr Maguire continuing to hold office as a parliamentary secretary (a matter exclusively in the gift of Ms Berejiklian when she was premier) and Mr Maguire's re-election as a member of Parliament (something that Ms Berejiklian had influence over as treasurer and premier in that she had the capacity to make decisions that were capable of enhancing Mr Maguire's prospects of re-election).

11.435. As noted above, Ms Berejiklian declared a potential conflict of interest in the appointment of a particular individual to a government board "due to attendance with [the person] at functions" and abstained from discussions in Cabinet as to that appointment. She said she made disclosures in relation to people she knew as associates when they were being put forward for appointments or the like in order to "avoid any sense of favouritism" or any perception that things were not being done "above board".

11.436. Despite Ms Berejiklian's assertions that she would "overcompensate" in dealing with potential conflicts of interest in relation to appointments in order to ensure that "there is no perception … of any bias", she took no such steps in relation to the appointment of Mr Maguire as parliamentary secretary.

11.437. Counsel Assisting submitted that the same reasons informed why Ms Berejiklian must have appreciated a need to take steps in relation to her relationship with Mr Maguire when dealing with matters that concerned him, or his electorate. The immediate concern that arose was the perception of favouritism. They contended this could not have been lost on Ms Berejiklian having regard to her understanding and application of disclosure requirements in other regards. The Commission accepts that submission.

11.438. As Counsel Assisting submitted, the consistent theme that emerged from the evidence was that Ms Berejiklian did not make disclosures or take other steps concerning her relationship with Mr Maguire, regardless of the circumstances. That she was otherwise careful to make relevant disclosures – to "overcompensate" as she put it – is consistent with a desire on her part to conceal from government her relationship with Mr Maguire.

11.439. In addition to her assertion that she did not see decisions such as those made in relation to the ACTA and RCM proposals as conferring a "private benefit" on Mr Maguire, Ms Berejiklian gave a variety of reasons for the non-disclosure of her relationship with Mr Maguire, including:

11.439.1. the fact they did not share finances

11.439.2. the fact they did not live together

11.439.3. a lack of confidence in his level of commitment

11.439.4. not regarding him as a member of her family

11.439.5. not regarding the relationship as having any impact on her public responsibility

11.439.6. the asserted insufficiency of the status of the relationship.

11.440. As Counsel Assisting submitted, a number of those reasons applied equally to Ms Berejiklian's relationships with, for example, her cousins and the associate she had encountered at functions. Further, the factual premise underpinning some of those assertions is contradicted by the evidence, including the evidence as to the seriousness of the couple's close personal relationship considered in the previous chapter under "Ms Berejiklian and Mr Maguire's 'close personal relationship'".

11.441. Counsel Assisting pointed out that at times, Ms Berejiklian sought to equate her relationship with Mr Maguire with the kinds of relationships she enjoyed with some of her parliamentary colleagues. She said that she "absolutely" would have done the same for any other colleague and was "confident she would have" taken "exactly" the same steps as she did at the behest of Mr Maguire for any other colleague.

11.442. As Counsel Assisting submitted, this was not a realistic or credible response. It is to be expected that different parliamentary colleagues of Ms Berejiklian may have attracted differing levels of attention and prompted differing responses. Counsel Assisting contended, and the Commission accepts, that Mr Maguire's level of access to Ms Berejiklian by reason of their close personal relationship put him in a special category.

11.443. As Counsel Assisting also submitted, Ms Berejiklian's attempt to equate her relationship with Mr Maguire to the kinds of relationships she enjoyed with some of her parliamentary colleagues has the appearance of attempts at retrospective justification of the non-disclosure of what clearly was a serious personal relationship and was unconvincing. The qualitative difference between such relationships was plain and could not have been lost on Ms Berejiklian either at the time her disclosure obligations arose, or at the time she gave evidence at the Second Public Inquiry.

11.444. At this point of the inquiry, it is relevant to note that Mr Baird, the premier at the time of the ERC ACTA decision, was of the view that Ms Berejiklian should have disclosed the relationship at the ERC meeting which considered the ACTA proposal. Had it been disclosed, Ms Berejiklian would have had to abstain from making, or participating in, any decision relating to the ACTA proposal, and possibly would have had to absent herself from the meeting.

11.445. Ms Berejiklian submitted that at all material times, she was aware of her duty to disclose any conflict of interest, as demonstrated in the evidence of her various disclosures over the years. She said she was "a consistent stickler for doing things by the book". She contended that, contrary to Counsel Assistings' submissions, this evidence did not favour an inference that she knew (or at least was reckless) that she was obliged to disclose her relationship with Mr Maguire under the conflict regime. She argued that such reasoning was question-begging in that it assumed that she believed that a conflict of interest was in play, whereas that evidence pointed in favour of her lack of knowledge/awareness that she had a conflict of interest by reason of her close personal relationship with Mr Maguire. She did not consider her feelings for Mr Maguire had any influence or capacity to influence the performance of her public duties; her relationship and what she felt for him was always completely separate from what she did in executing her public responsibilities. She submitted that evidence should be given full weight and Counsel Assistings' submission to the contrary should be rejected.

11.446. Ms Berejiklian also submitted that Counsel Assisting failed to account for the "general presum[ption] that a Minister making a decision does have regard to the public interest", and the need for "substantial evidence to make out a case that the Minister had not had regard to the public interest".[416] She contended that there is no "substantial evidence" before the Commission capable of displacing that general presumption.

[416] *Minister for Planning v Walker* [2008] NSWCA 224; 161 LGERA 423 at [41] per Hodgson JA (Campbell and Bell JJA agreeing); applied by Bathurst CJ in *Duncan v ICAC* [2016] NSWCA 143 at [228].

11.447. This submission is misconceived. There is no room for presumptions in the ICAC Act, which tasks the Commission with investigating, relevantly, whether public officials have engaged in corrupt conduct to promote the integrity and accountability of public administration – as it has been necessary to reiterate frequently in response to Ms Berejiklian's submissions.

11.448. The Commission also does not accept Ms Berejiklian's submission that there is no "substantial evidence" before the Commission that she failed to act in the public interest. There is cogent evidence that Ms Berejiklian participated in the ERC decisions concerning ACTA and the RCM, and otherwise exercised official functions in each respect without disclosing her close personal relationship with Mr Maguire, such that there was a real possibility of conflict between her public duty to act only according to what she believed to be in the public interest, and her private interest in her close personal relationship with Mr Maguire.

11.449. The evidence is compelling that Ms Berejiklian deliberately failed to disclose her personal relationship with Mr Maguire in circumstances where there was a real possibility of conflict between her public duty and her private interest in relation to her exercise of her official functions associated with proposals for government action that she knew were advanced by Mr Maguire, such as the ACTA proposal.

11.450. The Commission rejects Ms Berejiklian's submission that she did not know, nor was she reckless as to, her obligation to disclose her relationship with Mr Maguire under the conflict regime.

11.451. In the Commission's view, Ms Berejiklian's failure to disclose her relationship with Mr Maguire in relation to the decisions she made concerning the ACTA proposal cannot be put down to an honest error of judgment. Ms Berejiklian knew what her disclosure obligations were. In failing to disclose her relationship with Mr Maguire, Ms Berejiklian failed to comply with the "fundamental principle of public office-holding that office-holders are required to serve the public honestly, impartially and disinterestedly". A public official must not, in the discharge of their public office or its powers, act in relation to a matter in which the public official or a relevant third party (such as a family member, friend or other associate) has a personal interest.[417]

11.452. In terms of clause 7(3) of the ministerial code, a conflict of interest arose in relation to Ms Berejiklian because there was a conflict between her public duty as a representative of others to act in the public interest[418] and her private interest, being her close personal relationship with Mr Maguire, which could objectively have the potential to influence the performance of her public duty.

11.453. Ms Berejiklian said she could not say she even considered, or that it crossed her mind, to disclose the relationship at the ERC meetings that considered the ACTA and the RCM proposals.

11.454. The Commission rejects Ms Berejiklian's evidence in that respect. At the outset of every Cabinet or ERC meeting, there was a call for conflict of interest declarations. The Commission does not accept in that light that the fact that she should declare her close personal relationship with Mr Maguire (who was the principal proponent of the ACTA proposal) never crossed Ms Berejiklian's mind. She had met with him about the proposal in November 2016, and when the matter had been taken off the ERC agenda, and Mr Maguire had "fired up", she had restored it. He was not only the principal proponent of the proposal generally, he was also the principal instigator of ensuring it remained on the December ERC agenda. If she had had any doubt about whether she was in a position of conflict, she could have sought advice from those present at such meetings to assist specifically in that respect. She did not do so.

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417 *Investigating Corruption* (at [1.75]).

418 *Re Day [No 2]* at [49].

11.455. Ms Berejiklian also relied on her subjective view that her feelings for Mr Maguire did not have any influence or capacity to influence the performance of her public duties; her relationship and what she felt for him were always completely separate from what she did in executing her public responsibilities as supporting her contention she did not know, nor could it be inferred, that she was in a position of conflict of interest.

11.456. Clause 7(3) of the ministerial code does not look to the minister's subjective feelings about whether there is a conflict of interest. It is, as earlier discussed, an objective test. The Commission also does not accept that Ms Berejiklian kept what she felt for Mr Maguire separate from her discharge of her public functions. As discussed in the factual ACTA section, it is apparent Ms Berejiklian went out of her way to ensure the ACTA proposal remained on the ERC agenda, then nudged it towards fruition of the ERC conditions when it faltered. In the Commission's view, the available inference is that Ms Berejiklian took these steps because of her relationship with Mr Maguire, not because of the inherent merits of the ACTA proposal, which were flimsy, if not non-existent, at the ERC meeting stage, and did not improve substantially thereafter.

11.457. This is discussed in detail earlier in this chapter, but it will be recalled in this respect that Treasury advised the ERC that the ACTA submission should be rejected because "a net benefit to the State [had] not been adequately demonstrated". It opined that the BCR of 2.31 calculated in ACTA's business case was inconsistent with Treasury economic appraisal guidelines. ACTA's business case also included these benefits in the economic analysis in a manner inconsistent with the NSW Government *Guidelines for Economic Appraisal*. In addition, Treasury said that the nature of the project, with its localised benefits and limited ability to draw additional visitors from interstate and overseas, meant that a net benefit to the state from the additional $5.5 million in expenditure was very unlikely. Mr Baird also said the position he took at the ERC meeting was that expressed in Mr Blunden's advice: "They should go away, test the assumptions, verify the business case and then come back when it's solid." These views were reflected in the ERC conditions, including that the approved expenditure of $5.5 million was "subject to the finalisation of a satisfactory business case". When the business case was first reviewed by the IAU, it came out at 0.88. Ms Berejiklian agreed it was possible she asked that the BCR calculation of 0.88 by the IAU be revisited. When the business case was re-worked by GHD with Mr Minucos' input, it barely exceeded the required BCR of 1, coming in at 1.1. Mr Barnes communicated that information to Ms Berejiklian's office.

11.458. Having regard to the other, relatively remote, relationships with people Ms Berejiklian had disclosed as possible conflicts of interest and the similarity of the issue (the perception of favouritism) that disclosure of the relationship with Mr Maguire entailed, it is inconceivable that Ms Berejiklian did not consider whether to disclose her relationship with Mr Maguire in the circumstances referred to in the factual findings summary.

11.459. The Commission finds that Ms Berejiklian turned her mind to whether to disclose her close personal relationship with Mr Maguire when exercising her official functions, in the present circumstance as set out in the factual findings summary, but deliberately failed to do so. That behaviour was consistent with the approach she had taken in keeping her close personal relationship with Mr Maguire private for many years. Her failure to disclose the relationship in those circumstances, knowing what her public duty was, was wilful. It was also in bad faith: there was no reasonable excuse or justification for it.

11.460. The Commission finds that in 2016 and 2017 Ms Berejiklian engaged in conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising her official functions in relation to funding promised and/or awarded to ACTA in the respects set out below:

11.460.1. causing the ACTA proposal to be included on the agenda for the ERC meeting of 14 December 2016

11.460.2. supporting the ACTA proposal in the ERC meeting of 14 December 2016

11.460.3. communicating her support for and interest in the ACTA proposal to NSW Treasury staff, at least one ministerial colleague (Mr Barilaro) and staff within her office

11.460.4. causing steps to be taken by staff from her office to follow up on the progress of the ACTA proposal following the ERC ACTA decision, including by communicating a request that the initial BCR calculation of 0.88 by the IAU be revisited

without disclosing her close personal relationship with Mr Maguire when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship which could objectively have the potential to influence the performance of her public duty.

Section 9(1)(d), ICAC Act

11.461. Section 9(1)(d) of the ICAC Act provides that conduct does not amount to corrupt conduct unless it could constitute or involve, in the case of conduct of a minister of the Crown or parliamentary secretary or a member of a House of Parliament, a substantial breach of an applicable code of conduct.

11.462. Counsel Assisting submitted that in the event the Commission found Ms Berejiklian had engaged in a breach of public trust within the meaning of s 8(1)(c) in relation to the ACTA proposal, it should also conclude for the purpose of s 9(1)(d) of the ICAC Act that she engaged in conduct that constituted or involved a substantial breach of the ministerial code by exercising public functions in relation to grant funding promised and/or awarded to ACTA in circumstances where she was in a position of conflict of interest.

11.463. Counsel Assisting submitted that Ms Berejiklian breached 7(2) of the ministerial code and also clause 10(1), clause 11 and clause 12 of the Schedule to the ministerial code in relation to the ACTA proposal in the following respects:

11.463.1. No notice was given by Ms Berejiklian to then premier Mr Baird of the conflict of interest that arose in relation to the ACTA proposal, nor was such notice given on the occasions when Ms Berejiklian exercised her official functions in relation to the ACTA proposal as set out in the factual findings summary.[419]

11.463.2. Ms Berejiklian did not abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matter of the ACTA proposal, nor obtain a ruling approved by the premier that no conflict of interest arose or that any potential conflict of interest could be appropriately managed in relation to her involvement in the ACTA proposal.[420]

[419] NSW Ministerial Code of Conduct, Schedule clause 10(1).

[420] NSW Ministerial Code of Conduct, Schedule clause 12(1), (3). It will be recalled that the ERC decision was made when Ms Berejiklian was treasurer. She accepts the ministerial code applied to her at that time (Schedule clause 27(5)).

11.463.3. Ms Berejiklian did not comply with her obligation pursuant to clause 11 that, if during a meeting of the Cabinet or a Cabinet committee a matter arose in which a minister had a conflict of interest, the minister must (whether or not notice has been given to the premier):

11.463.3.1. disclose to those present the conflict of interest and the matter to which it relates as soon as practicable after the commencement of the meeting

11.463.3.2. ensure that the making of the disclosure is recorded in the official record of the proceedings

11.463.3.3. abstain from participating in any discussion of the matter and from decision-making in respect of it absent a ruling that no conflict of interest arises or that any potential conflict of interest can be appropriately managed

11.463.3.4. not be present during any discussion or decision-making on the matter unless the premier (or the chair of the meeting in the absence of the premier) otherwise approves.[421]

11.464. The Commission has found in relation to s 8(1)(c) that Ms Berejiklian was in a position of conflict of interest when she exercised her official functions in relation to the ACTA proposal, and that she deliberately refrained from disclosing that conflict of interest on the occasions referred to in the factual findings summary in a manner which was wilful and in bad faith.

11.465. Counsel Assisting contended that Ms Berejiklian's breaches were substantial having been constituted by multiple acts over an extended period of a kind that were inconsistent with the "highest standards of probity" that the ministerial code required. They submitted that the Commission would find Ms Berejiklian's breaches of the ministerial code also had significant real-world consequences. They contended that had Ms Berejiklian taken the steps that she was required by the ministerial code to take in relation to the ACTA proposal, it was likely to have been treated differently: it may not have been included on the 14 December 2016 ERC agenda at all and, if it had been, it may not have been the subject of a favourable decision.

11.466. Accordingly, they argued that Ms Berejiklian's exercise of public functions in relation to grant funding promised and/or awarded to ACTA constituted or involved a substantial breach of the ministerial code with the result that her conduct fell within s 9(1)(d) of the ICAC Act.

11.467. Ms Berejiklian submitted that on the assumption (which she disputed) that her conduct did constitute or involve a breach of public trust within the meaning of s 8(1)(c), the Commission could not be satisfied that it constituted or involved a substantial breach of the ministerial code on the following bases.

11.468. First, she reiterated her submissions that the ministerial code did not apply to her, and that her relationship with Mr Maguire did not constitute a "private interest" which conflicted with her public duties. This submission has been considered and rejected in the section, "Ministerial Code of Conduct: application to the premier" in the previous chapter.

11.469. Secondly, she submitted that "knowingly" and "aware" in the ministerial code required awareness by the minister that they have a conflict of interest.

11.470. The Commission considered this submission in the section "The requirement of awareness or knowledge under the NSW Ministerial Code of Conduct" in the previous chapter. It concluded

[421] NSW Ministerial Code of Conduct, Schedule clause 12 (3)(b).

that for those purposes it would be sufficient that the minister knew all the facts constituting the ingredients necessary to constitute a conflict of interest without subjectively knowing they constituted a conflict of interest.

11.471. Whether or not that conclusion was correct, the Commission has found that Ms Berejiklian was, in fact, aware on the relevant occasions that she was in a position of conflict of interest, but deliberately failed to disclose that fact as required by the ministerial code.

11.472. Thirdly, Ms Berejiklian contested the allegation that she substantially breached the ministerial code. She argued the Commission would conclude that she was not aware she had a conflict of interest by reason of her close personal relationship with Mr Maguire and that any breach would only have arisen from a misunderstanding of the legal effect of the code as construed by the Commission rather than amounting to knowing or deliberate conduct.

11.473. The Commission considered this submission in dealing with s 8(1)(c) and rejected the basic premise (misunderstanding) there for reasons which also apply to s 9(1)(d).

11.474. The Commission is satisfied that Ms Berejiklian deliberately breached clause 7(2) of the ministerial code in failing to notify her conflict of interest as required. The Commission also finds that Ms Berejiklian knowingly breached the Schedule to the ministerial code in the following respects:

11.474.1. Insofar as the matters set out in the factual finding summary relate to the 2016 ERC decision:

11.474.1.1 no notice was given by Ms Berejiklian to the premier as required by the Schedule at clause 10(1) in relation to the conflicts of interest that arose in relation to decisions made in respect to the ACTA proposal[422]

11.474.1.2. Ms Berejiklian did not, as required by the Schedule at clause 12(1), abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matters relating to the ACTA proposal

11.474.1.3 Ms Berejiklian did not obtain a ruling from the premier pursuant to the Schedule at clause 12(2), either to the effect that no conflicts of interest arose in relation to any of the decisions concerning the ACTA proposal or that any potential conflict of interest could be appropriately managed[423]

11.474.1.4 Ms Berejiklian did not comply with her obligations that, if during a meeting of the Cabinet or a Cabinet committee a matter arose in which a minister has a conflict of interest, the minister must:

11.474.1.4.1. disclose to those present the conflict of interest and the matter to which it relates as soon as practicable after the commencement of the meeting (the Schedule at clause 11(2)(a))

11.474.1.4.2. ensure that the making of the disclosure was recorded in the official record of the proceedings (the Schedule at clause 11(2)(b))

[422] NSW Ministerial Code of Conduct, Schedule clause 10(1).

[423] NSW Ministerial Code of Conduct, Schedule clause 12(1).

11.474.1.4.3. abstain from participating in any discussion of the matter and from decision-making in respect of it absent a ruling given pursuant to the Schedule at clause 12(2) that no conflict of interest arises or that any potential conflict of interest can be appropriately managed (the Schedule at clause 11(2)(c), the Schedule at clause 12).

11.474.2. Insofar as the matters set out in the factual finding summary relate to the steps Ms Berejiklian caused to be taken by staff from her office to follow up on the progress of the ACTA proposal following the ERC ACTA decision (after she became premier in January 2017):

11.474.2.1. no notice was given by Ms Berejiklian to the Cabinet as required by the Schedule at clause 10(1) and the procedure for which clause 27(5) provides, concerning the conflicts of interest that arose in relation to Ms Berejiklian taking, or participating in, any action in relation to the ACTA proposal after the ERC decision

11.474.2.2. Ms Berejiklian did not, as required by the Schedule at clause 12(1), abstain from taking, or participating in, any action in relation to the ACTA proposal after the ERC decision

11.474.2.3. Ms Berejiklian did not obtain a ruling pursuant to the Schedule at clause 12(2), in accordance with the procedure for which Schedule clause 27(5) provides, either to the effect that no conflicts of interest arose in relation to her taking, or participating in, any action in relation to the ACTA proposal after the ERC decision or that any potential conflict of interest could be appropriately managed.

11.475. As to the substantiality issue, Ms Berejiklian submitted that without derogating from the purpose of a conflict of interest regime as reflected in the ministerial code, in the particular circumstances of the present case, involving no pecuniary benefit to Mr Maguire or anyone associated with Ms Berejiklian (nor otherwise involving any misuse of office by Mr Maguire), and in which the relevant decisions were principally made by the government (not, for instance, stand-alone decisions by Ms Berejiklian) any breaches do not meet the "substantial" threshold.

11.476. In this case, the Commission has found that Ms Berejiklian breached clause 7(2) of the ministerial code as well as clause 10(1), clause 11 and clause 12 of the Schedule and participated in a decision in relation to a matter in respect of which she was aware she had a conflict of interest. As earlier discussed, the concept of a "conflict of interest" is a central concept of the ministerial code. Its importance to the integrity and accountability of public administration is made apparent by clause 11 of the Preamble emphasising that "Ministers have a responsibility to avoid or otherwise manage appropriately conflicts of interest to ensure the maintenance of both the actuality and appearance of Ministerial integrity".

11.477. On the Commission's findings, Ms Berejiklian breached the ministerial code on the occasions referred to in the factual findings summary associated with the ERC's consideration of the ACTA proposal while she was treasurer, and on the occasions there referred to in ensuring, following the ERC meeting, the ACTA proposal was finally funded. The evidence from her colleagues at the meeting is that had she disclosed the relationship, consideration would have had to be given to how the conflict was managed. The departmental officers who dealt with the funding issue after the ERC meeting gave evidence to like effect.

11.478. To recap, in the case of Mr Baird, his view was that whenever she disclosed it (that is to say, whether before or at the ERC meeting) Ms Berejiklian would not have been able to participate in the decision, and possibly may have been excluded from the meeting for that item. Mr Baird also saw disclosure as relevant to the decision-making process in relation to the ACTA proposal. He said that knowledge of the relationship was an additional piece of information for every ERC member who was considering the proposal. He would have wanted to make sure that there could be no suggestion, rightly or wrongly, that putting forward the ACTA proposal or support for it was affected by that potential conflict of interest.

11.479. Mr Barilaro spoke in similar terms. His view was that had the members of the December 2016 ERC meeting been aware of the relationship between Ms Berejiklian and Mr Maguire, most members "would have done everything differently". It would have changed the course of events in relation to how they managed the process, though not necessarily the outcome. Thus, it would have affected the way the ACTA item would have been debated, who would have been in attendance, and if there was a process or another approach in dealing with what would have been a perceived conflict of interest. In his view, had Ms Berejiklian declared a conflict of interest, he believed she would have excused herself from the debate, and "that in itself would have protected many of us in relation to the decision-making".

11.480. Although not a member of the ERC, Mr Ayres thought it would have been prudent for Ms Berejiklian to have disclosed her relationship so the question of whether she should recuse herself in relation to the ACTA decision could be addressed.

11.481. It is apparent that all three minsters had principles such as clause 11 of the Preamble to the NSW Ministerial Code of Conduct at the forefront of their consideration.

11.482. Mr Blunden also gave evidence that, had he been aware of the existence of the relationship between Ms Berejiklian and Mr Maguire at the time of his involvement in the ACTA proposal, he would have advised Mr Baird and "suspect[ed] … he would have sought some advice from somebody, maybe DPC, as to whether … there may have been a conflict of interest involved".

11.483. Similar observations, set out above, were made by the departmental officers involved in preparing the ACTA ERC submission, Mr Doorn and Mr Toohey, and those involved in implementing the ERC ACTA decision.

11.484. The Commission rejects Ms Berejiklian's submission that any breach on her part of the ministerial code did not meet the "substantial" threshold required by s 9(1)(d) of the ICAC Act because the ERC ACTA decision was principally made by the government and was not, for instance, a stand-alone decision by her. The vice of Ms Berejiklian's conduct was that she participated in the discussion about, and supported, the ERC ACTA decision meeting at which the decision was made without disclosing her conflict of interest. As earlier discussed, both Mr Baird and Mr Barilaro gave evidence to the effect that the tendency is for the members of the ERC to take their lead from the treasurer. Had Ms Berejiklian not participated in the discussion about, and supported, the ACTA proposal the outcome may have been different. As Counsel Assisting submitted, it may not have been included on the 14 December 2016 ERC agenda at all and, if it had been, it may not have been the subject of a favourable decision. The same result may have come about if the other members of the ERC had been aware of the conflict of interest and considered there would be an adverse public reaction if the ERC had permitted Ms Berejiklian to participate in a decision favourable to a project for which Mr Maguire advocated in circumstances where he was in a close personal relationship with her.

11.485. As to Ms Berejiklian's submission that the fact the ERC ACTA decision involved no pecuniary benefit to Mr Maguire or anyone associated was relevant to diminish the substantiality of the breach, the Commission notes that Ms Berejiklian's breach undermined probity in the exercise of official functions. The ICAC Act is concerned as much with process as with outcomes. There can be a breach of public trust whether or not a parliamentarian (or other public official, or indeed a member of the public) benefits financially from it.[424] The same principle should be applied when testing the substantiality of a breach, that is to say, a breach of the ministerial code can be substantial whether or not someone personally benefited financially from a decision.

11.486. In the circumstances explained above, the Commission finds for the purposes of s 9(1)(d) of the ICAC Act that Ms Berejiklian's breach of clause 7(2) of the ministerial code could constitute or involve a substantial breach of that code.

11.487. Ms Berejiklian's breaches of clause 7(2) of the ministerial code were of one of the principal provisions of the ministerial code, in circumstances where she may otherwise not have been able to participate in the decision. On the Commission's findings, Ms Berejiklian breached the ministerial code in relation to the actual ERC decision and by other acts over the following period, until the funding was finally approved. The breaches were inconsistent with, and undermined, the "highest standards of probity" the ministerial code required. The Commission finds that those breaches were a substantial breach of the ministerial code.

11.488. Insofar as the breaches of the provisions of the Schedule to the ministerial code are concerned, the Commission also finds that in the light of Ms Berejiklian's knowledge of her obligation to disclose that she was in a conflict of interest position, her breaches of the provisions of the Schedule referred to above were done "knowingly". Her breaches were also substantial. Those provisions of the Schedule are ancillary to the conflict of interest provision in the code which Ms Berejiklian breached. They are the mechanisms which give effect to disclosure of that fact and how the conflict of interest is to be managed. Accordingly, Ms Berejiklian's substantial breaches of the Schedule are a substantial breach of the ministerial code within the meaning of clause 4 of the that code.

11.489. For the purposes of s 9(1)(d) of the ICAC Act and having regard to the factual findings summary in the circumstances explained above, the Commission finds that by exercising public functions in relation to grant funding promised and/or awarded to ACTA in circumstances where she was in a position of conflict of interest, there are grounds on which it could objectively be found that Ms Berejiklian:

11.489.1. breached clause 7(2) of the ministerial code, this breach constituting a substantial breach of that code

11.489.2. knowingly breached clause 10(1), clause 11 and clause 12 of the Schedule to the ministerial code in a manner which was substantial; and

thereby engaged in conduct that could constitute or involve a substantial breach of the ministerial code.

[424] See *Question of Law Reserved* (No 2 of 1996) (1996) 88 A Crim R 417, 418 per Doyle CJ, referring to Finn, above (at 308).

Section 13(3A), ICAC Act

11.490. The Commission is satisfied for the purposes of s 13(3A) of the ICAC Act that having regard to the factual findings summary and in the circumstances explained above, by exercising public functions in relation to grant funding promised and/or awarded to ACTA in circumstances where she was in a position of conflict of interest, there are grounds on which it would objectively be found that Ms Berejiklian:

2.491.1. breached clause 7(2) of the ministerial code, this breach constituting a substantial breach of the ministerial code

2.491.2. knowingly breached clause 10(1), clause 11 and clause 12 of the Schedule to the ministerial code in a manner which was substantial; and

thereby engaged in conduct that constitutes or involves substantial breaches of the ministerial code.

11.491. Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74BA, ICAC Act

11.492. Counsel Assisting submitted that the Commission should conclude that Ms Berejiklian's conduct in exercising public functions in relation to grant funding promised and/or awarded to ACTA constituted serious corrupt conduct. They drew attention to the circumstances, discussed earlier in the report when dealing with the question of whether the ministerial code applied to the premier, in which s 9(1)(d) was added to the ICAC Act to redress the perception following *Greiner v ICAC* that ministers of the Crown were beyond the reach of the Commission.

11.493. Accordingly, Counsel Assisting submitted that conduct constituting or involving a substantial breach of an applicable code of conduct is properly seen as conduct that – from the viewpoint of the ICAC Act – is capable of being just as serious as conduct that could, for example, constitute or involve a "disciplinary offence" by a public sector employee and thus, in an appropriate case, warrant the making of a corrupt conduct finding.

11.494. Counsel Assisting submitted that the Commission should conclude that the corrupt conduct in which Ms Berejiklian engaged in relation to the ACTA proposal in breach of public trust was serious corrupt conduct for the following reasons:

11.494.1. It was engaged in by a person who, at the time of the conduct, was the head of government or a very senior minister in respect of whom the public is entitled to expect the highest standards of probity (as the ministerial code itself recognises).

11.494.2. Ms Berejiklian's breaches of the ministerial code were not trivial ones of no real-world consequence. Rather, a different real-world result may have ensued had Ms Berejiklian complied with the code.

11.494.3. The conduct was engaged in in circumstances where the person who engaged in the conduct knew that (or, at least, was reckless as to whether) she was obliged to take steps under the code in relation to her close personal relationship with Mr Maguire.

11.494.4. The conduct concerned the advancing of public funds to a private organisation that was not obliged to act in the public interest.

11.495. As to the seriousness of Ms Berejiklian's conduct being informed by the fact that she was a senior minister, then premier at all material times, Mahoney JA's observations in *Greiner v ICAC* are apposite:

> *It is important to have regard to the standard of conduct required of a Premier and a Minister. It is commonplace that more is expected of those to whom more is given. This is so not the least in respect of public power. In the case of a high official the power of his office carries, by its nature, influence over others. This is particularly so in the case of a Minister who may exercise not merely legal but political power. In the exercise of such power and influence, a Minister may be subject to little or no formal scrutiny: he is trusted to exercise the power properly. The misuse of public power in breach of such trust may be regarded as of particular seriousness.*

11.496. The perspicacity of his Honour's observation is borne out by the evidence already referred to concerning the influence of the treasurer's views on the outcome of ERC decisions. Counsel Assisting referred to Ms Berejiklian's two positions in respect of the ACTA proposal as being at or towards the apex of power in the state. As much can be accepted.

11.497. As to the issue of real-world consequences, Counsel Assisting submitted that Ms Berejiklian's failure appropriately to deal with her conflict of interest in relation to the ACTA proposal was not a technical failure of no real-world consequence but may have affected whether the ACTA proposal found its way onto the ERC agenda for 14 December 2016 at all and whether it received the approval of the ERC.

11.498. They referred to the evidence of Mr Baird, Mr Barilaro, Mr Ayres, Mr Blunden, Mr Barnes and Mr Toohey concerning what may have occurred in the event they had known of the relationship. They submitted that this evidence supported the proposition that had Ms Berejiklian taken the steps that she was required by the ministerial code to take in relation to the ACTA proposal, it is likely to have been treated differently. Indeed, it may not have been included on the 14 December 2016 ERC agenda at all and, if it had been, it may not have been the subject of a favourable decision. The Commission accepted this submission when dealing with the s 9(1)(d) issue, but it is equally relevant when considering the s 74BA issue as to the seriousness of Ms Berejiklian's conduct.

11.499. Ms Berejiklian submitted that this submission was speculation on Counsel Assistings' part and failed to give due and proper weight to the role of Mr Ayres in advocating for the proposal, and to the collective decision of the ERC in relation to the ACTA proposal subject to conditions.

11.500. Mr Ayres, the proponent minister, said that he did not recall having any direct contact with Ms Berejiklian, at least not insofar as it related to causing for the ACTA proposal to be included on the ERC agenda for the meeting on 14 December 2016. He did not participate in the ERC meeting. Rather, his recollection was that he waited outside the ERC meeting room but ultimately did not go in. He was told the ACTA submission had passed the ERC by someone who came out of the room to tell him he did not need to go in. Save to the extent that he was the proponent minister, whose advisers could not dissuade him from advancing the ACTA proposal, it is clear he did not play an operative role in either securing a place for the ACTA proposal on the ERC agenda, and no role in its deliberations. Contrary to Ms Berejiklian's implicit suggestion that his "advocacy" was motivated by the Orange by-election result on 12 November 2016, he said, "At no stage did I think we needed to fund this proposal to counteract the Shooters Party in regional New South Wales".

11.501. Rather, it was Ms Berejiklian's actions which were operative in ensuring the ACTA proposal got onto, and remained, an item on the 14 December 2016 ERC agenda. Insofar as the collective decision of the ERC is concerned, the Commission has discussed the powerful significance of the

treasurer's role in ERC decisions earlier in this chapter in the section headed "The ERC meeting – 14 December 2016".

11.502. The Commission finds that Ms Berejiklian's non-disclosure did have real-world consequences such that the outcome in relation to the ACTA proposal may have been different had Ms Berejiklian disclosed the relationship. This was a serious failure in process following what the Commission has found to be a deliberate decision on Ms Berejiklian's part not to disclose the relationship.

11.503. Ms Berejiklian knew she was obliged to take steps under the ministerial code in relation to any conflict of interest arising from her close personal relationship with Mr Maguire. Her failure to seek any advice from the advisors available to assist also supports a finding that Ms Berejiklian was reckless as to whether she was obliged to take steps under the code in relation to her close personal relationship with Mr Maguire.

11.504. As has been noted in relation to s 8(1)(c) of the ICAC Act, and as is also relevant here, the consistent theme that emerged from the evidence was that Ms Berejiklian did not disclose her relationship with Mr Maguire, regardless of the circumstances. That she was otherwise careful to make relevant disclosures – to "overcompensate" as she put it – is consistent with a desire on her part to maintain her relationship with Mr Maguire as something unknown within government notwithstanding knowing she had an obligation to disclose it.

11.505. Counsel Assisting submitted that Ms Berejiklian and Mr Maguire's relationship was plainly one that was objectively capable of influencing Ms Berejiklian's decision-making insofar as it concerned projects being advanced by Mr Maguire and she cannot have been ignorant of that fact. The Commission has already found to that effect.

11.506. Counsel Assisting also submitted that the dynamics of a personal relationship cannot simply be cast aside by willing them away or attempting to convince oneself that the personal and the professional can be neatly compartmentalised, particularly in circumstances where no measures are put in place to implement such compartmentalisation. The Commission accepts that submission.

11.507. On the basis of the Commission's findings that Ms Berejiklian either knew or was reckless as to whether her relationship with Mr Maguire required her to notify the premier she was in a position of conflict, the Commission also accepts Counsel Assistings' submission that her concealment of the relationship from her parliamentary colleagues over an extended period of time involved a very substantial departure from the standards of probity she had set for herself and her colleagues and one that can be fairly and appropriately labelled as serious corrupt conduct.

11.508. As to the nature of the decision, Counsel Assisting submitted that it was significant that the nature of the ACTA proposal was to advance public monies to a private organisation to build an asset that would then be owned and able to be used by the private organisation for private purposes (including, for example, to earn a revenue for the private organisation), rather than a proposal that money be advanced to an organisation charged with acting in the public interest such as a department or agency of government. They contended that was a factor to be taken into account in assessing the seriousness of Ms Berejiklian's conduct.

11.509. While the Commission accepts this is not insignificant, it does not accord great weight to it. The ACTA proposal as such was not unique in being an application for funding from a private enterprise. The RGETF from which the ACTA proposal was agreed by the ERC to be funded was just such a scheme, albeit that by reason of the ERC decision, the ACTA proposal did not have to go through the two-step process for which the conditions of an RGETF grant provided when they were settled in 2017.

11.510. It is the highly unusual way in which the process of the approval, and ultimate provision of the ACTA funding came about through Ms Berejiklian's conduct, which characterises it as significant and serious.

11.511. Counsel Assisting submitted that having regard to the significant adverse consequences to Ms Berejiklian including very significant damage to her reputation of a corrupt conduct finding, that finding should not be made unless the Commission was positively satisfied that such a finding was available and appropriate to be made in the circumstances of the particular case.

11.512. The Commission is so satisfied. Ms Berejiklian's conduct was carried out in two capacities. First, as treasurer, a very senior minister, insofar as the events of 2016 were concerned. Secondly, insofar as the events of 2017 were concerned as the premier, the head of government. It is a matter of grave concern for the public to understand how a person holding such positions and – bound by the ministerial code and its strictures as to the avoidance, and management of, conflicts of interest, a matter to be determined objectively – deliberately breached its provisions in respect of a proposal propounded by a person with whom she was in a close personal relationship.

11.513. In these circumstances, the Commission finds that Ms Berejiklian's conduct is serious corrupt conduct within the meaning of s 74BA.

Corrupt conduct conclusion – breach of public trust

11.514. The Commission finds that Ms Berejiklian engaged in serious corrupt conduct, in 2016 and 2017, constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising her official functions in relation to funding promised and/or awarded to ACTA, without disclosing her close personal relationship with Mr Maguire when she was in a position of a conflict of interest between her public duty and her private interest which could objectively have the potential to influence the performance of her public duty. Her conduct comprised:

11.514.1. causing the ACTA proposal to be included on the agenda for the ERC meeting of 14 December 2016

11.514.2. supporting the ACTA proposal in the ERC meeting of 14 December 2016

11.514.3. communicating her support for and interest in the ACTA proposal to NSW Treasury staff, at least one ministerial colleague (Mr Barilaro) and staff within her office

11.514.4. causing steps to be taken by staff from her office to follow up on the progress of the ACTA proposal following the ERC ACTA decision, including by communicating a request that the initial BCR calculation of 0.88 by the IAU be revisited.

Partiality – s 8(1)(b), ICAC Act

Introduction

11.515. Section 8(1)(b) of the ICAC Act provides that corrupt conduct is any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions.

11.516. Counsel Assisting submitted that there is a level of interrelation between the allegation that Ms Berejiklian engaged in conduct that constituted or involved the partial exercise of her official functions in connection with grant funding promised and/or awarded to ACTA, and the allegation of breach of public trust considered in the previous section of the report.

11.517. They noted that one of the purposes of the law pertaining to conflicts of interest is to avoid the actuality or perception of partial conduct in decision-making by exposing and dealing with matters that might cause, or be seen to cause, inappropriate influence in decision-making. They noted that procedures for identifying, exposing and dealing with conflicts of interest, or perceptions of conflicts of interest such as those in the ministerial code, exist to protect the integrity of decision-making processes. They suggested that had Ms Berejiklian invoked the procedures for which the NSW ministerial code provides in relation to the decisions that she participated in, and the other actions she took in connection with the ACTA proposal, she could have avoided any allegation that she engaged in corrupt conduct by exercising official functions partially in favour of Mr Maguire.

11.518. That not having occurred, Counsel Assisting submitted that the evidence before the Commission raised a question as to whether Ms Berejiklian exercised any of her official functions preferentially in favour of the ACTA proposal influenced by a desire on her part to maintain or advance her relationship with Mr Maguire.

11.519. They contended that if the answer to that question was "yes", then Ms Berejiklian engaged in "partial" conduct within the meaning of s 8(1)(b) of the ICAC Act because it is unacceptable in the relevant sense for a person holding an office of public trust, and thereby charged with acting in the public interest, to exercise official functions influenced by her or his close personal relationship with another.

11.520. Counsel Assisting submitted that in taking the steps referred to in the factual findings summary, Ms Berejiklian consciously preferred the ACTA proposal because it was advanced by Mr Maguire, a person with whom she was in a close personal relationship and who Ms Berejiklian knew was the proposal's "principal proponent".

11.521. Counsel Assisting accepted that a finding that Ms Berejiklian was consciously influenced by a desire on her part to maintain or advance her close personal relationship with Mr Maguire, required the Commission to reject Ms Berejiklian's evidence to the effect that the exercise of her official functions was not in any way influenced by her close personal relationship with Mr Maguire. It would be necessary for the Commission to reach a state of actual persuasion that Ms Berejiklian was in fact so influenced.

11.522. Counsel Assisting submitted that the Commission should reject Ms Berejiklian's evidence that Mr Maguire did not enjoy any greater level of access to her than any other member of Parliament. They contended that Mr Maguire plainly enjoyed a greater level of access, which common sense would otherwise dictate, and based on the significant volume of communications between the couple over the course of their long-term close personal relationship. They argued that it was also readily apparent from those communications that the work lives and personal lives of Ms Berejiklian and Mr Maguire were intertwined.

11.523. In addition, Mr Maguire accepted that, between 2015 and 2018, he would have had closer and more regular contact with Ms Berejiklian than he would have had with other ministers.

11.524. Ms Berejiklian also accepted that Mr Maguire advocated to her directly in relation to projects he was advancing.

11.525. Asked directly whether Mr Maguire's access was no greater or less than anyone else within members of Parliament within her party, Ms Berejiklian responded, "That's how I felt".

11.526. She further accepted (while noting that other colleagues did likewise) that Mr Maguire would complain to her about roadblocks or impediments he encountered in the pursuit of his projects. From time to time, Ms Berejiklian said she would intervene to address problems that Mr Maguire had identified to her, although she said that she did it "only through the appropriate channels". She claimed that any such intervention was no different from the manner in which she would have treated any other parliamentary colleague, and rejected the suggestion that she gave projects for which Mr Maguire was advocating particular attention over and above the attention she might give other projects. Ms Berejiklian further claimed that Mr Maguire had no greater or lesser level of access than anybody else to information regarding the status of consideration within executive government of projects he was proposing.

11.527. Counsel Assisting submitted that Ms Berejiklian's evidence to the effect that she intervened to fix issues raised by Mr Maguire, only to the same extent as she would have for any other member of Parliament, should also not be accepted. They relied on several incidents and conversations to make good this point.

Wagga Wagga Base Hospital

11.528. Counsel Assisting cited, as an illustration of what they submitted was a particular example to the contrary, Ms Berejiklian's intervention on 16 May 2018 regarding funding for the Wagga Wagga Base Hospital. At 4:38 pm that day, Mr Maguire complained to Ms Berejiklian in the following terms on a telephone call:

> *MAGUIRE:* *– I went down to Treasury and said now look "how are things coming along, how's my hospital?" Oh um, I said "am I getting my 170 million?" Oh, "it's not a line item", and he wouldn't sort of tell me. And then I said "well what am I getting?" and he said "oh you're getting some money for graffiti". Well that's a hundred thousand to put another van on the fucking road. I said "well what about Tumut Hospital?" Oh he said "not in this budget". "So what of the new school?" No, right. I said "what about the, the base hospital?" He – I said no money to, to – I said "we're about to start building". Oh he said "I'll have to get back to ya". See if –*
>
> …
>
> *- and they're ready to go to tender in January. I said to Brad* [minister for health Brad Hazzard] *before, I said "are we getting money or not?". He said "oh no, I haven't seen it. I don't know, it's up to Treasury". Well I said "you better fucking make sure Wagga's got money otherwise there's gonna be a riot on your hands".*

11.529. Ms Berejiklian responded that she would "deal with it" and "fix it".

11.530. Less than two hours later, at 6:30 pm, Ms Berejiklian called Mr Maguire and told him that she had "got [him] the Wagga Hospital money":

> *BEREJIKLIAN:* *We'll I've already got you the – I've already got you the Wagga Hospital –*
>
> *MAGUIRE:* *But they –*
>
> *BEREJIKLIAN:* *– money.*
>
> *MAGUIRE:* *– should have done it.*

BEREJIKLIAN:	*I know I just talked to Dom* [treasurer Dominic Perrottet] –
MAGUIRE:	*Why did they – why do the -*
BEREJIKLIAN:	*I just spoke to Dom and I said put the 140 in the budget. He goes no worries. He just does what I ask I ask him to –*
MAGUIRE:	*But – but –*
BEREJIKLIAN:	*– it's all fine.*
MAGUIRE:	*– but it's meant to be 170.*
BEREJIKLIAN:	*Whatever it is 170 I said (UNINTELLIGIBLE) I think it's around 140, I said just put it in. He's putting it in whatever it is, okay.*

11.531. Mr Maguire continued to complain to Ms Berejiklian, who responded, "Okay can you please not get yourself worked up again because all you do is shout at me sometimes Hokis." Mr Maguire continued to complain and Ms Berejiklian responded (amongst overtalking), "you don't need to give me that rubbish we're giving … Wagga more money than … than ever before".

11.532. Undaunted, Mr Maguire complained about funding for Tumut Hospital, leading to the following conversation:

MAGUIRE:	*Anyway, you need to find at least five hundred thousand or a million dollars to keep Tumut planning going.*
BEREJIKLIAN:	*Ehm.*
MAGUIRE:	*Just to have a line item. And – and, you know, five hundred thousand –*
BEREJIKLIAN:	*Can you text Brad – can you stress and text Brad cause I've–I've got you now got you the one seventy million in five minutes. You can at least get a few hundred thousand from Brad just keep texting him. If you keep bothering him he'll fix it okay.*
MAGUIRE:	*Yeah – yeah I'll –*
BEREJIKLIAN:	*You can have me fight –*
MAGUIRE:	*– go see Lee and she'll fix it.*
BEREJIKLIAN:	***You can't have me fixing all the problems all the time.***
MAGUIRE:	*I tell you what if you went to the budget without Wagga on it you –*
BEREJIKLIAN:	***Yeah I just fixed it okay.***
MAGUIRE:	*Hokis –*
BEREJIKLIAN:	***Okay it's done.***
MAGUIRE:	*I – I –*
BEREJIKLIAN:	*Alright.*
MAGUIRE:	*– can't believe that that was the top of my list and they ignored me.*
BEREJIKLIAN:	***Well luckily you've got –***

MAGUIRE:	*Why did that do that?*
BEREJIKLIAN:	*Because they're just – they're silly sometimes.*
MAGUIRE:	*Why – why do that do that?*
BEREJIKLIAN:	*Because there* [sic] *so busy getting caught up with so called key seats -*
MAGUIRE:	*Ask –*
BEREJIKLIAN:	*–they forget.*
MAGUIRE:	*– the question.*
	(Emphasis added)

11.533. Counsel Assisting submitted that it was apparent from calls that Mr Maguire was – consistent with his self-description as a "serial pest" – prepared persistently to badger Ms Berejiklian and complain to her in order to get his way in matters concerning his electorate. They also contended that it was apparent that Ms Berejiklian was prepared to take steps to placate Mr Maguire including in circumstances where he gets "worked up" and "shout[s] at [her] sometimes". They argued that those dynamics were suggestive of the impact that Mr Maguire was capable of having on Ms Berejiklian and illustrated why she is likely to have exercised functions in line with Mr Maguire's desires and not otherwise.

11.534. Counsel Assisting argued that Ms Berejiklian's comment, "you can't have me fixing all the problems all the time" was strongly suggestive of this call and the steps taken by Ms Berejiklian being other than an isolated incident. Having regard to the context they submitted there was a strong inference that the incomplete comment "luckily you've got…" was to have been finished with the word "me", which was consistent with Ms Berejiklian indicating that she prepared to take, in the exercise of her official functions, steps desired by Mr Maguire.

11.535. Counsel Assisting accepted that it was plausible that Ms Berejiklian's reference to having "got [Mr Maguire] the $170 million in five minutes" meant that she had caused for an amendment in the presentation of the budget papers, rather than actually having secured a specific appropriation of $170 million "in five minutes". However, they argued that did not detract from the significance of what the Commission should find occurred on 16 May 2018 – around a month before the treasurer's 2018-19 budget speech – that the premier of the state intervened in the preparation of the budget papers to the tune of $170 million because the person with whom she had been in a close personal relationship for several years asked her to.

11.536. The Commission accepts that submission – it is what Ms Berejiklian told Mr Maguire she had done.

11.537. Ms Berejiklian asserted that she "absolutely" would have done the same for any other colleague and was "confident she would have" taken "exactly" the same steps as she did at the behest of Mr Maguire for any other colleague. Counsel Assisting contended that this was not a realistic or credible response. They submitted that while it was to be expected that different parliamentary colleagues of Ms Berejiklian may have attracted differing levels of attention and prompted differing responses, Mr Maguire's level of access to Ms Berejiklian by reason of his close personal relationship with her put him in a special category.

The 14 February 2018 conversation

11.538. Counsel Assisting also relied on the conversation set out in the previous chapter of the report dealing with Ms Berejiklian and Mr Maguire's close personal relationship in which he asserted, with her agreement, that he was "the boss, even when you're Premier".

11.539. In another part of the conversation Ms Berejiklian told Mr Maguire that "normally you're the boss and it's hard when we have to switch it around that's the truth". Counsel Assisting submitted that was in all likelihood an accurate statement and that separating the personal from the professional in such circumstances would be "hard" at the least. They argued that that observation tended against acceptance of Ms Berejiklian's evidence that what she "felt for [Mr Maguire] was completely separate to what [she] did in terms of executing [her] responsibilities". They submitted that the entirety of the extract set out in chapter 10 indicated her level of personal concern for him and the dynamics of their relationship, which put Mr Maguire in a different category from Ms Berejiklian's other parliamentary colleagues.

The "going feral" conversation

11.540. Another illustration to which Counsel Assisting pointed about the different dynamics of the couple's relationship, compared to that of her colleagues, was in relation to their conversation on 30 August 2017 when Mr Maguire was threatening to "go feral" in relation to the United World Enterprises Pty Ltd (UWE) matter and intervene in an important trade mission to China that the minister for trade was to embark upon (see chapter 9). Counsel Assisting submitted that Ms Berejiklian's failure to take any action in response to this matter and, in effect, to indulge Mr Maguire in relation to what was a potential threat to an important trade mission, demonstrated a concern on her part as to the personal consequences of her actions taken in the exercise of his public functions. They argued that Ms Berejiklian's explanation that she "didn't think to" tell Mr Maguire not to intervene in the trade mission, should not be accepted. They submitted that it was implausible that it did not occur to Ms Berejiklian to tell Mr Maguire not to "go feral" and intervene in an important trade mission as he said he would do, as to do so was such an obvious course of action that nobody of Ms Berejiklian's experience could have failed to take it.

11.541. Counsel Assisting also submitted that the Commission should reject Ms Berejiklian's denial that her failure to take any steps to rein in Mr Maguire was in any way influenced by her personal relationship with him. They argued that the most likely explanation for Ms Berejiklian's failure to take action to seek to prevent Mr Maguire "go[ing] feral" (having been directly confronted with Mr Maguire's behaviour) is the existence of her personal relationship with Mr Maguire and a concern that the exercise of her authority in the public sphere would prejudice her private sphere relationship with Mr Maguire.

11.542. While Counsel Assisting accepted that each of the conversations considered above post-date the time at which Ms Berejiklian took steps in connection with the ACTA proposal, they contended they were indicative of the nature of Ms Berejiklian and Mr Maguire's close personal relationship which continued throughout the time that Ms Berejiklian exercised official functions in connection with the ACTA proposal.

The ACTA proposal

11.543. In relation to the ACTA proposal, Mr Maguire agreed that, from time to time, he would keep Ms Berejiklian up to date with his desires and concerns in that respect. He said that he "would have encouraged her to take a close interest in it". He understood that as treasurer, and later premier, Ms Berejiklian had "the power to make money flow to projects" such as the ACTA proposal.

11.544. Mr Maguire said that he did not recall the meeting concerning the ACTA proposal with Ms Berejiklian in November 2016, the subject of Mr Bentley's briefing note, but accepted that it was possible that such a meeting took place.

11.545. Ms Berejiklian was asked about the communication of her support to Treasury for the ACTA proposal around 6 December 2016, at about the time it was first placed on the ERC agenda for 14 December 2016, but before Treasury's formal advice about the proposal was received, in the following exchange:

[Counsel Assisting]: *Is it possible that you indicated that support before you received any advice?*

[Ms Berejiklian]: *It could have been, and,* ***and I should also say, Mr Robertson, top of mind would have been at that time the Orange by-election and, and potential repercussions on that front.***

[Q]: *So is that the reason why you indicated your support to NSW Treasury in relation to this item?*

[A]: *Not necessarily. I can't remember.*

[Q]: *Well, why did you indicate support in relation to this item?*

[A]: *I suspect the same reason that every other member of the Expenditure Review Committee provided support in that* ***it was regarded as a project which would raise our stocks in the regions and would also demonstrate to the community that we were cognisant of providing jobs and tourism opportunities.***

(Emphasis added)

11.546. Ms Berejiklian reiterated her support for the ACTA proposal as being related to the Orange by-election result as follows:

[Ms Berejiklian]: *My only distinct,* ***I distinctly recall the Orange by-election, I distinctly recall that and I distinctly recall the need to demonstrate to rural and regional communities that the New South Wales Coalition Government had not abandoned them in the face of a number of issues that they were concerned with and which they had assumed that we had turned our back on the bush.***

[Counsel Assisting]: *Including by supporting submissions in respect of which a net benefit to the state has not been adequately demonstrated according to the experts in New South Wales Treasury?*

[A]: *That would often occur, and obviously in addition to a business case, you also have to consider other items which would, would cause us to support a project.*

(Emphasis added)

11.547. Ms Berejiklian suggested that other considerations which may have influenced her decision to support the ACTA proposal were:

[Ms Berejiklian]: *I may have been adequately persuaded by the minister who was the proponent, by other members of the committee or by my own decision making insofar as we needed to appease the rural and regional communities. And we would have gauged whether there was community support and I think the government was very sensitive and very frightened or scared about the prospect of certain parts of the community in rural and regional New South Wales turning away from the government. And perhaps this was seen as a way in which we could provide support to the community under those difficult circumstances.*

11.548. As earlier noted, Mr Ayres, the proponent minister, said that he did not recall having any direct contact with Ms Berejiklian, at least not insofar as it related to causing for the ACTA proposal to be included on the ERC agenda for the meeting on 14 December 2016. Counsel Assisting submitted that given Ms Berejiklian accepted that she had already communicated her support to Treasury prior to the ERC meeting of 14 December 2016 in or around 6 December 2016, it is unlikely that she was persuaded by other members of the ERC to support the proposal. They accepted that electoral considerations could certainly have operated on her mind and appear to have done so given Ms Berejiklian's evidence. However, they submitted that given Mr Maguire's style of advocacy and his meeting with Ms Berejiklian in November 2016, there were strong reasons to infer that it was Mr Maguire who persuaded Ms Berejiklian to support the ACTA proposal.

11.549. This submission finds support in Ms Berejiklian acceptance that her support for the ACTA proposal "could have been" influenced by the fact it was being advanced by Mr Maguire:

[Counsel Assisting]: *Was your support for the Australian Clay Target Association submission influenced by the fact that it was a project being advanced by Mr Maguire?*

[Ms Berejiklian]: *It could have been part of the consideration, but the absolute consideration for me, the strongest consideration, was the consequence of the Orange by-election. That's the strongest recollection I have. I don't remember meeting with him. I don't remember the meeting.*

[Q]: *So it was a possible factor, but at least the dominant factor, at least so far as you can recall now–?*

[A]: *In my mind, yeah.*

[Q]: *– is the Orange by-election in the way that you and I have been discussing over the last few minutes, is that right?*

[A]: *Yeah. Yeah.*

11.550. When questioned on the topic by her counsel, Ms Berejiklian indicated that the fact that Mr Maguire had advanced the ACTA proposal "would have been a factor, but one of many" that influenced her support for the proposal. She said, "if the local member is strongly supporting something and then the minister puts forward a proposal and the Expenditure Review Committee's asked to consider that, the views of the local member–irrespective of what seat it is–are always taken into account". Counsel Assisting observed that this qualification may have been intended to suggest that Ms Berejiklian did not take into account the support of Mr Maguire as such, but rather the general idea that the proposal had the support of the local member with the result that that was a matter which influenced her decision-making regardless of who the local member actually was.

11.551. Counsel Assisting submitted that Ms Berejiklian's acknowledgment that her support "could have been" influenced by Mr Maguire's support for the ACTA proposal and that it "would have been a factor", tended to suggest she did not take steps to insulate herself from such influence, notwithstanding the nature of her relationship with Mr Maguire and her assertions that what she felt for Mr Maguire was "completely separate to what [she] did in terms of executing [her] responsibilities".

The observations of others

11.552. Counsel Assisting noted that none of Ms Berejiklian's immediate staff observed her to conduct herself in a manner that was partial towards either Mr Maguire or his electorate. They noted that those observations were non-contextual as those staff members, as well as Ms Berejiklian's professional colleagues, did not have the opportunity to observe Ms Berejiklian's interactions with Mr Maguire in the private sphere, nor were they aware any relationship existed between Ms Berejiklian and Mr Maguire before Mr Maguire's resignation from Parliament, and until her evidence in the First Public Inquiry.[425]

11.553. However, it will be recalled there were some close to the coal face of the implementation of the ERC ACTA decision, Mr Barnes and Mr Hanger in Regional NSW, who observed that Ms Berejiklian's office seemed to be particularly interested in the ACTA proposal.

11.554. Both the premier's office and the deputy premier's office asked Mr Barnes for regular updates about it. In his experience, the frequency of those requests was atypical. He understood that the principal source of the requests for updates was the premier's office, albeit through the deputy premier's office because the deputy premier had the running of the project. He assumed from those interactions that Ms Berejiklian had a particular interest in the ACTA project.

11.555. As explained in the factual section, some stage after the revised business case was reviewed by the IAU and assessed as having a BCR of 0.88, Mr Minucos contacted Mr Hanger and told him that they "needed to revisit the business case". Mr Hanger understood that request to come from the premier's office and the premier. This was because of a range of conversations at that time which indicated that the premier and the premier's office were particularly interested in this project. The way in which it had come forward, and the speed at which his agency needed to procure the business case following that ERC decision, all indicated to those involved in the agency a strong interest out of that office regarding the project.

The upshot

11.556. Counsel Assisting submitted that it was open to the Commission to conclude that Ms Berejiklian exercised official functions preferentially in favour of the ACTA proposal influenced by a desire on her part to maintain or advance her close personal relationship with Mr Maguire. They identified the following matters, which they contended, when considered cumulatively, tended in favour of such a conclusion:

11.556.1. the nature and strength of Ms Berejiklian's close personal relationship with Mr Maguire including Mr Maguire's status as a member of Ms Berejiklian's "love circle"

11.556.2. Mr Maguire's role as the "principal proponent" within government for the ACTA proposal to the knowledge of Ms Berejiklian

[425] Ms Cruickshank is an exception. On 13 July 2018, after Mr Maguire had given evidence in Operation Dasha, Ms Berejiklian told Ms Cruickshank she had had an historic relationship with Mr Maguire.

11.556.3. Mr Maguire's level of access to Ms Berejiklian and his preparedness to directly lobby her in order to seek to advance projects of which he was supportive, including the ACTA proposal

11.556.4. Mr Maguire's manner of lobbying – a self-described "serial pest" who was variously described by others as, amongst other things, persistent and aggressive

11.556.5. the absence of any measures taken by Ms Berejiklian to insulate herself from Mr Maguire's influence over her decision-making insofar as it concerned projects advanced by him

11.556.6. Ms Berejiklian's apparent preparedness to take, or not take, steps in her public life with a view to placating Mr Maguire and maintaining their personal relationship

11.556.7. Ms Berejiklian's acknowledgment that the fact that the project was being advanced by Mr Maguire "could have been part of the consideration" and "would have been a factor"

11.556.8. the absence of evidence supporting a conclusion that Ms Berejiklian supported the ACTA proposal because she concluded that it was in the public interest to do so.

11.557. Counsel Assisting observed that Ms Berejiklian's strong recollection of the results of the Orange by-election and her association between that event and the ACTA proposal suggested that Ms Berejiklian's desire to enhance the popular standing of the governing coalition of parties was a consideration that she took into account in deciding to exercise her official functions in support of the ACTA proposal. But they submitted that possibility did not excuse her conduct if one of the reasons that her official functions were exercised in the way that they were in relation to the ACTA proposal was because of her desire to maintain or advance her close personal relationship with Mr Maguire.

Ms Berejiklian's submissions

11.558. Ms Berejiklian submitted that the evidence before the Commission was not capable of supporting a finding of partiality. She relied on her submissions that partiality requires conscious wrongdoing and submitted this requirement was not satisfied here, as well as those submissions contending that partiality in s 8(1)(b) of the ICAC Act requires a comparative test.

11.559. Factually, Ms Berejiklian relied on the facts already recounted that no witness gave evidence that they perceived any personal relationship of substance between herself and Mr Maguire, nor did anyone who dealt directly with them perceive any partiality even with the benefit of hindsight.

11.560. To the extent that Ms Berejiklian was asked about it, she was adamant that she did not afford Mr Maguire treatment that she would not have given to other local members. For example, when it was put to her that it might have been unusual to tell a backbencher about the result of an ERC vote, she said that it would depend on the circumstances, and that Mr Maguire got the same opportunity as everyone else in that regard, evidence she submitted was not seriously challenged. Ms Berejiklian also gave evidence that she was always receptive to being contacted directly about local issues by members – including by telephone, SMS or in person. In that context, Ms Berejiklian submitted that the mere fact that she spoke on the telephone and exchanged SMSs with Mr Maguire could not be the basis for a finding of partial treatment.

11.561. Ms Berejiklian accepted that Mr Maguire had greater "access" to her than other members and acknowledged they talked frequently and at a more personal level. She contended there was nothing unusual or improper (in the sense of partiality or otherwise) in the mere fact that individuals with a closer personal or professional relationship to a Cabinet member have a "greater level of access" to her.

11.562. Ms Berejiklian submitted a more specific concept of "access" mattered in this context, being the extent to which the Cabinet member is willing to hear, consider and act upon representations from local members about matters affecting their electorate. Ms Berejiklian criticised Counsel Assistings' submission that Ms Berejiklian's partiality manifested itself in her willingness to "intervene" to address "roadblocks or impediments Mr Maguire encountered in the pursuit of his projects".

Wagga Wagga Base Hospital

11.563. Insofar as the Wagga Wagga hospital was concerned, Ms Berejiklian submitted that Mr Maguire raised the issue with Ms Berejiklian (the premier), after he had received non-committal responses from Treasury and "Brad" (that is, Brad Hazzard, then minister for health) as to funding for the hospital who raised it with Mr Perrottet (then treasurer), and the hospital funding was added as a line item in the budget papers. She emphasised that did not involve Ms Berejiklian securing any additional funding for the hospital that had not already been allocated. In that context, Ms Berejiklian submitted there was nothing unusual, let alone improper, in him raising it with her as the head of the government, and her following it up in the manner she did.

11.564. Ms Berejiklian submitted the Commission should accept her evidence that she would have done the same for other colleagues in the same circumstances and that there was no evidence to the contrary. She also contended that Counsel Assistings' submission that her relationship with Mr Maguire was "capable of influencing her conduct" because "people tend to wish to please and to seek to avoid disappointing the expectations or desires of people who they love and from whom they derive emotional strength as part of the maintenance and advancement of their relationship with [that] person" was an unsound foundation for a finding that Ms Berejiklian acted with partiality towards Mr Maguire.

11.565. Ms Berejiklian also submitted that the basis of Counsel Assistings' submission in the previous paragraph was unstable. She argued that the suggestion that the closer one's relationship with a person the more likely they may be influenced, "one might for example take steps in preferment of a lover in respect of whom she or he desires a long term relationship that she or he would not have taken in preferment of a casual friend" not only fails to allow for the multitude of factors which may bear upon a person acting with partiality, but carries with it unfounded assumptions about sexual relationships, friendships and influence.

The 14 February 2018 conversation

11.566. Insofar as the 14 February 2018 conversation is concerned, Ms Berejiklian submitted that the fact that in a private conversation, which "had nothing to do with work", Ms Berejiklian showed concern over Mr Maguire's insecurities, and sought to placate them, is unremarkable. Her banal reassurances in this conversation are, however, a world away from evidence that she would exercise her public functions with partiality, alive to Mr Maguire's insecurities and/or in a manner calculated to placate him. The exchange is easily recognisable as an instance of a woman appeasing an insecure man to make him feel better about himself. It does not reflect her sincere sentiments. She observed that Counsel Assisting did not deploy the conversation as proof of Ms Berejiklian's real view of the dynamic between them.

11.567. Ms Berejiklian submitted that the suggestion this conversation put Ms Berejiklian "on notice" that non-support by her of projects advanced by Mr Maguire would somehow damage their relationship is not borne out by this conversation nor anything else in the evidence before the Commission. She contended there was a conspicuous absence in the significant body of material obtained by the Commission of any evidence linking the fortunes of Ms Berejiklian and Mr Maguire's personal relationship with her support of projects in his electorate.

The "going feral" conversation

11.568. Ms Berejiklian submitted that Counsel Assistings' submissions in relation to this conversation mischaracterised the evidence. She suggested that properly understood, this conversation did not involve any acquiescence by Ms Berejiklian to Mr Maguire's suggestion that he could "go feral" on the trade mission. To the contrary, Ms Berejiklian knew that Ms Cruickshank was going to speak to Mr Maguire in her capacity as chief of staff. She told Mr Maguire to "calmly tell Sarah exactly what you're telling me". In those circumstances, Ms Berejiklian's evidence that "I had full confidence that my office would deal with it appropriately" should be accepted. There was no "failure to take action" or acquiescence, and there is no reason to think that she would have taken a different course with another member of Parliament.

The ACTA proposal

11.569. Ms Berejiklian made the following points:

11.569.1. Contrary to Counsel Assisting, she submitted there are not "strong reasons to infer" that Ms Berejiklian supported the ACTA proposal because of persuasion from Mr Maguire. Neither of them recalled having discussed the topic with each other. The notion that Ms Berejiklian was motivated in any way by Mr Maguire's advocacy is pure speculation.

11.569.2. The reference to Mr Maguire as the "principal proponent within Government" of the ACTA proposal was somewhat misleading when presented in an unqualified fashion. While she acknowledged he was the local member and no doubt actively promoted the ACTA proposal, she submitted that at all times when Ms Berejiklian played any role in the proposal, there was a proponent minister (first Mr Ayres then Mr Barilaro) who was more senior than Mr Maguire. She argued that their role and imprimatur could not be disregarded to create a false perception that Mr Maguire was signally associated with promoting the proposal.

11.569.3. Her evidence that it could have been part of her consideration that Mr Maguire supported the proposal was not a reference to Mr Maguire as such but it was a reference to the obvious fact that the support of the local member is a relevant consideration for supporting a proposal of this nature.

11.569.4. The evidence of Mr Ayres concerning the merits of the ACTA proposal, and the good reasons for supporting it, should be given weight. So too must the fact that there was a genuine deliberative process in the ERC meeting, which gave rise to a unanimous decision amongst the most senior ministers in the state. Ms Berejiklian appeared to contend that the "underlying merits" and the support for the ACTA proposal in the bureaucracy (which she contended Counsel Assisting had conceded in relation to RCM Stage 1, discussed in the next chapter), as well as the "genuine deliberative process in the ERC meeting which gave rise to a unanimous decision amongst the most senior Ministers in the State", were at odds with an allegation of partiality.

11.569.5. In respect of the ACTA proposal, she contended that by far the stronger inference was that she was motivated by these matters, along with what she specifically recalled was the need to respond to the concerns of regional voters following the loss of the Orange by-election and a perceived backlash against the government in regional NSW.

Conclusion

Section 8(1)(b), ICAC Act: partiality

11.570. The elements of s 8(1)(b) have been considered in the previous chapter. A finding of partial conduct must relate to a duty to act impartially. The Commission has no doubt that ministers must act impartially when allocating public funds.

11.571. Partial conduct requires conscious preferment. It also requires actual subjective consciousness of preferment for a reason which was unacceptable but, absent an admission of such consciousness, it is open to the Commission to impute an appreciation that what was being done, in the context in which it was done, in the exercise of official functions, was for a reason which was unacceptable. If such an appreciation can be imputed, and there is also a finding of conscious preferment, that warrants a *prima facie* finding that such conduct was a partial exercise of the public official's official functions, and subject to s 9, s 13(3A) and s 74BA, is therefore corrupt conduct for the purposes of s 8(1)(b).

11.572. The Commission concludes that Ms Berejiklian did consciously prefer the ACTA proposal for a reason which was unacceptable, namely, her close personal relationship with Mr Maguire. It rejects her evidence to the contrary. The circumstances in which it came onto the ERC agenda bespeak irregularity, all of which was within her control:

11.572.1. Ms Berejiklian agreed that to have a matter put on an ERC meeting agenda urgently would require the intervention or at least the agreement of the treasurer.

11.572.2. Ms Berejiklian accepted that Mr Maguire had had discussions with Mr Bentley and her with a view to getting her to give a request or direction that the ACTA matter be placed on the ERC agenda.

11.572.3. Mr Ayres did not recall any direct discussion and agreement with Ms Berejiklian to have the ACTA matter on the agenda.

11.572.4. To the extent that a 5 December 2016 email said, "I understand that Minister Ayres has agreed with the Treasurer that a submission seeking $5.5 million for a Clay Target Association in Wagga Wagga be considered by ERC on 14 December", Mr Ayres interpreted that to mean "our officers interacting with each other, not me and the Treasurer".

11.572.5. Lodging the final ACTA ERC submission one or two days before the ERC meeting was well outside the ordinary timeframes for dealing with an ERC submission.

11.572.6. Placing the ACTA proposal on the ERC agenda at such short notice was not standard procedure; it meant it by-passed "a stage where it would be circulated amongst departments".

11.572.7. On 6 December 2016, at a time when it does not appear the ERC submission could have been seen by Ms Berejiklian, she both placed the matter on the ERC agenda and indicated an inclination to support it.

11.572.8. The premier's office questioned why the ACTA submission could not be delayed until the new year, to allow time for market testing of costings and project planning to be completed.

11.572.9. Treasury recommended that the ACTA ERC submission not be supported as "a net benefit to the State [had] not been adequately demonstrated".

11.572.10. Mr Blunden:

11.572.10.1. inferred Ms Berejiklian wanted the ACTA matter to proceed in a substantive sense because "her office had put it on the agenda". He drew the same inference about Mr Ayres

11.572.10.2. queried whether this was the most appropriate expenditure of $5.5 million of taxpayers' money

11.572.10.3. questioned whether the ACTA proposal was a government priority as it "didn't stand out as anything particularly special that was a requirement, and particularly with the lack of a, a rigorous BCR".

11.572.11. When the matter was taken off the ERC agenda, Mr Maguire "fired up", and Ms Berejiklian reinstated it.

11.573. In the previous section of the report, the Commission addressed Ms Berejiklian's submissions about the process of decision-making in the ERC in the context of the treasurer's influence on the outcome. Without diminishing the independent consideration of the other ministers, the reality is, as one might expect in that context, that the treasurer would be a powerful proponent of the expenditure of public money.

11.574. That being said, the ERC decision was subject to conditions. Ms Berejiklian's interest in the ACTA proposal continued. She closely followed its progress, and the fulfilment of those conditions. As explained when dealing with s 8(1)(c), those close to the coal face of the implementation of the ERC ACTA decision, Mr Barnes and Mr Hanger, observed that Ms Berejiklian's office seemed to be particularly interested in the ACTA proposal. According to Mr Barnes, that degree of attention was atypical.

11.575. Ms Berejiklian sought to draw on a submission Counsel Assisting made in respect to the underlying merits of RCM Stage 1 and the support for it in the bureaucracy (discussed in chapter 12) to submit the same factors were present in the case of the ACTA proposal and were at odds with an allegation of partiality. The Commission rejects this submission. As discussed, the bureaucracy both in the Office of Sport and Treasury did not support the ACTA proposal. From the outset, the ACTA proposal was perceived by the departmental officers who prepared the ERC submission as being a "flimsy case for funding", while Treasury did not support it because it did not benefit the state as a whole and the business case did not comply with its guidelines. There is no evidence from which the Commission could conclude that the ACTA proposal and RCM Stage 1 were of comparable merit.

11.576. Mr Ayres' support was for a business case which was so irremediably flawed the ERC determined to make any grant of funds subject to a new one, and the deliberations of the ERC proceeded without Ms Berejiklian disclosing her conflict of interest and in circumstances where, had she done so, she may have been precluded from participating in the meeting, losing the meeting the influence the treasurer's favourable opinion afforded the ACTA proposal.

11.577. Further, Ms Berejiklian's submission is rather surprising in the light of her contention in dealing with the facts surrounding the ACTA proposal that it is not only unavailable on the evidence, but also beyond the function or role of this Commission to make any concluded finding as to the merits of the ACTA proposal (or the RCM proposal). Rather, she argued that is the function of the elected government. As the Commission has said elsewhere, its function is to investigate whether corrupt

conduct has occurred. That may include examining the evidence, rather than determining for itself, the merits of such matters as the ACTA proposal.

11.578. The common thread underpinning consideration of the ACTA proposal was the close personal relationship between Ms Berejiklian and Mr Maguire. The fact that neither can recall speaking to each other is beside the point. It is clear from Mr Bentley's memorandum to Ms Berejiklian about such a meeting that they did. It would be incontrovertible that at that meeting, Mr Maguire would have strongly advocated for the ACTA proposal being considered by the ERC in 2016.

11.579. The Commission has dealt with the relative roles of Mr Ayres and Mr Barilaro in the previous section. In the Commission's view, it was Mr Maguire who was in fact the principal proponent of the ACTA proposal, as can be seen not only in his constant advocacy of it throughout the many years preceding December 2016, but also in his constant advocacy in 2017, until the funding finally came through. While of course that was conduct he engaged in as a local member, so far as events reveal after the ERC decision, Ms Berejiklian's interest in the approval of the proposal was seen as atypical. It is an available inference that the level of her concern was motivated by her relationship with Mr Maguire.

11.580. Even if, as Ms Berejiklian submits, her concern about the outcome of the Orange by-election was a factor, that would not detract from the conclusion that her consideration for Mr Maguire demonstrated s 8(1)(b) partiality. The issue is similar to that which arose in *Greiner v ICAC* where, it will be recalled, the Commission found Mr Greiner and Mr Moore's conduct came within s 8(1)(a) – (c) of the ICAC Act, with the primary finding being that it came within s 8(1)(b).[426] There, as earlier noted, Mr Greiner and Mr Moore had argued that their conduct in preferring Dr Metherell was not corrupt because they did it for a "political reason". The Commission found they had done it for political advantage to the government, and in Mr Greiner's case to himself. That did not hold sway with the Commission and both Gleeson CJ and Mahoney JA upheld its reasoning in this respect.

11.581. Mahoney JA considered the argument by Mr Greiner and Mr Moore that their conduct in preferring Dr Metherell was acceptable because they did it for a "political reason" in having a by-election for Dr Metherell's seat. Mahoney JA rejected this submission. As earlier observed, in his Honour's view, in "the exercise of executive or administrative power … the ends for which public power may be exercised legitimately are limited by the law [and] [p]ublic power, for example, to appoint to a public office must be exercised for a public purpose, not for a private or a political purpose … It does not follow that, for example, the place where a public facility is to be built may be selected, not because it is the proper place for it, but because it will assist the re-election of a party member." [427]

11.582. Mahoney JA's reasoning is apposite. On Ms Berejiklian's argument, she supported the ACTA proposal for political advantage to prevent a repetition of the Orange by-election outcome and demonstrate to rural and regional communities that the NSW Coalition Government had not abandoned them in the face of a number of issues with which they were concerned and in respect of which they had assumed that the Coalition had turned its back on the bush. However, as Mahoney JA held in *Greiner v ICAC*, this was an impermissible political purpose. In approving the ACTA proposal, the ERC was exercising executive power which had to be exercised for a public purpose, not for a private or a political purpose.

[426] *Greiner v ICAC* (at 137) per Gleeson CJ.

[427] At 162, 163–164.

11.583. The Commission accepts that the mere fact that Ms Berejiklian spoke on the telephone and exchanged SMSs with Mr Maguire could not be the basis for a finding of partial treatment, nor could the mere fact that individuals with a closer personal or professional relationship to a Cabinet member have a "greater level of access" to her.

11.584. However, this is not a case of "mere" facts. As Mr Toohey described it (a description which was reflected in Mr Blunden's memorandum to the premier of 12 December 2016) the ACTA proposal was to allocate funds based on scant and inadequate information which did not meet the NSW Government's standards and was not a matter of government policy.

11.585. The evidence discloses that the conduct of Ms Berejiklian in advancing, and constantly supporting, the ACTA proposal was actuated by her close personal relationship with Mr Maguire.

11.586. In its report considered in *Greiner v ICAC,* the Commission said that the case that Mr Moore's conduct involved the partial exercise of his official functions, in circumstances where he was a personal friend of Dr Metherell, was "somewhat more clear than in Mr Greiner's [case]" because "[t]he Premier knew that his Minister for the Environment was actuated by friendship for Metherell, but only Moore knew the extent of that as a motivating force, and it was considerable … Moore favoured his friend so as to ensure he got the job. It is about as good an example as one could imagine of official functions being exercised in a manner which was positively partial."[428]

11.587. In the present case, no-one at the ERC meeting considering the ACTA proposal, or any of those who dealt with its progress to a final funding decision, knew of Ms Berejiklian's close personal relationship with Mr Maguire, let alone its extent "as a motivating force". In the Commission's view, like Mr Moore, the evidence demonstrates that Ms Berejiklian favoured Mr Maguire to ensure his project was funded. In so doing, like Mr Moore, she exercised her official functions in a manner which was positively partial: she consciously preferred him for an unacceptable reason.

11.588. In considering the influence of Ms Berejiklian and Mr Maguire's close personal relationship, the Commission is acutely conscious to avoid shibboleths about sexual relationships, friendships and influence. Rather, it has considered the evidence set out above, and, where direct evidence is unavailable, drawn inferences from the mosaic of information.

11.589. Part of that mosaic is the conduct Counsel Assisting relied upon in relation to the Wagga Wagga Base Hospital, the UWE incident and the 14 February 2018 conversation.

11.590. In each respect, in the Commission's view, Ms Berejiklian displayed a level of deference to Mr Maguire's wishes and demands. Mr Maguire had been unable to persuade those responsible for the hospital "roadblock" to include the $170 million allocation in the budget. After Mr Maguire's call, Ms Berejiklian immediately responded by telling the treasurer to have that amount included as a line item, thus, apparently, overriding Treasury.

11.591. In the case of the UWE intervention, Ms Berejiklian's submissions miss the point that it was her failure to oppose Mr Maguire's assertion he would "go feral" in relation to the trade mission, not her staff's. In addition, it will be recalled she withheld from her staff's information, the fact the UWE issue did not concern Mr Maguire's electorate.

11.592. As to the 14 February 2018 conversation, as the Commission concluded in the previous chapter, while it may not have been, as Ms Berejiklian submitted, her real view of the dynamic between them, her concern to address what she perceived as Mr Maguire's insecurities, can, as a matter of human experience, be expected to have manifested itself in a continuing desire to assuage his

[428] At 140.

feelings, and support him to the best of her ability. That would include supporting him bringing to fruition two Wagga Wagga projects for which he was a fervent advocate, one of which in the present context was the ACTA proposal.

11.593. The Commission also finds that Ms Berejiklian's exercise of her official functions in relation to the ACTA proposal was undertaken with a subjective consciousness that she was doing so for an unacceptable reason. This can be imputed to her from the context in which she acted, what she did in the exercise of her official functions and the fact that at least one of the reasons she did so was to prefer Mr Maguire, influenced by the existence of their close personal relationship or at least by a desire on her part to maintain or advance that relationship.

11.594. In all these circumstances, the Commission finds that, in 2016 and 2017, Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions within the meaning of s 8(1)(b) of the ICAC Act in connection with funding promised and awarded to ACTA by exercising her official functions influenced by the existence of her close personal relationship with Mr Maguire and by a desire on her part to maintain or advance that relationship.

Section 9(1)(d), ICAC Act

11.595. Counsel Assisting submitted that if the Commission concluded that Ms Berejiklian engaged in conduct that constituted or involved the partial exercise of any of her official functions in connection with ACTA, the Commission should conclude that that conduct constituted or involved a substantial breach of clause 6 of the ministerial code.

11.596. Clause 6 of the ministerial code provides:

> ***6 Duty to act honestly and in the public interest***
>
> *A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.*

11.597. "[P]rivate benefit" is defined in clause 11 of the code to mean (emphasis added):

> *Any financial or* ***other advantage*** *to a person (other than the State of New South Wales or a department of other government agency representing the State), other than a benefit that –*
>
> *(a) arises merely because the person is a member of the public or a member of a broad demographic group of the public and is held in common with, and is no different in nature and degree to, the interests of other such members, or*
>
> *(b) comprises merely the hope or expectation that the manner in which a particular matter is dealt with will enhance a person's or party's popular standing.*

11.598. To the extent the ministerial code contemplates that electoral considerations may be taken into account, it is notable that that effect must be an incidental one ("comprises merely the hope… etc"). That is to say, one consequence of "the manner in which a particular matter is dealt with". The overriding manner in which a particular matter is dealt with must be one that is not dishonest, that the minister "considers to be in the public interest", and that is not "improperly for their private benefit" (clause 6). The effect of the Commission's conclusion in relation to s 8(1)(b) is that Ms Berejiklian did act for her private benefit in preferring Mr Maguire when exercising her official functions in relation to the ACTA proposal.

11.599. Counsel Assisting submitted that if the Commission concluded that Ms Berejiklian exercised official functions partially in favour of the ACTA proposal influenced by a desire on her part to maintain or advance her close personal relationship with Mr Maguire, it would follow that Ms Berejiklian breached the ministerial code because it is improper to exercise official functions for one's private benefit in maintaining or advancing one's personal life and that conduct therefore constitutes a breach of clause 6 of the code. Such a breach is properly regarded as "substantial" for the purposes of s 9(1)(d) of the ICAC Act.

11.600. Ms Berejiklian challenged the basic premise of Counsel Assistings' submission that she breached clause 6 of the ministerial code by knowingly exercising her public powers for the purpose of advancing her personal life. She contended such a finding was: contrary to her evidence; contrary to the very weighty responsibilities and duties of the position she held; and contrary to the evidence of those who observed her executing her public duties as a "stickler", without ever acting in a manner suggestive to anyone (including her staff and then premier Mr Baird) that she treated Mr Maguire or the Wagga Wagga electorate favourably.

11.601. The Commission has dealt with, and rejected, these submissions in the previous section, and also when dealing with s 8(1)(c). The evidence is compelling that it was Ms Berejiklian who guided the ACTA proposal to its successful funding conclusion in the manner analysed above.

11.602. Further, it is not the case, as Ms Berejiklian submitted, that nobody thought Ms Berejiklian treated Mr Maguire favourably. As earlier discussed in detail, Mr Barnes formed the opinion relatively early in his involvement with the ACTA proposal, that Ms Berejiklian had an interest in it. As noted above, Mr Barnes' primary point of contact was in the deputy premier's office, and they had indicated to him that they were being hassled from the premier's office as well. He said that around that time, he was told by either someone in the premier's or the deputy premier's office "that Mr Maguire was well regarded by the Premier, and I think they used the term, you know, that Mr Maguire had her ear".

11.603. At the time, absent knowledge of the relationship between Ms Berejiklian and Mr Maguire, Mr Barnes put this down to "a particularly pesky backbencher that was, like, continually following up and, and demanding information around whether things were up to in a process, in a project that he was particularly committed to".

11.604. Had he had that information, as earlier explained, he said it would have caused those in his team responsible for the ACTA proposal and himself to reflect on whether the mechanisms for the management of the processes were appropriate. While he said that both projects would still have been dealt with on their merits, in the case of the ACTA proposal, it may have led to a different course of action albeit that it was endorsed by the ERC and therefore it had broad support.

11.605. Mr Hanger also concluded there was "strong interest out of [the premier's] office in regard to the project". Had he known about the personal relationship between Mr Maguire and Ms Berejiklian at the time he dealt with the ACTA and the RCM proposals, he said, "you would put in place ways of identifying and managing conflicts of, potential personal conflicts of interest".

11.606. This is the evidence of people at the coal face, who were in a much better position to assess Ms Berejiklian's conduct in relation to the ACTA proposal compared to her conduct in relation to others, than were Ms Berejiklian's colleagues who did not have the advantage of that, in effect, frequent exposure. As Mr Barnes put it, the frequency of the requests for information about the ACTA proposal from Ms Berejiklian's and the deputy premier's offices was atypical.

11.607. Ms Berejiklian also submitted that Counsel Assistings' contention that Ms Berejiklian breached clause 6 of the ministerial code was misconceived and should be rejected. This was essentially for the reasons for which she contended in relation to s 8(1)(c), that Counsel Assistings' reliance, in part, on the words in clause 6, "must act only in what they consider to be the public interest" raised an issue which was beyond the jurisdiction and institutional competence of the Commission.

11.608. It should be pointed out at the outset, that Counsel Assistings' submissions about clause 6 of the ministerial code do not turn on the phrase "must act only in what they consider to be the public interest" but, rather, on the phrase in clause 6 that ministers "must not act improperly for their private benefit".

11.609. However, insofar as Ms Berejiklian contends public interest issues are beyond the jurisdiction and institutional competence of the Commission, the Commission rejected that argument in the s 8(1)(c) section and also rejects it in the s 9(1)(d) context. As pointed out in the s 8(1)(c) section, the ministerial code recognises the obligation of ministers to "be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest", an obligation expressly recognised in the duty clause 6 imposes on ministers "…in the exercise or performance of their official functions … [to] act only in what they consider to be the public interest, and [they] must not act improperly for their private benefit…". The Commission is tasked to investigate matters arising from the ministerial code as it has been prescribed as an applicable code of conduct for the purposes of s 9(1)(d) if they fall within s 13(1) of the ICAC Act. The statutory intention is that such investigations include the matters set out in the ministerial code, including, of course, those identified in clause 6.

11.610. Ms Berejiklian also sought to rely upon what she contended was her unchallenged evidence that considered both the ACTA and RCM projects to be in the public interest. Insofar as the ACTA proposal is concerned, Ms Berejiklian relied upon her evidence that she thought "the public interest would have been that this would have kept a proportion of the community pleased because they wanted this facility".

11.611. It is not the case that this evidence was "unchallenged". Indeed, Ms Berejiklian gave this evidence in response to a question drawing her attention to the fact that "Treasury says that the submission doesn't demonstrate a net benefit to the state" and asking her to explain why "at least in [her] mind, was it in the public interest to support this [ACTA] proposal?"

11.612. There is a considerable body of evidence to the effect of the Treasury advice in relation to the ACTA proposal set out in this section of the report. It was a valid proposition on which to test Ms Berejiklian's contention that "the public interest would have been that this would have kept a proportion of the community pleased because they wanted this facility", to point out that the ACTA proposal did not satisfy Treasury guidelines and "demonstrate a net benefit to the state". Ms Berejiklian had already been challenged on why she supported the ACTA proposal having regard to the Treasury advice and contended that "decisions we take as a government don't always follow the Treasury advice [and that] ultimately it's the decision of government as to whether a public good or a public grant or a public asset should be invested in".

11.613. The reality was that Ms Berejiklian claimed to have no real recollection of why she supported the ACTA proposal and accepted she was speculating as to such matters as to whether "we … gauged whether there was community support". The only matter she said she clearly recollected was the recent loss of a seat at the Orange by-election to the Shooters, Fishers and Farmers Party. The Commission has considered that issue in the s 8(1)(b) section and concluded that was an impermissible political purpose.

11.614. Ms Berejiklian's contention that her "public interest" evidence was unchallenged also flies in the face of the extensive matters put to her to the effect that her support for the ACTA proposal was influenced by the close personal relationship between herself and Mr Maguire. It was in the light of that evidence that the Commission has found that Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions within the meaning of s 8(1)(b) in connection with funding promised and awarded to ACTA by exercising official functions influenced by the existence of her close personal relationship with Mr Maguire and by a desire on her part to maintain or advance that relationship.

11.615. The Commission rejects Ms Berejiklian's submission that her "public interest" evidence was neither undermined nor contradicted.

11.616. As to the issue of substantiality, Ms Berejiklian submitted that the Commission would not find that her conduct constituted a substantial breach of clause 6 of the ministerial code for the purposes of s 9(1)(d) of the ICAC Act. She relied on her submissions that the inference that neither she or Mr Maguire perceived that her involvement in projects associated with him could "maintain or advance" their relationship – or the converse proposition, that her opposition to such projects could imperil or diminish their relationship – was simply never put to either witness. The requirements of procedural fairness, therefore, prevented Counsel Assisting from using such an inference as the basis for their allegation that Ms Berejiklian committed a substantial breach of clause 6 of the ministerial code.

11.617. The Commission rejects this submission. Ms Berejiklian was given opportunities to express her views about the effect of her relationship with Mr Maguire on her exercise of her official functions. A response she gave to that question when asked in the context of her disclosure of her relationship after Mr Maguire's Operation Dasha evidence is indicative of her typical (using that term non-pejoratively) answer:

> *I was close friends with Mr Maguire. Whether or not the relationship was at a particular stage at any given time was irrelevant. I had a close association with him, a close ongoing association and relationship with him. How you define that is, is subjective, because I know exactly, you know, what my position was. But irrespective of how close or not it was at any particular time, as Premier I had a close relationship with him. I was, as I've stated, it, it was immaterial as to what others thought about it. I knew what situation I was in. And either way, either way that was a political consideration. But at the end of the day, it didn't affect what I did in terms of executing my public duty. It didn't affect what I thought were my obligations and it didn't affect how I thought about things.*

11.618. The Commission has considered and rejected such evidence on Ms Berejiklian's part on the basis of the evidence hitherto discussed and for the reasons earlier given in relation to the finding that Ms Berejiklian engaged in partial conduct.

11.619. Ms Berejiklian also submitted there was no evidence supporting an inference that she knowingly exercised her public powers for the purpose of advancing her personal life. The Commission has set out the evidence relied on in drawing such an inference.

11.620. For the reasons given in relation to her breach of public trust in connection with the ACTA breach of public trust section, the Commission rejects Ms Berejiklian's submission that any breach on her part of the ministerial code did not meet the "substantial" threshold required by s 9(1)(d) because the ERC ACTA decision was principally made by the government and was not, for instance, a stand-alone decision by her. In summary, as set out there, although the ERC decision was made in committee, so to speak, the evidence was that the treasurer's views were a powerful factor in

determinations. Ms Berejiklian's views in favour of the ACTA proposal would have held strong sway in the ERC decision.

11.621. It might be the case that Counsel Assisting only point to one breach of the ministerial code in relation to Ms Berejiklian's partial conduct. However, as earlier discussed, in the Commission's view, a single instance of a breach of a provision such as clause 6 of the ministerial code may amount to a "substantial" breach.

11.622. In this respect, clause 6, which the Commission has concluded Ms Berejiklian breached, is one of the key clauses of the ministerial code which gives effect to the principles of the Preamble. The obligations clause 6 imposes are central to public confidence in the integrity of government. It identifies conduct which goes to the heart of ministerial probity. For Ms Berejiklian, first as treasurer, then as premier, to exercise her official functions on the occasions set out in the factual findings summary without disclosing her close personal relationship with Mr Maguire, and to do so improperly for her private benefit – namely, the benefit in maintaining or advancing her close personal relationship with Mr Maguire – seriously undermined the high standards of probity that are sought to be achieved and maintained by the ministerial code.

11.623. In addition, the Commission has considered the fact that the ACTA proposal involved a grant of $5.5 million. Ms Berejiklian's ministerial colleagues and the departmental officers who gave evidence about this issue were all of the view the relationship should have been disclosed in relation to the ACTA proposal. Had it been, it is unlikely that she would have been able to participate in its consideration. As Counsel Assisting submitted, it may not have been placed on the ERC agenda, and, even if it had been, having regard to the evidence set out in the s 8(1)(c) section concerning her colleagues' reaction had they known about the relationship, may not have been approved.

11.624. For the purposes of s 9(1)(d) of the ICAC Act and having regard to these considerations and in the circumstances described above, the Commission finds that there are grounds on which it could objectively be found that Ms Berejiklian's breach of clause 6 of the ministerial code in relation to the ACTA proposal could constitute or involve a substantial breach of that code, that being an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act.

Section 13(3A), ICAC Act

11.625. The Commission is also satisfied for the purposes of s 13(3A) of the ICAC Act, that Ms Berejiklian's breach of clause 6 constitutes or involves a substantial breach of the ministerial code.

11.626. Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74BA, ICAC Act

11.627. Counsel Assisting submitted that if the Commission concluded that Ms Berejiklian engaged in partial conduct that constituted corrupt conduct within the meaning of the ICAC Act in connection with grant funding promised and awarded to ACTA, the Commission would conclude that that conduct constitutes "serious corrupt conduct" for the purposes of s 74BA of the ICAC Act, with the result that it was open to the Commission to make a corrupt conduct finding in relation to that conduct.

11.628. In so concluding, they submitted the Commission would take into account the following matters:

11.628.1. the intrinsic seriousness of the conduct – it is an intrinsically serious matter for a public official to exercise public power influenced by the advancement or maintenance of their personal life

11.628.2. Ms Berejiklian's position as a senior minister at the time of the relevant conduct

11.629.3. the fact that Ms Berejiklian must have known that she was not entitled to exercise official functions for her own private benefit.

11.629. Ms Berejiklian did not gainsay the proposition that it is an intrinsically serious matter for a public official to exercise public power influenced by the advancement or maintenance of their personal life.

11.630. The standard of conduct required of Ms Berejiklian as premier, and treasurer, is high such that Ms Berejiklian's misuse of public power by engaging in partial conduct may be regarded as of particular seriousness. It is clear, in the Commission's view, that Ms Berejiklian's conduct in relation to the ACTA proposal impairs, or could impair, public confidence in public administration.

11.631. As in the case of Ms Berejiklian's breach of clause 7(2) of the ministerial code, it is a matter of grave concern for the public to understand how a head of government, bound by the ministerial code and its strictures as to not engaging in partial conduct, deliberately breached clause 6 in respect of a proposal propounded by a person with whom she was in a close personal relationship.

11.632. As to the issue of real-world consequences, Counsel Assisting submitted that Ms Berejiklian's failure to deal appropriately with her conflict of interest in relation to the ACTA proposal was not a technical failure of no real-world consequence but may have affected whether the ACTA proposal found its way onto the ERC agenda for 14 December 2016 at all and whether it received the approval of the ERC.

11.633. The Commission has accepted that submission when dealing with the issue of breach of public trust. As it found there, the ERC ACTA decision did have real-world consequences such that the outcome in relation to the ACTA proposal may have been different had Ms Berejiklian disclosed the relationship or, in the present context, not exercised her official functions partially for her private benefit.

11.634. In these circumstances, the Commission is positively satisfied that the serious corrupt conduct finding for which Counsel Assisting contends is available and appropriate to be made in relation to Ms Berejiklian's breach of s 8(1)(b) of the ICAC Act.

11.635. Accordingly, the Commission finds that Ms Berejiklian's conduct in 2016 and 2017 constituting or involving the partial exercise of her official functions in connection with funding promised and awarded to ACTA by exercising official functions influenced by the existence of her close personal relationship with Mr Maguire, or by a desire on her part to maintain or advance that relationship, constituted serious corrupt conduct for the purposes of s 74BA of the ICAC Act.

Corrupt conduct conclusion – partiality

11.636. The Commission finds that Ms Berejiklian engaged in serious corrupt conduct in 2016 and 2017 constituting or involving the partial exercise of her official functions within the meaning of s 8(1)(b) of the ICAC Act in connection with funding promised and awarded to ACTA by exercising her official functions influenced by the existence of her close personal relationship with Mr Maguire and by a desire on her part to maintain or advance that relationship.

Section 74A(2) statement

11.637. Ms Berejiklian is an affected person for the purposes of s 74A(2) of the ICAC Act in that substantial allegations have been made against her in the course of or in connection with the matters the subject of this chapter.

11.638. Counsel Assisting submitted that the Commission should not make a s 74A(2) statement that in all the circumstances, it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for the offence of misconduct in public office in relation to her conduct constituting a breach of public trust and her partial conduct concerning the ACTA proposal.

11.639. They did so for the following reasons.

11.640. The Commission has considered whether Ms Berejiklian's conduct in relation to the ACTA proposal could constitute or involve a substantial breach of an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act, rather than whether it could constitute or involve a criminal offence for the purposes of s 9(1)(a). Nevertheless, Counsel Assisting accepted that a breach of public trust, partial conduct or a substantial breach of the ministerial code could constitute a criminal offence. Depending upon the circumstances and, in particular, on the mental state of the public officer, Counsel Assisting submitted that conduct of the identified kind could potentially constitute or involve the common law offence of misconduct in public office. The elements of that offence have been set out in chapter 3. It would, of course, be necessary for a prosecutor to prove the commission of that offence beyond reasonable doubt.

11.641. Counsel Assisting submitted that in relation to the requirement to prove that the accused has "wilfully misconduct[ed] her or himself", the prosecutor would have to establish that Ms Berejiklian knew (or was reckless as to whether) her conduct constituted misconduct and that she would not have engaged in the impugned conduct but for her improper purpose of maintaining or advancing her close personal relationship with Mr Maguire.

11.642. As to the requirement to prove that the accused's misconduct was "serious and meriting criminal punishment having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those objects", Counsel Assisting submitted that invoked a different concept of seriousness than the one considered above in the context of the phrase "serious corrupt conduct" in s 74BA of the ICAC Act. They distinguished the concepts on the basis that whereas the concept of seriousness relevant to the concept of misconduct in public office is that the conduct is so serious as to warrant criminal punishment in the relevant circumstances, in the case of s 74BA, it is possible for corrupt conduct to be so serious as to permit and warrant a corrupt conduct finding, but not so serious as to be capable of constituting or involving the offence of misconduct in public office.

11.643. In relation to Ms Berejiklian's partial conduct in relation to ACTA and/or the RCM, Counsel Assisting accepted that there is a body of evidence independent of Ms Berejiklian's own evidence that would likely be available in any criminal proceedings instituted against Ms Berejiklian for the offence of misconduct in public office in relation to alleged partiality concerning the ACTA and/or RCM proposals discussed in this chapter and chapter 12.

11.644. However, they submitted that it would be difficult absent Ms Berejiklian's evidence for the prosecutor to exclude the hypothesis that Ms Berejiklian would have engaged in the conduct for the purposes of electoral advantage (a purpose that she evidently regarded as legitimate) whether or not she engaged in that conduct influenced by a desire to maintain or advance her close personal relationship with Mr Maguire.

11.645. Counsel Assisting also addressed the issue that as Ms Berejiklian gave her evidence to the Commission under objection, by reason of s 37 of the ICAC Act, it would not be admissible against her in any criminal proceedings for an offence of misconduct in public offence. They submitted that proof of Ms Berejiklian's mental state, including as to the question of whether any misconduct by her was "wilful" would, on the prosecutor's case, be left to inference from the circumstances, a state of affairs they submitted would present a considerable obstacle to any successful prosecution of Ms Berejiklian.

11.646. Counsel Assistings' submissions in relation to the allegations of breach of public trust in relation to the ACTA and RCM proposals were similar. They accepted that there is a body of evidence independent of Ms Berejiklian's own evidence that would likely be available in any criminal proceedings instituted against Ms Berejiklian for the offence of misconduct in public office. They submitted that for the prosecutor to prove, by inference, to the criminal standard that Ms Berejiklian knew that she had obligations in the particular case to take action under the ministerial code in relation to her relationship with Mr Maguire, it would be necessary to disprove other reasonable hypotheses Ms Berejiklian raised at trial. Although not expressly stated, it is apparent Counsel Assisting regarded that task as confronting similar problems to those identified in relation to partial conduct.

11.647. Counsel Assisting also submitted that whilst recklessness is a sufficient mental state to satisfy the element of "wilful misconduct" for the purposes of making corrupt conduct findings, a real question arose as to whether recklessness would provide a sufficient foundation upon which to regard the alleged misconduct as being "so serious as to merit criminal punishment" for the purposes of the final element of the offence of misconduct in public office. They submitted that that was particularly so in circumstances in which the available evidence did not demonstrate that either Mr Maguire or Ms Berejiklian received any private financial benefit in connection with the exercise of official functions by Ms Berejiklian in respect of the ACTA and RCM proposals.

11.648. On balance, Counsel Assisting submitted that the obstacles to a prosecution of Ms Berejiklian for misconduct in public office in relation to partial conduct or breach of public trust in relation to the ACTA and/or RCM proposals were so formidable as to make it reasonably clear that any advice from the DPP with respect to the matter would be to the effect that no prosecution may be commenced.

11.649. The Commission accepts Counsel Assistings' submissions substantially for the reasons they advance.

11.650. The Commission has considered whether Ms Berejiklian's conduct in relation to the ACTA proposal could constitute or involve a substantial breach of an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act, rather than whether it could constitute or involve a criminal offence for the purposes of s 9(1)(a).

11.651. Ultimately, the Commission is of the view that Ms Berejiklian's conduct, while it constitutes or involves a substantial breach of the ministerial code, is not so serious that it could be demonstrated to merit criminal punishment (the fifth element of the offence of misconduct in public office) and therefore does not reach the very high bar required to make out the offence of misconduct in public office.

11.652. In those circumstances, it is reasonably clear to the Commission that any advice from the DPP with respect to the matter would be that no prosecution should be commenced.

11.653. For these reasons, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for the offence of misconduct in public office in relation to the ACTA proposal.

Chapter 12: Riverina Conservatorium of Music ("the RCM")

BEREJIKLIAN:	*We ticked off your conservatorium the other day so that's a done deal now.*
MAGUIRE:	*Yeah, but that's only –*
BEREJIKLIAN:	*The money.*
MAGUIRE:	*- that's – that's the building and ten million, not the rest of it. Not the next stage -*
BEREJIKLIAN:	*Oh my God. Heaven help us seriously.*

The conservatorium – Stage 1

"Left out in the cold"

12.1. The Riverina Conservatorium of Music Ltd ("the RCM") is a company limited by guarantee, a non-profit organisation and a registered charity. It was established in 1981 by the Riverina Institute of Advanced Education (a predecessor of Charles Sturt University (CSU)). It operated from the South Campus of CSU in Wagga Wagga for many years, paying only a peppercorn rent. In addition to providing the RCM with premises from which to operate, CSU also provided a level of funding to the organisation. However, the university progressively reduced funding for the RCM from 2012.

12.2. In 2014, the RCM was told that the executive of CSU was proposing to sell the property on which the RCM had been operating and would not be providing alternative accommodation. As Dr Andrew Wallace, the chair of the RCM, described it, "we were going to be left out in the cold".

12.3. Dr Wallace had been working with Mr Maguire since 2002 in the sense that he and the CEO of the RCM would see Mr Maguire once or twice a year, update him on what they were doing and talk about issues associated with regional conservatoria more generally in terms of the funding that was coming from the state government.

12.4. Dr Wallace told Mr Maguire that the RCM had a problem in that "in a few years' time we would be out on the street". The RCM's business model was based upon infrastructure funding from the state government, and the money it received on top of that from lessons. However, Dr Wallace gave evidence that "there's no money in it. So ... if we don't have the support of the university, we do not have the facilities to do it ourselves".

12.5. Dr Wallace was unabashed in saying that he "put the pressure … on Daryl Maguire" to assist, knowing that some other regional conservatoria were either housed in government-owned buildings or received financial assistance from the government to meet rental costs. Mr Maguire asked him, "Where would you like to go and what do you need?"

12.6. Initially, Dr Wallace identified an area of council land in Wagga Wagga on which CSU had operated a playhouse, but that had become surplus to CSU's needs.

12.7. On 7 August 2015, Mr Maguire wrote to the Hon Adrian Piccoli, the minister for education, seeking government funding for the RCM "to relocate from its dilapidated facilities to a new Conservatorium constructed with Government funding next to the Playhouse in the Cultural Precinct of the City". This letter was met with the response that there was no funding source, but when the poles and wires initiative came into existence that would be a good source of funding to make it happen.

12.8. On 11 September 2015, Mr Maguire wrote to the then treasurer, Ms Berejiklian, attaching a letter from Richard Gill OAM, the renowned music conductor, in support of a new building for the RCM.

12.9. Ms Berejiklian replied to Mr Maguire's letter on 11 October 2015 advising that, "As this falls within the specific responsibilities of the NSW Department of Education his correspondence has been forwarded to Mr Piccoli for consideration". The letter bore a handwritten note stating, "I appreciate receiving this information."

12.10. On 31 March 2016, Mr Maguire wrote to Ms Berejiklian again regarding funding for the RCM. Ms Berejiklian replied to that letter on 11 May 2016, thanking Mr Maguire for his letter and, once again, advising him that as the issues he raised fell within the specific responsibilities of the Department of Education she had forwarded his correspondence to Mr Piccoli for his consideration and appropriate action. The letter bore a handwritten note stating, "Daryl, rest assured I am aware of the merits of this proposal."

12.11. The idea of moving to the CSU playhouse site fell away because CSU did in fact open a theatre there in 2017. When Mr Maguire became aware of this, he told Dr Wallace, "there is another site … we're about to sell 1 Simmons Street". He suggested Dr Wallace have a look. Dr Wallace concluded the site was "absolutely perfect … in a beautiful location … and ticked all of the other boxes".

12.12. On 8 June 2016, Mr Barilaro visited the Wagga Wagga electorate in his capacity as minister for regional development. He said that Mr Maguire took him to the 1 Simmons Street site. Mr Barilaro said the visit was not part of his itinerary, but that it was "common on a trip to Wagga Wagga for DM to take Ministers to projects that were either funded, being delivered or projects he was advocating for".

12.13. On 24 June 2016, Dr Wallace sent a letter to Mr Maguire. He advised him that there was "growing anxiety within the RCM about our future", because CSU "has moved to seek expressions of interest in the purchase of South Campus, so 'crunch time' is now upon us". Dr Wallace anticipated that the RCM had approximately two-to-three years to secure a new site. Dr Wallace described the 1 Simmons Street site as "…surplus to the needs of the government, and … a perfect site for our growing conservatorium. It gives long-term security for the RCM and places us permanently at the centre of our community." He asked Mr Maguire "to continue your representations on our behalf, and your focus on developing a legacy for our community, facilitating our vision as we work with the government into the future".

12.14. Mr Maguire forwarded Dr Wallace's letter to Ms Berejiklian on 27 June 2016. He sought her "urgent advice" about Dr Wallace's proposal "for surplus government building in Simmons Street". Mr Maguire also advised that he had approached the premier (then Mr Baird) and the minister for finance and services (then Mr Perrottet) about his proposal.

12.15. On 16 August 2016, Mr Baird wrote to Mr Maguire, thanking him for the representations on behalf of the RCM and advising that he had referred Dr Wallace's letter to Mr Perrottet "who has portfolio responsibility for this matter and asked that he investigate what avenues there may be to assist the Conservatoruim [sic] to gain access to the site". Mr Maguire forwarded the letter to Hamish Tait, the CEO of the RCM, on 31 August 2016.

The unsolicited proposal

12.16. On 13 October 2016, Mr Perrottet wrote to Mr Maguire in response to his representations on behalf of the RCM regarding its prospective occupation of the 1 Simmons Steet site. He advised that he had sought advice from Property NSW, as owner of the site, to ascertain its intentions for the property. He told Mr Maguire that "the property has been identified as surplus to Government service delivery needs and in keeping with government policy, the sale of surplus government sites must be undertaken through an open and competitive process".

12.17. Nevertheless, Mr Perrottet advised that there were "a number of options available to [the RCM] to acquire or occupy the site on a long term basis", including by way of the unsolicited proposals process, which was described as the "preferred approach". According to Mr Perrottet, one of the advantages of the unsolicited proposals process was that it "allows the Conservatorium to demonstrate the unique benefits of its proposal, justifying a direct dealing with the Government". Dr Wallace discussed the options with Mr Maguire and, ultimately, they agreed the RCM should pursue the unsolicited proposal route.

12.18. On 9 December 2016, Gavin Melvin, chief of staff to Mr Baird, emailed a letter from the premier to Mr Maguire. The letter acknowledged Mr Maguire's correspondence of 23 November 2016 "on behalf of the Riverina Conservatorium of Music, regarding funding assistance for detailed architectural plans", and advised a one off $7,000 grant was approved (excluding GST) for this purpose. The premier thanked Mr Maguire for "bringing this important community request to my attention".

12.19. Dr Wallace prepared an unsolicited proposal for the acquisition of the 1 Simmons Street site, which he submitted on 23 February 2017 via Mr Comley, the then secretary of the DPC ("the unsolicited proposal"). Mr Maguire, amongst others, assisted in the preparation of the unsolicited proposal, with Mr Maguire's input predominantly being related to the division of the proposal into two stages. The unsolicited proposal noted that:

12.19.1. "Mr Maguire has historically been a strong supporter of the RCM … Mr Maguire is recognised for his work on behalf of the government in our community, and in supporting the RCM in particular"

12.19.2. the proposal involves gifting the 1 Simmons Street site to the RCM and an "initial investment of $6.9 million to refurbish the existing RMS building"

12.19.3. there is a separate funding application to complete the development of the second stage of the proposal

12.19.4. "[t]he proposal aims to … build commercial resources that will allow the RCM to generate independent funding to support the business model of the RCM"

12.19.5. an aspect of the proposal is the construction of a new building which would contain the recital hall and commercial spaces

12.19.6. the "preferred" project manager for the development of the 1 Simmons Street site is Neil Mangelsdorf of Regional Project Managers Australia Pty Ltd (RPMA).

12.20. Mr Mangelsdorf was introduced to Dr Wallace by Mr Maguire.

12.21. The unsolicited proposal canvassed both the relocation of the RCM from its existing site on the South Campus of CSU to Building A on the 1 Simmons Street site, with associated refurbishment and repurposing of the site, as well as the demolition of Buildings B and C and the construction of a new wing and other amenities (collectively, "the RCM proposal"). The relocation of the RCM came to be termed "RCM Stage 1" during the Second Public Inquiry. It involved refitting Building A "to provide teaching and administrative facilities for the RCM". The demolition of Buildings B and C, and the construction of the new wing which was to contain the recital hall and commercial facilities available for rent to external parties, was referred to as "RCM Stage 2".

12.22. Ms Berejiklian visited Wagga Wagga on 10 and 11 February 2017. A meeting with the RCM at the 1 Simmons Street site was the first event on her itinerary. Mr Maguire agreed that taking Ms Berejiklian there was part of him seeking to lobby her for her support in relation to the RCM project. Dr Wallace gave evidence that he met Ms Berejiklian at the site. He said that she "asked a lot of questions", "why this site, why not another site … where are students coming from, are there other alternatives, those kinds of questions were being asked". On Dr Wallace's account, both RCM Stage 1 and RCM Stage 2 were discussed.

12.23. On 27 February 2017, Ms Lions, Mr Maguire's electorate officer, emailed a letter from Mr Maguire to Ms Berejiklian, and ministers Mr Barilaro, Mr Constance, Victor Dominello and Mr Perrottet, enclosing Dr Wallace's letter dated 23 February 2017 forwarding the unsolicited proposal to the government. Mr Maguire's letter advised that "the current premises occupied by RCM located on the Charles Sturt University South Campus have been sold and it is now urgent for new permanent accommodation to be sourced to enable this iconic institution to exist well into the future". He asked the recipients of his letter to consider "the needs of RCM to ensure that its future is secured".

12.24. On 7 July 2017, Paul Myers, the executive director of the State Economy Branch within the DPC, wrote to Dr Wallace advising that the unsolicited proposal had not been successful. Specifically, he noted that the proposal had failed to meet the "uniqueness" criterion required under the *Unsolicited Proposals Guide for Submission and Assessment* (February 2014) as the RCM did not "have any unique rights to the property, and as such there would be other organisations who could potentially acquire the property in a standard procurement process". The letter also advised that the government appreciated the role and importance that cultural facilities such as the Conservatorium of Music have for communities in regional NSW. It advised that funding may be available from a $1.3 billion Regional Growth Fund and that the RCM's proposal had been provided to the DPC's Regional NSW Group which would be able to guide and assist the RCM in applying to the most appropriate fund/s to bring this proposal forward. It said that Mr Hanger, acting executive director, would contact the RCM shortly to discuss a range of potential funding application opportunities.

12.25. Following receipt of Mr Myers' letter, Dr Wallace contacted Mr Hanger to seek his advice on what the RCM should do next. Dr Wallace did not find him "sympathetic at all". He got the impression from their conversation that the RCM was "right back to starting again" and the RCM would likely lose the opportunity to occupy the 1 Simmons Street site as a result. He considered that Mr Hanger was "just talking as a bureaucrat".

12.26. Following his conversation with Mr Hanger, Dr Wallace contacted Mr Maguire and said, "This is rubbish. I'm going to write straight to the Premier."

12.27. Dr Wallace also either gave Mr Maguire the letter he received from Mr Myers or sent him a photograph of it. On 18 July 2017, Mr Maguire sent an email to Mr Barilaro and Ms Berejiklian with the title "Here we go on the merry go round again!", to which was attached a photograph of the letter of 7 July 2017. Mr Maguire said the purpose of the email was to get Ms Berejiklian or Mr Barilaro, or both, to take some steps in the direction of achieving the RCM proposal because "[t]he bureaucrats were wasting our time and every day wasted was another day that we couldn't get the university or get the conservatorium new, new homes which was becoming important in my mind".

12.28. Ms Berejiklian said she understood the RCM project was one for which Mr Maguire had a particular passion. She said she would have taken his email "as his frustration on [sic] the process". She said she was "very upset" and "incensed" when she became aware the RCM, a community organisation, had been given advice to proceed down the unsolicited proposals route which would have led to it spending considerable time and money putting together a proposal which would have ultimately resulted in it getting nothing. It would get nothing because the unsolicited proposal process was for large projects like toll roads and railway stations.

12.29. Mr Barilaro described the email as "typical Daryl in relation to the way he approached ministers when chasing funding or chasing up status or venting". He said Mr Maguire was "a very strong local member and someone that really didn't let go … a dog with a bone".

12.30. Dr Wallace said that writing to the premier was his own idea and not something Mr Maguire suggested. In his letter to Ms Berejiklian, addressed to a Government GPO Box, dated 23 July 2017, Dr Wallace complained that the criterion Mr Myers had said the unsolicited proposal failed to satisfy was "not within the guidelines as a determinant of uniqueness". He expressed the RCM's concern that the 1 Simmons Street site "may well now go to an open market, or that a controversial and divisive process will be imposed to open the property to all proposals, and then finally go [sic] the highest bidder". He sought Ms Berejiklian's advice as to how the RCM could appeal Mr Myers' decision. He noted that the RCM proposal had been referred to the Regional Cultural Fund for funding and expressed concern as to whether that fund would be sufficient to

support a capital works program such as that in the RCM proposal. He said he was aware that Mr Maguire and Mr Barilaro had been working to find alternative funds through the Regional Growth Fund, but no clear direction had emerged. He sought "sound advice" from Ms Berejiklian's office, particularly if there was something more the RCM could do "to support Mr Maguire in his work on our behalf". He thanked Ms Berejiklian for the advice and support she had already provided for the project. At 10.47 am on 26 July 2017, Dr Wallace emailed a copy of the letter to Mr Maguire noting that it had been sent to the premier "a few minutes ago".

12.31. Mr Maguire forwarded a copy of the letter to Ms Berejiklian's direct email address (which was not public facing) on 26 July 2017, within half an hour of receiving it from Dr Wallace.

12.32. Dr Wallace described the letter to Ms Berejiklian as "a game changer" as "the reaction to it was that two or three weeks after the letter, senior bureaucrats then became involved and came down and interrogated [him] about the project".

Regional NSW takes over – again

12.33. One of the "senior bureaucrats" to whom Dr Wallace referred was Mr Barnes, who was then deputy secretary of Regional NSW, to which Mr Myers' letter had referred. Mr Barnes' recollection was that his team became involved with the RCM in the second half of 2017. He said that in a regular update on the work of his unit, Mr Hanger mentioned that there was an expectation that he might meet with the RCM around funding sources for aspects of the proposal that had gone forward and had been unsuccessful. He thought that formal engagement with his team would have come about because of Mr Myers' letter.

12.34. At the time Regional NSW became involved with the RCM, it was a unit within the DPC in respect of which then deputy premier Mr Barilaro (as minister for regional development) was the portfolio minister and Ms Berejiklian, as premier, was the cluster minister.

12.35. Mr Hanger's recollection was that he became aware of the RCM when Mr Myers, who was also in the DPC, reached out to him as part of an endeavour with projects that are unsuccessful through funding paths, including unsolicited proposals, to try to look at other funding opportunities.

12.36. Notwithstanding Dr Wallace being of the view his 26 July 2017 letter to Ms Berejiklian was a "game changer", the reality was that very little directly happened vis-à-vis the RCM and Regional NSW until late 2017.

12.37. In the meantime, Mr Maguire kept agitating on the RCM's behalf. As he put it, he "probably would have torn strips off people and made a mongrel of myself", to get the RCM off "the merry-go-round".

12.38. One of the steps Mr Maguire said he took was to get a hold put in place so that the Simmons Street building could not disappear onto the open market. Another was to take Dr Wallace to see Mr Barilaro on 2 November 2017 to discuss policy in relation to public properties, or government-owned properties that were no longer being used by the government being able to be used by communities, and also to "advocate for the transfer of an RMS building" to the RCM.

12.39. In a lawfully intercepted telephone conversation between Mr Maguire and Mr Mangelsdorf on 20 November 2017, Mr Maguire said of the 2 November meeting, "they're trying to find a way to give us the property … their issue now is well where are you going to get the rest of the money from? I'm – I'm going to say give us the building first, I'll get the money … They want to help us, but you know they're all taking ownership of the government … Dominello's on side. They're all on side, Barilaro's right, everybody's right … we'll get there. Andrew and I sat there, and we were

quite happy with the meeting with Bara … Bara says well, can you have a lease, Andrew says yes um, you know, 99 year lease yes we can deal with that, done. So um we should have some action this week."

12.40. The idea of a transfer of the Simmons Street site to the RCM was a cause of some concern amongst officials in the premier's office and Regional NSW. As Alex Schuman, the head of economic policy in Ms Berejiklian's office and point of contact in the premier's office, wrote to Matthew Crocker, Ms Berejiklian's director of policy, on 21 November 2017 in an email the subject of which was "regional cultural fund/RCF":

- *Riverina Conservatorium of Music/RCM is being evicted from New England Uni land which is being sold.*
- *Daryl Maguire is lobbying hard to have a former-RMS office block ($3.5m) in Wagga gifted to RCF* [sic]*, and another $25m for renovations.*
- *Transport vacated the RMS site under the PAUT* [Property Asset Utilisation Taskforce], ***so it expects to recycle proceeds into new capex*** [capital expenditure].
- *To interrogate the right mix, I think RCM be listed on the RCF* [Regional Cultural Fund].
- *RCF can work on a business case, including RCM's requirements, location, etc. RCF can also purchase the site (or part) and act as landlord.*

(Emphasis added)

12.41. Mr Crocker responded, "I got sent the list yesterday–will flick it to you. I understand that there was some kind of process around it – so if it's not on the list, we should be very careful about upending the process". Mr Schuman replied, "Yes, that's my understanding too. I'd need to ask GB for support."

12.42. Mr Barnes read the RCM unsolicited proposal. What most resonated for him and Mr Hanger about it was the relocation to the 1 Simmons Street site and the public-value capacity in the ability for the RCM to continue to operate as a service to schools and the community. However, they did not approach their work on the basis for which Mr Maguire was contending of "gifting" the 1 Simmons Street site to the RCM. Rather, they worked towards the government retaining ownership of the 1 Simmons Street site but providing it as accommodation to the RCM. That necessitated engagement with Property NSW. As matters have eventuated, that is what occurred. An allocation of funds to Property NSW was made to enable the RCM to move from CSU to 1 Simmons Street. However, in Property NSW buildings, the expectation is that it will be at a market rate and a commercial rate. As at the date of the Second Public Inquiry, the question of how, if at all, the RCM was to pay the commercial rate of rent Property NSW requires had not been resolved.

12.43. Mr Barnes was less enamoured of the second stage of the RCM proposal, construction of the world-class performance hall and creating commercial places. He did not regard that aspect of the RCM proposal as being in the public interest. Mr Barnes was concerned about whether there would be a public interest in the government spending money on constructing a building for a private organisation and that private organisation then earning a revenue stream from the new building, as opposed to the government earning the revenue stream. Mr Barnes also did not think it was proportionate to what other conservatoria may have had and thought there could have been existing facilities that could have been used by the RCM to provide equivalent services and functionality.

12.44. Mr Barnes held further concerns in relation to the proposed construction of a world-class recital hall in Wagga Wagga:

- There were a number of regional conservatoria that received some level of government support and there might be a concern that the RCM was being treated more favourably if it were gifted such a substantial asset.
- There was no assurance that the RCM would be capable of administering a facility in the nature of a world-class recital hall.
- There were concerns about whether and how the RCM could meet the operational and maintenance costs of a world-class recital hall and whether it would require ongoing government funding, which Mr Barnes agreed was a "critical matter" to consider when funding capital works.

12.45. Mr Barnes told the Commission that he did not believe that he ever changed his view as to the merits (or, rather, lack thereof) of the proposed world-class recital hall.

12.46. In a telephone call of 22 November 2017, Mr Maguire and Ms Berejiklian discussed the RCM proposal and Mr Barnes' role in connection with it. That conversation included the following passage:

MAGUIRE:	*Well I had ahh what's his name Garry* [sic] *Barnes come and see me today they rang me.*
BEREJIKLIAN:	*I can't stand that guy.*
MAGUIRE:	*Hmm.*
BEREJIKLIAN:	*His head will be gone soon.*
MAGUIRE:	*Garry* [sic] *Barnes?*
BEREJIKLIAN:	*Hmm.*
MAGUIRE:	*Not until he fixes my conservatorium.*
BEREJIKLIAN:	*Yeah okay.*
MAGUIRE:	*He's the only one that's come to do it.*
BEREJIKLIAN:	*Alright good tell him to fix it and then after he fixes it, I'm sacking him.*

12.47. Ms Berejiklian agreed that she was considering sacking Mr Barnes as at 22 November 2017. She couldn't say that was the "main reason", but agreed that it was possible that one of the reasons that she decided not to sack him immediately was the fact that Mr Maguire wanted him to "fix" his conservatorium. It is difficult to draw any other inference from the language of this discussion than that the reason Ms Berejiklian decided at that time not to sack Mr Barnes was Mr Maguire's request that she not do so pending resolution of the RCM proposal. As will be apparent, this is a finding for which Counsel Assisting contend. As at the date of the Second Public Inquiry, Mr Barnes was still the secretary of the Department of Regional NSW.

A first-hand look

12.48. In November 2017, Mr Barnes formed the view that the premier's office would welcome either himself or Mr Hanger as the two senior people in their group to go and have a first-hand look at what was happening in respect of the RCM proposal. He understood the RCM proposal to have a level of support and priority within the premier's office, albeit not at the same level of the ACTA

proposal discussed in the previous chapter. It had been, again, something that had been raised with him and his team. This was part of the explanation for why he personally visited the site.

12.49. Mr Barnes visited Wagga Wagga on 29 November 2017. He believed he may have told the proponents from the RCM that the premier's office had encouraged him to come and look at these things firsthand, that it was aware that there was a clock ticking on the relocation of the conservatorium from one location to another and that it had asked him to look at things firsthand so that he could provide it with some advice. Dr Wallace was at the meeting and possibly also Mr Mangelsdorf. Mr Barnes visited both the RCM's accommodation at CSU to get a feel for the nature of its existing facility and also the 1 Simmons Street site to see whether, in fact, it was a suitable venue.

12.50. According to his itinerary for the trip, it appears that Mr Barnes was to meet Mr Maguire and Dr Wallace at the site for the proposed RCM relocation. It was his recollection that he did. Mr Mangelsdorf and Mr Maguire discussed Mr Barnes' visit in a conversation the next day, on 30 November 2017.

12.51. In the course of that conversation, the following exchange occurred:

MANGELSDORF:	*– and all the other things they getting* [sic] *council to con – contribute five hundred thousand dollars for the con and then they can also take up the maintenance and the, you know that sort of thing, yearly maintenance which reduces the ongoings and ah recurring expenses to maintain the facility. So that's – that's got some merit ah on – on that – only on that dollar front.* ***Um he was uncomfortable with – with commercial development in the space.***
MAGUIRE:	*Yeah.*
MANGELSDORF:	***Ah so I – I sort of – I understand why from a government perspective they can't be seen to be providing a commercial venture for – for nix –***
MAGUIRE:	*Correct.*
MANGELSDORF:	*–They provide us funding to do it, so all of that – that's pretty straight forward. Um –*
MAGUIRE:	***My solution to that – my solution to that was to build the entertainment space bigger –***
MANGELSDORF:	*Yep*
MAGUIRE:	***And then at a later date, I'm sure you can build it too big then put in some commercial stuff and sub-let it.***
	(Emphasis added)

12.52. Mr Maguire agreed that one of the "options" he discussed in relation to the RCM was to build the facilities bigger than was necessary to provide a revenue stream for the RCM. He also agreed that his comment, "I'm sure you can build it too big then put in some commercial stuff and sub-let it", could be interpreted as suggesting to government that a facility was required that was bigger than what was necessary so that the additional space could be sub-let to make money for the RCM. As Counsel Assisting submitted, Mr Maguire did not provide any alternate interpretation of his comment and there is no evidence supporting one. There is no evidence Ms Berejiklian was aware of this conversation.

Like for like

12.53. Following his visit to Wagga Wagga, Mr Barnes sent a briefing note dated 4 December 2017 to Mr Schuman in the premier's office setting out his observations about the RCM proposal. He sent the briefing note to the premier's office, rather than to his portfolio minister, Mr Barilaro (albeit that he kept the latter's office advised on what he was doing), following a request from the premier's office.

12.54. In his briefing note, Mr Barnes wrote:

> *The Ask is to gift an existing facility (old RMS site) and spend $25-28M to create a facility which includes 3 parts (a refurb on existing main building to accommodate office and teaching functions, a new building for early childhood functions* ***and commercial use to create revenue stream and a new performance hall. $25million includes acquisition of the existing Simmons St facility.***
>
> (Emphasis added).

12.55. Mr Barnes' briefing note was largely positive in terms of the proposed relocation to the 1 Simmons Street site. He described "[t]he starting premise for Govt consideration of finding a suitable home for the Con should be a staged approach with the first stage offering a 'like for like' solution". He suggested, "The Con could be offered a peppercorn rent for the refurbed site (again like for like)." He explained, "[a]s far as funding goes the funding pool identified will need to be cognisant of the fact that the project will not achieve a BCR of 1." He also did, however, express the view that "The site is valued at $3-3.5M and, while like sites in the precinct are having trouble attracting commercial tenants, the site is valuable and should be retained by Govt." However, insofar as the commercial aspect and the new performance hall were concerned, Mr Barnes wrote that the like-for-like solution could be achieved by "liaising with Council and CSU around ensuring access to their facilities at an affordable rate for major performances". This suggestion was no doubt derived from the fact that while located at CSU, Mr Barnes noted the RCM "regularly uses facilities in the town precinct (churches and public facilities – civic hall and CSU performing arts centre for larger performances). The Con argues that this is part of the core business of education."

12.56. In January 2018, Regional NSW prepared two briefing notes about the RCM, one for Ms Berejiklian and the other for Mr Barnes. Each concerned a letter about the RCM proposal, one for Ms Berejiklian to send to Mr Maguire, the other for Mr Barnes to send to the RCM.

12.57. Mr Barnes said that the briefing note was prepared for Ms Berejiklian at Mr Schuman's request. It was approved by Mr Barnes on 17 January 2018 and attached a draft letter to be sent to Mr Maguire. The briefing note explained to Ms Berejiklian that it was proposed that Regional NSW work with the RCM, Property NSW, the Department of Education and CSU with a view to establishing the RCM on the 1 Simmons Street site. It said that Regional NSW understood "the need to move quickly to ensure continuity of service". It explained the proposal was that the site continue to be owned by the government and that "initial parameters for work to be undertaken will include establishment of a facility and rental regime which allows for similar functionality (like for like) that the RCM enjoys at its current premises". As to funding, it "envisaged that funding can be sourced from the Regional Growth Funds [sic] for the repurposing of the site with a quantity surveyor to determine the scope and cost estimate. An estimate to refurbish and bring the building to code on a like-for-like would be less than $10 million."

12.58. The briefing note contained the following recommendations among others:

- Note the intention to retain ownership of land and facility.
- Note the basis for proceeding is initially to provide a "like for like" solution.

12.59. In the field on the briefing note for "Premier's comments" was handwritten, "Letter signed and sent/PLO 29/1". Another handwritten note further down the page said, "hard copy sent by BCU 29/1".

12.60. On 29 January 2018, Ms Berejiklian sent a letter concerning the RCM to Mr Maguire, the gist of which was as set out in the briefing note. It advised, among other matters, that she had "asked DPC to work with the RCM Board with a view to establishing the RCM on the Simmons Street site". It explained that underpinning this was "a decision that the site will continue to be owned by Government and that initial parameters for work to be undertaken will include establishment of a facility and rental regime which allows for similar functionality (like for like) that the RCM enjoys at its current premises".

12.61. At this stage, Mr Barnes agreed that what was being put forward was consistent with his advice that steps should be taken with a view to having a facility with a similar functionality on a like-for-like basis to that which RCM previously enjoyed. There was no suggestion that the premier should approve or direct Regional NSW to take steps in aid of a world-class performance hall or the building of commercial spaces.

12.62. The second briefing note, which bore an 11 January 2018 deadline, was written by Mr Hanger for Mr Barnes, to accompany draft correspondence to Dr Wallace. It was in much shorter terms than that to Ms Berejiklian, setting out the same text against two headings, "Analysis" and "Key reasons":

- RCM submitted an unsolicited proposal regarding the acquisition of 1 Simmons Street, Wagga Wagga in 2017 (Attachment B).
- After a thorough assessment, a decision has been made that the proposal should not be further considered under the unsolicited proposals framework.
- Regional NSW Group will work with RCM, Government Property NSW and Charles Sturt University with a view to establishing the RCM on the Simmons Street site.

12.63. On 1 February 2018, Regional NSW sent an email to Dr Wallace attaching a letter from Mr Barnes. The email and its attachment were copied to Mr Maguire as, to Mr Hanger's understanding, he was a proponent of the RCM proposal. The letter broadly reiterated Ms Berejiklian's letter to Mr Maguire and included the following:

> *As you may be aware the application did not comply with the Unsolicited Proposals Guide for Submission and Assessment. However, the NSW government is supportive of the role that the RCM plays in supporting a broad range of students, including school students from across the Riverina. Accordingly, my team has been asked to work with you and your Board with a view to establishing the RCM on the Simmons Street site.*
>
> *Underpinning this is a decision that the site will continue to be owned by Government and that initial parameters for work to be undertaken will include establishment of a facility and rental regime which allows for similar functionality (**like for like**) that the RCM enjoys at its current premises.*
>
> *The Government is keen to move quickly to ensure that the timing needs agreed with Charles Sturt University can be met to ensure continuity of service.*
>
> (Emphasis added)

12.64. Mr Barnes took the premier's endorsement of the briefing note recommending exploration of a "like for like" solution and her signing of the letter to Mr Maguire as sufficient endorsement that if the ERC were to approve other aspects of the project, recurrent grant funding would be made to the RCM to provide an equivalent rental regime to that it enjoyed at CSU.

12.65. Dr Wallace understood Mr Barnes' letter as a commitment to RCM Stage 1, including it "giv[ing] us the site", but not RCM Stage 2.

Another presumptive announcement

12.66. On 16 February 2018, Mr Maguire issued a media release, headed, "NEW HOME FOR THE RIVERINA CONSERVATORIUM OF MUSIC" which included the following:

> *Daryl Maguire MP, Member for Wagga Wagga, alongside Riverina Conservatorium of Music (RCM) Board Chairman Dr Andrew Wallace and RCM Director Hamish Tait today announced that the RCM has secured a permanent new home at 1 Simmons St, Wagga Wagga.*
>
> ...
>
> *"The building will be redeveloped to house a world class music recital space and its within close proximity to the existing cultural precinct in the City of Wagga Wagga, it will be an excellent addition," Mr Maguire said.*
>
> ...
>
> *RCM Chair Dr Andrew Wallace expressed his gratitude to the Member for Wagga Wagga for this vision and commitment to ensure Wagga Wagga and the Riverina has a superior conservatorium of music.*
>
> *"On behalf of the RCM board and staff we would like to acknowledge that this announcement would not have been possible without the tireless support of Mr Maguire".*

12.67. Like the ACTA media release Mr Maguire issued on 2 January 2017, this media release was presumptive. It was not supported by the letter Ms Berejiklian sent Mr Maguire on 29 January 2018. Further, at this stage, no ERC decisions had been made in relation to the RCM proposal. That did not take place until April 2018.

12.68. Both Mr Barnes and Mr Hanger agreed Mr Maguire's media release was inaccurate. First, the RCM had not "secured a permanent new home". Rather, the government had agreed to work with the RCM towards establishing the RCM on the 1 Simmons Street site. Secondly, there was no reference in the 29 January 2018 letter to a "world class music recital space" or anything of that sort.

12.69. Mr Barnes told the Commission that Mr Maguire's media release could put more pressure on the government than the public service. He thought it could have the tendency to cause some priority or attention to be given to the project by departmental officers on the ground in the electorate who would potentially get asked when the recital hall might be going to be built, but did not think it would materially impact on any decisions that the public service might make.

12.70. The pressure on government that a media release of the kind issued by Mr Maguire can create was exposed in a response given by Dr Wallace:

> *[Counsel Assisting]:* *Can I ask you to just focus on the phrase "express desires of government" which, what expression–?*
>
> *[Dr Wallace]:* *Well, they–*

[Q]: *Just let me finish my question. What expressions and desires are you referring to?*

[A]: *They promised us a, in, in the press release, a world class conservatorium. That language was used. That didn't come from us.*

12.71. By issuing a media release conveying that a "world class music recital space" formed part of the government's commitment to the RCM (and, in effect, the Wagga Wagga community), Mr Maguire armed the proponent, RCM, with a means to inflict political damage on the government if such a facility were not forthcoming. As Mr Toohey had explained in relation to the similarly presumptive ACTA media release, it made it "very, very hard then for the government … to do anything but to deliver".

12.72. Mr Maguire agreed that it was "possible" that he had been "over-announcing with a view to putting pressure on government to ultimately agree to construct a world class music recital space".

No risk on that

12.73. Following the correspondence of late January 2018 to Mr Maguire and Dr Wallace, the detailed work as to how the RCM could be relocated to 1 Simmons Street took place at the departmental level. Because Property NSW owned the 1 Simmons Street site, it was engaged with a view to keeping the 1 Simmons Street site as government-owned but leased to the RCM. Once the detailed work had been undertaken, the project to move RCM from CSU to 1 Simmons Street was funded as part of the 2018–19 budget process. Because Property NSW then took the lead, it was responsible for preparing Cabinet submissions or submissions to a committee of Cabinet.

12.74. That can be seen in an email, dated 19 February 2018, sent by Leon Walker (the executive director, Property NSW) to Mr Barnes and Mr Hanger saying, "Just trying to close out the Riverina Conservatorium of Music ERC proposal. Do the following Recs. continue to work based on what has been discussed and agreed within DPC, with the PO and RCM?"

12.75. Mr Walker's proposed recommendations were:

i. **Approve** *the transfer of 1 Simmons Street from Property NSW to either Department of Planning or Education or Arts NSW.*

ii. **Approve** *funding from consolidated fund to pay Property NSW $2.7m, being the market value of 1 Simmons Street, unless otherwise directed by ERC.*

iii. **Approve**, *in principle, the lease of 1 Simmons Street, Wagga Wagga on market terms, consistent with PAUT, to the Riverina Conservatorium of Music.*

iv. **Note**, *a term of lease will be that the property will be sold by Property NSW if RCM vacates or fails to rectify a default under the terms of the lease.*

v. **Note** *that Department of Premier & Cabinet will assist the Conservatorium to secure funding from the Regional Growth Fund for capital works necessary to provide like-for-like accommodation (est. at up to $10m).*

vi. **Note** *that ERC will be requested to provide an increase in recurring grant funding to the Conservatorium so that its financial position remains on a like-for-like basis allowing for a change from peppercorn to market rental.*

(Original emphasis)

12.76. Mr Barnes told Mr Walker to "Loose [sic] last reco as this will be negotiated outside of ERC". The last recommendation was, in effect, to offset for the RCM's benefit, recommendation (iii) concerning the lease to the RCM being "on market terms, consistent with PAUT".

12.77. During the following exchange, Mr Walker also asked "Is there a risk that the recurring grant funding won't be secured? This would be problematic for the future owner of the property if rent wasn't being paid as they would have the maintenance and opex obligation without the funding to support it", to which Mr Barnes responded, "No risk on that. It will happen."

12.78. Mr Barnes said he could advise Mr Walker so confidently because Ms Berejiklian had signed his memorandum to her of 17 January 2018 and sent the letter attached to it to Mr Maguire.

Mr Maguire's interest in the RCM proposal and Ms Berejiklian's support

12.79. Ms Berejiklian agreed that Mr Maguire raised the funding of the RCM proposal with her over a period of years and on a number of occasions. This included Mr Maguire raising complaints about "roadblocks" that he thought had been put in place by government in relation to the proposal such as when he sent Ms Berejiklian the "merry go round" email. Ms Berejiklian agreed that she understood Mr Maguire to have a "particular passion" for the RCM proposal, and knew that it was "something … he felt strongly about as a local Member of Parliament". He updated her from time to time on the progress of the proposal and she kept him up to date.

12.80. This can be illustrated by a conversation Ms Berejiklian had with Mr Maguire on 4 September 2017 in which he told her he had to call Dr Wallace because the RCM was chasing him about the building. And on 19 June 2018, Mr Maguire sent an email to Ms Berejiklian's private email address in turn forwarding an email from Dr Wallace complaining at length to Mr Maguire about the draft lease the RCM had received for 1 Simmons Street.

12.81. Another illustration of Ms Berejiklian's support for Mr Maguire in respect of the RCM proposal is found in the conversation referred to above in which, on 22 November 2017, she agreed to Mr Maguire's request not to dismiss a public servant until that person "fixes my conservatorium".

12.82. Ms Cruickshank recalled that Mr Maguire was a "proponent" of RCM Stage 1 and, when Ms Berejiklian first became premier, wanted her to visit the site, which it will be recalled she did on her visit to Wagga Wagga on 10 and 11 February 2017, in one of her first regional trips after becoming premier. Mr Maguire lobbied the premier's office in relation to the project, although, as Ms Cruickshank made clear, and as of course can be accepted, it was far from unusual for a member of Parliament to lobby the premier's office in relation to projects. Mr Maguire was, in her observation, "strident" in his manner of advocacy, although not necessarily unusually prolific as a member of Parliament. It was a project he wanted to get Ms Berejiklian and the government interested in.

"We ticked off your conservatorium the other day"

12.83. In April 2018, the ERC made two decisions in respect of the RCM. As at that date, the members of the ERC were the premier, Ms Berejiklian, the deputy premier, Mr Barilaro, the treasurer, Mr Perrottet, the minister for transport and infrastructure, Mr Constance, the minister for finance, services and property, Mr Dominello and the minister for trade, Mr Blair.

12.84. On 12 April 2018, as part of a larger suite of proposed transfers and/or sales of government property, the ERC determined to approve the transfer of the 1 Simmons Street site from Property NSW to Arts NSW for the purposes of relocating the RCM there. The approval was in the following terms:

> *i) Approved the following recommendations relating to the intra-government transfer and/or sale of real property assets (as detailed in the relevant attachment), including:*
>
> …
>
> *1 Simmons Street, Wagga Wagga (Simmons St)*
>
> …
>
> *u) the transfer of Simmons St from PNSW to the DPE* [Department of Planning and Environment] *(Arts NSW) via an equity adjustment (i.e., non cash) at current market value ($2.7 million), subject to resolution of Recommendation i.) v) of the Submission; and*
>
> *v) the lease of 1 Simmons St on market terms to the Riverina Conservatorium of Music (RCM) and note DPC will assist RCM to apply for funding from the Regional Growth Fund envelope for fit-out capital works (estimated at up to $10 million).*

12.85. Ms Berejiklian was listed in the relevant ERC minute as attending the ERC meeting of 12 April 2018, which had a start time of 5:10 pm and an end time of 7:25 pm. She did not declare any conflict of interest in respect of her close personal relationship with Mr Maguire.

12.86. Less than an hour later, at 8.21 pm on 12 April 2018, Mr Maguire and Ms Berejiklian began an exchange of text messages. Mr Maguire wrote, "I am busy killing mmc you do your job and lead the state". Ms Berejiklian responded, "I can't without you" to which Mr Maguire replied, "I am your biggest supporter! Got your back go and do your job". At 8:27 pm on 12 April 2018, just two hours after the ERC meeting, Ms Berejiklian replied to Mr Maguire: "But you are my family."

12.87. Ms Berejiklian accepted that at least as of April of 2018, she regarded Mr Maguire as part of her family, albeit of a different kind in that he was in a personal relationship with her as distinct from a familial relationship of a kind that a parent might have with a child.

12.88. This exchange of texts is referred to in the section dealing with Ms Berejiklian and Mr Maguire's relationship, but it is appropriate to set it out in this context juxtaposed to the first RCM decision and Ms Berejiklian's failure to disclose her relationship with Mr Maguire at the ERC meeting. Ms Berejiklian's evidence in short was that her statement "you are my family" was a "turn of phrase" but she "did not mean it in the context that [she] regarded him as family, especially not in relation to the [ministerial code]."

12.89. Counsel Assisting submitted that regardless of the precise intent or meaning behind those words, it was clear that Ms Berejiklian's relationship with Mr Maguire and her "close connection" to him were matters in her direct contemplation on 12 April 2018. The Commission accepts that submission.

12.90. On 24 April 2018, the ERC determined to endorse grant funding of $10 million to the RCM for the purposes of refurbishing and repurposing the 1 Simmons Street site in order to make it fit-for-purpose for the RCM. Once again, the relevant approval was part of a larger suite of endorsements that had been put forward for consideration and was in the following terms:

> *i) Endorsed the Treasurer's acceptance of the following unqualified recommendations from Infrastructure NSW (INSW) for Restart NSW funding commitments, to be funded from existing reservations:*
>
> …
>
> *xi) Approved the following changes to regional programs*
>
> …

c) allocating $[redacted] *from the Consolidated Fund for the following programs or projects:*

…

iv. $10.0 million to Property NSW for the Riverina Conservatorium of Music

…

12.91. Ms Berejiklian was listed in the relevant ERC minute as attending the ERC meeting of 24 April 2018. She did not declare any conflict of interest in respect of her close personal relationship with Mr Maguire.

12.92. Mr Barnes agreed that the result of the two ERC decisions of 12 and 24 April 2018 was that RCM Stage 1 was to proceed on the basis of the "like-for-like" solution that had been proposed – but the decision did not extend to the commercial aspects that had been sought, nor the world-class recital hall component. An aspect of the $10 million funding was master planning of the site that could have embraced some design work on RCM Stage 2, however, "events overtook things".

12.93. Mr Barilaro gave the following evidence on the question of whether Ms Berejiklian was supportive of the ERC decisions of 12 and 24 April 2018, insofar as they concerned the RCM proposal. While he said it was "very hard to gauge if she was supportive or not supportive of this project because it was all part of a, a broader program of funding that had gone through a process that had now been given approval," in response to a question from Ms Berejiklian's counsel, Mr Barilaro said he understood all members of the ERC to have supported the RCM proposal, including Ms Berejiklian.

12.94. Mr Barilaro said that he could not recall whether Ms Berejiklian had discussed support for RCM Stage 1 prior to the ERC meetings of 12 and 24 April 2018, although he indicated it was "possible". His "sense" was that such discussions took place after those ERC decisions and were in the nature of requests for updates.

12.95. On 1 May 2018, a week after the ERC decision of 24 April 2018 in relation to RCM Stage 1, Ms Berejiklian had the following conversation with Mr Maguire (emphasis added):

BEREJIKLIAN:	***We ticked off your conservatorium the other day so that's a done deal now.***
MAGUIRE:	*Yeah, but that's only –*
BEREJIKLIAN:	*The money.*
MAGUIRE:	*– that's – that's the building and ten million, not the rest of it. Not the next stage -*
BEREJIKLIAN:	*Oh my God. Heaven help us seriously.*
MAGUIRE:	*But it's two stages.*
BEREJIKLIAN:	*Yes I know. Anyway.*
MAGUIRE:	*So anyway, that – that's alright they'll all be happy with that –*
BEREJIKLIAN:	*Thank you for that.*

12.96. Notwithstanding the fact the RCM proposal was but one agenda item among a number on the 24 April 2018 ERC agenda, Ms Berejiklian was clearly aware that she had made a decision concerning the RCM proposal at that meeting which would give Mr Maguire something for which he had been advocating. That was the effect of the 24 April decision, taken together with the 12 April decision – they effectively underwrote the relocation of the RCM from

CSU to 1 Simmons Street (RCM Stage 1). Ms Berejiklian's reference to the RCM as "your conservatorium" demonstrates her comprehension of the detail of the RCM proposal, the effect of the two ERC decisions and the fact they vindicated his fervent advocacy about the issue.

The conservatorium – Stage 2

Maguire: Alright I'll go and chill you just throw money at Wagga.

Berejiklian: I will I'll throw money at Wagga, don't you worry about that lots of it.

12.97. A further $20 million in funding for RCM Stage 2 was the subject of a commitment and funding reservation in the campaign preceding the Wagga Wagga by-election of September 2018 triggered by Mr Maguire's resignation from Parliament. As leader of the Liberal Party that was contesting the seat of Wagga Wagga, Ms Berejiklian was responsible for determining which commitments and announcements would be made during the by-election campaign. The commitment of $20 million was for the construction of a "purpose-built recital hall that will ensure Wagga Wagga becomes the Riverina's premiere entertainment destination" for the RCM on the 1 Simmons Street site. This was not a like-for-like commitment. The RCM did not enjoy a similar facility at its former site at CSU.

Prelude

The "name of the game"

12.98. As at May 2018, Mr Maguire was considering retiring at the next election, which in accordance with the NSW election cycle was due to be held in March 2019. Had he retired then, it was possible Ms Berejiklian and Mr Maguire would have made the existence of their relationship known publicly.

12.99. One of the things Mr Maguire was attempting to do towards the middle of 2018 was to put in place a series of projects with a view to making it easier for him to be able to retire at the next election by making the Coalition popular in the electorate of Wagga Wagga. As he described it, that was "[t]he name of the game".

12.100. Mr Maguire appreciated in this context that he had the benefit of incumbency, but that there was always a risk if he retired at the next election, and there was to be a new candidate, there could be a swing and that other political parties would enter the race, seeing an opportunity.

12.101. Mr Maguire's intention was to deliver on the commitments that he had made so that if he retired, he could do so knowing that he had honoured his promises, and that a new Liberal candidate would get the benefit. While he regarded the priority for the RCM as being to "get them housed", he regarded the RCM project as an important part of his legacy as a local member.

12.102. Mr Maguire's plan to retire was circumvented by the events of 13 July 2018 when he was called to give evidence at the Operation Dasha public inquiry. Following that appearance, Mr Maguire resigned from Parliament.

Just throw money at Wagga

12.103. Prior to his resignation taking effect, Mr Maguire rang Ms Berejiklian on 30 July 2018:

BEREJIKLIAN:	*You don't see it you don't see it I don't want to argue with you, I just need to go and chill because you have stressed me out.*
MAGUIRE:	*Alright I'll go and chill you just throw money at Wagga.*
BEREJIKLIAN:	***I will I'll throw money at Wagga, don't you worry about that lots of it.***
	…
BEREJIKLIAN:	***Alright and I'll throw money at Wagga*** *you just have to do what's right from your end otherwise you'll kill me.*
MAGUIRE:	*I know its fine.*
BEREJIKLIAN:	*Hmm.*
MAGUIRE:	*I'm batting for you.* ***You just need to know what the right things are to throw money at Wagga and you need—***
BEREJIKLIAN:	***I already know you've already told me the three top things I already know.***
MAGUIRE:	*And you need and you need and go and give them a stadium give them a fuck—*
BEREJIKLIAN:	***I'll do that I'll do that too.***
MAGUIRE:	*—a stadium.*
BEREJIKLIAN:	***I'll do that too. I'll do that too don't worry.***
MAGUIRE:	*Well the bureaucrats knocked it all out they're idiots.*
BEREJIKLIAN:	***Yes well I yes but I can overrule them anyway.***
	(Emphasis added)

12.104. Mr Maguire agreed that one of the "three top things" was RCM Stage 2, namely, the recital hall. Insofar as Ms Berejiklian told him "You've got to do what's right from your end", he said that meant "Shut up and stay out of the campaign." Ms Berejiklian also agreed that Mr Maguire suggested to her during the Wagga Wagga by-election that one of the things that the government should announce was funding for building a large recital hall for the RCM. One of the reasons Mr Maguire put forward RCM Stage 2 during the by-election campaign was with a view to securing his legacy as a by-product, having regard to the work that he had done as the local member.

12.105. Ms Berejiklian agreed that Mr Maguire had given her advice or assistance as to what by-election announcements should be made during the 2018 Wagga Wagga by-election campaign that was triggered by his resignation from Parliament. She said that Mr Maguire advised her staff and was "pretty sure" that he would have contacted her directly. She said it was not uncommon if a retiring member caused a by-election that regard would be given to what they regarded as the major issues in the electorate.

12.106. Ms Berejiklian did not agree that it was uncommon for such advice to be sought when the resignation happened under a cloud, commenting that "that's a separate matter, the person's

already resigned, they've already fallen from grace, they've already left the party, they're absolved of their responsibilities".

12.107. Nevertheless, she acknowledged that the ultimate decision was a matter for the party leader, based on advice and consultation with colleagues. Ms Cruickshank agreed that Ms Berejiklian would, within her office, have been the ultimate decision-maker in relation to whether there should be a by-election announcement in relation to RCM Stage 2.

12.108. Mr Barilaro considered that it would have been "very, very strange" for Mr Maguire to have had a role in what announcements might be made as part of the 2018 Wagga Wagga by-election as he resigned from parliament and "was under investigation" and was considered somewhat of a "persona non grata".

12.109. Mr Maguire's view was that his direction to Ms Berejiklian that she "throw money at Wagga" was "politics at play … given with a view to winning the seat".

"I think you will feature in the election"

12.110. Even before Mr Maguire formally left Parliament, Dr Wallace sought to shore up the possibility of RCM Stage 2 coming to fruition. He wrote to Ms Berejiklian on 31 July 2018 expressing concern about the "future of [the RCM] work in this electorate, and to the uncertainties relating to the resignation" of Mr Maguire and "the loss of energy and advocacy that were hallmarks of Mr Maguire's work in … government". He set out a short list of issues the RCM sought "to explore" with Ms Berejiklian following Mr Maguire's departure. These included the fact the cost of RCM Stage 2 was estimated at that stage to be $20 million, a figure which did "not fit neatly into existing funding initiatives of government". He observed that "[t]he Regional Cultural Fund does not support projects over $10 million." He said that "Mr Maguire had been working with the RCM to find funding sources to support this stage, but the work is incomplete". He said the RCM needed certainty "on how we can fund the vision that we shared with you in February of last year", the latter presumably being a reference to Ms Berejiklian's visit to the RCM in February 2017. He sought an answer to the question, "Are you in a position to promise the completion of the popular RCM initiative in the upcoming by-election, or in the general election in 2019?"

12.111. On 31 July 2018, Mr Maguire and Dr Wallace exchanged emails concerning Dr Wallace's letter:

Dr Wallace to Mr Maguire 7.42 pm:

> *Hi Daryl,*
>
> *I prepared and sent a letter to the Premier today regarding Stage 2 of the RCM initiative (**see attached**)* [emphasis added]. *I will let you know how that all goes into the future.*
>
> *Do enjoy your time in the deep north–I assume that you will be spending time supporting your daughter–our best wishes go to your family at this time.*
>
> *Kind regards,*
>
> *Andrew*

Mr Maguire's response at 7.58 pm: "BTW I think you will feature in the election"

Dr Wallace to Mr Maguire at 8.08 pm:

Hi Daryl,

The letter has already gone in. The funny thing is that my last letter to the Premier which shook things up was sent at this time last year – only a difference of one week!

I am very happy to be part of the election – thank you for your work in promoting our vision!

Kind regards,

Andrew

Mr Maguire replied, "Ha **they got it**! My sources just confirmed stick to the line u will be OK 👍"

(Emphasis added)

12.112. Mr Maguire agreed that it was "possible" he could be confident the RCM would feature in the by-election because he knew that Ms Berejiklian would accept his advice regarding the three top things to announce during the Wagga Wagga by-election campaign.

12.113. Mr Maguire also agreed it was possible Ms Berejiklian was the "sources" to whom he referred.

12.114. Given the conversation that took place between Mr Maguire and Ms Berejiklian on 30 July 2018, and the timing of this exchange, it is probable that Ms Berejiklian was the "source". She was the only person who could give the sort of confirmation that promised the completion of RCM Stage 2 which was the critical "line" in Dr Wallace's letter. She could make that decision even if it was opposed by the public service, because she could "overrule them anyway".

12.115. As Ms Berejiklian said:

> *At the end of the day, it's the government's decision. It was a by-election. We're trying to retain the seat. So at the end of the day, we would have received advice on a multitude of things and then it would have been up to the government to make those announcements.*

12.116. At this time, Mr Maguire was regarded in political circles as "persona non grata" as Mr Barilaro said. Mr Maguire agreed nobody else within the party spoke to him. He "was a leper". There is no evidence there was any other ministerial involvement in RCM Stage 2, save to the extent of the sign-off by Mr Perrottet with Ms Berejiklian for the funding of RCM Stage 2 during the campaign. Mr Barnes was sending his memoranda about RCM Stage 1 (which to a small extent touched on RCM Stage 2) to Ms Berejiklian's office as advised, and as he understood at her request.

12.117. It is apparent that Dr Wallace's letter was in Ms Berejiklian's office on 1 August 2018, the day after it was sent. This appears to have occurred because as Neil Harley, then the head of the parliamentary liaison office in the premier's office, explained, there was "a system of correspondence management within the office of the premier that would have, in effect, picked up this letter and ensured that it got before the right eyes, as it were, during the course of a by-election campaign".

12.118. Thus, Mr Harley clearly had the letter when on 1 August 2018, he sent an email to Mr Crocker:

> *Just as an FYI….re corro from Riverina Conservatorium of Music, you are probably aware that this has been a long standing wish list item for the current member. I haven't formed a view yet as to whether this is something we should go all out to support.*

12.119. Notwithstanding the impression conveyed by this email that Mr Harley's view might be decisive, he gave evidence that, as a matter of practice within the Coalition, decisions around by-election announcements were in the gift of the leader of the party contesting the seat. In the case of the

Wagga Wagga by-election of 2018, such decisions would have been a matter for Ms Berejiklian as leader of the Liberal Party. Mr Barilaro gave evidence to similar effect.

12.120. Mr Harley ultimately came to the view that he did not support the making of a by-election commitment for RCM Stage 2. He was concerned that:

12.120.1. the RCM had only recently been granted funding of $10 million for RCM Stage 1

12.120.2. NSW was deep in drought at this stage, and he felt that providing what was a substantial amount of money to the RCM would not be well regarded by either the Wagga Wagga community or for that matter the broader NSW community

12.120.3. it might be seen as quite a "political announcement"

12.120.4. the by-election should focus on other projects and other announcements as opposed to the conservatorium matter.

12.121. Mr Harley's concern that announcing RCM Stage 2 might be seen as a "political announcement" was shared by Bradley Burden, the director of strategy in Ms Berejiklian's office, whose mind was exercised during the by-election campaign that by such an announcement, it might be seen that the government was trying to "buy" the election.

More risky business

12.122. In August 2018, Berge Okosdinossian, a policy adviser in Ms Berejiklian's office, prepared a briefing note on the RCM Stage 2 proposal for the premier. The only date on the document is: "Date to Premier: 13/08". The briefing note referenced Dr Wallace's letter saying it "request[ed] that the Government commit to a further stage 2 round of funding. Stage 2 would provide for a concert hall and associated facilities at the RCM. Rough estimates of stage 2 are costed at approx. $20 million." It also attached a copy of the letter. The "Adviser comments" portion of the briefing note reads:

> *As I understand it, the $10 million for stage 1 was a significant achievement for the RCM and was received very positively by the community. It is now in the purview of Property NSW to engage architects and master planners to commence the delivery of stage 1.*
>
> *There is some concern from the community that now that Daryl is gone, the Government might not follow through on its commitment to Stage 1 – as there was a perception that Daryl was very much personally driving the project.*
>
> ***Stage 2 is very much a "nice to have" for the RCM; no doubt they are using the by-election as leverage to secure funding for this next stage. Based on conversations I have had with DPC staff based in Wagga (James Bolton – formerly GM of Wagga Council); stage 2 is by no means a top order priority for the community and could seen*** [sic] ***as quite a "political" announcement.***
>
> *Options here for us are:*
>
> *1. Reconfirm our $10 million commitment for stage 1 fit out of the new RCM site, and announce that we are moving to the next stage of master planning and engaging architects. We could turn this into quite a nice announcement.*
>
> *2. Commit to stage 2, with the additional (approx.) $20 million to fund the new concert hall. However, as the letter attached shows, they are still at an early stage of their planning for Stage 2,* ***and so do not have a firm cost or design for the project****.*

As part of option 1, we could say that we commit to exploring the options around stage 2, ***without actually committing any funds at this stage****.*

Recommendation: Please provide your feedback so we can lock in announcement you prefer – with the view of making an announcement on 24/8.

(Emphasis added)

12.123. Mr Okosdinossian's note demonstrates that RCM Stage 2 was perceived as being a "nice to have" for the RCM rather than a "need to have" and "by no means a top order priority" within the local community. This was, no doubt, because while RCM Stage 2 had been conceived by Mr Maguire and Dr Wallace as a way to defray the costs of the new location of the RCM, the "government's commitment to RCM includ[ed] recurring grant funding to cover the annual cost of occupying and maintaining the new conservatorium (for stage 1)". It also highlighted the risk that the announcement of RCM Stage 2 might be seen as quite a "political announcement", which would appear to reflect Mr Harley and Mr Burden's concerns that the announcement could be seen as an attempt to "buy" votes.

12.124. There was no bureaucratic support to fund RCM Stage 2. Mr Barnes said that he never changed his view that RCM Stage 2 was not in the public interest. He was not aware of any official advice having been sought but believed that Mr Schuman and Mr Okosdinossian would or may have been aware of the generally adverse views of Mr Barnes' team.

12.125. On 16 August 2018, Mr Okosdinossian sent an email to Mr Walker (Property NSW), Mr Bolton (director, Riverina Murray, DPC Regional) and Mr Hanger which he copied to Mr Barnes. He sought advice from Mr Walker and Mr Bolton as to "the full scope of works that will be undertaken as part of the stage 1 $10 million approved by ERC, and what if any, that would cover for stage 2 (recital hall planning)". He asked Mr Hanger for "options in relation to a funding stream that we can pursue over the coming days". He remarked that "timeframes are tight so could I please ask that we get the ball rolling ASAP".

12.126. On 19 August 2018, Mr Maguire had a telephone conversation with Julia Ham, the Liberal candidate for the Wagga Wagga by-election, which included the following exchanges (emphasis added):

MAGUIRE:	*And, and the ah the Intermodal Terminal, so I don't know where that is in the mix, but if you've got ah the Equex/stadium, um –*
HAM:	*Yeah.*
MAGUIRE:	*– under your belt and* ***you've got the conservatorium they're gonna give you the money for that as well****.*
HAM:	*Yeah –*
MAGUIRE:	*Right.*
HAM:	*– I mean –*
MAGUIRE:	*That's another –*
HAM:	*Yeah.*
MAGUIRE:	*– that's another 18 million.*
MAGUIRE:	*Yep. So, so my humble advice is stick there for a while, 'cause a by-election and you'll get everything you want. (Laughs)*

HAM:	*Yeah. (Laughs/coughs). Yeah, sorry you –*
MAGUIRE:	*(Laughs).*
HAM:	*– you can't help being a little bit cynical can you?*
	...
MAGUIRE:	*Oh well. No well that, that – statewide they'll have more money don't worry. But –*
HAM:	*Um and the, and Daryl like you probably know but the, the tides have turned on you. Everyone's just, everyone's just going but Daryl did this.*
MAGUIRE:	*(Unintelligible).*
HAM:	*Daryl was the one who started this and all I get now is how wonderful you are so –*
MAGUIRE:	*Good so, so all's you want to do is continue the good work of, of the Liberal Party*

12.127. Mr Maguire said that he would have found out that RCM Stage 2 was to be funded either from Mr Bentley or Ms Berejiklian. The probability again is that it was Ms Berejiklian. He could have drawn this simply from the 30 July 2018 conversation and the fact that RCM Stage 2 was one of the "three top things" Ms Berejiklian had agreed to "throw money at". It is equally probable she communicated that fact to him in a conversation on 31 July 2018 when Dr Wallace sent Mr Maguire a copy of his letter to her, and Mr Maguire told him that evening "stick to the line u will be OK".

12.128. As already observed, only Ms Berejiklian was able to make by-election commitments. There is no evidence that a formal decision to fund RCM Stage 2 had been made at this stage. Accordingly, it is improbable that Mr Bentley could have conveyed such advice to Mr Maguire. However, it appears Ms Berejiklian had informally reached that view as can be gleaned from an email Mr Harley sent to his colleagues within the premier's office at 4:59 pm on 20 August 2018, which included the following comments:

> *What's the announcement? The $10mil has already been announced so what's new?*
>
> ***I personally don't want to push this project, but the Premier did so I think we need to make it clear to her that there is no need to go further than we already have at this stage (and indeed that there is some risk if we do so given the context of the drought)***. (Emphasis added)

12.129. Mr Harley said that his statement about making it clear to Ms Berejiklian "that there is no need to go further than we already have at this stage" reflected his "belief that a further commitment of further funds, beyond the 10 million that had already been announced, wouldn't be helpful and perhaps would draw criticism as being unnecessary".

12.130. Mr Burden replied to Mr Harley's email, "We need the full $20m team". Mr Burden's recollection was that when he wrote this email, he was expressing the view of either Ms Berejiklian or Ms Cruickshank rather than his own. He could not recall any political advisers or staffers of Ms Berejiklian's office wanting her to push this project. Ms Cruickshank said she was definitely not pushing RCM Stage 2.

12.131. This exchange occurred as part of an email chain which included Mr Bolton's 20 August 2018 response to Mr Okosdinossian's 16 August 2018 email in which Mr Bolton pointed out that the RCM Stage 2 funding scope included "Development of a master plan and cost estimate for the entire site (stages 1 and 2)" and that "Stage 2 scope is to be finalised during the master planning process". Mr Okosdinossian forwarded the email chain to Mr Harley, Mr Crocker and Mr Burden with the suggestion "we can talk in broad terms about stage 2, as the ERC approved $10 million will cover master planning for both stages. This means we don't need to refer to any further dollars at this stage. This is a possible announcement for GB in her trip to Wagga with Harwin this Friday."

12.132. Ms Berejiklian agreed she ultimately decided that the funding of RCM Stage 2 should be a by-election announcement, on the basis that "[c]learly it had community support. The community wanted it. You look for announcements which are going to cause the community to feel favourably about your new candidate." This was belied by Mr Okosdinossian's briefing note on the RCM Stage 2 proposal for Ms Berejiklian referred to above, apparently prepared on or about 13 August 2018.

12.133. Ms Berejiklian could not recall the names of any members of her staff who supported the RCM Stage 2 announcement. She recalled that not all members of her staff wanted to make the announcement. There is no evidence that anyone other than Mr Maguire (and of course the RCM) supported RCM Stage 2. It will be recalled that even Ms Berejiklian was exasperated at the prospect of the RCM needing more money when Mr Maguire raised the necessity for RCM Stage 2 in their conversation on 1 May 2018. In addition, her office had received Mr Barnes' memorandum of 4 December 1017 in which he pointed out, in essence, that the RCM did not need a recital hall as "the like-for-like solution" could be achieved by "liaising with Council and CSU around ensuring access to their facilities at an affordable rate for major performances". It is an available inference that Ms Berejiklian saw that memorandum having regard to the interest she was displaying in the RCM proposal. In January, Ms Berejiklian had signed a letter to Mr Maguire, and Mr Barnes had signed one to Dr Wallace, from which it was clear, and Dr Wallace understood, that there was a commitment to RCM Stage 1, but not RCM Stage 2.

12.134. On 21 August 2018, Mr Hanger had a meeting with the premier's office. The next morning, 22 August 2018, he sent an email relevantly to Mr Walker and Mr Bolton, which he copied to Mr Barnes. He advised that:

- *The Premier is keen to announce this Friday that $20.5m funding has been reserved for the Recital Hall component of Stage 2 of the Wagga Conservatorium project*
- *I've advised the PO that this announcement can be facilitated through a reservation from the Regional Communities Development Fund which opened for project nominations this week*
- *The PO will work with the DPO so this project is nominated for that fund by the DP – the Premier's advisor leading this work and the DP's CoS have discussed the project late yesterday*
- *I advised the PO that I would work with agencies to try and quantify the likely ongoing costs for NSW Government (above the $20.5m initial capital costs) to maintain the Recital Hall and also options for ownership/management*.

12.135. Later on the afternoon of 22 August 2018, Mr Crocker sent an email to Mark Connell and Laura Clarke (members of Mr Barilaro's staff), Mr Okosdinossian and Monica Tudehope (a member of treasurer Mr Perrottet's staff). The subject was "Wagga Conservatorium Paperwork". Mr Crocker wrote:

> *After discussions with Monica, we think the best approach is that we prepare paperwork for conservatorium to be reserved for funding from the RCDF* [Regional Communities Development Fund]*, and that we can then address the issue about the current and future commitments from the fund at an ERC down the track.*
>
> *As I understand it, the paperwork would be a letter from the DP to the Treasurer and Premier, and then a response.*
>
> *We've asked DPC to prepare the letter, and to talk to Treasury on preparing the response – and then perhaps the Premier, Treasurer and Deputy Premier can discuss tomorrow post Community Cabinet, if there are any concerns on the issue.*

12.136. Regional NSW then prepared a letter dated 23 August 2018 for Mr Barilaro, in his capacity as minister for regional NSW, to send to Mr Perrottet seeking a funding reservation of $20.5 million as against the $80 million Regional Communities Development Fund for the recital hall component of RCM Stage 2. The Regional Communities Development Fund was a fund the government was launching through the Regional Growth Fund.

12.137. In an undated letter on the premier's letterhead, but one presumably written on or before 24 August 2018, the authors replied to Mr Barilaro:

> *As per the ERC Terms of Reference, the Premier and I have agreed to the reservation of up to $20 million, from the recently announced Regional Communities Development Fund (RCDF), for the project subject to:*
>
> *- The project being submitted for consideration and successful through the competitive assessment process of the RCDF –*
>
> *- Finalisation of the scope of works for the project*
>
> *- The project meeting the guidelines of the RCDF*
>
> *- A Final Business Case being approved by ERC.*

12.138. Only Mr Perrottet's signature appeared on the letter, however as already noted, it was on letterhead generated out of the premier's office and as is apparent, it was written on Ms Berejiklian and Mr Perrottet's collective behalf. Mr Barilaro understood the letter to have approved the proposal in his 23 August letter, commenting, "The Treasurer doesn't have the ability to write a letter like this on the Premier of New South Wales letterhead."

12.139. The reservation appears to have been made for $20 million rather than $20.5 million as there was a $20 million cap on funds for single projects under the Regional Communities Development Fund. The expression "As per the ERC Terms of Reference" in the letter referred to the ERC conditions of the fund pursuant to which the premier and treasurer would have been signatories to approvals or reservations. So, the letter was in accordance with the decision of the ERC establishing the Regional Communities Development Fund. There is no evidence that the by-election announcement of the funding for the RCM Stage 2 was itself the subject of an ERC decision.

12.140. Ms Berejiklian said she "would definitely have supported the decision, otherwise it wouldn't have been made". She also accepted that, during the prelude to the Wagga Wagga by-election, Mr Maguire had suggested that one of the announcements she should make related to the recital hall component of the RCM (that is, RCM Stage 2) and that she ultimately decided to make such a commitment as part of the by-election. She said it never crossed her mind, when the decision was made to reserve $20 million for RCM Stage 2, to declare her relationship with Mr Maguire to Mr Perrottet or Mr Barilaro.

The "buy-election "

12.141. Mr Harley and Mr Burden's concerns about how an announcement of funding for RCM Stage 2 might be perceived were not misplaced. Following the 24 August 2018 announcement, the *Sydney Morning Herald* apparently published an article claiming the government was running a "buy-election". A media statement was drafted by way of response to the article in the premier's office and circulated to both Mr Harley and Mr Burden for approval, outlining the historical Coalition spend on Wagga Wagga, then dealing with announcements made during the by-election. Not all were costed, but of those which were, the reservation of $20 million funding for RCM Stage 2 was the second largest and the largest was a commitment of $50 million to redevelop Tumut Hospital.

12.142. The question of funding for Tumut Hospital was the subject of a vehement attack by Mr Maguire on Treasury in an exchange with Ms Berejiklian which commenced by text message and continued in two conversations on 16 May 2018, previously cited in chapter 11 in the discussion of Ms Berejiklian's partial conduct in relation to the ACTA proposal.

12.143. At 11.20 am, Mr Maguire sent a text to Ms Berejiklian, saying:

> *I just went to see treasurer staff! No money for stage 3 wagga hospital needs 170 million, ?no money Tumut hospital! No money north Wagga school, just piddling sum for graffiti removal? Gee*

12.144. He sent another message, about three minutes later, saying, "No line items."

12.145. Ms Berejiklian rang Mr Maguire that afternoon at about 4.40 pm. He asked if she had received his message. She said she could not understand it. Mr Maguire responded:

> *MAGUIRE:* *– I went down to Treasury and said now look "how are things coming along, how's my hospital?" Oh um, I said "am I getting my 170 million?" Oh, "it's not a line item", and he wouldn't sort of tell me. And then I said "well what am I getting?" and he said "oh you're getting some money for graffiti". Well that's a hundred thousand to put another van on the fucking road. I said "well what about Tumut Hospital?" Oh he said "not in this budget". "So what of the new school?" No, right. I said "what about the, the base hospital?" He – I said no money to, to – I said "we're about to start building". Oh he said "I'll have to get back to ya". See if –*
>
> …
>
> *– and they're ready to go to tender in January. I said to Brad before, I said "are we getting money or not?". He said "oh no, I haven't seen it. I don't know, it's up to Treasury". Well I said "you better fucking make sure Wagga's got money otherwise there's gonna be a riot on your hands".*

12.146. Ms Berejiklian replied that she would "deal with it" and "fix it".

12.147. Mr Maguire turned to Tumut Hospital, saying:

> *MAGUIRE:* *Jesus Christ, and Tumut not a dollar, but mind you we haven't finished the planning but –*
>
> *BEREJIKLIAN:* *Mmm.*

MAGUIRE:	*– you know (unintelligible), there's no money for it and there's no money for the new school in Estella. I'm gonna have a fucking terrible time at the election, just a terrible time.*

12.148. Ms Berejiklian telephoned Mr Maguire again on 16 May 2018, about two hours after the first conversation to tell him she had got him the Wagga Wagga Base Hospital money:

BEREJIKLIAN:	*We'll I've already got you the – I've already got you the Wagga Hospital –*
MAGUIRE:	*But they –*
BEREJIKLIAN:	*– money.*
MAGUIRE:	*– should have done it.*
BEREJIKLIAN:	*I know I just talked to Dom –*
MAGUIRE:	*Why did they – why do the –*
BEREJIKLIAN:	*I just spoke to Dom and I said put the 140 in the budget. He goes no worries. He just does what I ask I ask him to –*
MAGUIRE:	*But – but –*
BEREJIKLIAN:	*– it's all fine.*
MAGUIRE:	*– but it's meant to be 170.*
BEREJIKLIAN:	*Whatever it is 170 I said (unintelligible) I think it's around 140, I said just put it in. He's putting it in whatever it is, okay.*

12.149. Later in the conversation, Mr Maguire returned to the issue of Tumut Hospital:

MAGUIRE:	*And they had nothing for Tumut. You know fuck me dead we've amalgamated them, we've got the Tumut bonfire that Tumbarumba bonfire going. I've got all these goddamned issues happening, goddamned rail trails that Greg's created. He's got this fuckin bushfire happening in – in Tumbarumba, and they say oh there's no money for Tumut Hospital. Hello guys.*
BEREJIKLIAN:	*Mm.*
MAGUIRE:	*This is the – this is the key to win the goddamned um vote up there to have them not turn against us.*
	…
MAGUIRE:	*I can't believe they left Wagga Hospital off there. What is wrong with them?*
BEREJIKLIAN:	***I've just fixed that one. I can't fix everything else, but I've got that one on for you –***
MAGUIRE:	***Yeah but – but –***
BEREJIKLIAN:	***– a hundred and seventy mil.***
MAGUIRE:	*– but – yeah but – but – but what's wrong with them. I mean the problem is, if – if you – anyway. They've got to give something for Tumut or at least some excuse for Tumut because we're going into an election with no money for a new hospital.*

	Nothing, not even you know planning money, but give them half a million for planning, something to keep them all occupied. Put a (unintelligible) line on it because um that all comes down as consolidated revenue for the health budget –
BEREJIKLIAN:	*Mm.*
MAGUIRE:	*They need to put a line item that says further planning, acquisitions at Tumut Hospital, five million dollars, two million, doesn't matter. And the same as the fuckin school, you know a million dollars to continue planning, anything than leave it off.*
MAGUIRE:	*– you go tell them or go tell them at Wagga Hospital or you go tell them at Tumut.*
BEREJIKLIAN:	*Yeah, you don't need to give me that rubbish we're giving –*
MAGUIRE:	*Yeah –*
BEREJIKLIAN:	*– Wagga more money than (inaudible) –*
MAGUIRE:	*No, but you –*
BEREJIKLIAN: -	*than ever before.*
MAGUIRE:	*– but you – but you go and tell them at Tumut.*
MAGUIRE:	*Anyway, you need to find at least five hundred thousand or a million dollars to keep Tumut planning going.*
BEREJIKLIAN:	*Ehm.*
MAGUIRE:	*Just to have a line item. And – and, you know, five hundred thousand –*
BEREJIKLIAN:	*Can you text Brad – can you stress and text Brad cause I've–**I've got you now got you the one seventy million in five minutes.** You can at least get a few hundred thousand from Brad just keep texting him. If you keep bothering him he'll fix it okay.*
MAGUIRE:	*Yeah – yeah I'll –*
BEREJIKLIAN:	*You can have me fight –*
MAGUIRE:	*– go see Lee and she'll fix it.*
BEREJIKLIAN:	***You can't have me fixing all the problems all the time.***
MAGUIRE:	*I tell you what if you went to the budget without Wagga on it you –*
BEREJIKLIAN:	*Yeah I just fixed it okay.*
MAGUIRE:	*Hokis –*
BEREJIKLIAN:	*Okay it's done.*
MAGUIRE:	*I – I –*
BEREJIKLIAN:	*Alright.*
MAGUIRE:	*– can't believe that that was the top of my list and they ignored me.*

BEREJIKLIAN:	*Well luckily you've got –*
MAGUIRE:	*Why did that do that?*
BEREJIKLIAN:	*Because they're just – they're silly sometimes.*
MAGUIRE:	*Why – why do that do that?*
BEREJIKLIAN:	*Because there* [sic] *so busy getting caught up with so called key seats –*
MAGUIRE:	*Ask –*
BEREJIKLIAN:	*– they forget.*
MAGUIRE:	*– the question.*
	(Emphasis added)

12.150. Ms Berejiklian said she thought the reason she told Mr Maguire to go and talk to the health minister, Mr Hazzard, about Tumut Hospital was because she suspected the Tumut Hospital funding had not been allocated. According to the 2017–18 NSW Budget papers, "new projects announced in the 2017-18 Budget included capital investment in 2017-18 of … $15.0 million for a State-wide Mental Health Program and to plan future capital works at Rouse Hill, Griffith, Tumut, Liverpool and St George Hospitals".

12.151. On 17 August 2018, the NSW Government issued a media release announcing "at least $50 million for the rebuild of Tumut Hospital to provide a modern health care service for the local community". Ms Berejiklian was quoted as saying, "This is fantastic news for the community. We want to ensure the residents of Tumut and surrounding areas are cared for in the most modern facilities."

12.152. Ms Berejiklian said she thought there was an issue with the Tumut Hospital during the 2018 by-election. She "recall[ed] some announcement at the Tumut Hospital, if I'm not mistaken, during the by-election". It is apparent that a lot had happened between May 2018 and late August 2018 to support the announcement during the by-election of $50 million to redevelop Tumut Hospital.

Always read the fine print

12.153. On 24 August 2018, a public commitment was made by the government to spend $20 million on the RCM Stage 2 recital hall. The commitment was announced by the then minister for the arts, the Hon Don Harwin, including through the issue of a NSW Government media release.

12.154. The media release included the advice that "[t]he funding of $20 million will be made available subject to the full project scope and costings for the recital hall being finalised. This work is already underway as part of the Stage One redevelopment being supported by the NSW Government." Mr Barilaro described this advice as the "fine print at the bottom", and said it was appropriate "to announce a commitment but also explain to the public that there will be a process in place in relation to the scope of the works". In his view, it was "not only important but appropriate and being absolutely transparent with the decision".

12.155. Mr Barilaro agreed that a funding reservation of the type made on or about 24 August 2018 in respect of RCM Stage 2 carried with it at least a level of political imprimatur for the particular proposal, albeit not to the extent that a decision of the ERC conveyed. That this was the case was demonstrated by what happened over the three or so years following the by-election.

12.156. The effect of the funding reservation was that the funds could not be spent on other projects until it was released (or alternatively the funds could be spent on the project itself once approved). The fund against which the $20 million was reserved (the Regional Communities Development Fund) was a "non-Restart" fund, meaning a BCR of greater than 1 was not required before funding could be provided. It was, however, a competitive fund. Mr Barnes said that RCM Stage 2 would have needed to satisfy a competitive process notwithstanding the funding reservation that had been made as part of the by-election announcement.

12.157. There was no evidence to suggest that any further advice was sought at the departmental level regarding the merits or otherwise of the government proceeding to fund, or to commit to funding, RCM Stage 2 prior to the 24 August 2018 announcement. That was not an aspect of the project that had been endorsed at the departmental level in early 2018. Such advice as was received by Ms Berejiklian was confined to the "like for like" proposal (RCM Stage 1). Further, as noted above, Mr Barnes was of the view that RCM Stage 2 could not be said to be in the public interest for a variety of reasons and he did not believe his view ever changed in that regard.

12.158. Nominations for the Regional Communities Development Fund closed on Friday 31 August 2018, a week after the by-election announcement, according to a briefing paper submitted to Mr Barilaro. Attachment A of the briefing paper noted the RCM was nominated by Mr Barilaro. The RCM was granted an exemption from the 25 per cent co-contribution on grounds of hardship or disadvantage. The nominated projects were required to submit a detailed application/business case.

12.159. Mr Barilaro said that he would have been less concerned about Ms Berejiklian's relationship with Mr Maguire in the context of RCM Stage 2 as Mr Maguire had resigned by that point and there was an election commitment with processes. He did, however, say that the only conflict here would have been that the letter from Dr Wallace (that is, the letter dated 31 July 2018) indicated that Mr Maguire had played a supportive role or worked with the RCM on its proposal and "that could have caused a level of concern".

12.160. On 8 September 2018, the Wagga Wagga by-election was held. An Independent, Dr Joe McGirr, was elected. There was an almost 30 per cent swing against the Liberal Party.

The RCM – epilogue

12.161. On 31 May 2019, Mr Hanger sent an email to Dr Wallace advising that the business case supplied by the RCM contained "insufficient information to support a proper assessment". The "assessment" referred to formed part of a competitive assessment process of the kind that the ACTA proposal (and RCM Stage 1) avoided. The letter stated that "the commitment of $20 million from the NSW Government to this project remains steadfast". It asked the RCM to submit "more detailed design and project costing, a complete and proper business case, a data sheet to support the financial case for the project and greater details on the operating model for the overall project." It encouraged the RCM to work with its allocated business development manager to develop these documents in order to progress the funding for the project. In referring to a "commitment", Mr Hanger meant a "political commitment" as opposed to a commitment in the sense of an actual allocation or approval.

12.162. On 14 October 2020, the Hon Walt Secord asked a question without notice during a sitting of the Parliamentary Committee on the Independent Commission Against Corruption, addressed to Mr Harwin:

> *Is the Minister aware that the $30 million grant provided to the Riverina Conservatorium of Music was more than all of the grants provided to the 18 other conservatoriums* [sic] *combined in New South Wales?*

12.163. In reply, and after making it clear the RCM was not his portfolio responsibility, Mr Harwin said, "I am aware that that is a very large grant compared to what other regional conservatoria get…"

12.164. On 13 July 2021, deputy premier Mr Barilaro approved a briefing note from Mr Hanger advising that RCM Stage 2 should not proceed. He directed the funding reservation of $20 million be released back to the Department of Regional NSW budget. The briefing note recorded that the Strategic Business Case the RCM had submitted said the RCM would not have the capacity to fund the ongoing operational and maintenance expenses of the RCM Stage 2 development. Accordingly, the briefing note said it would be "financially irresponsible for the NSW Government to continue to progress the Stage Two [RCM] project knowing the financial implications for the RCM".

12.165. At the time of the Second Public Inquiry, the construction of RCM Stage 1 was underway.

Mr Maguire and the RCM – the RCM's "go-to person within government"

12.166. Dr Wallace described Mr Maguire as the RCM's "go-to person within government". As much can be seen from the narrative of the funding of RCM Stages 1 and 2. It is plain that Mr Maguire's assistance was pivotal in securing the attention of politicians and, through them, the involvement of the bureaucrats charged with investigating and ensuring the RCM proposal was successful.

12.167. Mr Maguire agreed that the RCM proposal was a project he was "seeking to advance" and that, as far as he was aware, he was the "principal proponent of that project within government". He said his office would write to any minister they thought relevant. He would have lobbied anybody who would listen.

12.168. As noted earlier, Mr Maguire agreed that he suggested the new RCM facility should be built bigger than was necessary with a view to having extra space that could then become a commercial space which could become a revenue stream.

12.169. An illustration of this can be seen in an email from Dr Wallace to Mr Maguire on 16 June 2018, complaining about the draft lease for 1 Simmons Street and expressing his concern that the RCM seemed to have "a communication problem within sections of government". He sought Mr Maguire's help to achieve clarity of purpose between the RCM and Property NSW. Among Dr Wallace's concerns was the term of the lease, which he described as "an impossibly short-term of only 5 years".

12.170. Mr Maguire sent Dr Wallace's email to Ms Berejiklian on 19 June 2018. He did so to seek her support and intervention to remove what might be described as a roadblock. He also forwarded Dr Wallace's email to Mr Barnes on 20 June 2018, who replied, "Daryl: I have arranged a catch-up with Government Properties (who have the running with this) later today and will give you a call tomorrow before I engage with Andrew." In response, Mr Maguire wrote, "I went saw Domiellos [sic] office as well. Need it resolved 50 year lease or 99". Mr Barnes replied, "Ok thanks."

Breach of public trust

Section 8(1)(c), ICAC Act

Counsel Assistings' submissions

12.171. Counsel Assisting submitted that the Commission should conclude that Ms Berejiklian engaged in conduct constituting or involving a breach of public trust by exercising her public functions in relation to funding promised and/or awarded to the RCM in circumstances where there was a real possibility of conflict between her public duties and her private interest in maintaining or advancing her close personal relationship with Mr Maguire. They repeated their submission that the relationship between Ms Berejiklian and Mr Maguire was one of such closeness as to be capable, objectively, of influencing Ms Berejiklian's performance of her public duties in such circumstances.

12.172. Counsel Assisting observed that, as with the ACTA proposal, Mr Maguire was the "principal proponent" within government for the RCM proposal. Ms Berejiklian knew that Mr Maguire had a "particular passion" for the RCM proposal, and knew that it was "something … he felt strongly about as a local Member of Parliament". They drew attention to Ms Berejiklian's evidence that she participated in meetings of the ERC on 12 April and 24 April 2018, at which decisions were made concerning the RCM proposal, and did not declare any interest pertaining to Mr Maguire.

12.173. Counsel Assisting submitted that the nature and extent of Ms Berejiklian's feelings for Mr Maguire, as at April 2018, were apparent from the text message exchange between Ms Berejiklian and Mr Maguire on the evening of 12 April 2018 within two hours of the ERC meeting approving the transfer of the 1 Simmons Street site from Property NSW to the DPE (Arts NSW), then that site's lease on market terms to the RCM, in which she told him, "you are my family". Counsel Assisting submitted that, in those circumstances, there was a real possibility of conflict between Ms Berejiklian's public duty to act only according to what she believed to be in the public interest, and her private interest in maintaining or advancing her close personal relationship with Mr Maguire in relation to agenda items concerning the RCM proposal, a proposal for which Ms Berejiklian knew Mr Maguire had a "particular passion".

12.174. Counsel Assisting also submitted that Ms Berejiklian remained in a position of conflict in relation to her exercise of official functions concerning RCM Stage 2 in the lead up to the Wagga Wagga by-election on 8 September 2018. They noted in that regard, that Ms Berejiklian agreed Mr Maguire was the "driving force, the primary force, within Government" in relation to RCM Stage 2. She also accepted that Mr Maguire had suggested to her that one of the announcements she should make by way of by-election commitment related to the recital hall component of the RCM (that is, RCM Stage 2).

12.175. Counsel Assisting argued that notwithstanding his resignation from Parliament, the RCM was something that Mr Maguire wanted – he was a champion of the RCM's cause, having worked closely with the RCM on the RCM proposal (including Stage 2) over an extended period of time. He was, in effect, a part of the team bidding for funding. He did not surrender that role after his resignation from Parliament.

12.176. Nor, Counsel Assisting observed, did the circumstances in which Mr Maguire resigned or any other matter have the result that Ms Berejiklian's personal relationship with Mr Maguire ceased to be of the nature, extent and closeness such as to be capable of influencing Ms Berejiklian's conduct. They pointed to a conversation she had with Mr Maguire on 30 July 2018, four days before he formally left Parliament, as indicating her level of personal concern for Mr Maguire at or about the time that she took steps in relation to RCM Stage 2:

BEREJIKLIAN:	*You don't see it you don't see it I don't want to argue with you, I just need to go and chill because you have stressed me out.*
MAGUIRE:	*Alright I'll go and chill you just throw money at Wagga.*
	…
BEREJIKLIAN:	*Alright and I'll throw money at Wagga you just have to do what's right from your end otherwise you'll kill me.*

12.177. Counsel Assisting submitted that during this conversation, Ms Berejiklian was clearly and understandably concerned about Mr Maguire in circumstances where he had just suffered a sudden fall from grace in his professional life and experienced significant tragedy in his personal life. She was at the time otherwise concerned not to "add too much to what was going on at [that] moment". His circumstances were clearly a factor operating on her mind and a source of stress for her, as might be expected (and as she expressly told Mr Maguire on 30 July 2018).

12.178. Given those circumstances and the continuance of her close personal relationship with Mr Maguire generally, Counsel Assisting argued Ms Berejiklian was in a position in which Mr Maguire's desire to bring about RCM Stage 2 was one that was capable of influencing Ms Berejiklian in the exercise of her public duties. That state of affairs had the result that there was a real possibility of conflict between Ms Berejiklian's public duty to act according to what she believed to be in the public interest, and her private interest in the maintenance and advancement of her relationship with Mr Maguire. It was a breach of public trust for Ms Berejiklian to exercise public functions in circumstances in which such a conflict existed. They submitted the Commission should so conclude.

Ms Berejiklian's submissions

12.179. Ms Berejiklian repeated the legal submissions noted when dealing with s 8(1)(c) and s 9(1)d) in relation to ACTA. They have been dealt with earlier in the report and, relevantly, in chapter 11.

12.180. Factually, Ms Berejiklian submitted (as she did in relation to the ACTA) that:

12.180.1. even if there was a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act, there was no breach, let alone a "substantial" breach of the ministerial code for the purposes of s 9(1)d) on the basis that the Commission would conclude that Ms Berejiklian was not aware she had a conflict of interest by reason of her close personal relationship with Mr Maguire. Any breach (which was disputed) would only have arisen from a misunderstanding of the legal effect of the code as construed by this Commission rather than knowing or deliberate conduct

12.180.2. in the particular circumstances of the present case, involving no pecuniary benefit to Mr Maguire or anyone associated with Ms Berejiklian nor otherwise involving any misuse of office by Mr Maguire, and in which the relevant decisions were principally made by the government not, for instance, stand-alone decisions by Ms Berejiklian, any breaches did not meet the "substantial" threshold

12.180.3. Counsel Assisting conceded the evidence did not establish RCM Stage 1 was likely to have taken a different course but for the involvement of Ms Berejiklian

12.180.4. as to RCM Stage 2, this must be considered in the context of an election promise made and funding reserved – no more

12.180.5. the Commission would not be satisfied the present case amounted to serious corrupt conduct.

Consideration

RCM Stage 1

12.181. In the previous chapter, when dealing with ACTA, the Commission found the evidence was compelling that Ms Berejiklian deliberately failed to disclose her personal relationship with Mr Maguire in making decisions concerning ACTA in circumstances where there was a real possibility of conflict between her public duty and her private interest in relation to her exercise of her official functions associated with proposals for government action that she knew were advanced by Mr Maguire. The reasons on which that finding was based apply with equal force to Ms Berejiklian's participation in decisions made in the ERC meetings of 12 and 24 April 2018, approving respectively the transfer of the 1 Simmons Street site from Property NSW to Arts NSW for the purposes of relocating the RCM there and the funding of RCM Stage 1.

12.182. As with the ACTA proposal, Ms Berejiklian knew that Mr Maguire had long been an advocate for the RCM. He had raised the funding of the RCM proposal with her over a period of years and on a number of occasions. Ms Berejiklian understood Mr Maguire to have a "particular passion" for the RCM proposal, and knew that it was "something … he felt strongly about as a local Member of Parliament". He updated her from time to time on the progress of the proposal and she kept him up to date.

12.183. In addition to the reasons given in the context of ACTA, in the RCM context the Commission has taken into account the text message exchange between Ms Berejiklian and Mr Maguire on the evening of 12 April 2018 within two hours of the ERC meeting approving the transfer of the 1 Simmons St site from Property NSW to Arts NSW, then that site's lease on market terms to the RCM, in which she told him, "you are my family". That was a clear indication of the strong bond Ms Berejiklian felt she had with Mr Maguire around the time of the two April 2018 ERC decisions.

12.184. The Commission accepts Counsel Assistings' submission that, having regard to the nature and extent of Ms Berejiklian's close personal relationship with Mr Maguire and Mr Maguire's advocacy for the RCM proposals (Stages 1 and 2), the relationship was capable, objectively, of influencing Ms Berejiklian's performance of her public duties in relation to those proposals.

12.185. It is possible, as Counsel Assisting submitted, that Ms Berejiklian may not have been aware that the 12 April 2018 agenda included the decision concerning the land transfer necessary to provide the RCM with its new conservatorium in Wagga Wagga. However, there is clear evidence that Ms Berejiklian was aware the 24 April 2018 ERC papers included the proposal for funding of RCM Stage 1.

12.186. Ms Berejiklian told Mr Maguire on 1 May 2018, "We ticked off your conservatorium the other day so that's a done deal now." It is apparent from that statement, that Ms Berejiklian was aware that the decision had been made at least on 24 April 2018 to fund RCM Stage 1. As she told Mr Maguire that "his" conservatorium had been "ticked off the other day", it is tolerably apparent that she must also have been aware that when she participated in the 12 April 2018 ERC meeting its agenda included a proposal to approve the transfer of the 1 Simmons Street site from Property NSW to Arts NSW for the purposes of relocating the RCM there, and that that resolution had been passed. There would have been no point funding RCM Stage 1 on 24 April 2018, if the land to which the RCM was to move had not been secured.

12.187. Ms Berejiklian did not dispute that she participated in the two ERC decisions concerning the RCM proposal, and that she did not declare any interest pertaining to Mr Maguire at the time of her participation.

12.188. Ms Berejiklian claimed that it would not have crossed her mind at the time of the two ERC decisions relating to RCM Stage 1 to disclose her relationship with Mr Maguire. The Commission rejects Ms Berejiklian's evidence in that respect. It is inherently implausible – having regard to the express requests for conflict of interest disclosures at the outset of each ERC meeting, Ms Berejiklian's history of disclosing even the remotest of relationships to Cabinet/ERC meetings and the close personal relationship between her and Mr Maguire in 2018 – that it would not have occurred to Ms Berejiklian that she was in a position of conflict of interest by virtue of that relationship which should be disclosed at ERC meetings as such.

12.189. The Commission also does not accept Ms Berejiklian's evidence that she kept what she felt for Mr Maguire separate from her discharge of her public functions in relation to the ERC decisions concerning the RCM. Her feelings about Mr Maguire at the time of the two RCM Stage 1 decisions are discussed further below. The general nature of the relationship discussed earlier in the report and her actions in relation to both the ACTA and RCM projects bely that assertion. As with respect to the ACTA proposal, Ms Berejiklian, in effect, took the RCM proposal under her wing.

12.190. On 22 November 2017, Ms Berejiklian agreed with Mr Maguire's request that she not sack Mr Barnes of Regional NSW until he "fixed" Mr Maguire's conservatorium. Mr Barnes had also been asked by the premier's office to report to it the outcome of his November 2017 meeting in Wagga Wagga with the representatives of the RCM. He did so on 4 December 2017. As earlier noted, Mr Barnes understood the RCM proposal to have a level of support and priority within the premier's office, albeit not at the same level of the ACTA proposal. It had, again, been something that had been raised with him and his team by the premier's office. This was part of the explanation for why he personally visited the site for the November 2017 meeting.

12.191. Counsel Assisting submitted that the nature and extent of Ms Berejiklian's feelings for Mr Maguire as of April 2018 were apparent from the 12 April 2018 text message: "you are my family". In those circumstances, they argued there was a real possibility of conflict between Ms Berejiklian's public duty to act only according to what she believed to be in the public interest and her private interest in maintaining or advancing her close personal relationship with Mr Maguire in relation to ERC agenda items concerning the RCM proposal.

12.192. Ms Berejiklian and Mr Maguire's exchange of text messages soon after the 12 April 2018 ERC meeting ended demonstrates the emotional strength of the relationship which could, objectively, have the potential to influence the performance of her public duty, a sentiment which was clearly persisting on 1 May 2018 when Ms Berejiklian confided with Mr Maguire the outcome of the April 2018 ERC meetings.

12.193. The statement, "you are my family", must also be understood in the context that in early April 2018, Ms Berejiklian and Mr Maguire had discussed making their relationship public after he retired from political office and Ms Berejiklian had aspirations that they would get married. It must also be understood in the context of the conversation between Ms Berejiklian and Mr Maguire on 14 February 2018, in which she twice agreed with his statement that "I am the boss, even when you're the Premier".

12.194. As already discussed, at the outset of each ERC meeting, there was a call for conflict of interest declarations. It is uncontroversial that Ms Berejiklian was well aware of her obligations in that respect. As Ms Berejiklian acknowledged, she did not declare her close personal relationship with Mr Maguire at either of the two April 2018 meetings.

12.195. In the Commission's view, Ms Berejiklian's failure to do so in relation to the decisions she made concerning the RCM Stage 1 proposal on 12 and 24 April 2018 cannot be put down to an honest error of judgment. Rather, the Commission finds that Ms Berejiklian turned her mind to whether to disclose her close personal relationship with Mr Maguire when exercising her official functions in relation to the two April 2018 ERC decisions, but deliberately refrained from doing so when she participated in, and made, each of those decisions. As with the ERC ACTA decision, that behaviour was consistent with the approach she had taken in keeping her close personal relationship with Mr Maguire private for many years. Ms Berejiklian should have disclosed the relationship at each of those meetings.

12.196. In failing to disclose her relationship with Mr Maguire in relation to the decisions she made concerning the RCM proposal on 12 and 24 April 2018, Ms Berejiklian failed to comply with the fundamental principle of public office-holding referred to in this context in the previous chapter dealing with ACTA. Her deliberate failure to disclose the relationship in those circumstances, knowing her public duty, was wilful. It was also in bad faith: there was no reasonable excuse or justification for it. In the Commission's view, in so doing, Ms Berejiklian deliberately preferred her private interest in maintaining or advancing her close personal relationship with Mr Maguire over her public duty.

12.197. In these circumstances, the Commission finds that Ms Berejiklian engaged in conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising official functions associated with proposals for government action that she knew were advanced by Mr Maguire:

12.197.1. in participating in the 12 April 2018 ERC decision concerning RCM Stage 1 in relation to the transfer of land at 1 Simmons Street, Wagga Wagga, to provide a site for the RCM; and

12.197.2. in participating in the 24 April 2018 ERC decision in relation to the funding granted for RCM Stage 1

without disclosing her close personal relationship with Mr Maguire, when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship with Mr Maguire in relation to agenda items concerning the RCM proposal, which could objectively have the potential to influence the performance of her public duty.

RCM Stage 2

12.198. RCM Stage 2 did not reflect "like for like", which was the original concept for assisting the RCM. It was a proposal to construct a recital hall for the RCM, in circumstances where previously the RCM had used other facilities in Wagga Wagga to stage its performances.

12.199. It is apparent that Ms Berejiklian was not enamoured of the proposal. On 1 May 2018 when she told Mr Maguire "We ticked off your conservatorium the other day so that's a done deal now", he reminded her there was still "the next stage". She was clearly exasperated and responded, "Oh my God. Heaven help us seriously." Even though she said that her exasperation did not mean "it wasn't a worthy project to support", she appears to have thought at that stage that funding RCM Stage 2 was a step too far.

12.200. Despite this, on 30 July 2018, as Mr Maguire was on the verge of leaving Parliament, the couple had the conversation during which she promised him she would "throw money at Wagga". It was common ground that one of the "three top things" Mr Maguire told Ms Berejiklian to throw money at was RCM Stage 2. Ms Berejiklian also agreed that Mr Maguire suggested to her during

the Wagga Wagga by-election that one of the things that the government should announce was funding for building a large recital hall for the RCM. On the strength of that conversation, it would appear, Mr Maguire re-assured Dr Wallace the next day that the RCM would "feature in the election".

12.201. This conversation took place both in the context relevant to the April 2018 decisions, and the fact that the close personal relationship persisted as of 13 July 2018. Ms Berejiklian agreed that as at 13 July 2018, she still had aspirations to marry Mr Maguire following his retirement from political life.

12.202. Mr Maguire left Parliament on 3 August 2018. However, as Counsel Assisting submitted, Ms Berejiklian's relationship with Mr Maguire continued following his departure from government with apparently little change. Some indicia of that are the facts that the relationship continued until September 2020, Ms Berejiklian never asked Mr Maguire to return the key to her house she had given him some years before, she remained in touch with him after the events of 13 July 2018 notwithstanding the advice of Ms Cruickshank and Mr Burden not to have anything to do with him, she clearly took his advice about the conduct of the by-election, and she "threw money" at Wagga Wagga. Her interest in the RCM proposal explained in relation to RCM Stage 1 persisted in relation to RCM Stage 2. She accepted that Mr Maguire was the "driving force, the primary force, within Government" in relation to RCM Stage 2.

12.203. The evidence discloses that Ms Berejiklian did her best to deliver RCM Stage 2, as she had apparently agreed with Mr Maguire on 30 July 2018 she would, during the by-election. As Mr Harley wrote, it was the premier who wanted to "push this project". In response to his suggestion that no further money be allocated to the RCM project, she pushed back, conveying through Mr Burden the "need [for] the full $20m". Mr Burden's recollection was that when he wrote this email, he was expressing the view of either Ms Berejiklian or Ms Cruickshank. Ms Cruickshank was not supportive of the project, nor, clearly, could she make a decision to commit $20 million of public funds to it. Ms Berejiklian's push back reflected her statement to Mr Maguire on 30 July 2018 that she could "overrule [the bureaucrats] anyway".

12.204. Ms Berejiklian also clearly kept Mr Maguire up to date. On 19 August 2018, Mr Maguire was confident enough about the RCM Stage 2 funding coming through that he told Ms Ham, the Liberal candidate for the Wagga Wagga by-election, "you've got the conservatorium they're gonna give you the money for that as well".

12.205. Ms Berejiklian's support for the RCM Stage 2 funding persisted, despite the opposition of those in her office, and the likely public antipathy to it in the Wagga Wagga electorate as reflected in Mr Bolton's advice to her office that RCM Stage 2 was "by no means a top order priority for the community and could seen [sic] as quite a 'political' announcement".

12.206. While it was Ms Berejiklian and Mr Perrottet who were the formal decision-makers in relation to the reservation of the RCM Stage 2 funding, it was Ms Berejiklian who was the effective decision-maker. It was she who set in train the process leading up to the execution of the final reservation letter. She conveyed to Mr Hanger her wish to announce that $20.5 million funding had been reserved for the recital hall component of Stage 2 of the Wagga Wagga conservatorium project, although it was Mr Okosdinossian who formally communicated that wish. Following the election, even though the Liberals lost the seat, the $20 million remained reserved for RCM Stage 2 for just over three years, during which its viability was assessed.

12.207. Following the advice to Mr Hanger that Ms Berejiklian wished to announce the RCM Stage 2 funding, a formal process was undertaken by Mr Barilaro first writing to Mr Perrottet, seeking the reservation against the Regional Communities Development Fund that he administered.

12.208. The RCM Stage 2 funding was approved by the letter addressed to Mr Barilaro on the premier's letterhead and signed by Mr Perrottet as treasurer, with a place for the premier to sign. Although the letter does not bear Ms Berejiklian's signature, she agreed she "would definitely have supported the decision, otherwise it wouldn't have been made". The letter was expressed in terms of an ERC decision establishing the Regional Communities Development Fund. The funding reservation entailed a reservation of public monies.

12.209. Mr Barilaro had not heard about Ms Berejiklian's relationship with Mr Maguire until it was disclosed at the First Public Inquiry. There is no evidence Ms Berejiklian disclosed it to Mr Perrottet. Ms Berejiklian agreed she did not turn her mind to declaring any conflict of interest in relation to the approval of the RCM Stage 2 funding, so it is apparent she did not disclose it to Mr Perrottet when she approved the letter he executed on her letterhead.

12.210. As noted above, Ms Berejiklian agreed Mr Maguire was the "driving force, the primary force, within Government" in relation to RCM Stage 2. In reserving the funds for RCM Stage 2, Ms Berejiklian gave effect to Mr Maguire's 30 July 2018 request, as well no doubt also to his advocacy for the RCM proposal over many years.

12.211. Ms Berejiklian submitted that there was nothing untoward about the local member, Mr Maguire, being involved in the by-election strategy. That is not what Ms Berejiklian's staffers thought at the time. Ms Cruickshank and Mr Burden told Ms Berejiklian not to have anything to do with him – in Ms Cruickshank's case with knowledge of what she believed to be Ms Berejiklian's historic relationship with Mr Maguire. It is an available inference that those around Ms Berejiklian would have thought it even more undesirable for Mr Maguire to have anything to do with the by-election had Ms Berejiklian disclosed her relationship with him and the impact such knowledge may well have had on the electorate.

12.212. Ms Berejiklian submitted that Counsel Assistings' suggestion that the support from Ms Berejiklian's government of RCM Stage 2 was a cynical attempt to "buy" the by-election was unfair and without merit. But this was not Counsel Assistings' submission. It was Mr Burden, whose mind was exercised during the by-election campaign by the idea that by announcing funding for RCM Stage 2, it might be seen that the government was trying to "buy" the election. That concern was borne out when after the $24-million funding announcement on 24 August 2018, $20 million of which was for the RCM Stage 2, the *Sydney Morning Herald* apparently published an article claiming the government was running a "buy-election". Ms Berejiklian's staff started drafting a response, but that apparently did not proceed.

12.213. Even Ms Ham, the Liberal candidate, thought the amount of money being thrown at the by-election by the government was "a little bit cynical".

12.214. Finally, as outlined above, none of the political staffers in Ms Berejiklian's office supported announcing the funding of the RCM Stage 2 during the by-election. In effect, they saw it as politically unwise. Notwithstanding, Ms Berejiklian pressed ahead in the face of their opposition. The Commission finds that she did so to meet Mr Maguire's demands, motivated by their close personal relationship.

12.215. Counsel Assisting submitted that, notwithstanding the context in which the RCM Stage 2 commitment was made and announced (that is, during a campaign for a by-election), Ms Berejiklian's conduct in relation to RCM Stage 2 involved the exercise of public functions, not just political functions. They argued that the commitment made in relation to RCM Stage 2 was not just a politician's promise or commitment to the effect that if a particular election or by-election result was achieved, certain steps were promised to be taken in the future in the exercise of public functions. Rather, the commitment involved the exercise of public functions including by effecting a funding reservation in the exercise of public powers.

12.216. The Commission accepts that submission. The decision to reserve $20 million against RCM Stage 2 cannot be characterised, as Ms Berejiklian submits, as an "election promise made and funding reserved. No more," as if it had no more consequences than being a bait to attract votes at the by-election.

12.217. Ms Berejiklian also submitted, in effect, that the decision during the by-election in relation to RCM Stage 2 is how election promises are made. The Commission does not accept that submission. Promises which concern the allocation of public funds cannot be made without regard to the public interest. As was said in *Porter v Magill*, "public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party".

12.218. It is manifest in all the circumstances that in deciding to reserve funding for RCM Stage 2, there was a real possibility of conflict of interest between Ms Berejiklian's public duties and her private interest which could objectively have the potential to influence the performance of her public duty.

12.219. The Commission rejects Ms Berejiklian's evidence that it never crossed her mind, when the decision was made to reserve $20 million for RCM Stage 2, to declare her relationship with Mr Maguire to Mr Perrottet or Mr Barilaro. As found in relation to the ACTA decision, Ms Berejiklian was well aware of her obligations in this respect. The Commission finds that Ms Berejiklian deliberately refrained from declaring the conflict of interest when she participated in that decision.

12.220. In the circumstances outlined above, the Commission finds that Ms Berejiklian's decision to approve the funding reservation for RCM Stage 2 on 24 August 2018, without disclosing her conflict of interest, was motivated by her desire to accommodate Mr Maguire's demands and driven by her private interest in the maintenance and advancement of her relationship with Mr Maguire.

12.221. As with the decisions made in relation to RCM Stage 1, the Commission finds that in so doing, Ms Berejiklian's conduct was wilful. It was also in bad faith: there was no reasonable excuse or justification for it.

12.222. The Commission finds that Ms Berejiklian engaged in conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising official functions associated with a proposal for government action that she knew was advanced by Mr Maguire in:

12.222.1. determining to make a funding reservation of $20 million in relation to RCM Stage 2

12.222.2. approving the letter arranging for that funding reservation to be made

without disclosing her close personal relationship with Mr Maguire, when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship with Mr Maguire in relation to RCM Stage 2, which could objectively have the potential to influence the performance of her public duty.

Section 8(1)(c) conclusion

12.223. In these circumstances, the Commission finds that in 2018, Ms Berejiklian engaged in conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising official functions in relation to decisions concerning the RCM proposal which she knew were advanced by Mr Maguire in:

12.223.1. participating in the 12 April 2018 ERC decision concerning RCM Stage 1 in relation to the transfer of land at 1 Simmons Street, Wagga Wagga, to provide a site for the RCM

12.223.2. participating in the 24 April 2018 ERC decision concerning RCM Stage 1 in relation to the funding granted to the RCM Stage 1

12.223.3. determining to make a funding reservation of $20 million in relation to RCM Stage 2, and

12.223.4. approving the letter arranging for that funding reservation to be made

without disclosing her close personal relationship with Mr Maguire, when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship with Mr Maguire, which could objectively have the potential to influence the performance of her public duty.

Section 9(1)(d), ICAC Act

12.224. Counsel Assisting submitted that in the event the Commission found Ms Berejiklian had engaged in a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act in relation to the RCM proposal (a term defined in their submissions to include RCM Stages 1 and 2), it should also conclude that she engaged in conduct that constituted or involved a substantial breach of the ministerial code by exercising official functions in relation to grant funding promised and/or awarded to the RCM in circumstances where she was in a position of conflict of interest.

12.225. Counsel Assisting submitted, and the Commission has already found in dealing with the s 8(1)(c) issue, that Ms Berejiklian had a "conflict of interest" within the meaning of clause 7(3) of the ministerial code in relation to her exercise of public functions concerning the RCM proposal. As they contended, Ms Berejiklian's interest as a person who was, at all material times, in a close personal relationship with Mr Maguire was one of such a nature and strength as could objectively have had the potential to influence the performance of her public duty to act only according to what she believed to be in the public interest in relation to proposals advanced by Mr Maguire, including the RCM proposal.

12.226. Counsel Assisting submitted that Ms Berejiklian breached clause 7(2) of the ministerial code and also clause 10(1), clause 11 and clause 12 of the Schedule to the code in relation to the RCM proposal in the following respects:

12.226.1. No notice was given by Ms Berejiklian to the Cabinet as required by Schedule clause 10(1) and the procedure for which Schedule clause 27(5) provides in relation to the conflicts of interest that arose in relation to decisions made in respect to the RCM proposal.

12.226.2. Ms Berejiklian did not, as required by Schedule clause 12(1), abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matters relating to the RCM proposal.

12.226.3. Ms Berejiklian did not obtain a ruling pursuant to Schedule clause 12(2) in accordance with the procedure for which Schedule clause 27(5) provides, either that no conflicts of interest arose in relation to any of the decisions concerning the RCM proposal or that any potential conflict of interest could be appropriately managed.

12.226.4. Ms Berejiklian did not comply with her obligations that, if during a meeting of the Cabinet or a Cabinet committee a matter arose in which a minister has a conflict of interest, the minister must:

12.226.4.1. disclose to those present the conflict of interest and the matter to which it relates as soon as practicable after the commencement of the meeting (Schedule clause 11(2)(a))

12.226.4.2. ensure that the making of the disclosure was recorded in the official record of the proceedings (Schedule clause 11(2)(b))

12.226.4.3. abstain from participating in any discussion of the matter and from decision-making in respect of it absent a ruling given in accordance with the procedure for which Schedule clause 27(5) provides, that no conflict of interest arises or that any potential conflict of interest can be appropriately managed (Schedule clause 11(2)(c), Schedule clause 12).

12.227. To the extent that Ms Berejiklian submitted that there was no breach, let alone a "substantial" breach of the ministerial code for the purposes of s 9(1)d) on the basis that the Commission would conclude that she was not aware she had a conflict of interest by reason of her close personal relationship with Mr Maguire, or that being aware, or knowing of that conflict of interest she continued to act regardless, those issues have been resolved against her in dealing with s 8(1)(c).

12.228. Ms Berejiklian made all the decisions relating to the RCM Proposal as premier. Counsel Assistings' submission that Ms Berejiklian breached clause 7(2) of the ministerial code, and also knowingly breached clause 10(1), clause 11 and clause 12(1) of the Schedule to the code in relation to the RCM proposal, enlivens the issue earlier discussed as to the application of the ministerial code to a premier. The earlier discussion principally concerned the interaction between clause 7(2) of the code and Schedule clause 12(1). Ms Berejiklian submitted that those provisions could not apply to the premier because of the dichotomy between ministers and the premier in clause 7, and other provisions in the code concerning conflicts of interest. The Commission concluded that the clear intent of the ministerial code was that it applies to all ministers, one of whom is the premier, and that in the premier's case, Schedule clause 27(5) gives that application practical effect through the process of Cabinet approving a ruling in respect of the conflict of interest (or other matter) disclosed by the premier.

12.229. The following builds on the earlier discussion as to how the ministerial code applies to a premier to analyse Counsel Assistings' submissions in these respects.

12.230. Clause 8 of the Preamble to the ministerial code relevantly provides that "The Schedule to the NSW Ministerial Code of Conduct prescribes certain additional administrative and governance requirements that Ministers … must comply with and that are directed to minimising the risk and opportunities for breaches of the Code." Clause 9 of the Preamble provides that "A substantial breach of the NSW Ministerial Code of Conduct (including a knowing breach of any provision of the Schedule) may constitute corrupt conduct for the purposes of the *Independent Commission Against Corruption Act 1988*." This is reflected in clause 4 of the ministerial code which provides that "A Minister must not knowingly breach the Schedule to the NSW Ministerial Code of Conduct. Accordingly, a substantial breach of the Schedule is, if done knowingly, a substantial breach of the NSW Ministerial Code of Conduct."

12.231. Clause 7(2) of the code prohibits a minister from making, or participating in the making of, any decision or taking any other action in relation to a matter in which the minister is aware they have a conflict of interest, without the written approval of the premier.

12.232. The mechanics of the minister obtaining that approval are set out in the Schedule. Schedule clause 10(1) requires a minister to "promptly give notice to the Premier of any conflict of interest that arises in relation to any matter". Schedule clause 11 sets out the form of a Schedule clause 10 disclosure: it must be in writing, signed by the minister, specify the nature and extent of the relevant interest, the matter to which it relates, the reason why a conflict of interest arises, and be placed on the Ministerial Register of Interests.

12.233. Schedule clause 12(1) requires a minister who has a conflict of interest in a matter to abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matter unless the premier, being satisfied that no conflict of interest arises or that any potential conflict of interest can be appropriately managed, makes a ruling authorising the minister to continue to act (Schedule clause 12(2)). Such a ruling must, in accordance with Schedule clause 27(2), be made in writing, dated and placed on the Ministerial Register of Interests. It is then a ruling of the sort which, in the case of the premier, may be given if approved by the Cabinet (Schedule clause 27(5)) and, as explained below, a "written approval" of the sort referred to in clause 7(2).

12.234. It is clear that the intent of the ministerial code is that in the case of a premier, the reference to "the written approval of the Premier" in clause 7(2) is a reference to a ruling given pursuant to Schedule clause 12(2) at the end of the mechanical process triggered by a premier disclosing a conflict of interest in respect of which they wished to obtain a ruling that they could participate in meetings and discussions concerning it. Similarly, the reference in Schedule clause 10(2) to notice being given to the premier must be read to refer to the notice given to the Cabinet to obtain its approval to a ruling in respect of the premier.

12.235. Contextually, in the case of Schedule clause 12(3)(b) (which assumes a conflict of interest arises during a meeting of the Executive Council, the Cabinet or a Cabinet committee, and it being orally disclosed), and the conflicted minister obtaining an approval from the premier or the chair of the meeting to be able to participate in discussion and decision-making in its respect, the approval must be one given by the Cabinet members present where it is the premier who has disclosed the conflict.

12.236. Counsel Assisting also submitted that before a conclusion could be reached that Ms Berejiklian breached the ministerial code, it would be necessary for the Commission to be satisfied that Ms Berejiklian was "aware" she had a conflict of interest as referred to in clause 7(3), required to trigger the process of obtaining the written approval to which clause 7(2) refers. They submitted that insofar as RCM Stage 1 was concerned, this issue turned on whether Ms Berejiklian was aware of the inclusion of the matters relating to the RCM in the agendas of the ERC meetings of 12 and 24 April 2018.

12.237. The Commission has considered this issue in making its s 8(1)(c) finding. For the reasons there given, the Commission finds that Ms Berejiklian had the necessary state of awareness in relation to the RCM Stage 1 matters being on the relevant ERC agendas but deliberately failed to declare her clause 7(3) conflict of interest. Accordingly, she participated in the meetings concerning RCM Stage 1, and made decisions relating to it on each occasion, without obtaining the written approval referred to in clause 7(2). The Commission finds that in so doing, Ms Berejiklian breached clause 7(2) of the ministerial code.

12.238. Insofar as RCM Stage 2 is concerned, Counsel Assisting pointed to the facts that at the time of the decisions in this respect, Ms Berejiklian knew of her close personal relationship with Mr Maguire, knew of the facts as to the nature and extent of that relationship, knew of the fact that Mr Maguire was a proponent – the "principal proponent" – of the RCM proposal (which included RCM Stage 2) and had a "particular passion" for it, and knew that she was exercising her official functions for the advancement of the RCM proposal.

12.239. They contended, and the Commission accepts, that that state of knowledge was sufficient to amount to "aware[ness]" and knowledge of the conflict of interest that Ms Berejiklian relevantly had for the purposes of clause 7(2) of the ministerial code and also to make Ms Berejiklian's breaches of the Schedule to the code ones that were performed "knowingly".

12.240. Ms Berejiklian was well aware of her obligation to disclose conflicts of interest under the ministerial code. She deliberately refrained from doing so as required by Schedule clause 10(1) to the code in relation to the RCM proposal. She also deliberately made or participated in decisions and took other action concerning the RCM proposal without written approval obtained in accordance with clause 7(2) of the ministerial code, Schedule clause 12(2) and the procedure for which Schedule clause 27(5) of the ministerial code provides, in relation to a matter in which she was aware she had a conflict of interest.

12.241. Having regard to these findings, the Commission also finds that Ms Berejiklian knowingly breached the Schedule to the ministerial code in the following respects:

12.241.1. No notice was given by Ms Berejiklian to the Cabinet as required by Schedule clause 10(1) and the procedure for which Schedule clause 27(5) provides in relation to the conflicts of interest that arose regarding decisions made with respect to the RCM proposal.

12.241.2. Ms Berejiklian did not, as required by Schedule clause 12(1), abstain from making, or participating in, any decision or from taking, or participating in, any action in relation to the matters pertaining to the RCM proposal.

12.241.3. Ms Berejiklian did not obtain a ruling pursuant to Schedule clause 12(2) in accordance with the procedure for which Schedule clause 27(5) provides, either that no conflicts of interest arose in relation to any of the decisions concerning the RCM proposal or that any potential conflict of interest could be appropriately managed.

12.241.4. Ms Berejiklian did not comply with her obligations that, if during a meeting of the Cabinet or a Cabinet committee a matter arises in which a minister has a conflict of interest, the minister must:

3.241.4.1. disclose to those present the conflict of interest and the matter to which it relates as soon as practicable after the commencement of the meeting (Schedule clause 11(2)(a))

3.241.4.2. ensure that the making of the disclosure was recorded in the official record of the proceedings (Schedule clause 11(2)(b))

12.241.4.3. abstain from participating in any discussion of the matter and from decision-making in respect of it absent a ruling given in accordance with the procedure for which Schedule clause 27(5) provides, that no conflict of interest arises or that any potential conflict of interest can be appropriately managed (Schedule clause 11(2)(c), Schedule clause 12).

12.242. Counsel Assisting submitted that Ms Berejiklian's breaches of the ministerial code were not insubstantial. They contended that the breaches were constituted by multiple acts over an extended period of a kind that was inconsistent with the "highest standards of probity" that the ministerial code prescribed by Ms Berejiklian's government contemplated. Accordingly, they submitted that it follows that Ms Berejiklian's exercise of public functions in relation to grant funding promised and/or awarded to the RCM involved a substantial breach of the ministerial code with the result that that conduct falls within s 9(1)(d) of the ICAC Act.

12.243. Ms Berejiklian's submissions in relation to the substantiality issue reflected those made in relation to the ACTA proposal, save as to RCM Stage 2: Ms Berejiklian was unaware she was in a position of conflict of interest, the decisions were not stand alone, neither Ms Berejiklian or Mr Maguire obtained any pecuniary benefit and, in the case of RCM Stage 2, it was "an election promise made and funding reserved. No more."

12.244. The Commission rejects Ms Berejiklian's submission that any breach on her part of the ministerial code did not meet the "substantial" threshold required by s 9(1)(d). It has already rejected her submission that she was unaware she was in a position of conflict of interest.

12.245. Insofar as Ms Berejiklian contends the ERC RCM decisions were principally made by the government and were not, for instance, stand-alone decisions she made, it might be accepted that in the case of the decisions in relation to RCM Stage 1, the two ERC decisions were one among many matters listed on the agenda. Ms Berejiklian attended the meeting as premier, rather than treasurer as she did in relation to the ACTA decision. While it might still be the fact that the premier's view would be highly respected by other members of the ERC, the fact that the two ERC matters were not stand-alone items on the agenda as the ACTA matter had been, meant it was probable they were not the subject of individual consideration.

12.246. However, the ministerial code does not turn on the number of ministers who participate in a decision. It devolves important obligations to identify conflicts of interest on all ministers. As earlier explained, the vice lies in Ms Berejiklian's participation without disclosure. The RCM Stage 2 decision, as explained in relation to s 8(1)(c), was, in effect, a stand-alone one. It was Ms Berejiklian who was the effective decision-maker.

12.247. The Commission also rejects Ms Berejiklian's submission that the decision in relation to RCM Stage 2 was "an election promise made and funding reserved. No more." While funding decisions such as that in relation to RCM Stage 2 may be "within the prerogative of the Government", that prerogative must be exercised in the public interest as explained in the authorities discussed in chapter 3, and as also made plain in the ministerial code. The duties of members of Parliament, and particularly ministers, include "the function of vigilantly controlling and faithfully guarding the public finances", and they must do so "uninfluenced by other considerations".[429] It is not possible to erase these obligations by characterising the RCM Stage 2 funding as Ms Berejiklian seeks to do.[430]

12.248. For the reasons given in relation to the ACTA breach of public trust section, the Commission also rejects Ms Berejiklian's submission that the fact the ERC RCM decisions involved no pecuniary benefit to Mr Maguire, or anyone associated with her, was relevant to diminish the substantiality of her breaches of the ministerial code. Once again, it is not the case that nobody benefited financially from the decisions made in relation to the RCM proposal. There is no suggestion that it was in any way involved in Ms Berejiklian's breaches of public trust, however, it is the case that the RCM benefited financially from the decisions made in relation to Stage 1. It also benefited from the decision made in relation to RCM Stage 2 because it was given the opportunity to seek to persuade the government to fund Stage 2, albeit that that ultimately proved unsuccessful.

12.249. Further, the RCM Stage 1 approvals involved the transfer of a significant publicly-owned real estate property and funding of $10 million to create the new conservatorium. The RCM Stage 2 funding reservation also involved a significant sum, which when added to the $10 million committed to RCM Stage 1, amounted to public funding of $30 million for the RCM. As Mr Harwin, the then minister for the arts who announced the funding later agreed, it was a "very large grant compared to what other regional conservatoria get…"[431]

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[429] *R v Boston* (at 401). *Re Day (No 2)* at [49], referring to *Wilkinson v Osborne* (1915) 21 CLR 89 at 98–99 per Isaacs J; see also at 94 per Griffith CJ [1915] HCA 92; *Greiner v ICAC* (at 161) per Mahoney JA; see also the authorities discussed in chapter 3, Common law.

[430] See also the discussion of *Porter v Magill* in chapter 11.

[431] NSW Legislative Council, *Parliamentary Debates* (Hansard), 14 October 2020, 3776.

12.250. Finally, as Counsel Assisting submitted, Ms Berejiklian's breaches of the Schedule to the ministerial code in relation to the RCM proposal were constituted by decisions made over an extended period of a kind that was inconsistent with the "highest standards of probity" the code contemplated. They were breaches of the provisions which underpin the ministerial code: those dealing with conflicts of interest.

12.251. These breaches were committed by the most senior minister in the state who had extensive experience as a member of Parliament and a minister as explained above and who was primarily responsible for administering the ministerial code (clause 26), and who failed to declare her conflict of interest in relation to the RCM proposal. As the note to clause 26 of the Schedule to the ministerial code makes clear, "While enforcement of the requirements of this Schedule, including any sanctions for a breach, is a matter for the Premier, the ministerial code has also been adopted for the purposes of the *Independent Commission Against Corruption Act 1988*".

12.252. It is inconceivable that a politician of Ms Berejiklian's standing did not know that her duty as set out in the Preamble to the ministerial code was to maintain public confidence in the integrity of government by exhibiting, and being seen to exhibit, the highest standards of probity in the exercise of her office and to pursue, and be seen to pursue, the best interests of the people of NSW to the exclusion of any other interest such as her relationship with Mr Maguire.[432]

12.253. In the circumstances explained above, the Commission finds for the purposes of s 9(1)(d) of the ICAC Act that Ms Berejiklian's breach of clause 7(2) could constitute or involve a substantial breach of the ministerial code.

12.254. Ms Berejiklian's knowing breaches of the provisions of the Schedule to the ministerial code were also substantial. Those provisions of the Schedule complement clause 7(2) of the code which Ms Berejiklian breached. They require disclosure of the conflict of interest, and provide mechanisms for how it may be managed as contemplated by clause 7(2) of the code. The Commission finds that Ms Berejiklian's substantial breaches of the Schedule in relation to the RCM proposal are a substantial breach of the ministerial code within the meaning of clause 4 of that code.

12.255. For the purposes of s 9(1)(d) of the ICAC Act, the Commission finds that by exercising her public functions in relation to grant funding promised and/or awarded to the RCM in circumstances where she was in a position of conflict of interest, Ms Berejiklian:

12.255.1. breached clause 7(2) of the ministerial code

12.255.2. knowingly breached clause 10(1), clause 11 and clause 12 of the Schedule to the ministerial code in a manner which was substantial, and

thereby engaged in conduct that could constitute or involve a substantial breach of the ministerial code.

12.256. Accordingly, the Commission's finding that Ms Berejiklian engaged in conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising official functions in relation to decisions concerning the RCM proposal which she knew were advanced by Mr Maguire in:

12.256.1. participating in the 12 April 2018 ERC decision concerning RCM Stage 1 in relation to the transfer of land at 1 Simmons Street, Wagga Wagga, to provide a site for the RCM

[432] See, by analogy, *Obeid v R 2017* (at [196]) per Bathurst CJ.

12.256.2. participating in the 24 April 2018 ERC decision concerning RCM Stage 1 in relation to the funding granted to RCM Stage 1

12.256.3. determining to make a funding reservation of $20 million in relation to RCM Stage 2, and

12.256.4. approving the letter arranging for that funding reservation to be made

without disclosing her close personal relationship with Mr Maguire, when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship with Mr Maguire, which could objectively have the potential to influence the performance of her public duty and without obtaining a ruling pursuant to Schedule clause 27(5) of the ministerial code to permit her to so act, is not excluded from being corrupt conduct by s 9 of the ICAC Act.

Section 13(3A), ICAC Act

12.257. The Commission determines for the purposes of s 13(3A) of the ICAC Act, that it is satisfied there are grounds on which it would objectively be found that in failing to disclose her conflict of interest in relation to the RCM proposal, Ms Berejiklian engaged in conduct which constituted or involved a substantial breach of the ministerial code by:

12.257.1. breaching clause 7(2) of the ministerial code, this breach constituting a substantial breach of that code; and

12.257.2. knowingly breaching clause 10(1), clause 11 and clause 12 of the Schedule to the ministerial code in a manner that was substantial.

12.258. Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74BA, ICAC Act

12.259. The principles and submissions as to what constitutes serious corrupt conduct for the purposes of s 74BA of the ICAC Act have been set out in the previous chapter.

12.260. Ms Berejiklian's submissions opposing a serious corrupt conduct finding largely went to legal or factual issues which have been resolved adversely to her elsewhere in the report. Thus, she firmly disputed that, as a matter of law, a conflict of interest arose, or as a matter of fact, that she "knew" she was in a position of conflict. The Commission has rejected Ms Berejiklian's legal submission.

12.261. It has also found that Ms Berejiklian knew she was in a position of conflict, but wilfully and in bad faith, deliberately did not disclose it. Ms Berejiklian's evidence in this respect was inconsistent with her knowledge of her obligation to disclose conflicts of interest and the numerous occasions when she disclosed conflicts of interest of an apparently less serious nature than that arising from her close personal relationship with Mr Maguire.

12.262. Furthermore, Ms Berejiklian contended that her breaches did not (as suggested by Counsel Assisting) have the "real world consequences" contended for. The Commission has found that Ms Berejiklian's non-disclosure did have consequences such that the outcome in relation to the ACTA proposal may have been different had Ms Berejiklian disclosed the relationship. That was a serious failure in process following what the Commission has found to be a deliberate decision on Ms Berejiklian's part not to disclose the relationship. That underlines the seriousness of Ms Berejiklian's conduct.

12.263. For these reasons, and those which follow, the Commission finds that the conduct in which Ms Berejiklian engaged in relation to the RCM proposal constituting a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act was serious corrupt conduct because:

12.263.1. it was engaged in by a person who, at the time of the conduct, was the head of government and, of course, a minister in respect of whom the public is entitled to expect the highest standards of probity as clause 1 of the Preamble to the ministerial code recognises

12.263.2. it was conduct which undermined the ministerial code and fundamental principles concerning government decision-making, such as to have the potential to impair public confidence in the integrity of government and public administration

12.263.3. Ms Berejiklian knew (or, at least, was reckless as to whether) she had duties under the ministerial code in relation to her close personal relationship with Mr Maguire

12.263.4. Ms Berejiklian's concealment of the relationship with Mr Maguire from her parliamentary colleagues over an extended period of time involved a substantial departure from the standards of probity she had set for herself and her colleagues and one that can be fairly and appropriately characterised as serious corrupt conduct

12.263.5. it was conduct which involved a significant breach of public trust. Ms Berejiklian was obliged always to act in the public interest, rather than to make decisions for the extraneous reasons of a close personal relationship

12.263.6. Ms Berejiklian's breaches of the ministerial code were not trivial

12.263.7. in the case of RCM Stage 2, Ms Berejiklian's breaches of the ministerial code had real-world consequences, in the sense that had Ms Berejiklian disclosed her conflict of interest arising from her close personal relationship with Mr Maguire, it seems improbable her colleagues, Mr Barilaro and Mr Perrottet, would have agreed to the funding reservation in August 2018. The evidence does not disclose any support for the funding of RCM Stage 2 by departmental officers (see Mr Barnes, 24 December 2017 briefing), Ms Berejiklian's office (other than Ms Berejiklian herself) or in the Wagga Wagga community. In the context of a by-election, it is highly unlikely that the same course would have been taken in connection with RCM Stage 2 had someone other than Ms Berejiklian been in the role of effective decision-maker

12.263.8. the conduct was engaged in in circumstances where Ms Berejiklian knew that (or, at least, was reckless as to whether) she was obliged to take steps under the ministerial code in relation to her close personal relationship with Mr Maguire

12.263.9. the conduct did not involve an isolated failure or aberration but constituted part of a course of conduct over the making of the three decisions in relation to the RCM proposal. In addition, it is relevant to take into account the fact that Ms Berejiklian had already breached public trust by taking actions whilst in a position of conflict on a number of prior occasions in connection with the ACTA proposal. As Counsel Assisting submitted, Ms Berejiklian had had the opportunity to reflect on her obligations over time and determined not to exercise them any differently in connection with the RCM proposal. Accordingly, her conduct cannot be regarded as isolated or an aberration.

12.264. In these circumstances, the Commission finds that Ms Berejiklian engaged in serious corrupt conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising official functions in relation to decisions concerning the RCM proposal which she knew was advanced by Mr Maguire in:

12.264.1. participating in the 12 April 2018 ERC decision concerning RCM Stage 1 in relation to the transfer of land at 1 Simmons Street, Wagga Wagga, to provide a site for the RCM

12.264.2. participating in the 24 April 2018 ERC decision concerning RCM Stage 1 in relation to the funding granted to RCM Stage 1

12.264.3. determining to make a funding reservation of $20 million in relation to RCM Stage 2, and

12.264.4. approving the letter arranging for that funding reservation to be made

without disclosing her close personal relationship with Mr Maguire, when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship with Mr Maguire, which could objectively have the potential to influence the performance of her public duty.

Corrupt conduct conclusion – breach of public trust

12.265. In these circumstances, the Commission finds that in 2018, Ms Berejiklian engaged in serious corrupt conduct constituting or involving a breach of public trust within the meaning of s 8(1)(c) of the ICAC Act by exercising her official functions in relation to decisions concerning the RCM proposal which she knew was advanced by Mr Maguire in:

12.265.1. participating in the 12 April 2018 ERC decision concerning RCM Stage 1 in relation to the transfer of land at 1 Simmons Street, Wagga Wagga, to provide a site for the RCM

12.265.2. participating in the 24 April 2018 ERC decision concerning RCM Stage 1 in relation to the funding granted to RCM Stage 1

12.265.3. determining to make a funding reservation of $20 million in relation to RCM Stage 2, and

12.265.4. approving the letter arranging for that funding reservation to be made

without disclosing her close personal relationship with Mr Maguire, when she was in a position of a conflict of interest between her public duty and her private interest in maintaining or advancing her close personal relationship with Mr Maguire, which could objectively have the potential to influence the performance of her public duty.

Partiality

Section 8(1)(b), ICAC Act

Counsel Assistings' submissions

12.266. Counsel Assisting submitted that the evidence before the Commission raised a question as to whether Ms Berejiklian exercised any of her official functions preferentially in favour of the RCM proposal influenced by a desire on her part to maintain or advance her relationship with Mr Maguire.

12.267. They observed that if the answer to that question was "yes", Ms Berejiklian engaged in "partial" conduct within the meaning of s 8(1)(b) of the ICAC Act because it is unacceptable in the relevant sense for a person holding an office of public trust, and thereby charged with acting in the public interest, to exercise official functions influenced by her or his close personal relationship with another.

12.268. Counsel Assisting submitted that it was open to the Commission to conclude that Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions in connection with funding promised and awarded to the RCM by exercising her public functions influenced by a desire on her part to maintain or advance her relationship with Mr Maguire.

12.269. In so doing, Counsel Assisting contended it would be open for the Commission to find Ms Berejiklian was consciously influenced by a desire on her part to maintain or advance her close personal relationship with Mr Maguire. They accepted that such a finding required the Commission to reject Ms Berejiklian's evidence to the effect that the exercise of her official functions was not in any way influenced by her close personal relationship with Mr Maguire.

12.270. Counsel Assisting did not submit that the Commission should find that, in her endorsement of the January 2018 RCM briefing, on 29 January 2018, or in her participation in the ERC decisions of 12 and 24 April 2018, Ms Berejiklian consciously preferred the RCM Stage 1 proposal influenced by her close personal relationship with Mr Maguire. Rather, in light of the underlying merits of RCM Stage 1 and the support for it in the bureaucracy, they noted there was reason to think that Ms Berejiklian took the course that she did in the exercise of her official functions because she was accepting recommendations from others and not because she was consciously preferring a proposal supported by Mr Maguire.

12.271. Nevertheless, Counsel Assisting submitted that Ms Berejiklian was in a position of conflict of interest at the time that she exercised her official functions in relation to the RCM proposal on 29 January, 12 April and 24 April 2018, in which Ms Berejiklian's private interest was objectively capable of influencing the exercise of her public duties. They noted that the question for the Commission was whether it was actually persuaded, applying the approach to proof discussed in *Briginshaw v Briginshaw*, that Ms Berejiklian was in fact influenced. They did not submit that the Commission should so find in relation to Ms Berejiklian's exercise of official functions on 29 January, 12 April and 24 April 2018 but accepted the Commission might take a different view having regard to its assessment of the whole of the evidence. The Commission is persuaded by Counsel Assistings' submissions in respect of these matters that the evidence does not demonstrate that Ms Berejiklian consciously preferred the RCM Stage 1 proposal on account of her close personal relationship with Mr Maguire on those occasions.

12.272. Counsel Assisting did, however, submit that it was open for the Commission to find that, in taking steps in the exercise of her official functions in connection with the by-election commitment and associated funding reservation of $20 million in relation to RCM Stage 2, Ms Berejiklian exercised public functions in circumstances where she consciously preferred the RCM proposal because it was advanced by Mr Maguire, a person with whom she was in a close personal relationship.

12.273. Counsel Assisting submitted that the partiality submissions in relation to the ACTA proposal provided important context in the consideration of whether Ms Berejiklian acted partially in the exercise of her official functions in connection with the RCM proposal, as did the assessment of whether Ms Berejiklian acted partially in connection with the ACTA proposal.

12.274. Similarly to the ACTA proposal, Ms Berejiklian agreed that Mr Maguire raised funding of the RCM proposal with her over a period of years and on a number of occasions. This included Mr Maguire raising complaints about "roadblocks" that he thought had been put in place by government in relation to the proposal. Ms Berejiklian also agreed that she understood Mr Maguire

to have a "particular passion" for the RCM proposal. He updated her from time to time on the progress of the proposal and she kept him up to date on its progress.

12.275. Counsel Assisting submitted that Ms Berejiklian's awareness of Mr Maguire's keen interest in the RCM proposal of itself enlivened the possibility that she took steps in connection with the project out of a desire to please Mr Maguire and to avoid disappointing him.

12.276. Counsel Assisting submitted that the circumstances in which Ms Berejiklian exercised her official functions in connection with RCM Stage 2 stood in considerable contrast to the ERC decisions of 12 and 24 April 2018. In the former case, there is evidence that Mr Maguire directly lobbied Ms Berejiklian and an absence of evidence that Ms Berejiklian received any departmental advice that was supportive of RCM Stage 2 as a proposal that was worthwhile in the public interest. Nor was there any evidence of an assessment having been made at the departmental level of the feasibility or otherwise of RCM Stage 2 in advance of Ms Berejiklian exercising official functions in connection with RCM Stage 2. Further, such witnesses as were called during the Second Public Inquiry were unable to identify any person within Ms Berejiklian's ministerial office who was supportive of RCM Stage 2, other than Ms Berejiklian herself.

12.277. Ms Berejiklian agreed that Mr Maguire had "advised her staff" on by-election announcements and was "pretty sure" that she spoke with him directly on the topic. That she had spoken to Mr Maguire directly on the topic is apparent from the intercepted telephone call between the couple on 30 July 2018, extracts of which are set out earlier in the chapter. During that call, Mr Maguire directly lobbied Ms Berejiklian to "just throw money at Wagga" and to throw it at "the right things". Ms Berejiklian indicated in the call that she would "throw money at Wagga ... lots of it" and that Mr Maguire had "already told [her] the three top things".

12.278. Counsel Assisting submitted that the call of 30 July 2018 also highlighted Ms Berejiklian's personal concern for Mr Maguire at or about the time she was making decisions in connection with RCM Stage 2.

12.279. Counsel Assisting also submitted that the evidence indicated that the call of 30 July 2018 was not the only interaction between Mr Maguire and Ms Berejiklian concerning RCM Stage 2 in the lead up to the Wagga Wagga by-election in 2018. Mr Maguire's email communications with Dr Wallace on 31 July 2018, as extracted above, are consistent with Mr Maguire being in dialogue with Ms Berejiklian on that date. Mr Maguire's awareness on 19 August 2018 that RCM Stage 2 was to be the subject of a by-election announcement was also consistent with Mr Maguire being in dialogue with Ms Berejiklian, and with her having conveyed her decision to Mr Maguire at a time when her ministerial staff were still debating the merits of that course of action.

12.280. Ms Cruickshank's evidence was that she would have been "surprised" had Mr Maguire been consulted regarding by-election commitments. Counsel Assisting observed that while it was not necessarily unusual to consult an outgoing member during the course of a by-election, the "nature of Mr Maguire's departure" was such that Ms Cruikshank would have found it surprising. Mr Harley said that he did not recall being aware that Mr Maguire had been consulted and agreed that it would at least have been "a little bit strange" in circumstances where he was somewhat of a "persona non grata" (as well as being unnecessary in circumstances where his views were apparent from Dr Wallace's letter).

12.281. Ms Berejiklian's evidence was that she did not know what advice she received from the department in relation to RCM Stage 2, although she was "sure there was some advice provided". She accepted that it was possible that she made her decision either contrary to, or in the absence of, departmental advice and indicated that it would "not be the first time and it certainly won't be the last", later adding that "that's how by-elections work".

12.282. Mr Harley did not have any specific recollection of advice being sought or received from the department regarding the merits or otherwise of RCM Stage 2. Mr Burden did not know if Ms Berejiklian had access to any advice from a government department or agency.

12.283. Counsel Assisting submitted that the Commission should find that Ms Berejiklian made her decision in relation to RCM Stage 2 in the absence of any departmental advice. No such advice had been uncovered despite having been sought by investigators and the two individuals most likely to have been the conduit for such advice, Mr Barnes and Mr Hanger, were unaware of any such advice having been provided. Mr Barnes was aware of some communication between Mr Bolton and the ministerial office of Ms Berejiklian. However, that was in the nature of a status update on RCM Stage 1 rather than advice on the merits or otherwise of proceeding with RCM Stage 2.

12.284. Counsel Assisting also submitted that had any such advice been sought, it was unlikely to have been favourable towards RCM Stage 2 in light of the attitude of Mr Barnes and the public interest concerns he expressed as to the merits of the recital hall component of the RCM proposal.

12.285. Of the support for RCM Stage 2 within her ministerial office, Ms Berejiklian stated that she "had some staff members that said you should definitely do this" and that her "understanding was that everyone agreed that it was a good thing to announce". Despite that evidence, Ms Berejiklian was not able to name a single staff member who was supportive of the announcement of RCM Stage 2. Counsel Assisting submitted that the ready explanation for this was that there were, in fact, no such staff members.

12.286. Ms Berejiklian also gave evidence that she knew that there were staff supporting it because she "received briefing notes to that effect … to say this is something we should support". As with the departmental advice referred to above, no such advice communicating support for RCM Stage 2 has been uncovered throughout the course of the investigation despite advice of such nature having been sought by investigators.

12.287. Ms Cruickshank was not supportive of the RCM Stage 2 proposal. Mr Harley was not supportive of the proposal either and flagged one of the opportunity costs of proceeding with such an announcement: foregoing the chance to provide drought relief that might otherwise have been welcomed by the community. Mr Harley also noted the political risk associated with such a funding announcement – the "buy-election".

12.288. Counsel Assisting observed that political risk was a theme that was repeated in the advice prepared for Ms Berejiklian by Mr Okosdinossian. The advice he had received from DPC staff based in Wagga Wagga was that RCM Stage 2 was "by no means a top order priority for the community and could be seen as quite a 'political' announcement". It was further noted that RCM Stage 2 was regarded as a "nice to have" rather than something that fulfilled a particular need for either the RCM or the community more generally.

12.289. While Mr Harley had flagged the possibility that Mr Burden may have been supportive of RCM Stage 2, Mr Burden did not confirm that to be the case. He could not recall anyone within the ministerial office, other than Ms Berejiklian, "wanting to push the project".

12.290. Mr Burden's recollection that it was Ms Berejiklian alone who wished to announce RCM Stage 2 is consistent with the balance of the evidence, save for Ms Berejiklian's account that "some" staff members who she could not identify "definitely said do it". Counsel Assisting submitted the Commission should reject Ms Berejiklian's account in circumstances where she was unable to identify any such staff members, and find that Ms Berejiklian acted in the absence of any support from staff in her ministerial office and, indeed, contrary to such advice that was provided. The Commission accepts that submission.

12.291. Counsel Assisting submitted that the fact Ms Berejiklian had formed and communicated to Mr Maguire a view that RCM Stage 2 would be the subject of a by-election announcement by 19 August 2018 was consistent with her having acted contrary to the advice of staff in her ministerial office, or at least in the absence of their support. Ms Berejiklian's earlier comment to Mr Maguire that she was prepared to "ignore the advice" of staff within her ministerial office also resonated with her having acted in such a way on this occasion.

12.292. When asked why she thought RCM Stage 2 was a worthwhile project, Ms Berejiklian gave the following explanation:

> *Because I think arts and culture in the bush, I think all children and all people should have access to arts and culture in regional New South Wales, and, in fact, it was something that I believe was a good project. But it was also something that I understood from public reporting, from representations, there would have been a whole host of things we announced in the by-election. This was one of them. I suspect there was a long list of them. I can't remember what the list was.*

12.293. Counsel Assisting submitted that Ms Berejiklian's response started with what might be described as motherhood statements before trailing off into unrelated and unresponsive topics. When asked whether she was aware of any comparative consideration being undertaken regarding RCM Stage 2, Ms Berejiklian indicated that she "didn't care to all this level of detail" and that she made a "holistic consideration" of what to announce, including RCM Stage 2. She later stated that the project "was a worthwhile project for the entire Riverina region" which "may have attracted students and performers from all across regional and rural New South Wales" and "could have had very huge benefits for that community". At other times during the course of her evidence, Ms Berejiklian asserted that she would "always" act in the best interests of the community and that "every decision" that she made in public life was made on such a basis. However, Counsel Assisting submitted these were mere assertions.

12.294. The Commission accepts that submission. Ms Berejiklian's evidence was inconsistent with the overriding evidence of Mr Maguire putting to Ms Berejiklian, and her agreeing, on 30 July 2018, that she should support three projects he identified for the by-election, one of which was RCM Stage 2, and her earlier, albeit exasperated, agreement on 1 May 2018, to support the second tranche of funding.

12.295. Counsel Assisting submitted that having been directly lobbied by Mr Maguire in relation to RCM Stage 2 at a time when she was plainly concerned for his welfare, Ms Berejiklian either did not seek or did not have regard to the kinds of advice that would have informed both public interest considerations and the political expediency of proceeding down the path which she was proposing. They contended that there was no evidence from which the Commission could find that Ms Berejiklian satisfied herself that announcing RCM Stage 2 was a matter that she believed to be in the public interest. In all the circumstances, they contended the strong inference is that Ms Berejiklian was moved to act, at least in part, influenced by her close personal relationship with Mr Maguire and a desire to placate his strong desire to see RCM Stage 2 proceed. They submitted that if and to the extent that the Commission so found, it would conclude that Ms Berejiklian acted partially within the meaning of s 8(1)(b) of the ICAC Act.

Ms Berejiklian's submissions

12.296. Ms Berejiklian submitted that much of her support for the RCM Stage 2 proposal manifested itself after Mr Maguire was the local member and continued even after the seat was lost to an independent at the by-election. Ms Berejiklian contended that this chronology renders implausible the notion that her support for the proposal was influenced by any partiality towards Mr Maguire

on her part. She also questioned the proposition that a conflict of interest by reason of her relationship with Mr Maguire could have persisted following Mr Maguire's resignation. While she accepted that Mr Maguire "wanted" the proposal and encouraged her to support it, she argued there was nothing personal in it whatsoever for him by this stage – his advice to support it was in the nature of political advice, and given as someone who understood the value of the project.

12.297. Next, Ms Berejiklian submitted that it is not an absolute requirement that a project be "endorsed at the department level", or that advice be sought from the department, prior to a premier deciding to announce funding for a particular project. She contended that such decisions are within the prerogative of the government. She suggested that was particularly the case here, where Ms Berejiklian had personally visited the proposed RCM site and met with its leaders and had a good working knowledge of the nature and merits of the proposal.

12.298. Ms Berejiklian also submitted that the context (that this was a by-election announcement) mattered. As Mr Barilaro explained, "this was a Liberal Party by-election, it was the Liberal Party that was running it, and therefore the Liberal Party leadership and the Treasurer, the Premier of the day, et cetera, they make decisions about what election commitments are to be made". Mr Harley gave consistent evidence to the effect that in his experience by-election announcements are in the gift of the leader of the party contesting the seat (that is, Ms Berejiklian). Ms Berejiklian pointed to Mr Barnes' evidence that, "it's the domain of … our political masters" to make such decisions.

12.299. Ms Berejiklian also pointed to Mr Harley's evidence that he did not know whether there was any contact between the premier's office and Mr Maguire concerning strategy for the Wagga Wagga by-election, but agreed with the characterisation that such contact "doesn't necessarily carry with it anything necessarily inappropriate because one might be asking for advice from someone who's been a longstanding local member over some number of years". Mr Maguire also advised the Liberal Party candidate for the by-election, Ms Ham, who approached him for advice. In these circumstances, she contended that the implication in Counsel Assistings' submissions that it was inappropriate for Mr Maguire to have any involvement in the by-election strategy (based solely on Mr Barilaro's testimony) carried no weight. Mr Maguire was an experienced and adroit local politician, who had successfully held the seat for some 20 years; his opinion on strategy for the by-election was understandably worthy of consideration.

12.300. Ms Berejiklian next suggested that Counsel Assistings' suggestion that the support from Ms Berejiklian's government of RCM Stage 2 was a cynical attempt to "buy" the by-election was unfair and without merit. She suggested it was also very much in tension with the primary case theory propounded by Counsel Assisting, that Ms Berejiklian's motivation for supporting the proposal was her personal partiality towards Mr Maguire. She argued Counsel Assistings' submission was further rebutted by Mr Barnes' evidence that Mr Maguire's successor, Dr McGirr (an Independent) "was a strong proponent of stage 2 and that after he won that seat he continued to advocate for the project". She submitted that suggested support for the project stemmed from its popularity with the community, not any subjective partiality towards Mr Maguire, or a cynical attempt by the Liberal Party to win a by-election through funding a meritless project.

12.301. Ms Berejiklian also disputed Counsel Assistings' submission that Mr Maguire's continuing interest in the project was affected by his hope that the RCM would form part of his personal "legacy", which she submitted Mr Maguire had rejected. She relied in this respect on his evidence:

> *[Counsel Assisting]: Was part of your reason for suggesting RCM stage 2 as a by-election announcement the desire to seek to preserve your legacy and the work that you did when you were the local member?*

[Mr Maguire]: ***No, not entirely.*** *The, the conservatorium needed its future cemented. It needed to be given encouragement. And, look, if, if a legacy was the by-product of that, so be it. But my concern was that the conservatorium has an enormous amount of support and we'd made a commitment. This would have been additional, great for the city, great for the region and, yeah, sure, a vote winner."*

(Emphasis added)

12.302. In such circumstances, Ms Berejiklian submitted that there was nothing improper or self-interested in Mr Maguire recommending to the Liberal Party (including to Ms Berejiklian personally) that RCM Stage 2 be supported as a by-election commitment. In any event, she contended it was difficult to understand how any subjective motivation by Mr Maguire concerning his personal legacy could possibly be relevant to the allegations against Ms Berejiklian. She submitted that she had no basis to infer that he was motivated by his legacy. Certainly, there is no basis to suggest that she was motivated to protect Mr Maguire's political legacy.

Consideration

12.303. As the Commission said in relation to the ACTA proposal, there is clearly a duty to act impartially when allocating public funding. The same such duty must apply in relation to the dismissal of departmental officers.

12.304. Ms Berejiklian's submission that much of her support for RCM Stage 2 manifested itself after Mr Maguire ceased being the local member, such that there was no conflict of interest by reason of her relationship with Mr Maguire, was one that was difficult to understand and must be rejected.

12.305. The conflict of interest issue in relation to Mr Maguire does not turn on the fact of him having been a member of Parliament. It turns on the fact of their close personal relationship and its objective capacity to influence the performance of her public duty. As explained earlier in chapter 10, the Bowen Report made it clear that capacity can exist objectively as between mere friends, let alone those in a close personal relationship. The fact that Ms Berejiklian continued to support the project after the seat was lost does not make good the point for which Ms Berejiklian contends, but the opposite. The relationship with Mr Maguire continued after that date, and it can reasonably be inferred that he continued to urge Ms Berejiklian to support it if she ever appeared to waver in that respect. It would have been difficult for her, without explanation, to withdraw support for a project she had strongly championed.

12.306. There is no evidence one way or the other as to why the new independent member of Parliament for Wagga Wagga supported it.

12.307. For the reasons given in the s 9(1)(d) section in relation to the RCM breach of public trust, the Commission rejects Ms Berejiklian's submission that the RCM Stage 2 funding was "an election promise made and funding reserved. No more." In short, Ms Berejiklian was required to exercise her official functions in relation to any prerogative in the public interest "uninfluenced by other considerations" such as her close personal relationship with Mr Maguire.[433]

12.308. Further, it is difficult to see how ministers can determine whether they are exercising the vigilance required if they approve, even if subject to conditions, a grant of $20 million to a project without supportive departmental advice and in the face of opposition from even their close advisers. If Ms Berejiklian had been influenced by a visit to the site, it might be thought these matters

[433] *Re Day (No 2)* at [49], referring to *Wilkinson v Osborne* (1915) 21 CLR 89 at 98–99 per Isaacs J; see also at 94 per Griffith CJ [1915] HCA 92; *Greiner v ICAC* (at 161) per Mahoney JA; see also the authorities discussed in chapter 3, "Common law", of this report.

would have disturbed and disabused her. The fact that she persisted in the face of that silence and opposition to support the proposition was because of her relationship with Mr Maguire.

12.309. The "buy-election" issue has been addressed in the s 8(1)(c) section where it is made plain that this was the concern of Ms Berejiklian's close staff advisers, which was borne out by a newspaper article published the day after the 24 August 2018 funding announcement which included the RCM Stage 2 funding, which so labelled it.

12.310. As to the extent to which Mr Maguire considered the RCM Stage 2 to be part of his legacy, the facts are set out in the previous section. It clearly was part of his legacy. It might reasonably be inferred that Ms Berejiklian would have been motivated to ensure some remnant of a legacy survived the debacle of the end of Mr Maguire's political career in circumstances where she remained in a relationship with him for more than two years after his fall from grace.

12.311. Turning to the two matters on which Counsel Assisting focused, the Commission considers that Ms Berejiklian's conduct on or around 22 November 2017 in failing to exercise her official functions to carry out her decision to dismiss a departmental official was clearly carried out at Mr Maguire's request because for some reason he perceived this person as able to fix "my conservatorium". This was conduct by which she consciously preferred Mr Maguire's interests in respect of a matter close to his heart. On the premise that Ms Berejiklian had determined there was a valid reason to dismiss the departmental official, she must have realised that her conduct in refraining from doing so until he fixed Mr Maguire's conservatorium issue was wrong. It could potentially have affected other matters for which that person was responsible and in which respect Ms Berejiklian had found them wanting.

12.312. Having said that, it should be noted that the departmental officer of whom they were speaking, namely, Mr Barnes, was still engaged as such at the time of the Second Public Inquiry four years later.

12.313. Insofar as Ms Berejiklian approved the funding reservation of RCM Stage 2, the facts are also set out in the s 8(1)(c) section. The Commission finds that in approving the decision to make the funding reservation for RCM Stage 2, Ms Berejiklian consciously preferred Mr Maguire, with whom she was in a close personal relationship and who she knew was its "principal proponent". The Commission also finds that in so doing, Ms Berejiklian knew that decision was wrong, as demonstrated not only by the fact she concealed her relationship at the time, but also by the fact that she approved the funding reservation without any support from either the relevant departmental officers or her own staff. The only apparent purpose of the decision was to throw money at Wagga Wagga as Mr Maguire had demanded.

12.314. The Commission finds that in 2018, Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions within the meaning of s 8(1)(b) of the ICAC Act in connection with funding promised and awarded to RCM Stage 2 by exercising official functions influenced by the existence of her close personal relationship with Mr Maguire or by a desire on her part to maintain or advance that relationship.

Section 9(1)(d), ICAC Act

12.315. Counsel Assisting submitted that if the Commission concluded that Ms Berejiklian exercised her official functions partially in favour of the RCM proposal, influenced by a desire on her part to maintain or advance her close personal relation with Mr Maguire, the Commission would further conclude that Ms Berejiklian exercised those official functions improperly for her own private benefit – namely, the benefit in maintaining or advancing her close personal relationship with Mr Maguire. It would follow that Ms Berejiklian breached clause 6 of the ministerial code.

12.316. Counsel Assisting also submitted that if the Commission concluded that Ms Berejiklian engaged in conduct that constituted or involved the partial exercise of any of her official functions in connection with the RCM, the Commission should conclude that that conduct could constitute or involve a substantial breach of clause 6 of the ministerial code, the relevant provisions of which are set out in chapters 10 and 11.

12.317. Counsel Assisting submitted that such a breach would properly be regarded as "substantial" for the purposes of s 9(1)(d) of the ICAC Act because improperly exercising public functions in order to maintain or advance one's personal life is a serious matter that could not properly be regarded as amounting to an insubstantial breach of the code. They argued that that was so, given the extent to which such conduct undermined the high standards of probity that were sought to be achieved and maintained by the code.

12.318. Counsel Assisting submitted that if the Commission concludes that Ms Berejiklian exercised official functions partially in favour of the RCM proposal influenced by a desire on her part to maintain or advance her close personal relationship with Mr Maguire, that conduct would not be excluded from the definition of "corrupt conduct" by s 9 of the ICAC Act.

12.319. Ms Berejiklian made substantially the same submissions about s 9(1)(d) for the RCM proposal partial conduct issue as she did in respect of the ACTA proposal. In summary, Ms Berejiklian:

12.319.1. contended the ministerial code did not apply to her when she was premier

12.319.2. challenged the basic premise of Counsel Assistings' submission that she breached clause 6 of the ministerial code by knowingly exercising her public powers for the purpose of advancing her personal life as intrinsically contrary to her evidence, her position as premier, and the evidence that her ministerial colleagues and staff did not observe her favouring Mr Maguire or his electorate

12.319.3. submitted that the RCM proposal was at least partly influenced by electoral considerations

12.319.4. submitted that her unchallenged evidence was that the public interest was the "key issue" in her decision-making the subject of this proposal.

12.320. The Commission rejects Ms Berejiklian's submission that the evidence did not support the conclusion that she breached clause 6 of the ministerial code by knowingly exercising her public functions for the purpose of advancing her personal life. The evidence which led to that conclusion has been set out earlier in this chapter, and in particular in relation to the s 8(1)(b) issue.

12.321. Insofar as Ms Berejiklian relies upon electoral considerations, in relation to the same submission made in connection with the ACTA proposal, the Commission refers to its conclusion in chapter 11 to the extent the ministerial code contemplates that electoral considerations may be taken into account, it is notable that that effect must be an incidental one ("comprises merely the hope…"; that is to say, one consequence of "the manner in which a particular matter is dealt with"). The overriding manner in which a particular matter is dealt with must be one that is not dishonest, that the minister considers to be in the public interest, and that is not "improperly for their private benefit" (clause 6). Regarding the ACTA proposal, the effect of the Commission's conclusion in relation to s 8(1)(b) is that Ms Berejiklian did act improperly for her private benefit in preferring Mr Maguire in exercising her official functions in relation to the ACTA proposal.

12.322. Insofar as Ms Berejiklian asserted her unchallenged evidence was that the public interest was the "key issue" in her decision-making the subject of this proposal, she actually pointed to evidence she had given in relation to the ACTA proposal which the Commission considered in the partiality section of that chapter. Even accepting that evidence might be considered as also applicable to Ms Berejiklian's approach to the RCM proposal, the Commission rejects the proposition that the "key issue" in relation to the RCM proposal was unchallenged.

12.323. Once again, this submission flies in the face of the extensive material put to Ms Berejiklian and analysed in relation to both the breach of public trust and the partiality issues concerning the interactions between Ms Berejiklian and Mr Maguire in relation to RCM Stage 2. That evidence is compelling as to Ms Berejiklian agreeing with Mr Maguire that she would support RCM Stage 2. As Mr Burden said, it was Ms Berejiklian alone who wished to announce RCM Stage 2. She did so without any advice supporting RCM Stage 2, whether from departmental officers or her own staff. The only advice it appears she had received from a departmental officer on or about 4 December 2017, from Mr Barnes, was that the RCM did not need the recital hall which was the essence of RCM Stage 2, because it could undertake the performances it gave in the various facilities for such already available in Wagga Wagga as it had done historically.

12.324. The Commission finds that the evidence is compelling that in approving the funding reservation for RCM Stage 2, Ms Berejiklian breached clause 6 of the ministerial code by exercising her official functions partially in favour of RCM Stage 2 improperly for her own private benefit – namely, the benefit in maintaining or advancing her close personal relationship with Mr Maguire.

12.325. The Commission also finds that such a breach would properly be regarded as "substantial" for the purposes of s 9(1)(d) of the ICAC Act.

12.326. Improperly exercising public functions in order to maintain or advance one's personal life is a serious matter that could not properly be regarded as amounting to an insubstantial breach of the ministerial code. That is so given the extent to which it undermines the high standards of probity that are sought to be achieved and maintained by the code.

12.327. The Commission has also taken into account that the RCM Stage 2 funding reservation proposal involved the sum of $20 million, and that it was approved without Ms Berejiklian declaring a conflict of interest to either of her ministerial colleagues who were directly involved in the decision-making process, Mr Barilaro and Mr Perrottet.

12.328. For the purposes of s 9(1)(d) of the ICAC Act and having regard to these considerations and the circumstances described above, the Commission finds that there are grounds on which it could objectively be found that Ms Berejiklian's breach of clause 6 of the ministerial code in relation to the RCM proposal could constitute or involve a substantial breach of the code, that being an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act.

12.329. Accordingly, the Commission's finding that in 2018 Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions within the meaning of s 8(1)(b) of the ICAC Act in connection with funding promised and awarded to RCM Stage 2, by exercising official functions influenced by the existence of her close personal relationship with Mr Maguire or by a desire on her part to maintain or advance that relationship, is not excluded by s 9 of the ICAC Act.

Section 13(3A), ICAC Act

12.330. The Commission determines for the purposes of s 13(3A) of the ICAC Act, that it is satisfied there are grounds on which it would objectively be found that Ms Berejiklian's breach of clause 6 constitutes or involves a substantial breach of the ministerial code, that being an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act.

12.331. Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74BA, ICAC Act

12.332. Counsel Assisting submitted that if the Commission concluded that Ms Berejiklian engaged in partial conduct that constituted corrupt conduct within the meaning of the ICAC Act in connection with grant funding promised and awarded to the RCM, the Commission would conclude that that conduct constituted serious corrupt conduct for the purposes of s 74BA of the ICAC Act with the result that it was open to the Commission to make a corrupt conduct finding in relation to that conduct. They repeated the following submissions they made in that respect in relation to s 74BA and a finding of partial conduct in respect to the ACTA proposal:

12.332.1. the intrinsic seriousness of the conduct – it is an intrinsically serious matter for a public official to exercise public power influenced by the advancement or maintenance of her or his personal life

12.332.2. Ms Berejiklian's position as a senior minister at the time of the relevant conduct

12.332.3. the fact that Ms Berejiklian must have known that she was not entitled to exercise official functions for her own private benefit.

12.333. Ms Berejiklian submitted that the Commission would not conclude that she engaged in corrupt conduct by failing to have specific regard to the public interest in relation to RCM Stage 2. She referred to a part of Counsel Assistings' submissions in a section headed "Conduct engaged in solely for the purpose of enhancing popular standing". Ms Berejiklian had objected to the Commission dealing with that section of Counsel Assistings' submissions for procedural fairness reasons as it was not opened upon. The Commission has not dealt with them for that reason. Those submissions do focus on issues of public interest as do Ms Berejiklian's submissions on that point.

12.334. This was not, with respect, as earlier pointed out, the allegation made against Ms Berejiklian in this regard. Rather, the allegation advanced by Counsel Assisting, and the Commission's finding, is that Ms Berejiklian engaged in conduct constituting or involving the partial exercise of her official functions within the meaning of s8(1)(b) of the ICAC Act in connection with funding promised and awarded to RCM Stage 2 by exercising official functions influenced by the existence of her close personal relationship with Mr Maguire or by a desire on her part to maintain or advance that relationship.

12.335. Ms Berejiklian recognised elsewhere in her submissions that Counsel Assisting submitted that she engaged in conduct involving the partial exercise of her official functions contrary to s 8(1)(b) of the ICAC Act. In addition, her submissions noted that Counsel Assisting submitted when dealing with the issue of breach of the ministerial code, that Ms Berejiklian breached clause 6 because she exercised her official functions improperly for her own private benefit, namely, the benefit of maintaining or advancing her close personal relationship with Mr Maguire.

12.336. Counsel Assistings' submissions concerning s 74BA for the purposes of s 8(1)(b) were set out at the conclusion of their submissions on partiality and are repeated above. As can be seen, they do not focus on an issue of public interest. Ms Berejiklian did not address them in the context of the partiality issue.

12.337. As in the case of Ms Berejiklian's conduct in relation to the ACTA proposal, the standard of conduct required of Ms Berejiklian as premier is high, such that her misuse of public power by engaging in partial conduct may be regarded as of particular seriousness. It is clear, in the Commission's view, that Ms Berejiklian's conduct in relation to the RCM proposal impairs, or could impair, public confidence in public administration.

12.338. Again, as in the case of Ms Berejiklian's breach of clause 7(2) of the ministerial code, it is a matter of grave concern for the public to understand how a head of government, bound by the ministerial code and its strictures as to not engaging in partial conduct, deliberately breached clause 6 in respect of a proposal propounded by a person with whom she was in a close personal relationship.

12.339. As the Commission has concluded in relation to the s 74BA breach of public trust issue, in the case of RCM Stage 2, Ms Berejiklian's breach of clause 6 of the ministerial code had real-world consequences. Had Ms Berejiklian disclosed her conflict of interest arising from her close personal relationship with Mr Maguire, it seems improbable her colleagues, Mr Barilaro and Mr Perrottet, would have agreed to the funding reservation in August 2018. She would not, in those circumstances, have been able to act partially in that respect.

12.340. In these circumstances, the Commission is positively satisfied that the serious corrupt conduct finding for which Counsel Assisting contends is available and appropriate to be made in relation to Ms Berejiklian's breach of s 8(1)(b) of the ICAC Act.

12.341. Accordingly, the Commission finds that Ms Berejiklian's conduct in 2016 and 2017, constituting or involving the partial exercise of her official functions in connection with funding promised and awarded to RCM by exercising her official functions influenced by the existence of her close personal relationship with Mr Maguire, or by a desire on her part to maintain or advance that relationship, constituted serious corrupt conduct for the purposes of s 74BA of the ICAC Act with the result that it is open to the Commission to make a corrupt conduct finding in relation to that conduct.

Corrupt conduct conclusion – partiality

12.342. Accordingly, the Commission finds that in 2018, Ms Berejiklian engaged in serious corrupt conduct constituting or involving the partial exercise of her official functions within the meaning of s 8(1)(b) of the ICAC Act in connection with funding promised and awarded to RCM Stage 2 by exercising her official functions influenced by the existence of her close personal relationship with Mr Maguire, or by a desire on her part to maintain or advance that relationship.

Section 74A(2) statement

12.343. The Commission accepts that Ms Berejiklian is an affected person for the purposes of s 74A(2) of the ICAC Act in that substantial allegations have been made against her in the course of, or in connection with, the investigation concerned.

12.344. Counsel Assisting have submitted in some detail the reasons the Commission should not make a s 74A(2) statement as to whether in all the circumstances, it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for the offence of misconduct in public office in relation to her conduct concerning the RCM.

12.345. The Commission has considered whether Ms Berejiklian's conduct in relation to the RCM could constitute or involve a substantial breach of an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act, rather than whether it could constitute or involve a criminal offence for the purposes of s 9(1)(a).

12.346. Ultimately, the Commission is of the view that Ms Berejiklian's conduct, while it constitutes or involves a substantial breach of the ministerial code, is not so serious as to merit criminal punishment (an element of the offence of misconduct in public office) and therefore does not reach the very high bar required to make out this element of the offence of misconduct in public office.

12.347. For this reason, the Commission is not of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for the offence of misconduct in public office in relation to the RCM proposal.

Chapter 13: Ms Berejiklian and the duty under s 11 of the ICAC Act

13.1. This chapter concerns the question of whether Ms Berejiklian's duty under s 11 of the ICAC Act "to report to the Commission any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct" was enlivened in the circumstances of her knowledge of Mr Maguire's activities.

13.2. Counsel Assisting submitted that Ms Berejiklian had an actual suspicion on reasonable grounds as at September 2017 and July 2018, that Mr Maguire may have been engaged in corrupt conduct, such that she was under a duty to report her suspicions to the Commission. They contended that she failed to report such suspicions, and thereby failed to discharge her duty in a manner which constituted the dishonest or partial exercise of an official function for the purposes of s 8(1)(b) of the ICAC Act.

13.3. Ms Berejiklian submitted that the evidence before the Commission did not support a finding that, at any relevant time, she had knowledge of any "matter" which she suspected on reasonable grounds concerned or may concern corrupt conduct. On that basis, she contended the Commission should find that her duty under s 11(2) of the ICAC Act was not enlivened.

Legislative framework

13.4. Section 11 of the ICAC Act relevantly provides:

> *11 Duty to notify Commission of possible corrupt conduct*
>
> *(1) This section applies to the following persons—*
>
> ...
>
> *(e) a Minister of the Crown.*
>
> *(2) A person to whom this section applies is under a duty to report to the Commission* ***any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.***
>
> ...
>
> *(3) The Commission may issue guidelines as to what matters need or need not be reported.*
>
> *(3A) A Minister of the Crown who is under a duty under this section to report a matter may (despite subsection (2)) report the matter either to the Commission or to the head of any agency responsible to the Minister.*

(4) This section has effect despite any duty of secrecy or other restriction on disclosure…

(Emphasis added)

Report guidelines for ministers

13.5. The *Report guidelines for ministers*, issued by the Commission pursuant to s 11(3) of the ICAC Act in 2015 ("the 2015 Guidelines") addressed the state of mind that is required to enliven the s 11 duty. They drew the minister's attention to the purpose of the guidelines ("to help you as a minister understand your obligation under s 11 of the *Independent Commission Against Corruption Act 1988* ('the ICAC Act') to report suspected corrupt conduct either to the NSW Independent Commission Against Corruption (ICAC) or to the head of any agency responsible to you.") They set out the terms of s 11(2) and (3A) of the ICAC Act. They explained "Reasonable grounds for suspicion" as follows:

> *The words **suspects on reasonable grounds** mean there is a real possibility that corrupt conduct is, or may be, involved. There needs to be more than an idle wondering but there can be less than a firm belief. Proof is not necessary. In some cases, you may hold the suspicion even though no individual has been identified. Such matters should still be reported.*
>
> *The ICAC is often asked whether there is a cut-off point, whereby matters of a minor nature need not be reported. There is no easy answer to what constitutes a minor matter. In the ICAC's experience, the real question is whether the conduct gives rise to a suspicion that it may involve corruption. For example, the fact that a staff member's cash register is short by a small sum of money on one occasion is unlikely to give rise to a reasonable suspicion that they have stolen the money. Repeated occurrences may give rise to a suspicion that the person is either stealing money or is incompetent. In other words, there may be an explanation that does not involve corrupt conduct. However, if there is reasonable suspicion that corrupt conduct may be involved, the matter should be reported.*
>
> *You can contact the ICAC to discuss particular matters that you may be unsure about or to seek clarification on any issue concerning reporting corrupt conduct. However, as a general rule, if you are unsure about a matter, you are encouraged to err on the side of caution and report it either to the ICAC or to the head of an agency responsible to you. You can, of course, report to both. If you report to the head of an agency, as a principal officer, they have a duty to report matters involving suspected corrupt conduct to the ICAC.*
>
> (Original emphasis)

13.6. The 2015 Guidelines advised that a report must be made "as soon as you have a reasonable suspicion that corrupt conduct may have occurred or may be occurring" and that "To delay reporting can result in the loss of investigative opportunities." They also advised that "Matters must be reported to the ICAC regardless of any duty of secrecy or other restriction on disclosure. Your s 11 duty to report overrides any obligation to maintain secrecy."

13.7. Under the heading as to whether an s 11 referral should be made public, the 2015 Guidelines stated:

> *However, it is the view of the ICAC that a referral should be made without advising the person(s) to whom the report relates and without publicity. Failure to handle reports to the ICAC confidentially may prejudice any subsequent investigation and may cause unnecessary damage or embarrassment to individuals.*

13.8. The 2015 Guidelines also explained "corrupt conduct" in the following terms:

> *Corrupt conduct is defined in the ICAC Act. It involves deliberate or intentional wrongdoing involving (or affecting) a public official or public authority in NSW…*
>
> *Conduct will not be "corrupt" for the purposes of the ICAC Act unless it could constitute or involve a criminal or disciplinary offence, be grounds for dismissal or, in the case of members of Parliament, involve a substantial breach of their code of conduct. However, at the point you report to the ICAC, you need not know with any certainty that this seriousness test can be satisfied as this will often be known only after a full investigation.*

After setting out some examples of corrupt conduct, it advised:

> *As noted above, if you are unsure whether a complaint or suspected activity involves corrupt conduct, you are encouraged to err on the side of caution and report it to the ICAC.*

13.9. The 2015 Guidelines also described what should be included in a report.

13.10. Counsel Assisting submitted that while the guidelines did not control the proper construction of s 11(2) of the ICAC Act, they were consistent with the proper construction of that subsection and accurately described, in practical terms, the bounds of what did and did not constitute a sufficient basis to prompt the s 11 duty.

Operation of s 11 of the ICAC Act

"Matter"

13.11. It was common ground that a question of construction arises as to what the term "matter" encompasses for the purposes of s 11(2) of the ICAC Act. The term "matter" is not defined in the ICAC Act.

13.12. Counsel Assisting submitted it would appear to include an occurrence, event or set of circumstances. Ms Berejiklian submitted that to engage s 11(2), the "matter" must be confined at least by some specified subject matter.

13.13. Ms Berejiklian submitted that the legal duty in s 11(2) requires the individual to report to the Commission a "matter" that he or she suspects may concern corrupt conduct. The starting point of any analysis of the s 11(2) duty ought to be identification of the relevant "matter/s". She contended it was only by reference to that identification that the Commission (or the individual with the duty) could sensibly analyse whether the person held the relevant state of mind and whether the necessary reasonable grounds for that state of mind existed.

13.14. Ms Berejiklian observed, by way of illustration, that it would not be sufficient to show that a person had a generalised suspicion about someone engaging in corrupt conduct, unlimited by subject matter, as that would be a suspicion devoid of content. She submitted that the duty in s 11 is only capable of fulfilment by making a report. If there is no specified "matter", a generalised report that an individual is suspected of corrupt conduct has little to no practical utility and does not serve to advance the purpose of s 11.

13.15. Ms Berejiklian submitted that in his opening address, Counsel Assisting stated the "matter" with no more particularity than being "in relation to the conduct of Daryl Maguire" and that this was inadequate. She complained that when she sought particulars of this allegation, she was informed by the Commission that its duty to give Ms Berejiklian procedural fairness on this subject "would be discharged by the exchange of written submissions at the conclusion of the public inquiry". She submitted that Counsel Assistings' closing submissions still failed to identify adequately the "matter" said to have been reportable.

13.16. In this respect it is relevant to have regard to s 11(3) of the ICAC Act empowering the Commission to "issue guidelines as to what matters need or need not be reported". The 2015 Guidelines are outlined above.

13.17. As is apparent, they refer to a broad range of conduct, emphasise that a person need not even have information which identifies the individual and encourage ministers to err on the side of caution if unsure whether to make a complaint about suspected corrupt conduct; that is to say, encourage reporting even in the case of uncertainty. This runs contrary to Ms Berejiklian's submission that in order for a "matter" to be reported it "must be confined at least by some specified subject matter". A reporting minister may merely have observed an isolated act, which even without a context as to some particular subject matter to which it related, struck them as so out of order in relation to a public official's conduct that they suspected that it concerned, or may concern, corrupt conduct. Illustrations of such matters were set out in the 2015 Guidelines.

13.18. Ms Berejiklian's submission that a generalised report that an individual's conduct concerns, or may concern, corrupt conduct has little to no practical utility, and does not serve to advance the purpose of s 11 of the ICAC Act, misunderstands the nature of the investigatory work of the Commission, the breadth with which s 11 was drafted and the wide scope of matters referred to in the guidelines, which one could infer from the purpose of the ICAC Act was intentionally wide (like s 8) in order to capture a broad range of reports about potential corrupt conduct, and advance the objects of the ICAC Act.

13.19. The 2015 Guidelines also emphasised the necessity to make reports expeditiously. While they made clear that any reports must be based on "a reasonable suspicion that corrupt conduct may have occurred or may be occurring" they stressed that "[t]o delay reporting can result in the loss of investigative opportunities".

13.20. The Commission does not accept that Counsel Assisting has failed adequately to identify the "matter" said to have been reportable. Counsel Assisting set out in detail in their submissions the circumstances which they argued gave rise to an actual suspicion on Ms Berejiklian's part based on reasonable grounds. They identified the time at which they contended those circumstances supported the proposition that it was probable Ms Berejiklian suspected Mr Maguire was engaging in conduct which may have been corrupt. At the end of each relevant section of their submissions, Counsel Assisting have identified the actual suspicion they contend the Commission should find Ms Berejiklian had based on the facts and circumstances which came to her attention concerning Mr Maguire's conduct and which enlivened her s 11 duty.

13.21. Ms Berejiklian's submission that a "specific matter" must be identified loses sight of the fact that the mental element for which s 11 calls is of suspicion, not knowledge, of corrupt conduct. As outlined by the 2015 Guidelines, proof or a firm belief of what the corruption involves is not necessary.

Actual suspicion

13.22. It was common ground that the s 11(2) duty was enlivened by actual suspicion. Counsel Assisting submitted that is not enough that there are reasonable grounds for a suspicion or that the person to whom s 11 applies should have had a suspicion. They contended that while evidence of the existence of reasonable grounds for suspicion may assist in drawing an inference as to whether a person actually had a suspicion of the requisite kind, no s 11 duty arises in the absence of such an actual suspicion.

13.23. Counsel Assisting submitted that the question for the Commission was not whether Ms Berejiklian should have suspected that Mr Maguire may have been engaging in corrupt conduct, or whether there were reasonable grounds for such a suspicion, although they submitted that, plainly, there were.

13.24. Rather, Counsel Assisting contended the question for the Commission was whether Ms Berejiklian did, in fact, suspect any matter that concerned, or may concern, corrupt conduct. That Ms Berejiklian was told things which were collectively capable of founding a reasonable suspicion was relevant to the Commission's determination as to whether her s 11 duty was enlivened in such a manner as to require her to report her suspicions to the Commission. But the context and manner in which Ms Berejiklian received the information that raised reasonable grounds for suspicion must also be taken into account.

13.25. Ms Berejiklian agreed with Counsel Assisting that actual suspicion was required. She submitted that it was not enough that the individual – or a reasonable person in the individual's position – ought to have held the suspicion, or that there was evidence sufficient to put the individual on inquiry. Rather, it was necessary to focus on her actual mental state at the relevant times.

13.26. Ms Berejiklian referred to Kitto J's explanation of "suspicion" in *Queensland Bacon Pty Ltd v Rees*:

> *A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence".*[434]

13.27. Ms Berejiklian then submitted that this requirement of actual suspicion in s 11(2) is not to be diluted. She observed that the legislature chose actual suspicion as the relevant criterion, as opposed, for example, to constructive knowledge. She suggested the policy rationale for such a choice was obvious in the context of a provision the breach of which may support a finding of corrupt conduct.

13.28. As much may be accepted. However, it should also be noted that in *George v Rockett* the High Court held that "[w]hen a statute prescribes that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person".[435]

[434] (1966) 115 CLR 266 at 303; [1966] HCA 21.

[435] 1990) 170 CLR 104 (at 112); [1990] HCA 26.

13.29. In the context in which that expression appears in s 11(2) of the ICAC Act, the state of mind to be induced is in the context of the reporting to the Commission, as the heading to s 11 makes clear, the "possibility of corrupt conduct". The clear intention of s 11 duty is to ensure matters are reported to the Commission which may trigger its s 13(1)(a) investigative function.

13.30. It is unnecessary to pursue this because, for the reasons which follow, the Commission has found that Ms Berejiklian did have an actual suspicion that Mr Maguire had engaged in conduct which concerned, or may concern, corrupt conduct.

Background

13.31. It is uncontroversial that at all material times, Ms Berejiklian was a minister of the Crown and, therefore, was a person to whom s 11 of the ICAC Act applied. Ms Berejiklian was therefore required, whilst a minister of the Crown, to report to the Commission (or to the head of any agency responsible to her) any matter which she suspected on reasonable grounds concerned, or may concern, corrupt conduct.

13.32. Ms Berejiklian agreed that during her time as a minister, she was aware of her duty to notify the Commission or a head of any agency responsible to her of any matter she suspected on reasonable grounds concerned, or may concern, corrupt conduct. She understood that obligation to include a duty to report any suspicion that she held on reasonable grounds that a member of Parliament was misusing their office for their own benefit or for the benefit of persons close to them.

13.33. When the information Mr Maguire shared with Ms Berejiklian during their relationship and prior to 13 July 2018 is considered, a pattern emerges, of which Ms Berejiklian was aware, of Mr Maguire telling her he was seeking to make money in relation to property dealings far from his electorate, and of activities in which he was engaging in conduct from which it was apparent he was using his public office for private gain. What is telling about most of the information which Mr Maguire imparted to Ms Berejiklian concerning these money-making deals, is that her knowledge of Mr Maguire's conduct in this respect intensified from about mid-2017. The intensification coincided with their discussion of Mr Maguire's plan to retire prior to the 2019 NSW State Election. Ms Berejiklian was keenly interested in this plan and with the opportunity it would afford the couple to make their relationship public and do such things as travel together.

What Ms Berejiklian knew before 5 July 2018

13.34. Ms Berejiklian gave evidence at the First Public Inquiry that she was aware that Mr Maguire had arrangements in place to obtain commissions or other payments in connection with property sales or development, that she had assumed that at least one of Mr Maguire's "outside business interests" was property and property development, and that he "would often talk about these mega deals"; however, she said, "they never seemed to come to fruition".

13.35. Ms Berejiklian noted that nothing about Mr Maguire's official positions at the time precluded him from engaging in secondary employment, including property development projects, and receiving commissions for such work. Hence, the mere fact of his involvement in property development, or hope to receive commissions, did not by itself connote any wrongdoing on his part. The Commission accepts that submission.

13.36. The fact that such deals may never have come to fruition does not preclude them from being corrupt conduct. Conduct comprising an attempt to commit or engage in conduct that would be corrupt conduct under s 8 of the ICAC Act is regarded as corrupt conduct under s 8, and is not excluded by s 9 if, had the attempt been brought to fruition by further conduct, that further

conduct could constitute or involve an offence or grounds referred to in s 9 (see s 7(2) and 7(3), ICAC Act).

13.37. Ms Berejiklian's awareness of Mr Maguire's property dealings related, at least in part, to an exchange of text messages between Ms Berejiklian and Mr Maguire on 11 February 2014 as follows:

DM to GB	*Hawkiss* [sic] *good news One of my contacts sold a motel for 5.8 million I had put her in contact so I should make 5k*
GB to DM	*Congrats!!! Great News!! Woo hoo*
DM to GB	*yes 12.00 today we should have it closed*
GB to DM	*That is really good. Does that mean your commission is 0.1 per cent?*
DM to GB	*sharing with Chinese business partner so commission is 20k usually its 50% of that but I will only ask for 25% cause uts* [sic] *such a small sale only 5.8m so I get5k*
GB to DM	*Great stuff!*

13.38. It is apparent from this text exchange that from early in their relationship, Mr Maguire was unabashed in disclosing to Ms Berejiklian that he was going to earn commission on a property transaction. This exchange occurred just before Mr Maguire was first appointed a parliamentary secretary on 24 February 2014. At that time (and also after he became a parliamentary secretary), he was not precluded from engaging in secondary employment, including having interests in the property industry.

13.39. As Counsel Assisting submitted, the quantum of the commission Mr Maguire was likely to earn in 2014 and its proportion of the stated sale price were not, on their face, such as would raise a suspicion that Mr Maguire's involvement may have involved a misuse of his office or other corrupt conduct.

13.40. What these exchanges do show, however, is that Mr Maguire was making, or claiming to be making, money in connection with introductions to properties and that he told Ms Berejiklian as much. Further, Ms Berejiklian is clearly paying attention to what Mr Maguire is telling her and asking pertinent questions. She agreed that he was at least confiding this information as a close friend.

13.41. Unsurprisingly, Ms Berejiklian did not recall this text exchange until she was shown it during a compulsory examination on 16 August 2020. She agreed that it jogged her memory of communications with Mr Maguire in which he told her of commissions he had received. Ms Berejiklian said that she recollected that from time to time, in thousands of telephone calls, Mr Maguire would mention such matters with the details of which she would engage, at least sometimes.

Mr Demian

13.42. The section concerning Charbel Demian in chapter 7 deals with the circumstances in which on 25 November 2016, when Ms Berejiklian was still the treasurer, Mr Maguire forwarded to her an email chain concerning steps he was taking to assist Mr Demian. The subject line of the email chain was "181 James Ruse Drive, Camellia". It was apparent from the email chain that Mr Demian was a property developer, associated with the development of a "major project with a potential gross realisation of $2.5 Billion" in Camellia. The email chain revealed Mr Maguire's

assistance to Mr Demian included taking the matter up with the RMS. Mr Maguire did not confine his distribution of the email chain to Ms Berejiklian. He also sent it to staff in the office of the then premier, Mr Baird, and to staff of the then minister for planning, Mr Stokes, with a request that it be forwarded to the premier.

13.43. It is significant that Mr Maguire was taking up a matter concerning a property developer with a government department, that the matter had no apparent relation to his electorate and that he was doing so at Mr Demian's request. And, while Mr Maguire did not confine the email's distribution to Ms Berejiklian, as far as the evidence reveals, she was the only recipient aware of Mr Maguire's previous activity seeking commission in connection with property sales.

13.44. Ms Berejiklian said she had two email addresses: a public facing one, which was monitored by her staff who logged emails and correspondence and determined the action to be taken; and a direct email address. She said she did not expect members of the public to be emailing her directly on her direct email address. She said she would regard it as an invasion of her privacy and security for that particular email address to be provided to someone outside of government.

13.45. Mr Maguire sent the email chain concerning Camellia to Ms Berejiklian's direct email address. Ms Berejiklian said that if she considered an email she received at her direct email address should be logged and dealt with in the usual fashion, she might forward it to her personal assistant or chief of staff or someone else within her office to deal with. Ms Berejiklian also said she might ignore or delete correspondence received to her direct email address. She speculated that upon receiving the email from Mr Maguire concerning Mr Demian, she would have seen that it had gone to relevant people and deleted it.

13.46. In addition, Mr Maguire was someone who was prepared to and did follow up, and encouraged others to do the same, on issues to which he, or they, had received no satisfactory response. One illustration is the encouragement he gave to Louise Waterhouse on 23 October 2017 to "keep the pressure on" Mr Sowter when he had not responded to her email (see chapter 8). Another involved him pestering Ms Berejiklian on 16 May 2018 to "get" him his "170 million" in relation to the Wagga Wagga Base Hospital.

13.47. Ms Berejiklian submitted that there was no evidence that she read this email, that she had no recollection of having done so and that her evidence to this effect was unchallenged.

13.48. That is hardly surprising considering that the email was sent to Ms Berejiklian's direct email address. However, it is clear from her evidence that she would at least have looked at it to determine how to deal with it. Making that decision would have involved engaging with its contents. Even if she only blinked at it, it would have been apparent from the subject line, that it did not concern a matter in Mr Maguire's electorate. As Counsel Assisting submitted, the email chain at least raised a question as to why Mr Maguire was using his office as a member of Parliament to make representations to a government department in such circumstances.

Mr Maguire's involvement with UWE

13.49. The details of Mr Maguire's involvement with UWE, and Ms Berejiklian's knowledge of that, are set out in chapter 9.

13.50. Counsel Assisting recounted the events of Mr Maguire's attempts in late August and early September 2017 to make representations on behalf of UWE concerning the problems which had arisen concerning its Chinese co-owner, Jimmy Liu, seeking to withdraw from the joint venture with UWE Hay.

13.51. They pointed out that in conversations between Ms Berejiklian and Mr Maguire commencing on 24 August 2017, and continuing on 30 August 2017, Mr Maguire had told her about "problems with this um, with the UWE and the financing", mentioned the possibility of him going to China to see the head company, Bright Foods, to "tell them to sort out their problem now" because "they listen to Government MPs" and also that he was concerned about "Jimmy". It was clear from the 30 August 2017 conversation that Ms Berejiklian knew the UWE issue concerned matters outside Mr Maguire's electorate. During the conversation which concerned his possible trip to China to make representations on behalf of UWE, and her staff's concern that he might "go off his brain in China", she said to him "they seem to think it's in your electorate, I didn't say anything".

13.52. When questioned at the First Public Inquiry about why she said "they seem to think it's in your electorate" to Mr Maguire and did nothing to fix this misapprehension herself, Ms Berejiklian told the Commission that while she could not recall why she made that statement, she assumed her "comment", "it's not in your electorate" was, "If you want to correct that, you better tell them, because I'm not involving myself in this".

13.53. When played this conversation again in the Second Public Inquiry, and asked why, in relation to this statement, she had not said to Mr Maguire, "Why the hell are you concerned about this issue that is not even in your electorate?", Ms Berejiklian told the Commission, "again, I can't recall the conversation or what I thought at the time but presumably it was about regional jobs and in any event I'd asked him to contact my office". The latter proposition appears to have emerged from Ms Berejiklian's suggestion the previous year that embedded in her statement about not telling her office that Mr Maguire's issue was not in his electorate, was an instruction that he "better tell them what this is about".

13.54. Ms Berejiklian did not think it was strange that Mr Maguire was involving himself in a matter outside his electorate "if it was an adjoining electorate or regional jobs". As noted, Ms Berejiklian was less sanguine about Mr Maguire getting involved in matters outside his electorate in their conversation on 5 July 2018 when they were discussing his imminent appearance before the Commission in Operation Dasha.

13.55. Ms Berejiklian described the course of action Mr Maguire proposed to take in travelling to China as "beyond completely inappropriate for that to have proceeded". She gave a number of explanations for not telling him at that time that it was inappropriate for him to do so: "Because there was a proper process in place", "And to be honest, I did not know the full extent of the issue and the matter at that stage", "Because I, I would have assumed perhaps I wasn't paying attention to it sufficiently, or perhaps I assumed my office would go through that process."

13.56. The Commission rejects Ms Berejiklian's assertion that she did not pay attention to Mr Maguire's involvement in the Bright Foods issue. She was the one who raised it with him in the telephone call of 30 August 2017. At no time did Ms Berejiklian query who "Jimmy" was. She clearly knew. She also knew enough to advise that the issue was not one based in Mr Maguire's electorate. Further, Ms Berejiklian told Mr Maguire that the concern had been raised from the office of the minister for trade, Mr Blair, that Mr Maguire might "go off his brain in China". The contents of this telephone call were not foreign to her and, accordingly, her assertion that perhaps she had not been paying attention is rejected.

13.57. Ms Berejiklian also said, that as at 30 August 2017, she "didn't even know what UWE was". That evidence is not accepted. The 30 August 2017 conversation clearly proceeds on the basis that Ms Berejiklian knew what Mr Maguire was talking about – he had, at the very least, touched upon the nature of the issue in their conversation on 24 August 2017. In addition, at the outset of the 30 August 2017 conversation, it was Ms Berejiklian who related to Mr Maguire the facts that Ms Cruickshank had texted her to tell her she (Ms Cruickshank) had to ring Mr Maguire

that Mr Blair had "rung up … to say 'Tell Daryl not to worry, I'm raising the issue on his behalf in China'", and she had made the statement "they seem to think it's in your electorate, I didn't say anything," clearly demonstrating she appreciated that UWE was not in his electorate.

13.58. Counsel Assisting also noted that during a compulsory examination on 16 August 2020, Ms Berejiklian had said she did not know "who Jimmy is, I don't know his last name, I don't know if that's his, I had a, had a notion that he was Chinese but I don't know if he was or not, but I've known that they have been friends for a long time". However, they submitted that given Ms Berejiklian did not question who "Jimmy" was during the course of the 30 August 2017 conversation, and had already been provided with information in relation to the issues concerning UWE on 24 August 2017, the Commission should find that Ms Berejiklian understood Mr Maguire's reference to "Jimmy" to be a reference to his friend named Jimmy. The Commission accepts that submission.

13.59. Mr Maguire and Ms Berejiklian spoke again about the UWE issue on 1 September 2017, the day after Mr Liu had told Mr Maguire that UWE was "nearly bankruptcy", as Mr Maguire pointed out to Ms Berejiklian in the course of the following conversation:

MAGUIRE:	*– Niall Blair's office, don't want me to go to China. (Laughs)*
	…
MAGUIRE:	*Oh look it'd be really (unintelligible) when the Minister's there. I said "**Why, 'cause you're frightened I'll blow up the place**". And he said "Well look, you know, it just would be good". I said but needs to go* [sic] *and solve his problem, you know.*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*He can just mention it, what's the point and um, anyway I said "**I'll go where I please**". I said "But if you manage to get some movement and get some, a result" I said "I don't want to go". I said "I don't want to go, but you know what, **I'm not gonna let this company fold and, and go under**."*
BEREJIKLIAN:	*Mmm*
	…
MAGUIRE:	*It's all about their Minister and um, so anyway so the um, **so that was Sarah's call that she must've got him to do**. (Laughs)*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*Anyway, it doesn't matter. But they've, they've made some progress which is real good so.*
BEREJIKLIAN:	*Oh that's good. Do you still need to go if it gets it fixed?*
MAGUIRE:	*No.*
BEREJIKLIAN:	*Oh good.*
MAGUIRE:	*That's why I'm pushing.*
BEREJIKLIAN:	*It might get fixed.*
MAGUIRE:	*Well I'm hoping, that's what I'm pushing them for.*

BEREJIKLIAN:	***Yeah and then well you, you need to to – yeah but, you can't make them think that you're gonna go regardless. Just say well if you fix it I won't need to go.***
MAGUIRE:	*I told him, that's what I told him.*
BEREJIKLIAN:	*Oh good, oh good.*
MAGUIRE:	*I said what if you fix it, you know, but trouble is I said well, they said "Oh we just don't want you there when the Minister's there right".*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*And it, you know, and I thought oh thanks colleagues, you fuckers.*
BEREJIKLIAN:	*Mmm, mmm.*
MAGUIRE:	***Um, mind you they've got reason to be frightened, um.***
BEREJIKLIAN:	*(Laughs).* ***Yeah I don't blame them, I'm frightened.***
MAGUIRE:	***Well you should be. Um, now you need –***
BEREJIKLIAN:	***I don't care, to be honest I don't care yeah.***
	(Emphasis added)

13.60. As can be seen, in this conversation Ms Berejiklian did not display the compunction she professed in relation to the 30 August 2017 conversation about not telling Mr Maguire what to do but leaving it to the "process". There was no apparent lack of appreciation of the "issue", rather, she was engaged with the conversation: she clearly understood that Mr Maguire had been threatening to go to China, that Mr Blair had not wanted him to do so (she had already relayed to him in the 30 August 2017 conversation that Mr Blair wanted her office "to tell [Mr Maguire] so that he doesn't go off his brain in China against all these people because the Minister's promised to, promised to fix it for him"). She knew sufficient in this conversation to tell him when he told her he did not need to go to China if the minister got the issue fixed, not to "make them think that you're gonna go regardless. Just say well if you fix it I won't need to go". She was clearly paying attention.

13.61. Ms Berejiklian gave evidence that she did not suspect, at the time of those interactions, that Mr Maguire may have been engaged in corrupt conduct and did not regard it as strange that Mr Maguire was dealing with a matter that was not in his electorate. Ms Berejiklian said she could not recall the conversation in which she had told him she had not disabused her staff of their belief the UWE issue concerned his electorate, or what she thought at the time but said "presumably it was about regional jobs and in any event I'd asked him to contact my office".

13.62. Counsel Assisting pointed out that Ms Berejiklian was not the only person who was aware that Mr Maguire was threatening to fly to China and undercut an important trade mission with a view to "fixing" the problems that UWE was facing. That was known both to staff in Ms Berejiklian's office (including Ms Cruickshank and Ms McCure) and to staff in Mr Blair's office (including Charles Cull and the minister himself). They observed that there was no evidence that, at the time of the conduct, any of those persons raised any suspicions that they held that Mr Maguire may have been engaging in corrupt conduct, although Mr Cull did make such a report upon his becoming aware of Mr Maguire's evidence before Operation Dasha.

13.63. Counsel Assisting suggested that Mr Maguire's conduct could conceivably have been perceived by such people as simply a function of his "aggressive" advocacy in the pursuit of advancement of his electorate. They also submitted that those people were labouring under the misapprehension that the matter that Mr Maguire sought to raise related to his electorate. Mr Cull gave evidence to that effect and Ms Berejiklian's comment to Mr Maguire – "they seem to think it's in your electorate, I didn't say anything, I just … said let me know how it goes, yeah" – tended to confirm that to be the case. They contended that it was the fact of Mr Maguire's personal interest (for Jimmy), and the fact he was operating outside of his electoral district, that tended to demonstrate that his inappropriate conduct was, or may have been, in the nature of corrupt conduct such as by misusing his public office for private gain and that Ms Berejiklian was aware of both of these factors.

13.64. Shortly before Mr Maguire started agitating on UWE's behalf about the Bright Foods issue, UWE suggested that Mr Maguire might join its board. On 26 July 2017, Mr Maguire discussed that possibility with the parliamentary ethics adviser. However, there is no evidence Ms Berejiklian was aware of this offer at that time.

13.65. Counsel Assisting submitted that there were reasonable grounds for Ms Berejiklian to suspect that Mr Maguire was or may have been misusing his office for his friend "Jimmy", and that the question for the Commission was whether Ms Berejiklian, in fact, "joined the dots" marked by several conversations and formed a suspicion of the requisite kind.

13.66. Counsel Assisting submitted that it would be open to the Commission to find that, on the basis of what Ms Berejiklian was told by Mr Maguire in August–September 2017, as outlined above, that she formed an actual suspicion that Mr Maguire may have been engaged in corrupt conduct by the misuse of his public office to advance the private interests of his friend, Mr Liu. However, they pointed out that to make such a finding, it would be necessary for the Commission to reject Ms Berejiklian's evidence that she did not suspect, at the time of the interactions concerning "Jimmy", that Mr Maguire may have been engaged in corrupt conduct and reach a state of actual persuasion that, despite that evidence, Ms Berejiklian in fact had a suspicion of the requisite kind.

13.67. Counsel Assisting submitted that if such a finding were made, the Commission would conclude that Ms Berejiklian's s 11 duty was enlivened because, in that event, she was aware of matters that she suspected on reasonable grounds concerned or may concern corrupt conduct on the part of Mr Maguire (namely, the matters that Mr Maguire made Ms Berejiklian aware of as discussed above).

13.68. Ms Berejiklian submitted that an important fact omitted from Counsel Assistings' analysis of these events was her indication to Mr Maguire in the conversation on 30 August 2017 that he "calmly tell Sarah [Cruickshank] exactly what you're telling me". She contended that that remark was signally inconsistent with any suspicion on her part that what Mr Maguire was telling her concerned corrupt conduct in which he was engaged. If Ms Berejiklian suspected that Mr Maguire was engaged in corrupt conduct, it was wholly improbable that she would have simply suggested he tell her chief of staff.

13.69. This submission misses the point. Ms Berejiklian was suggesting Mr Maguire tell her staff about his concerns that even though he had been told the trade delegation would raise his concerns about the UWE-Bright Food issue, they would not do so adequately.

13.70. Counsel Assistings' submission is more subtle than that. It is that Ms Berejiklian knew that Mr Maguire intended to use his position as a member of Parliament to make representations on behalf of his friend Mr Liu in relation to a matter that was not, to her knowledge, in his electorate. In addition, the fact that she had concealed the latter information from her staff gave rise to the inference that she appreciated Mr Maguire was doing something wrong.

13.71. The Commission accepts that there are unsatisfactory aspects of Ms Berejiklian's evidence in this respect. It is troubling that she thought she should conceal from her staff the fact the mid–2017 "crisis" did not concern a matter in his electorate. That suggests she thought that he should not be involved in such matters. However, the fact she thought the matter may concern regional jobs has some force. Even if UWE's business was outside his electorate (it was in Leeton in the electorate of Murray in the Riverina of which district both Wagga Wagga and Leeton are part), the possibility of job losses was certainly a real concern Mr Liu was explaining to Mr Maguire, which he communicated to some extent to Ms Berejiklian. She recollected there was concern over job losses in the Riverina. Such job losses could impact upon Wagga Wagga. Further, there is no evidence Ms Berejiklian understood at this stage that Mr Maguire may be pursuing the opportunity of private gain from UWE in relation to a position on its board. On the evidence before the Commission, it was not until 3 May 2018 that he told her that "Jimmy's made me an offer".

13.72. The Commission is not persuaded that the evidence in relation to Ms Berejiklian's knowledge of Mr Maguire's involvement with UWE in August–September 2017 enables it to reach a state of persuasion that Ms Berejiklian had an actual suspicion that Mr Maguire had misused his office to advance the private interests of his friend Mr Liu such that his conduct in that respect concerned, or may concern, corrupt conduct.

Mr Maguire's retirement plans – Badgerys Creek – Ms Waterhouse

13.73. By at least 2017, as Ms Berejiklian understood it, Mr Maguire was considering retiring from Parliament at the 2019 election, although she did not know whether it was definitive. At the same time (that is, in around 2017 to 2018), she was considering whether to give her relationship with Mr Maguire a higher status if he retired by making it public rather than keeping it private. Ms Berejiklian denied that she cared about Mr Maguire's financial status, in the sense of her needing to depend upon his income.

13.74. Ms Berejiklian said that Mr Maguire was obsessed with his financial status. He advised her from time to time on a number of occasions about what he was trying to do to put himself in a financial position that would permit him to retire from Parliament. Ms Berejiklian agreed that one of the factors weighing on Mr Maguire's mind, which he raised with her, in deciding whether or not to resign from Parliament effective from the 2019 election, was whether he was in a sufficient financial position to be able to do so.

13.75. Ms Berejiklian said that when he did raise this issue, she would not take it seriously or would disregard it, because she always regarded him as being in a financially comfortable position. She agreed Mr Maguire told her about the extent of his debts but contended, "that wouldn't have concerned me". When pressed with how she could form a view Mr Maguire was financially comfortable if he was always talking to her about his financial position, Ms Berejiklian said, "because he had, because he's, he had a pecuniary interest register with a number of interests, in terms of – I always assumed that he was, he was comfortable in his position. I never had cause for concern in relation to that." She then said she had not looked at Mr Maguire's pecuniary interest register but "knew that he had rental property and other things, so I never assumed he was in difficulty".

13.76. On 1 August 2017, Mr Maguire advised Ms Berejiklian during the course of a lawfully intercepted telephone call that he was attempting to "pull … deals off":

MAGUIRE:	*I'm not going not going to have those problems so much when I retire which is good.*
BEREJIKLIAN:	***Thank goodness for that thank god that means we can actually go places together is that what it means?***

MAGUIRE:	*I won't have any money but we will be more flexible.*
BEREJIKLIAN:	*(Indecipherable).*
MAGUIRE:	***I won't have any money unless I can pull these deals off which I am working on.***
BEREJIKLIAN:	*But hokis the thing is all you need to do is you we don't need money I can support myself always have always will and you just need to do whatever you need you know for yourself and your kids.*
	…
MAGUIRE:	*I said it you talking tripping around and stuff expensive–anyway just hold on a second.*
BEREJIKLIAN:	*You just need to stay healthy so we enjoy it.*
	(Emphasis added)

13.77. The proposition that Ms Berejiklian was not, at the very least, concerned by, or interested in, Mr Maguire's financial position does not sit easily with conversations between the couple such as those recorded on 1 September 2017, when they discussed his debt level and Ms Berejiklian clearly engaged with the issues he raised, as always, asking pertinent questions and making suggestions. The conversation was interrupted by Ms Berejiklian having to attend a function:

At 18:12:50:

MAGUIRE:	*So I paid my car lease out yesterday, it's gone, so I don't have any money coming out that's for anything other than property and rates and things like that –*
BEREJIKLIAN:	*Yeah.*
MAGUIRE:	*– which are all tax deductible.*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*So that's all I've got coming out you know, parking fees, things like that, insurances, so they're all –*
BEREJIKLIAN:	*That's all handy.*
MAGUIRE:	*What do you mean?*
BEREJIKLIAN:	***That's handy, that's good. It means you've, you've simplified everything as well.***
MAGUIRE:	*Tax effective.*
BEREJIKLIAN:	*Yeah.*
MAGUIRE:	*Mmm. So I've done that, but it depends how much money they're gonna give me. And I had $10,000 left over yesterday—*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*– so they put um, they put it off my primary mortgage –*
BEREJIKLIAN:	***Mmm, like offset it.***
MAGUIRE:	*– so my prim –*

BEREJIKLIAN:	*Yeah.*
MAGUIRE:	*Yeah, well the, the house one is now $689,000.*
BEREJIKLIAN:	***You'll – that's nothing, you'll fix that.***
MAGUIRE:	*No, that's the house.*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*The rest of it's 1.55 million.*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*Mmm, so anyway, so I needed to fix that. So anyway, I knocked it off that. And then depending how much they're gonna give me in a cheque,* ***I've got some cash in a tin so I'm –***
BEREJIKLIAN:	***Yeah, I know that.***
MAGUIRE:	*Mmm, well I, I'm, I'm gonna, well I need some for Kara's wedding. So I think what I'll do is if they give me a cheque for my tax I think it's better taken off my mortgage. I think what I'll do is I'll whack it into shares. I think -*
BEREJIKLIAN:	*You told me that before.*
At 22:04:49	
MAGUIRE:	*Yeah I'm getting a big tax return I'm told so I'm very happy about that.*
BEREJIKLIAN:	*Ohh well that's good you won't be you won't be you won't be saying you are poor then for maybe a week and then you'll start saying it again.*
MAGUIRE:	*No well I am poor I'm telling you 1.59 million poor.*
BEREJIKLIAN:	*Yeah.*
MAGUIRE:	*Just repeat after me 1.5 million.*
BEREJIKLIAN:	*I'm not going to say any such thing.*
MAGUIRE:	*Your... just repeat it.*
BEREJIKLIAN:	*Hmm.*
MAGUIRE:	***That's right. But I'm going to solve that problem now which I am working on hmm.***
	(Emphasis added)

13.78. It is apparent from this conversation that Ms Berejiklian was engaged with what Mr Maguire was telling her about his financial position, though perhaps a bit irritated by him harping on about it. She was certainly aware of the large amount he needed to clear his debts. She knew he was working on a solution to achieve this.

13.79. Four days later, on 5 September 2017 at 12.52 pm, Ms Berejiklian and Mr Maguire had a conversation in the following terms:

MAGUIRE:	*– and then I'll work on the farm in the next few days to get my projects up?*
BEREJIKLIAN:	*Mmm, mmm.*
MAGUIRE:	*I've got to get it making money.*
BEREJIKLIAN:	*Mmm.*
MAGUIRE:	*Anyway, you didn't ask me how much money I got back. (Laughs)*
BEREJIKLIAN:	*Because you'd swear at me.*
MAGUIRE:	*No I wouldn't swear at you. It's only when you want me to spend money that I swear.*
BEREJIKLIAN:	***No, you told me not to ask you anything so, about money so I won't ask you about anything***
MAGUIRE:	***No –***
BEREJIKLIAN:	***– about money.***
MAGUIRE:	***– money as in when, when – to do with other stuff.***
BEREJIKLIAN:	***Well I can't tell what I can and can't ask you so. (Sighs). I can't work out your head, what's okay and what's not to ask you so.***
MAGUIRE:	*True. Anyway, put it this way I won't starve for this year.*

(Emphasis added)

13.80. Counsel Assisting submitted that given the context of the couple's conversation on 1 September 2017, Mr Maguire's comment, "anyway, you didn't ask me how much money I got back", appeared to be a reference to his tax refund. Ms Berejiklian's comment, "you told me not to ask you anything … about money", indicated that she understood Mr Maguire to have told her, at some prior point, not to ask him about "money". Mr Maguire's response clarified that he had not meant money generally, but "money as in when – to do with other stuff". The use of a cryptic reference by Mr Maguire to "other stuff" suggested that he did not want to expressly state the "money" matters into which he did not want Ms Berejiklian to enquire. Ms Berejiklian responded by indicating some confusion about what she could or could not ask but seemed at least to appreciate that it was not the topic of money itself that was off limits, but rather that there were aspects of that topic that were and were not "okay".

13.81. Later, on 5 September 2017 at 8.30 pm, Mr Maguire told Ms Berejiklian "…and **it looks like we finally got the Badgerys Creek stuff done**, that's good, mmm [emphasis added]. I'll be glad when that's done 'cause I'll make enough money to pay off my debts (laughs), which would be good. Can you believe it, in one sale?", and she responded, "I can believe it."

13.82. Ms Berejiklian said she could not recall this conversation and could not confirm what her understanding of what Mr Maguire said had been. However, it is notable that she did not ask him what "got the Badgerys Creek stuff done" referred to and must have realised it was a deal which could earn him enough to clear the $1.59 million in debt he had told her about four days earlier. It is apparent from the fact he referred to achieving this "in one sale", that he was referring to earning some commission.

13.83. As is apparent, and not surprisingly, Ms Berejiklian's response to Mr Maguire telling her about his imminent largesse, is hardly that of a disinterested bystander. As Ms Berejiklian accepted at the First Public Inquiry, and reaffirmed at the Second Public Inquiry, she was aware that at least according to Mr Maguire, he thought that he may be able to get a "deal" done as at about September 2017, which would give him enough money to pay off his debts in the order of $1.5 million. It is apparent from this conversation that this was Ms Berejiklian's understanding as well.

13.84. However, Ms Berejiklian said that this information did not cause her to suspect that Mr Maguire may have been engaged in corrupt conduct as she did not "pay too much attention", "he was always talking big" and she "trusted him as a colleague and as a close personal friend". Ms Berejiklian also said she did not think she took too seriously that Mr Maguire would somehow be able to make the very large sum of $1.5 million as, in effect, a secondary employment job whilst being a member of Parliament.

13.85. A day later, on 6 September 2017 at 9.24 am, Mr Maguire informed Ms Berejiklian, "if we do this deal with um **if William gets this deal done at Badgerys Creek** then I won't have to worry about it, too much we'll be in front again" (emphasis added). At 4:43 pm that afternoon he texted her, "Plus I have money in bank as well so I am almost at target and still got 25 k for next election, **also good news we clinched the land deal** For my Friends 😝 I should be back in the Black soon".

13.86. The reference to Badgerys Creek in the 6 September 2017 conversation cannot have been lost on Ms Berejiklian. She regarded the Western Sydney Airport, to be located at Badgerys Creek, as a "big issue and a big deal" and "an issue that was always foremost in [her] thoughts", and had been since 2011. She agreed that in 2017, and when she gave her evidence at the First Public Inquiry, Badgerys Creek was a critical, and ongoing, economic development for the NSW Government.

13.87. Mr Maguire reiterated his success the next morning on 7 September 2017 at 9.44 am, in the following exchange:

MAGUIRE:	*That's true and the good news is William–William tells me we've done our deal so hopefully that's about half of all that gone now*
BEREJIKLIAN:	*That's good … **I don't need to know about that bit.***
MAGUIRE:	***No you don't.***
BEREJIKLIAN:	*Yep.*
MAGUIRE:	***You do not** so anyway it's all good news so we are moving ahead.*
BEREJIKLIAN:	*Okay good.*

(Emphasis added)

13.88. Counsel Assisting submitted that with the conversation from 5 September 2017 in mind, Ms Berejiklian's comment of 7 September 2017, "I don't need to know about that bit", should be taken as an appreciation on her part that this was an aspect of the topic of money that Mr Maguire did not want her asking about. Mr Maguire's response of "no you don't … you do not" then confirmed as much. They contended that Mr Maguire's desire not to be questioned about this topic could only have served to fuel suspicion on the part of Ms Berejiklian and that Ms Berejiklian's failure to make any enquiries of Mr Maguire and her description of the "deal" with William (Luong) and its consequences as a bit that she "d[id]n't need to know about" were properly seen as a wilful attempt by her to keep herself blind as to details of the "deal". Counsel Assisting submitted that this further suggested an actual suspicion of wrongdoing by Mr Maguire on Ms Berejiklian's part – if she did not suspect any possible wrongdoing by

Mr Maguire in connection with his deal with Mr Luong and the consequences of it, why was that a bit that she "d[id]n't need to know about"?

13.89. What is apparent from the 5 and 7 September conversations is that Mr Maguire was deliberately limiting the information he gave Ms Berejiklian, and she was conscious she should not ask about how he was hoping to earn money from his "deal" for reasons concerned with her state of knowledge.

13.90. In the Commission's view, Ms Berejiklian could have had no illusions that what Mr Maguire was talking about in this conversation was what he had told her about only 24 hours earlier – the "deal … at Badgerys Creek". However, when her attention was drawn to this conversation and the number of communications around September 2017, which seemed to be associated with land deals, Badgerys Creek, and matters of that kind at the First Public Inquiry, Ms Berejiklian said, "I have numerous conversations with people, get numerous messages, and I wouldn't have made any connection here". She would not accept that the fact of their close personal relationship, and that Mr Maguire had told her that a factor in deciding whether he was going to resign from parliament in 2019 was his financial position, were significant in terms of her recollection.

13.91. The Commission rejects Ms Berejiklian's evidence in this respect. It concludes, as Counsel Assisting put to Ms Berejiklian, that she was seeking to downplay this conversation. It does not accept that Ms Berejiklian did not appreciate the significance of what Mr Maguire was telling her about "the land deal". It had been apparent to Ms Berejiklian, since at least 1 August 2017, that Mr Maguire was "working on" deals to smooth his financial path to retirement and their future together. As time had progressed in the intervening months, he had become more specific both as to his debt levels and the amount of money he could pull off from the deal which would be sufficient to discharge the burdensome debt.

13.92. Ms Berejiklian was clearly engaged not only with the conversation on 7 September 2017 and sufficiently alert to its implications to tell Mr Maguire, "I don't need to know about that bit". She was also clearly engaged with the previous conversations in which Mr Maguire had addressed his retirement ambition, the level of his debt, his concern to be relieved of that debt burden prior to his retirement, the fact that he was looking to obtain about $1.59 million from the "Badgerys Creek stuff", which was going to reap him "enough money to pay off my debts", and the communications over 6 and 7 September 2017 in which he reported the imminent, and then actual, success of "the land deal".

13.93. Mr Maguire agreed that there was a time when he came to the view that he should not share information with Ms Berejiklian concerning his business dealings, perhaps generally or perhaps with property developers more specifically. He was concerned that if he shared a little bit more information than what he did with her, she might need to take action in the exercise of her public functions. He was particularly concerned about questions that might be raised as to the propriety of his involvement in the Badgerys Creek matter and sought to shield some of that information from Ms Berejiklian. Nevertheless, he shared some because to some extent, she was a sounding board or someone with whom he might discuss the kinds of things that he was involved in, at least in general terms.

13.94. Mr Maguire also understood that there were particular bits of information that Ms Berejiklian did not want to know about his activities. He was concerned about descending to specifics and communicating information that might put her in a conflict of interest position. He agreed with Counsel Assisting's proposition that an example of this was information in respect of Smartwest. Sydney because the NSW Government was making decisions almost constantly about how that project would be brought to fruition. Mr Maguire's ready reply, "No, you don't" to Ms Berejiklian's comment "I don't need to know that bit", appears to reflect his understanding about what she did not need to know.

13.95. Counsel Assisting submitted that a strongly available inference from Ms Berejiklian's comment "I don't need to know about that bit" on 7 September 2017 was that she consciously declined to make any enquiries of Mr Maguire out of an appreciation that he may have been engaged in corrupt conduct, and she was thus acting with wilful blindness. As noted by the High Court in *Pereira v Director of Public Prosecutions*:

> *…the fact remains that a combination of suspicious circumstances and failure to make inquiry may sustain an inference of knowledge of the actual or likely existence of the relevant matter.*[436]

13.96. Two other ways of putting this proposition, as Steward J observed in *Stubbings v Jams 2 Pty Ltd*, are:

> *When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring.*[437]

and

> *A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.*[438]

13.97. Ms Berejiklian rejected that suggestion during the First Public Inquiry, after being played the audio tape of the conversation set out above between herself and Mr Maguire on 7 September 2017 at 9.44 am:

[Counsel Assisting]:	*Weren't you trying to limit the amount of information you had regarding this proposed deal so as to avoid you having to do anything about it in the exercise of your public duties?*
[Ms Berejiklian]:	*Mr Robertson, can I make it very clear to you, please if at any time I felt there was wrongdoing on the part of Mr Maguire, if I felt at that time there was anything that I needed to report I would not have hesitated. However, this* [referring to the telephone intercept quoted above] *is so general and generic I would have assumed that if anything had transpired, and I would suspect at the time that I would have had vague assumptions that nothing may have transpired, that* [Mr Maguire] *would have disclosed them or already had disclosed interests, so there was nothing for me at that time to consider a concern, and if I did regard anything as a concern, I would have reported it or dealt with it and I want to make that very clear*
	…
[Q]:	*So you deny the proposition that I put to you? That's what I want you to confirm.*

[436] (1989) 63 ALJR 1 at 3; [1988] HCA 57 per the Court (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); cited with approval in *Stubbings v Jams 2 Pty Ltd* [2022] HCA 6; (2022) 96 ALJR 27 at [168] (*Stubbings*) per Steward J.

[437] *R v Crabbe* (1985) 156 CLR 464 at 470; [1985] HCA 22 per Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ, cited in *Stubbings* (at [165]).

[438] Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 159, cited in *Stubbings* (at [166]).

[A]: *I deny the proposition that I turned a blind eye, as I think what you're saying, yeah.*

13.98. Ms Berejiklian said she had no recollection of saying to Mr Maguire on 7 September 2017, "I don't need to know about that bit." However, she denied that she intimated to Mr Maguire that he should not give her details of deals that he was involved in because she was concerned that, if she was given those details, she might have to act. She said:

> *…my assumption would have been that's his business, he needs to disclose, and, and it was something that didn't concern me and I didn't need to know. And, Mr Robertson, with all due respect, holding the position I do, I'm extremely busy and I would not have wanted to be bored or be given information I didn't need, because my assumption was that he was doing everything properly.*

13.99. The 7 September conversation was put to Ms Berejiklian in conjunction with what she had been told on 6 September about, namely, that if Mr Luong got the deal done at Badgerys Creek, Mr Maguire would not have to worry about his financial position, with her knowledge of Mr Maguire's financial position and the fact that on 7 September she effectively asked Mr Maguire not to continue telling her about whatever this deal was.

13.100. She was then asked whether by this stage she was starting to be concerned that Mr Maguire would make a profit as a member of Parliament out of a large-scale investment in which the government was concerned. Her response was:

> *I wouldn't have expressed a concern or registered a concern at that stage, and again I don't have a specific recollection, was because he was always talking big about deals and they always seemed to fall through, so I didn't take it seriously. And I always assumed that if anything did materialise he was always – ask my colleagues – he was always big talking about deals, they always seemed to fall through. They always seemed quite fanciful to me, and I always assumed that if any of them did happen to materialise that he would have disclosed them at the appropriate time. But I did not have any reason to believe that all this pie in-the-sky fanciful stuff would actually come to fruition, because it wasn't just to me but to a lot of people he would often talk about these mega deals and whatever else, but they never seemed to come to fruition. So therefore it didn't spark my concern because it was, it was known amongst colleagues and others that he talked big, and whether or not it came to fruition is a matter for this body, but my understanding was he'd always talk about deals and they never seemed to eventuate. So it didn't prick my interest and I also genuinely would have believed that had he had anything materialise and had he owned land or had he done anything, that it was already either registered or would be disclosed at the appropriate time.*

13.101. Pressed again to explain why she had said "I don't need to know about that bit," Ms Berejiklian added to what she had already said, "I could have been busy or it could have been a fact that that was his interest." She denied that she was concerned that if she were given more information, it might fix her with knowledge she did not want to have. She responded:

> *…if there was anything of concern I would have reported it. If there was anything, if I thought there was any wrongdoing, I would have reported it. But to me, it just seemed like repeated fanciful speculation that may or may not have accounted to anything, and if it did, I would have expected that he would have either or he made or make the appropriate disclosures.*

13.102. Ms Berejiklian submitted that a critical piece of contextual evidence to the 7 September conversation was the exchange between Mr Maguire and herself less than 48 hours before, on 5 September 2017, which she contended put her statement "I don't need to know about

that bit" and Mr Maguire's response "No you don't … you do not" on 7 September in a new light. She suggested it was tolerably clear the 7 September exchange implicitly referred to her acknowledgement in the 5 September exchange that Mr Maguire had "told [her] not to ask [him] anything … about money so [she] won't ask [him] about anything". The Commission accepts that submission as far as it goes.

13.103. In the Commission's view, however, it is apparent that by 7 September 2017, Ms Berejiklian had herself formed the view that she was getting close to the position where she may have to do something about Mr Maguire's activities. The 6 and 7 September conversations made it clear Mr Maguire was expecting to earn a large amount of money which would pay off his debts in connection with a deal at Badgerys Creek. This was in the context that she regarded the Western Sydney Airport as a "big issue and a big deal" and "an issue that was always foremost in [her] thoughts".

13.104. Ms Berejiklian's basic proposition in relation to the Badgerys Creek matter was that the evidence and inferences arising did not support a finding that she suspected on reasonable grounds that matter concerned, or may concern, corrupt conduct on his part.

13.105. Ms Berejiklian submitted that viewed properly and in context, the Commission would not conclude that the early September 2017 conversations between Ms Berejiklian and Mr Maguire regarding his hope to complete a land deal at Badgerys Creek that would pay off his debts (singularly or collectively) gave rise to reasonable grounds for suspicion, or that Ms Berejiklian in fact suspected that Mr Maguire was involved in corrupt conduct. She submitted that in this respect, the Commission would have regard to her evidence that that Mr Maguire was "always talking big" about such "pie-in-the-sky" ambitions, that Mr Maguire was "someone I trusted and I also believe he was someone my colleagues trusted", that "literally [she] had no understanding of the context" and she did not know whether she would have been paying attention to the detail of what Mr Maguire was saying.

13.106. Ms Berejiklian submitted that Counsel Assistings' description of this evidence as a "laundry list of (not entirely consistent) possible justifications" was unfair. She accepted she had no independent recollection of the conversations, but was being asked to explain, or speculate. She submitted that there was no inconsistency in what she pointed to and that it was to be accepted that she did not understand the context of what he was saying.

13.107. The Commission rejects this submission. Ms Berejiklian was not asked to speculate. She was being asked to explain a series of conversations from which she could have been in no doubt that Mr Maguire was attempting to pull off a deal in connection with Badgerys Creek which would lead to him earning a very lucrative commission – enough to pay off his debts of $1.5–1.59 million.

13.108. Ms Berejiklian's submission that viewed in the context of the 5 September conversation, her statement to Mr Maguire, "I don't need to know that bit" was because he had just told her that he did not want her to ask him any questions about money, is also rejected. That was not what Ms Berejiklian said to Mr Maguire on 7 September 2017. She told him "I don't need to know about that bit" in response to his statement "William tells me we've done our deal so hopefully that's about half of all that gone now." The previous day he had clearly connected William to the Badgerys Creek deal. By this stage, in the Commission's view, Ms Berejiklian had clearly connected the dots that Mr Maguire's imminent "wealth" was connected with the Badgerys Creek development and that was a major piece of NSW infrastructure which was "always foremost in [her] mind".

13.109. Even if Ms Berejiklian did not suspect Mr Maguire at that stage of being engaged in corrupt conduct, at the very least she must have realised she was exposed to the risk of a conflict of interest in participating in decisions concerning the Badgerys Creek development if Mr Maguire were looking to benefit financially in some manner from a land deal in its vicinity.

13.110. It was certainly a risk that had occurred to Mr Maguire.

13.111. The Commission rejects Ms Berejiklian's evidence that she did not attach significance to Mr Maguire's boasting about the "land deal" at Badgerys Creek and the fact that his likely remuneration of about $1.59 million could clear his debt position. The Commission concluded that Ms Berejiklian appreciated the significance of Mr Maguire earning that amount could raise difficulties if shared with her, leading to her telling him on 7 September 2017, "I don't need to know about that bit."

13.112. In the context of the present inquiry, namely whether Ms Berejiklian actually suspected on reasonable grounds that Mr Maguire's activities in relation to the "deal" at Badgerys Creek and his likely remuneration concerned, or may concern, corrupt conduct, the Commission rejects Ms Berejiklian's denial that she turned a blind eye to the significance of what he was telling her. It also rejects her evidence that Mr Maguire's business did not concern her, and she did not need to know it, or that she "would not have wanted to be bored or be given information I didn't need". It is contrary to the contemporaneous conversations, and contrary to compelling inference.

13.113. Ms Berejiklian's submission to the effect that she treated Mr Maguire's statements as "pie-in-the-sky", trusted Mr Maguire, did not understand the context and was not paying attention to the detail is belied by the actual conversations. It is apparent that Ms Berejiklian was listening to what Mr Maguire was telling her, responding appropriately, and believed him when he said he could earn enough money to pay off his debts in "one sale". She was sufficiently concerned about the implications of his activities to tell him on 7 September 2017 that she did not "need to know this bit" when he was recounting the fact that his "deal" was done.

13.114. Ms Berejiklian's submission is also inconsistent with the background to the September conversations. Since early August 2017, the couple had been discussing Mr Maguire's possible retirement, his concern to improve his financial position prior to that event and her expressed hope that they would be able to make their relationship public. Even though Ms Berejiklian had expressly told him he did not need to improve his financial position for her sake, it was clear she shared his concern that he wanted to improve it, if only for his sake. However, it is apparent from the 5 and 7 September conversations that by then she had become concerned about the nature of his activities in relation to Badgerys Creek.

13.115. Counsel Assisting submitted that the idea that a member of Parliament might stand to make a very substantial sum of money – perhaps up to $1.5 million – in connection with a "land deal" in the Badgerys Creek area was of itself a reasonable basis upon which to suspect that the member of Parliament may have misused, or may have proposed to misuse, his or her office and therefore have engaged or proposed to engage in corrupt conduct. They posed what they contended was the obvious question as to how the member of Parliament could be capable of earning such a significant commission in an area that involved considerable government decision-making surrounding land use absent some misuse of the member of Parliament's office? They contended that Ms Berejiklian did not offer a satisfactory response to that question.

13.116. Ms Berejiklian's evidence in this respect was tested in a long exchange:

[Counsel Assisting]: *Now, Ms Berejiklian I think you accepted in the last public inquiry that, as you understood it, at least according to Mr Maguire, he thought that he may be able to get a deal done as at about September of 2017, which would give him enough money to pay off his debts of $1.5 million. Do you recall giving evidence to that effect?*

[Ms Berejiklian]: *Yeah, I stand by everything I said at the last public hearing.*

[Q]: *That information coming to your attention as at about the middle of September 2017, did you suspect that Mr Maguire was or may have been engaged in correct* [sic – should be "corrupt"] *conduct?*

[A]: *I did not.*

[Q]: *Well, how did you think a member of parliament was capable of earning a commission something in the vicinity of $1.5 million in relation to a land deal?*

[A]: ***I did not pay too much attention to that because he was always talking big and I didn't pay too much attention to that, but I trusted him as a colleague and as a close personal friend and I, I never, I never thought that he was doing anything untoward.***

[Q]: *But you said in that telephone intercept that you can believe it, you can believe the proposition that $1.5 million might be able to be earned by way of a commission. Why did you believe that $1.5 million might be able to be earned by Mr Maguire?*

[A]: ***I have no recollection of what I thought at the, or what I, what I, what the context was of that telephone conversation. But the general, my general response, Mr Robertson, is I never suspected that he was doing anything untoward.*** *I also assumed he was previously the whip and was very well aware of his disclosure requirements. I assumed that any interests he had which were of a private nature would have been appropriately disclosed, and at that stage I had no reason to consider that he was doing anything untoward.*

[Q]: *Well, let's put aside the disclosure requirements for a moment. Did it at least strike you as strange that a member of parliament would somehow be able to make the very large sum of $1.5 million as, in effect, a secondary employment job whilst being a member of parliament?*

[A]: ***I don't think I took it too seriously.***

[Q]: *Did it not at least cross your mind Mr Maguire must be getting something for his $1.5 million? It must be something more than simply introducing someone to a particular site. It's not $10,000 as a finder's fee or $50,000. It's $1.5 million, at least according to Mr Maguire. You might not have known whether or not Mr Maguire was engaged in inappropriate or corrupt conduct but you must have at least suspected that having regard to that information, didn't you?*

[A]: ***No. I don't think I would have paid it any attention. I don't even know if I listened properly.***

[Q]: *Well, as at September of 2017 and perhaps even to the present day, the questions as to the way in which land around Badgerys Creek is a matter of political controversy or at least a matter of community debate?—*

[A]: ***– I've not paid, well, I've not paid too much attention to what you're referring to specifically.***

[Q]: *What I'm suggesting to you is that, at least in the vicinity of Badgerys Creek, questions about things like where roads might be built or what zoning might take place are matters which, to your knowledge as a minister, are matters that could affect things like the commercial value of land. Correct?*

[A]: ***Well, I wasn't across any detail of that.***

[Q]: *You might not have been across the detail but you at least knew enough to know that that was a matter of at least significant community debate and, in fact, at least to some extent continues to be?*

[A]: *I wouldn't have said, I wouldn't have said known enough about it but, no doubt, some people didn't want the airport, so that was certainly controversial.* ***But I wouldn't have paid too much attention to detail that I didn't need to pay attention to.***

[Q]: *But I'm trying to understand why would you believe, because that's your words, he says, "Can you believe it in one sale?" And you say something like, "Yeah, I believe it," or, "I believe it," or something along those lines. Why did you believe that Mr Maguire might make $1.5 million off a land sale?*

[A]: ***I can't confirm that I was even paying attention or listening properly to that conversation.***

[Q]: *But the answer, as I showed you, it wasn't just a "mmm" or, you know "whatever, whatever, I've got to go" it was something, like, "I can believe it," or "Can believe it," or, "I believe it," something along those lines.*

[A]: *I may have just been polite.*

[Q]: *By saying, "I believe it"?*

[A]: ***Well, I wouldn't take my words literally. It was literally I had no understanding of the context****, I doubt I would have paid much attention to it and I certainly wouldn't have taken it seriously.*

[Q]: *So are you saying it didn't even cross your mind that it was strange that a sitting member of parliament was suggesting to you that he might be able to make something like $1.5 million in relation to a property deal?*

[A]: ***I would have disregarded it, dismissed it or not taken it seriously or not thought about it, to be honest.*** *If I was*

very busy, I would have just been obliging and, and let the conversation continue, but I, I wouldn't have taken it seriously or at least assumed that anything untoward was happening. He was someone I trusted and I also believe he was someone my colleagues trusted.

[Q]: *Does that mean the answer to my question is no? It didn't cross your mind that it was strange or unusual or unexpected that a sitting member of parliament expected or thought or was suggesting that they could make some $1.5 million in relation to a property deal?*

[A]: *Well, he was always talking about pie-in-the-sky things, so I don't think I would have given it any degree of importance or relevance.*

[Q]: *Does that mean the answer to my question is no or is it some other answer?*

[A]: *I'm sorry, can you repeat the question, please?*

[Q]: *It didn't even cross your mind, is this right, it didn't even cross your mind that it might be strange or unusual or unexpected that a then sitting member of parliament was saying to you that "I'm expecting to make some $1.5 million in relation to a single property deal"?*

[A]: ***It wouldn't have crossed my mind that it would materialise. I would have assumed it's pie in the sky, and I wouldn't have given it any other thought.***

[Q]: *I'm sorry, I still don't understand your answer. Is the answer to my question no, it didn't cross your mind that it was somehow unusual or strange that a sitting member of parliament would think that they could earn $1.5 million in relation to a land deal in or around Badgerys Creek?*

[A]: ***Well, wouldn't have thought that – I can't remember what I was thinking when we had that conversation.*** *But I, if you're asking me whether I suspected he was capable of doing anything untoward, my answer to that is no, I did not, I did not have that understanding or appreciation.*

[Q]: *I'm asking you whether it stood out to you as strange or unusual or unexpected that a sitting member of parliament thought, at least according to him, that he could make something like $1.5 million out of a property deal in relation to land.*

[A]: *I just can't recall what I thought at the time. I did, I would have dismissed it. It would, it wouldn't have been something that I would have given a second, second notice to.* ***But obviously any financial gain outside of one's role as a member of parliament would have required all those processes of disclosure and, and making sure it was dealt with appropriately by the relevant member.***

[Q]: *So does that mean it's something that you may have found strange at the time, you just don't recall one way or another, sitting there now?*

[A]:	***Yeah, I just don't, I just don't have a recollection.***
[Q]:	*But it was at least not regarded as sufficiently strange that you decided to make any notification to this Commission or to an agency responsible to you, is that right?*
[A]:	*That's correct.*
	(Emphasis added)

13.117. Ms Berejiklian submitted that the Commission should not accept Counsel Assistings' submission. She argued that Mr Maguire was not a member of Cabinet, and his electorate was not near Badgerys Creek, and there was no evidence that at the time of this dealing, Ms Berejiklian had any reason to suspect that Mr Maguire was involved in official decision-making around Badgerys Creek through his public office. In circumstances where, as a parliamentary secretary, he was entitled to pursue property development deals and earn commissions (including "substantial" amounts, for example, $1.5 million), and he was well aware of his disclosure obligations, Ms Berejiklian argued there was no proper basis to conclude that the mere fact of a substantial commission ought to, or did, give rise to suspicion on reasonable grounds on her part that he was involved in corrupt conduct.

13.118. These conversations involving Mr Maguire's likely lucrative land deal at Badgerys Creek took place in the context of the intense government activity in that area. Ms Berejiklian's responses that she had not paid too much attention specifically to, or was not across any detail of, questions about things like where roads might be built or what zoning might take place at Badgerys Creek so as to appreciate they were matters which could affect things like the commercial value of land, does not sit easily with her self-professed reputation for being a stickler for going through the processes and for making sure everything is done by the book; or with what was happening at Badgerys Creek having been foremost in her thoughts for years. Ms Berejiklian impressed as a shrewd politician concerned to be across the detail at all times. The obfuscatory responses she gave to Counsel Assisting's questions about Mr Maguire's activities were inconsistent with her obviously paying attention to what he was telling her in 2017, and stopping him when she appeared to realise he could not have been earning the large amounts of which he spoke about without having engaged in some form of misuse of his position as a member of Parliament.

13.119. The Commission rejects Ms Berejiklian's submission. It is apparent from Ms Berejiklian's response to Counsel Assisting's question that, as they submitted, Ms Berejiklian did not give a satisfactory response to the question of how a member of Parliament could earn such a significant commission in an area that involved considerable government decision-making surrounding land use, particularly from a "land deal", absent some misuse of the member of Parliament's office. Ms Berejiklian's assertion that Mr Maguire was well aware of his disclosure requirements rings hollow in light of Ms Berejiklian saying she never looked at the disclosures he was required to provide to the premier.[439] Ms Berejiklian's retrospective assumption, that she thought what he was saying was "pie-in-the-sky", also rings hollow in the light of her telling him that she could believe that he could make so much money in relation to "one sale" connected to Badgerys Creek. It is apparent that by 7 September 2017, Ms Berejiklian thought better of being fixed with any more knowledge of the "deal" because, contrary to her assertion, she did suspect he was capable of doing something untoward.

[439] NSW Ministerial Code of Conduct, Part 2 (Standing disclosures of interests), clause 6 and clause 7.

13.120. The Commission finds that as at September 2017, Ms Berejiklian suspected on the basis of the information Mr Maguire had given her concerning his likely remuneration from the land deal at Badgerys Creek that Mr Maguire's activities concerned, or may concern, corrupt conduct. It also finds that Ms Berejiklian realised this was probable (that is to say, infers from her refusal to enquire that she knew this, or knew it was likely), but refrained from obtaining the final confirmation because she wanted in the event to be able to deny knowledge.[440] By the time of the 7 September 2017 conversation, Mr Maguire had regaled Ms Berejiklian almost every day since 1 September with details of his financial situation, and the steps he was taking to address his debt of $1.5–$1.59 million. These conversations all took place against the background of their discussions on 1 August 2017 of his plans to retire, that once he did they would be able to go places together and that, to that end, he was working to "pull these deals off which I am working on", and that his "deal" involved land at Badgerys Creek, the area of a major government infrastructure development.

Ms Waterhouse comes into the picture

13.121. If there was any doubt in Ms Berejiklian's mind about the characterisation of Mr Maguire's conduct in relation to the Badgerys Creek land deal at this stage, it would have been dispelled by what happened about six weeks later. On 18 October 2017, Mr Maguire told Ms Berejiklian that he had taken Ms Waterhouse up to Ms Berejiklian's office and asked her staff to help solve Ms Waterhouse's "big problem" (see chapter 8).

13.122. Mr Maguire told Ms Berejiklian that Ms Waterhouse had "a lot of property out at Badgerys Creek" and that her problem related to "the Planning Department and RMS", which were telling Ms Waterhouse they did not "want to plan that now, we're too busy worrying about you know, the new housing and all this around Badgerys Creek", whereas Ms Waterhouse was saying, "I need a road, I need an access, give me an access. I'll develop it myself … and they're resisting." He said that Ms Waterhouse had been trying to resolve the issue for two years and that he had "got Roads, I got Jock to come down and I got um, one bloke from your place there, got them to put their heads together and said look, why can't you fix this".

13.123. Counsel Assisting submitted that in this conversation, Mr Maguire conveyed to Ms Berejiklian that he was using his office to engage with government departments in order to "fix" Ms Waterhouse's problems in an electorate entirely remote from his own, but in respect to which he had recently claimed that he stood to make substantial profits in connection with a "land deal".

13.124. Counsel Assisting also observed that this conversation suggested that Mr Maguire had not previously told Ms Berejiklian that the Badgerys Creek deal he had mentioned in early September 2017 involved land belonging to Ms Waterhouse. However, they submitted she could have been in no doubt after this conversation that Mr Maguire's boasting in September 2017 about the "deal" at Badgerys Creek, and his likely remuneration of $1.5–$1.59 million which could clear his debt position, concerned Ms Waterhouse's land. Nor could she have been in any doubt that Mr Maguire was using his position as a parliamentarian to assist Ms Waterhouse with a view to enhancing the prospect of him receiving his remuneration.

13.125. Counsel Assisting also submitted that Ms Berejiklian may or may not have "joined the dots" between the events in September and those in October (which were about six weeks apart), but contended that, regardless, these events must have raised in Ms Berejiklian's mind the question: why is this member of Parliament who doesn't represent Badgerys Creek so interested

[440] Glanville Williams, *Criminal Law: The General Part*, 2nd ed (1961) at 159, cited in *Stubbing* (at [166]).

in Badgerys Creek? They also submitted that in this conversation Mr Maguire conveyed to Ms Berejiklian that he was using his office to engage with government departments in order to "fix" Ms Waterhouse's problems in an electorate entirely remote from his own, but in which he had recently claimed that he stood to make substantial profits in connection with a "land deal".

13.126. The Commission accepts these submissions. Ms Berejiklian was clearly attuned to the sensitivity of Mr Maguire engaging in activities beyond his electorate. On 30 August 2017, she had been talking to him about the events discussed in chapter 9 concerning his representations on behalf of UWE and her staff's concern that he might "go off his brain in China", and she had told him "they seem to think it's in your electorate, I didn't say anything". And, as shall become apparent, her concern about the implications of such extra-electorate activity is manifest in a conversation she had with Mr Maguire on 5 July 2018, shortly before his appearance before the Commission on 13 July 2018.

13.127. Ms Berejiklian initially denied at the Second Public Inquiry that, prior to 13 July 2018, she was aware that Mr Maguire had attempted to assist Ms Waterhouse by having the proposed location of a road changed. Having been shown the transcript of the 18 October 2017 telephone intercept, Ms Berejiklian accepted that she knew that Mr Maguire had been lending such assistance to Ms Waterhouse.

13.128. Ms Berejiklian was also aware that Mr Maguire's assistance to Ms Waterhouse continued. On 15 November 2017 at about 11 am, he asked her if she had received an email from Ms Waterhouse, and when she said she had not, assured her that she would. He explained that Ms Waterhouse was "really pissed off … about the you know, the, the airport" and blamed "these bureaucrats passing the buck". He told her it was the "Same out at um, Camellia too". The latter was a reference to the representations Mr Maguire made on Mr Demian's behalf discussed earlier in this chapter, and in chapter 8.

13.129. In this telephone conversation, Mr Maguire made clear to Ms Berejiklian that he was involved in some fashion with two property developers. He referred by name to Ms Waterhouse and her issue involving "the airport" with which the Federal Government was involved. Only a month or so earlier, on 18 October 2017, Mr Maguire had told Ms Berejiklian that he had taken Ms Waterhouse "up to [her] office" and explained that Ms Waterhouse had "a lot of property out at Badgerys Creek". And a month or so before that, on 1 and 5 September 2017, he had told her his debts were about $1.59 million and that "it looks like we finally got the Badgerys Creek stuff done", which was going to reap him "enough money to pay off my debts".

13.130. The second matter Mr Maguire raised in the 15 November 2017 conversation related to Mr Demian's development site at Camellia which, as discussed above, had also encountered issues with the RMS. About a year earlier, on 25 November 2016, Mr Maguire had forwarded to Ms Berejiklian an email chain concerning steps he was taking to assist Mr Demian. The subject line of the email chain was "181 James Ruse Drive, Camellia". Again, having regard to the context, it must have been apparent to Ms Berejiklian that Mr Maguire was attempting to do a remunerative deal by assisting a property developer at Camellia.

13.131. On the evening of 15 November 2017, Ms Waterhouse sent an email to Ms Berejiklian as Mr Maguire had foreshadowed in his conversation with Ms Berejiklian earlier that day. Attached to Ms Waterhouse's email was a letter "about an urgent need to future-proof important infrastructure in Sydney's West–which greatly concerns me and I believe will concern you too". It was clear from the letter that Ms Waterhouse had been present recently at a presentation Ms Berejiklian had given at the Sydney Institute, where Ms Waterhouse had drawn attention to the NSW Government's "extraordinary investment in infrastructure for Sydney's West",

and "also aired my concern that with the pressure of deadlines there is risk of not future-proofing this 'once in a generation' investment". Ms Waterhouse developed her concerns in the letter she sent Ms Berejiklian, including referring to the road access issue Mr Maguire had mentioned to Ms Berejiklian on 18 October 2017.

13.132. The same evening, Mr Maguire brought Joe Alha to see Ms Berejiklian in her Parliament House office. Ms Berejiklian knew him to be a friend of Mr Maguire and involved in property development.

13.133. As set out in chapter 8, Mr Maguire again informed Ms Berejiklian of assistance he was providing to Ms Waterhouse in a conversation on 4 December 2017. She could have been in no doubt he was continuing to assist Ms Waterhouse. On this occasion, he told her of problems Ms Waterhouse was experiencing with the "Sydney Planning Commission" [sic – referring to the Greater Sydney Commission] and that he had "met her and introduced her to people".

13.134. Ms Berejiklian submitted that to connect Mr Maguire's assistance to Ms Waterhouse and his bringing Mr Alha (a property developer) to meet Ms Berejiklian on 15 November 2017 was without foundation. She contended there was no evidence that those activities were connected, let alone that Ms Berejiklian thought them to be connected, or suggestive of corruption.

13.135. The Commission rejects that submission. There is a wealth of evidence as discussed in chapter 8 that Mr Maguire's attempts to earn the amount that would clear his debts in "one sale" related to Ms Waterhouse's Smartwest.Sydney development at Badgerys Creek. Ms Berejiklian accepted that she knew that Mr Maguire had been attempting to assist Ms Waterhouse by having the proposed location of a road changed. That knowledge was sourced to his three communications with Ms Berejiklian in late 2017 telling her about the various public officials he was attempting to persuade to assist Ms Waterhouse, and about the personal communication Ms Berejiklian could expect to receive from Ms Waterhouse. There could be no doubt, in the Commission's view, that when Mr Maguire told Ms Berejiklian on at least three occasions towards the end of 2017 of the efforts he was making to resolve Ms Waterhouse's issues in relation to the access to the Smartwest.Sydney land, that she must have realised this was connected to his "land deal" at Badgerys Creek, and that he was using his position as a member of Parliament to assist him.

13.136. The Commission concludes that after:

13.136.1. the series of conversations between Mr Maguire and Ms Berejiklian commencing on 1 August 2017 with him saying to her that he would not "have any money unless I can pull these deals off which I am working on"

13.136.2. the September conversations reporting apparently successful progress with a land deal being done in connection with Badgerys Creek which would procure him enough money to pay off his debts of $1.59 million

13.136.3. the October – December 2017 conversations about Mr Maguire assisting Ms Waterhouse in Parliament House and advising her Ms Waterhouse was going to write to her in relation to the airport

Ms Berejiklian could have been in no doubt that Mr Maguire was hoping to make a substantial commission by helping Ms Waterhouse to resolve her issues in connection with her land near the planned airport at Badgerys Creek and was doing so by making representations acting in his role as a member of Parliament on Ms Waterhouse's behalf, including by giving Ms Waterhouse direct contact with Ms Berejiklian.

Summary

13.137. Counsel Assisting summarised the events of which Mr Maguire had informed Ms Berejiklian prior to 5 July 2018 as follows:

13.137.1. he had made a $5,000 commission in connection with the sale of a property in February 2014 (in a telephone conversation)

13.137.2. he was "taking up" a matter with a government department in November 2016 that had no apparent relation to his electorate and that he was doing so on the direct request of Mr Demian in association with a "major project with a potential gross realisation of $2.5 Billion" (in an email)

13.137.3. he "[wouldn't] have any money unless [he] could pull these deals off which [he was] working on" in August 2017 (in a telephone conversation)

13.137.4. he was intending to fly to China in September 2017 and use his office as a member of Parliament in order to "fix" a problem for UWE that the relevant minister thought was inappropriate to raise and was concerned about "Jimmy" (across a series of telephone conversations)

13.137.5. he stood to make a substantial sum of money in connection with a property transaction in the vicinity of Badgerys Creek in September 2017 – possibly up to $1.5 million (across a series of telephone conversations)

13.137.6. he had "clinched the land deal" for his friends and "should be back in the black soon" in September 2017 (in a text message)

13.137.7. he was providing assistance to Ms Waterhouse in her dealings with the RMS in connection with her land at Badgerys Creek in October 2017 (in a telephone conversation).

13.138. Counsel Assisting submitted that some care needed to be taken in considering what Ms Berejiklian was told over time and what she may have inferred from the conversations in isolation. Nonetheless, they contended that the combined circumstances outlined above were such that there were good grounds for concluding that, by at least September 2017, Ms Berejiklian reached a state of actual suspicion that Mr Maguire may have been misusing his public office to advance the private interests of himself and/or others and thus may have been engaged in corrupt conduct.

13.139. The Commission accepts that submission, albeit not insofar as Counsel Assisting relied on the matter concerning UWE which the Commission has already held would not have caused Ms Berejiklian to have a belief that enlivened her s 11 duty.

13.140. The Commission finds that Ms Berejiklian's s 11 duty was enlivened by at least September 2017, because she was aware Mr Maguire was making representations on behalf of property developers in his capacity as a member of Parliament, that he stood to earn a substantial amount of money in connection with the Badgerys Creek land deal and that he would not have been able to earn those sums if he had not been misusing his position as a member of Parliament. On this basis, she had reasonable grounds to suspect that Mr Maguire's activities concerned, or may have concerned, corrupt conduct on his part which she had a duty to report to the Commission. She did not do so.

Events between 5 July 2018 and Mr Maguire's evidence at Operation Dasha

Introduction

13.141. The circumstances which led to Mr Maguire's resignation from Parliament in 2018, following him giving evidence at the Commission in the Operation Dasha public inquiry, have been set out in chapter 2 ("How the investigation came about") and chapter 8 ("Operation Dasha – Operation Keppel"). There is a back story which is relevant to the issue concerning Ms Berejiklian's compliance with her s 11 duty. By the time of the conversation referred to below, the public inquiry in Operation Dasha had been running, albeit not continuously, but for at least two two–week blocks since 16 April 2018.

13.142. In short order, on 5 July 2018, Ms Berejiklian and Mr Maguire had a conversation about him having received a summons to appear as a witness at the Operation Dasha public inquiry on 13 July 2018. As a result of the evidence he gave on 13 July 2018, it was apparent to Ms Berejiklian that Mr Maguire "had been caught up with some people who … likely had … done some wrongdoing". Ms Berejiklian called on him to resign and issued a public statement saying in part that he had let down his constituents, the people of NSW and the NSW Liberal Party.

13.143. Ms Cruickshank initiated a system in relation to s 11 of the ICAC Act ("Duty to notify Commission of possible corrupt conduct") which would enable members of staff for whom they were responsible to come forward and advise of any concerns they held regarding Mr Maguire or his conduct "to make sure that everybody knows that if they have things to report [to the Commission] that they should". At least one such report that such a notification was to be made came to Ms Berejiklian's attention in July 2018. She said she would have assumed it related to Mr Maguire because it related to Operation Dasha.

13.144. Ms Berejiklian said that she understood when she was a minister that she had a duty to notify the Commission or a head of an agency responsible to her of any matter that she suspected on reasonable grounds concerned, or may concern, corrupt conduct. She understood that to include a duty to report any suspicion that she held on reasonable grounds that a member of Parliament was misusing his or her office for their own benefit or for the benefit of persons close to them.

13.145. Ms Berejiklian did not make any such report to the Commission in relation to any of Mr Maguire's activities.

13.146. Counsel Assisting submitted that the Commission should find both as at September 2017 and July 2018, that Ms Berejiklian had reached a state of actual suspicion that Mr Maguire may have been engaged in corrupt conduct such as to enliven her s 11 duty to report such matters to the Commission, and that her failure to do so constituted the dishonest and/or partial exercise of her official functions by refusing to discharge her duty under s 11 of the ICAC Act to notify this Commission of possible corrupt conduct (s 8(1)(b), ICAC Act) and constituted or involved a substantial breach of the ministerial code (s 9(1)(d), ICAC Act).

"Summonsed to ICAC, so that's exciting"

BEREJIKLIAN: Don't, don't talk … I don't I don't want to know any of that stuff

5 July 2018 conversation between Mr Maguire and Ms Berejiklian

13.147. On 5 July 2018, Ms Berejiklian rang Mr Maguire at about 7 pm. During the 52-minute conversation, he told her he had "been subpoenaed to go to ICAC, summonsed to ICAC, so that's exciting". She was clearly shocked and asked, "what for?", to which he replied, "because I introduced that idiot Hawatt to um, Country Garden". The conversation included the following (emphasis added):

13.147.1. After Mr Maguire told Ms Berejiklian he had been to see a lawyer, she asked, "Is there anything to, is there anything to worry about?". He replied, "No … you know I've never, I've never accepted a dollar [to which she responded: "Yeah"]–never done a deal um, you know." Ms Berejiklian then asked, "So why, so why are you being subpoenaed?"

13.147.2. When Mr Maguire started saying, "I think Hawatt was to benefit from the skulduggery he [Hawatt] was getting up to … with that Council", Ms Berejiklian intervened to say "**Don't, don't talk, I don't … I don't want to know any of that stuff**", but Mr Maguire added, "But nobody knew, mmm, nobody knew".

13.147.3. Mr Maguire said, "**So anyway they never asked me to do anything um with the, the Parliament whatever, which I wouldn't** … so I was never asked to do anything there um, **I merely made some introductions, but now even making introductions is a problem, um, you know.**"

13.147.4. Ms Berejiklian asked, "**Did the lawyer say there was anything to worry about**?" to which Mr Maguire replied, "**No well they've got a whole heap of texts and things and um, you know they, they drag up everything of course … so anyway um, I dug up what I could find. But none of it relates to the addresses they're talking about**, and all these people I don't know them, you know." Ms Berejiklian asked, "What address, what addresses are you talking about?", and also "What do you mean, in the council area?" and appeared reassured when Mr Maguire said, "Yeah, yeah, yeah", she said, "Oh right, right."

13.147.5. Mr Maguire then told Ms Berejiklian, "There's a whole heap of addresses where they must've been playing funny buggers um, and **they sent to me a whole list which I referred to Country Garden, said here, you know**, um and ah, then I introduced them to ah Johnson so – and Johnson got sacked then." When Ms Berejiklian asked, he explained that Johnson was "the boss of Country Garden". Mr Maguire went on to tell her, "then Tim came along … he's he was the um, you know, property acquisition … he was in charge of all that, so I introduced him to, to him. But they never bought anything, you know nothing went nowhere … so I don't actually know even what happened to the properties. But you know what it was like in 2014, '15, '16. My god, it was just crazy."

13.147.6. Mr Maguire indicated that he had assisted one of Mr Hawatt's associates who had a "problem with roadworks": Mr Maguire said he "made representations and ah, the Department, you know, met with him and did whatever". He further indicated that he had assisted with "a planning issue that [Mr Hawatt's associate] was having trouble with. And I think I introduced him to Jeff Lee as well. Said look you know '**This guy's got property in your area, can you look after him'** – that was the end of that."[441]

13.147.7. Ms Berejiklian asked, "**But why, why did you feel you needed to do that for Country Garden? Like why – the lawyer will say why did you**…", to which Mr Maguire replied, "Oh Tim and I are great mates. Tim and I have developed a great friendship … You, you know I've talked about Tim…" and Ms Berejiklian said, "I don't think I, I know who he, who…".

13.147.8. Ms Berejiklian told Mr Maguire, "just make sure you answer everything as, as directly and honestly. Anyway, take the lawyer's advice…" to which he replied, "Well that's all you can do. I mean you know she said, 'Oh have you ever accepted anything?' No I haven't … I've got no deals with anybody. I've never accepted a dollar and, and if I had a deal with someone I would want a bloody solicitor to sign it, you know."

13.147.9. Ms Berejiklian asked, "So in other words, in other words is, is the nub of the story that you're, you're mates with Tim, he wanted an introduction, you made a few introductions but got nothing in return. Is that the nub of it?" and Mr Maguire replied, "Absolutely, positively."

13.147.10. When Mr Maguire ridiculed the fact of him being summonsed, Ms Berejiklian said, "Yeah but why are they making a, **like they're obviously trying to establish something**."

13.147.11. Mr Maguire then explained in some detail, "I think what they're trying to establish is Hawatt stand, stood to profit because … because he was pressuring or apparently blackmailing the general manager [of the council]. I haven't read all about that, but apparently there was this big row going on … about development approvals and some of them must've been the ones that referred to Country Garden. The, the, the prerequisite was they had to be DA approved or Country Garden wouldn't look at them and that's what was asked for, DA approved. And some of them came through that weren't approval, were in the process, blah, blah, blah, right. So –".

13.147.12. At this stage, Ms Berejiklian interrupted Mr Maguire and said, "**Yeah but if I was, but if I was, if I was um new to all of this I'd say well what's it to you, why do you care**...". Mr Maguire's response was that he and Tim "started to hit it off. We were great friends." Ms Berejiklian appeared underwhelmed, first responding, "Mmm", then re-framing Mr Maguire's explanation to say, "**Right okay. Well that's, that's understandable then if you say that you and Tim were friends and you were helping out a mate**."

13.147.13. Mr Maguire professed, "I never accepted a dollar, I never asked for a dollar um, you know, nothing happened that I know of. Um, it certainly didn't involve me and it cert, they certainly didn't ask me to do anything that I consider even slightly wrong. You know me, I wouldn't do that," to which Ms Berejiklian acquiesced, saying, "Yeah I know".

[441] At that time (and since 2011) Geoff Lee was the member for Parramatta and was also the parliamentary secretary to the premier, western Sydney and multiculturalism.

13.147.14. Mr Maguire told Ms Berejiklian that he was appearing after "Charlie Demian … one of the guys that made presentations to Country Garden. He must own one of the sites I guess …", and Ms Berejiklian interrupted and said, "Who's he, **anyway I don't want to know, yeah**."

13.147.15. Mr Maguire said his lawyer had asked him whether he had accepted money and that he had responded, "I said no, not in your bloody life, no bloody way."

13.147.16. Ms Berejiklian asked, "**are they trying to suggest that you had something to do with making money**," to which Mr Maguire replied, "Yeah, of course, of course … I think what they're suggesting is because I made the introduction to Hawatt, to Country Garden … that Hawatt would benefit and then he … pressured perhaps the general manager and others about planning, to get planning approved so he could sell it to Country Garden. But I knew nothing about that, I mean that's all news to me … you know, nothing was ever said to me um, not at all. I only ever asked for DA approved stuff. That, that's all their interested – I know how the Chinese think."

13.147.17. Mr Maguire reiterated he had told his lawyer he had not "accepted money" and asserted that **if someone had suggested an incentive payment**, he "would have to say see my lawyer, we have companies, we have an accountant, you deal with them right."

13.147.18. Mr Maguire revealed his lawyer had said to him, "But you knew Hawatt was … a councillor", to which he had said, "I thought he was a real estate agent and a councillor".

13.147.19. Ms Berejiklian said, **"the only issue I would have right … is why, why is this member of Parliament who lives, who doesn't represent the Inner West … so interested in the Inner West"**, to which Mr Maguire replied, "Because Country Garden asked me to right … asked me to make some introductions, which I did right." He then explained that he had been introduced to Country Garden by William Chiu.[442]

13.147.20. Ms Berejiklian asked Mr Maguire, "**Did your lawyer ask you the questions I'm asking you**?" and when he said "Yeah, yeah", she said, "Oh good."

13.147.21. Ms Berejiklian returned to trying to determine the issue, asking Mr Maguire, "**Are they trying to ping Hawatt and use you to ping Hawatt? Is that the issue?**", at which stage he embarked on another long explanation that he thought "what they're reading is that Hawatt … stood to benefit and that's why he pressured or got into a row with the general manager or whatever he was doing um, because of the introduction that was made to Country Garden, you know with this you know, development opportunities. I don't know that that's truly the case but anyway I think that's where they're going…". Ms Berejiklian said, "**I've always kept my distance from people like that. I just don't think they're – I think they're dodgy … Hawatt and all that people, all those people.**"

[442] Mr Chiu was a member of the Australian Council for the Promotion of the Peaceful Reunification of China (ACPPRC) with whom Mr Maguire engaged in relation to the sale of wine in attempting to earn money for G8wayInternational.

Counsel Assistings' submissions

13.148. Counsel Assisting submitted that the Commission should reject Ms Berejiklian's evidence that she "[did not] even think [she] absorbed the information" that Mr Maguire made some introductions in relation to property developers. She said she was asking him many questions, "Well, only to satisfy myself that, that he, he assured me there was nothing wrong." They contended that Ms Berejiklian's subsequent questioning of Mr Maguire confirmed that she did not blithely proceed on an uncritical acceptance of Mr Maguire's protestations of innocence.

13.149. Counsel Assisting also submitted that Ms Berejiklian's statements to Mr Maguire during the conversation telling him "don't talk" and "I don't want to know any of that stuff" should be regarded as an act of wilful blindness. They contended that Ms Berejiklian deliberately sought to avoid the receipt of additional information that she apprehended would only serve to confirm suspicions she already held about Mr Maguire.

13.150. When Counsel Assisting asked Ms Berejiklian why she had asked Mr Maguire, "But why, why did you feel like you needed to do that for Country Garden?" in the context where Counsel Assisting had asked Ms Berejiklian that morning about recordings in which Mr Maguire was telling her he was attempting to do deals and the like and she had not asked questions, Ms Berejiklian said she could not recollect as the conversation "was how many years ago? It's very difficult to remember exactly what you thought some years ago."

13.151. Ms Berejiklian was asked if she understood that Mr Maguire's statement that he had "no deals with anybody" was not the full story bearing in mind the evidence she had given the same day, to the effect that she was aware that Mr Maguire was attempting to do deals, including a deal in relation to the $1.5 million (a reference to his endeavours on Ms Waterhouse's behalf in relation to Badgerys Creek). Ms Berejiklian said, "but I would have no knowledge or information as to whether any of that materialised. Just because he says something, doesn't mean it's happened or it's materialised and, and I believed him when he said he'd done nothing wrong."

13.152. The Commission does not accept Ms Berejiklian's evidence in this respect. It is evident from the conversations Ms Berejiklian had with Mr Maguire concerning both the ACTA and the RCM proposals, as well as those with him concerning the likelihood of him earning a commission of $1.5 million in relation to Badgerys Creek, that she was engaged with Mr Maguire's projects in the sense of comprehending what he was seeking to do and thus would have had knowledge or information about where they were up to. In the context in which these questions were being asked, namely Ms Berejiklian's appreciation of her s 11(2) obligation to report to the Commission "any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct", the question whether "any of that materialised" is, in any event, beside the point.

13.153. When asked to explain why she was asking Mr Maguire questions such as "why do you care" on 5 July 2018, but had not asked similar questions when Mr Maguire had given her other information about his activities such as in relation to the UWE issue, Ms Berejiklian replied, "It was of no interest to me … because when you trust somebody and they tell you they're not doing anything wrong, and that everything they're doing is by the book and everything they're doing is by the rules that are in place, I, I wouldn't have questioned anything beyond that. I trusted him. I mean, that's the issue. I trusted him at that time and I didn't have any reason to consider that he wasn't telling me the truth, and that's why that transpired."

13.154. It is contextual to note at this stage that the proposition that Mr Maguire's activities were of no interest to Ms Berejiklian is inconsistent with the conversations between the couple about UWE, during which, it will be recalled, she said she refrained from telling her staff that UWE was not in his electorate, a matter she shared with him as if to demonstrate how she had protected him.

It is also inconsistent with the conversations about Mr Maguire earning enough to pay off his large debts in September 2017 in respect of which Ms Berejiklian was attentive until it is appears she may have realised, as earlier discussed, the implications of what he was telling her.

13.155. When she was asked again about why she was asking questions such as "why do you care" on 5 July 2018 in relation to both UWE and the September 2017 $1.5 million land deal, Ms Berejiklian said she would "only be speculating if [she] answered that question". Further questioning of Ms Berejiklian by Counsel Assisting on this issue elicited no more useful response, mainly a reiteration of the proposition that if Mr Maguire assured Ms Berejiklian he had done nothing wrong, that was sufficient.

13.156. Counsel Assisting put to Ms Berejiklian that, as at 5 July 2018, she at least knew that Mr Maguire's statement to her that "I never accepted a dollar, I **never asked for a dollar** [emphasis added], um, you know, nothing's happened that I know of" was untrue because he had not just asked for a dollar in relation to property deals, he had asked for something like $1.5 million. Ms Berejiklian's response was, "why would you assume this is the same matter? In relation to this matter he said he's done nothing wrong. I, I don't know how you're making that connection between the two things … I mean, I don't know how I'd be expected to make any joining of the dots which don't exist in this case. Again, I can only speculate that it's in relation to this matter that he's been asked to come and provide information on."

13.157. Ms Berejiklian rejected the proposition that the questions she was asking Mr Maguire demonstrated at least a level of concern on her part, having regard, for example, to information Mr Maguire had previously given about his attempted deals. She explained that because Mr Maguire was asked to come before the Commission at a public inquiry, that was of interest to her, "which is why I wanted to make sure that he was not concerned and had done nothing wrong. And he gave me that assurance, as you heard, that he hadn't done anything wrong."

13.158. Ms Berejiklian said she asked Mr Maguire if the Commission was "trying to suggest that you had something to do with making money", because she was trying to get a sense of what the matter was that was about to become public. She was concerned that if it was suggested in public that Mr Maguire had something to do with making money in connection with property developments, that that could become a matter of political controversy, even though she was "convinced, I didn't have any concern. He told me he did nothing wrong, and I believed him."

13.159. Ms Berejiklian said she had no concern that Mr Maguire may have been engaged in wrongdoing in connection with "property deals", notwithstanding he was telling her quite a bit of information about his relationship with property developers, including the fact that he had made representations on behalf of property developers. This was again because she trusted him, he told her he had done nothing wrong, and people in that industry are known to members of Parliament and others.

13.160. Ms Berejiklian did not accept that the information Mr Maguire shared during the 5 July 2018 telephone call, when coupled with the information Mr Maguire had earlier shared with her about the $1.5 million deal, caused her to hold a concern that he may have been engaged in wrongdoing. She said she did not take the $1.5 million deal seriously. When asked on another occasion, she said she "didn't believe it would eventuate" and did not "think I was paying attention to the conversation".

13.161. Counsel Assisting submitted that Ms Berejiklian sought to evade accepting that she was aware as at 5 July 2018 that Mr Maguire had been making representations on behalf of property developers, including in relation to planning issues, even though the intercepted telephone call of 5 July 2018 included a passage where Mr Maguire told Ms Berejiklian exactly that. Although Ms Berejiklian appeared to accept that Mr Maguire had told her he had made representations on behalf of one

or more property developers, she first said, "Well, in this instance he's told me but I don't know what it means", then said, "Well, in the transcript it says he told me. Whether or not I listened or cared is another matter," and finally, "That's what he, that's what I was told. Doesn't mean that I absorbed or cared or assumed or knew anything else".

13.162. When asked why she had queried why Mr Maguire was "so interested in the Inner West", Ms Berejiklian accepted it was a cause of some concern to be dealt with by Mr Maguire, that he seemed to be so interested in something that was not in his electorate at all. She said, "I mean, I wasn't concerned that he'd done anything wrong because I believed him that he hadn't done anything wrong. I guess I was just curious as to how he was connected to all of this." She said she could only speculate as to why she had not asked the same kinds of questions in relation to matters such as Badgerys Creek, which was nowhere near Mr Maguire's electorate, and the UWE matter, which was also not in his electorate, "but the previous matter didn't, didn't involve this body and I had no interest in what he was doing in a private capacity, and in this instance I obviously was curious as to why he'd been asked to provide evidence to this body".

13.163. At one stage, Ms Berejiklian did accept that she was at least concerned enough about the information Mr Maguire was providing to her to ask, "is that going to be a problem?", but she said those concerns were assuaged by her being satisfied with, and believing, Mr Maguire's response that he had not done anything wrong.

13.164. Ms Berejiklian suggested that she did not even hold a concern regarding the fact that Mr Maguire had been issued with a summons to attend the Commission, merely an "interest". She said that she assumed he was in a category of witnesses who were simply in a position to assist the Commission rather than a subject of the investigation itself.

13.165. However, as she herself submitted, at least one purpose of her questions was to determine whether he was the subject of investigation, by asking a series of questions to understand the subject matter he anticipated being asked about and whether he might be exposed to criticism (warranted or otherwise).

13.166. Counsel Assisting submitted that response did not square with the questions Ms Berejiklian asked Mr Maguire during the telephone call – for example, her question as to why the member for Wagga Wagga was involved in property transactions in the Canterbury City Council local government area that had attracted the attention of the Commission.

13.167. Counsel Assisting submitted that Ms Berejiklian's denial that at the time of the 5 July 2018 conversation, she did not suspect that Mr Maguire may have been engaged in corrupt conduct and that, if she had, she would have reported it, did not sit with the combination of what Ms Berejiklian was told in the 5 July 2018 conversation and the nature of the enquiries she made of Mr Maguire during its course, and what she had been told previously.

13.168. Counsel Assisting also submitted that the information Mr Maguire shared with Ms Berejiklian on 5 July 2018 could only have served to confirm suspicions that she must already have held by then regarding possible corrupt conduct on Mr Maguire's part. They noted that Mr Maguire had directly advised Ms Berejiklian that he had been engaging with government departments on behalf of developers. They contended that that must have been concerning enough of itself, but all the more so in circumstances where those activities were entirely unrelated to his electoral district and had attracted the attention of the Commission.

Ms Berejiklian's submissions

13.169. Ms Berejiklian emphasised that the Commission's focus in relation to the 5 July 2018 conversation must be firmly upon Ms Berejiklian's state of knowledge at the time of the conversation. In that light, she submitted the Commission should accept that she had no reason not to accept Mr Maguire's explanations and that such acceptance was inconsistent with her having a state of suspicion of corrupt conduct on the part of Mr Maguire.

13.170. Ms Berejiklian submitted that Counsel Assistings' reliance on the "snippets" of the 5 July 2018 conversation they extracted in their submissions and relied upon as evidence "she was concerned about the propriety of what Mr Maguire had been engaging in" mischaracterised the purpose of her questions to Mr Maguire.

13.171. Ms Berejiklian contended she was plainly focused upon ascertaining whether Mr Maguire was being called as a witness to assist the Commission (like "Jodi McKay had to and Luke Foley did") or whether he was the subject of investigation. She argued that her questions did not demonstrate the "positive feeling of actual apprehension or mistrust" necessary for a finding of s 11 suspicion, and that she was evidently satisfied by Mr Maguire's responses at the time. She contended that, particularly given the context (him being summonsed to the Commission), the fact that she asked him some probing questions did not mean that she formed a state of suspicion that he had been engaged in corrupt conduct.

13.172. The Commission does not accept Ms Berejiklian's submission that Counsel Assistings' reliance on extracts of the 5 July 2018 conversation to support the proposition that Ms Berejiklian "was concerned about the propriety of what Mr Maguire had been engaging in", mischaracterised the purpose of her questions to Mr Maguire. As she herself acknowledged, it was apparent she was seeking to determine whether Mr Maguire was being called as a witness to assist the Commission or whether he was the subject of investigation. The logical extension of her seeking to determine whether Mr Maguire was the subject of investigation was that she was trying to work out if he was under investigation for corruption. The latter question could not be resolved without her considering the propriety of what Mr Maguire had been engaging in. As much was apparent from her questioning him, for example, as to why he felt he needed to do things for Country Garden, asking him why he was concerned with matters far from his electorate and herself concluding "they're obviously trying to establish something".

13.173. Ms Berejiklian submitted that a state of suspicion on her part that Mr Maguire was engaged in corrupt conduct was positively refuted by her repeated exhortations to him to tell the truth, because he had done nothing wrong. She contended that Counsel Assisting did not take those exhortations into account, yet they were highly germane to Ms Berejiklian's mental state at the time. She argued that each of those statements was inconsistent with her having formed a "positive feeling of actual apprehension or mistrust" in Mr Maguire in relation to the matters they were discussing. Her belief was clearly that if Mr Maguire was forthcoming and told the truth in his evidence, there would be nothing to worry about. She submitted that such a belief was directly at odds with her suspecting that Mr Maguire had engaged in corrupt conduct.

13.174. Ms Berejiklian re-iterated her submission that the s 11 duty is framed to require a level of precision for it to be enlivened in terms of a specific "matter" capable of being the subject of a report. She complained that Counsel Assisting had not identified what "matter" it was said her s 11(2) duty required her to report to the Commission arising from this conversation.

13.175. Ms Berejiklian contended that if the allegation was that she must have drawn a link between the matters the subject of Operation Dasha (based entirely on what Mr Maguire told her about this) and her conversations with him in around September 2017 concerning Mr Maguire's land deal at

Badgerys Creek, there was no evidence that Ms Berejiklian ever drew that connection. She relied upon her contention that it was highly likely that she had forgotten those matters by July 2018, in circumstances where it did not amount to anything in her mind at the time or subsequently, and her response to Counsel Assisting's question seeking to test her in this respect:

[Counsel Assisting]:	*He says, "Yeah, that's fine, but I, I never accepted a dollar, I never asked for a dollar, um, you know, nothing's happened that I know of." Do you see that there?*
[Ms Berejiklian]:	*Yes, I do.*
[Q]:	*At 5 July, 2018, you at least knew that that statement to you was untrue, didn't you? You knew in particular that Mr Maguire had not just asked for a dollar in relation to property deals, he had asked for something like $1.5 million?*
[A]:	*But I, but why would you assume this is the same matter? In relation to this matter he said he's done nothing wrong. I, I don't know how you're making that connection between the two things.*

13.176. Ms Berejiklian submitted that her puzzlement at the notion of a connection between the two matters was understandable on the basis that in respect of the Badgerys Creek deal, Mr Maguire told her that he was involved expressly with the aim of earning a commission for himself. In respect of the Operation Dasha matters, which concerned property in the Inner West of Sydney, he was adamant that he had "never accepted a dollar" and "never done a deal". She argued that the fact she knew Mr Maguire had previous business interests in relation to land at Badgerys Creek – something which she repeated he was perfectly entitled to have in accordance with the offices he held – was not inherently inconsistent with his account to her that he had no pecuniary interest in the matters concerning Operation Dasha.

13.177. In relation to the Operation Dasha matter, Ms Berejiklian submitted she clearly accepted Mr Maguire's account that he had conducted himself honestly; she did not suspect on reasonable grounds that matter concerned, or may concern, corrupt conduct on his part. In those circumstances, she submitted, her s 11 duty was not enlivened.

13.178. Ms Berejiklian submitted that this conclusion was reinforced by her evidence as to her assumption that Mr Maguire had always complied with his official disclosure obligations, which Mr Maguire told her during this conversation he complied with when making any outside commissions. The passage on which Ms Berejiklian relied was one where Mr Maguire addressed what he claimed he would do if "one of these things actually got up right". Nevertheless, Ms Berejiklian submitted that her "assumption that Mr Maguire complied with his disclosure obligations was positively encouraged by him".

13.179. Ms Berejiklian submitted that as far as she was concerned, there was nothing secret about the fact that Mr Maguire had interests in property development, and that he had made money from it in the past. Based on her assumption, that it was a matter of public record, recorded on the Register of Ministerial Interests, she submitted that the notion that it would have occurred to her to suspect him of corrupt conduct was far-fetched.

13.180. Ms Berejiklian also submitted that Counsel Assistings' submission that her statement "I don't want to know any of that stuff" (in response to Mr Maguire mentioning Mr Hawatt's "skulduggery") evinced "wilful blindness" aimed at avoiding fixing herself with knowledge of corrupt conduct of which she already had suspicions, should be rejected. She contended that that remark was made immediately following Mr Maguire assuring her that he had "never accepted a dollar"

– an assurance which she believed. In those circumstances, her explanation that she said this because Mr Maguire "had told me he'd done nothing wrong so therefore I didn't need to go any further" was inherently plausible and ought to be accepted. She also submitted that the notion that she was actively seeking to avoid fixing herself with knowledge of Mr Maguire's activities on this call was entirely inconsistent with the series of questions she asked him about those activities.

Conclusion

13.181. Ms Berejiklian's evidence about the 5 July 2018 conversation was highly unsatisfactory. She would not engage with the questions, was argumentative and frequently asked rhetorical questions with the intention of deflecting the questioner. She claimed an almost entire lack of memory of the 5 July 2018 conversion other than from what appeared on its transcription (and what she heard played to her). Her assertions that virtually no matter what Mr Maguire told her, she did not believe he had done anything wrong, let alone engaged in corrupt conduct, were dissembling, and almost impossible to accept as genuine. As Counsel Assisting submitted in relation to her evidence generally, this was a clear example of Ms Berejiklian's evidence which did not exhibit the hallmarks of a credible and reliable witness such as making reasonable concessions and attending directly to the questions asked of her without seeking to reframe the question and arguing with the examiner.

13.182. The Commission does not accept Ms Berejiklian's submission that she had no reason not to accept Mr Maguire's explanations during the 5 July 2018 conversation and that such acceptance was inconsistent with her having a state of suspicion of corrupt conduct on the part of Mr Maguire.

13.183. The Commission accepts that at this stage of the inquiry, the focus is on Ms Berejiklian's state of mind at 5 July 2018. However, Ms Berejiklian did not engage with the 5 July 2018 conversation in a vacuum. She had known since November 2016 that Mr Maguire had provided assistance to Mr Demian in relation to his development in Camellia, an area far from his electorate, by seeking to get assistance for him from government instrumentalities. In addition, Mr Maguire had told Ms Berejiklian, as recently as September 2017, that it was likely he would earn a commission of about $1.5 million dollars from a "deal" in connection with the planned airport at Badgerys Creek. Later that year, she became aware he was assisting Ms Waterhouse, too, with a road access issue in relation to land she held at Badgerys Creek by seeking to get assistance for her from government instrumentalities. Further, Ms Berejiklian knew Mr Maguire was trying to earn large amounts of money to reduce the large burden of his debts, and that those endeavours were at least in part directed to making his retirement more comfortable. His retirement was the path to their possible life together.

13.184. In addition, it was clear Mr Maguire had given Ms Waterhouse Ms Berejiklian's direct email address. Ms Waterhouse had used that address to email Ms Berejiklian twice about her issues with Badgerys Creek. He had also been involved, to Ms Berejiklian's knowledge, in arranging meetings for Ms Waterhouse in Parliament House in relation to her Badgerys Creek roads issue. That background information gave Ms Berejiklian a form of template into which it was apparent the activities the couple was discussing on 5 July 2018 could easily fit.

13.185. Insofar as the Badgerys Creek matter is concerned, as earlier noted, Ms Berejiklian's basic proposition was that the evidence and inferences arising did not support a finding that she suspected on reasonable grounds that the matter concerned, or may have concerned, corrupt conduct on his part. The Commission has already rejected this submission. On the basis of that finding, Ms Berejiklian came to the 5 July 2018 conversation already suspecting that Mr Maguire may have engaged in corrupt conduct. However, in considering the 5 July 2018 conversation, and in order to consider Ms Berejiklian's submissions fully, the Commission has proceeded on the premise that Ms Berejiklian may not have had that suspicion about the Badgerys Creek matter at that stage.

13.186. Ms Berejiklian submitted that by July 2018, she had likely forgotten (to the extent she ever absorbed) this information about Badgerys Creek. She pointed out that there was no evidence of the topic ever being discussed again, which she suggested was unsurprising since it never came to fruition. She contended that Counsel Assistings' submissions that the events of 13 July 2018 would have caused her "to see matters of which [she was] previously aware in a different light" rested on an unwarranted assumption, not supported by evidence, that Mr Maguire's evidence in Operation Dasha would have caused Ms Berejiklian to call those conversations to the forefront of her mind, reassess the information and form a suspicion of corrupt conduct.

13.187. Accordingly, Ms Berejiklian submitted that as to the information Mr Maguire gave her from August to September 2017, there was no evidence that following Mr Maguire's evidence on 13 July 2018, she turned her mind to, or saw any of those matters differently.

13.188. It was clearly significant to Ms Berejiklian during this 5 July 2018 conversation that Mr Maguire told her that he had made representations on behalf of property developers and assisted them by referring properties as potential investments to Country Garden. He also acknowledged that an "incentive payment" for his introduction and assistance was within his contemplation. As Counsel Assisting submitted, the compelling inference is that Ms Berejiklian was asking questions such as "But why did you feel the need to do that for Country Garden?" because she was concerned about the propriety of what Mr Maguire had been doing. Ms Berejiklian gave no explanation to the contrary (she said she had no recollection of why she asked this question).

13.189. The Commission rejects Ms Berejiklian's denial that as at 5 July 2018 she knew Mr Maguire's statement that he had "never asked for a dollar" in relation to making introductions was untrue because she knew he had asked for "something like $1.5 million" in relation to property deals. In the light of her astute questioning of Mr Maguire during the 5 July 2018 conversation, and the information of which she was aware in relation to his past activities, not least those in respect of which she had information since early August 2017, it is not credible that she would not have joined the dots between what she knew historically and what he was telling her about his activities with property developers such as Country Garden and Mr Hawatt.

13.190. Ms Berejiklian's evidence that she "[did not] even think [she] absorbed the information" that Mr Maguire made some introductions in relation to property developers, cannot be accepted. It is not supported in the light of the numerous probing questions she put to him during the conversation as to the matters that he thought might be of interest to the Commission – which, it will be recalled, were the sort of questions his lawyer was asking him. Ms Berejiklian's response as to why she was asking these questions, was, "Well, only to satisfy myself that, that he, he assured me there was nothing wrong."

13.191. The Commission does not accept this evidence. It also does not accept Ms Berejiklian's submission that a state of suspicion on her part that Mr Maguire was engaged in corrupt conduct was positively refuted by her repeated exhortations to him to tell the truth, because he had done nothing wrong. Even though Mr Maguire told Ms Berejiklian he had done "nothing wrong", Ms Berejiklian must have been left with a sense of doubt about why he had been summonsed at all. As Mr Maguire said:

MAGUIRE:	*Well who knows, you don't know, you don't know because they post stuff every day. The, these people, these people are surprise artists. You don't know what they're gonna come up with next, you've got no idea. This is ever – you know this is all about you know, setting you up and then stinging you with the tail.*
BEREJIKLIAN:	*Mmm.*

MAGUIRE: *That's what it's all about so they put up what they want you to know and then they don't put up what they want you – they drop it in front of you and say well what about this, right. So you don't know, who knows, who knows Glad. Anyway. That's how it is.*

13.192. The proposition that Ms Berejiklian did not absorb the information communicated during the 5 July 2018 conversation is also gainsaid by her statements to Mr Maguire such as that she did not "want to know any of that stuff" in response to him starting to talk about Mr Hawatt's "skulduggery". It is clear Ms Berejiklian absorbed the significance of what Mr Maguire was telling her and was trying to avoid being fixed with that knowledge. Ms Berejiklian's explanation, that she said that because she "probably would have felt uncomfortable if he was providing evidence to this body", makes no sense. When pressed as to whether she made this remark because she was concerned that Mr Maguire may have had information that may require her to take some steps in the exercise of her public functions, Ms Berejiklian said, "Not at all, because I trusted him. He just told me he'd done nothing wrong so therefore I didn't need to go any further."

13.193. Counsel Assisting submitted that the Commission should reject this evidence. They contended that Ms Berejiklian's subsequent questioning of Mr Maguire confirmed that she did not blithely proceed on an uncritical acceptance of Mr Maguire's protestations of innocence. The Commission accepts that submission. It is apparent that Ms Berejiklian questioned Mr Maguire shrewdly, with a view to determining what matters adverse to himself he might be asked about, and might reveal in his evidence before the Commission. The shrewdness of the questions she asked him can be gleaned from the fact that Mr Maguire's lawyer had asked him the same questions.

13.194. Counsel Assisting also submitted that Ms Berejiklian's statements to Mr Maguire during the conversation, including telling him "don't talk" and "I don't want to know any of that stuff", should be regarded as an act of wilful blindness. They contended that Ms Berejiklian deliberately sought to avoid the receipt of additional information that she apprehended would only serve to confirm suspicions she already held about Mr Maguire. The Commission also accepts that submission. Ms Berejiklian's behaviour in this respect is consistent with her making clear to Mr Maguire in September 2017 that she did not need to know about the success of his $1.5 million land deal at Badgerys Creek.

13.195. This response can be seen quite starkly in the context of that part of the 5 July 2018 conversation in which Mr Maguire told Ms Berejiklian, "I never accepted a dollar, I never asked for a dollar, um, you know, nothing's happened that I know of." When it was put to Ms Berejiklian by Counsel Assisting that, as at 5 July 2018, she "at least knew that that statement … was untrue" and in particular that Mr Maguire had "not just asked for a dollar in relation to property deals, he had asked for something like $1.5 million", her response was, "why would you assume this is the same matter? In relation to this matter he said he's done nothing wrong. I, I don't know how you're making that connection between the two things … I mean, I don't know how I'd be expected to make any joining of the dots which don't exist in this case. Again, I can only speculate that it's in relation to this matter that he's been asked to come and provide information on."

13.196. The Commission rejects Ms Berejiklian's denial in this respect, and her submission that there was no evidence that she ever drew a connection between the matters the subject of Operation Dasha and the September 2017 conversations. As already observed in relation to other responses, viewed objectively, in the light of her astute questioning of Mr Maguire during the 5 July 2018 conversation, and the information of which she was aware in relation to his activities, not least those in respect of which she had information since early August 2017, it is not credible that she would not have joined the dots.

13.197. As Ms Berejiklian accepts, she was at least trying to determine whether Mr Maguire was the subject of investigation. The idea that Ms Berejiklian would not have seen at least the possible parallels between what Mr Maguire had told her he had done for Ms Waterhouse in the September 2017 conversations and what he was telling her about what he had done for Country Garden, as well as the discussion of Mr Hawatt's possible conduct, is not credible. Rather, Ms Berejiklian's denials in this respect are consistent with her closing her mind during those September conversations to what Mr Maguire was actually doing, or at least, seeking to do.

13.198. At one stage, Ms Berejiklian did accept that she was at least concerned enough about the information Mr Maguire was providing to her to ask, "is that going to be a problem?", but she said those concerns were assuaged by her being satisfied with, and believing, Mr Maguire's response that he had not done anything wrong. However, as Counsel Assisting submitted, the compelling inference is that Ms Berejiklian was asking questions such as "But why did you feel the need to do that for Country Garden?", because she was concerned about the propriety of what Mr Maguire had been doing. Ms Berejiklian gave no explanation to the contrary, rather, she said she had no recollection of why she asked this question. Based on the facts available to her, it is apparent that Ms Berejiklian viewed Mr Maguire's conduct in relation to Country Garden as suspicious.

13.199. Counsel Assisting submitted that the information Mr Maguire shared with Ms Berejiklian on 5 July 2018 could only have served to confirm suspicions that she must already have held by then regarding possible corrupt conduct on Mr Maguire's part. They noted that Mr Maguire had directly advised Ms Berejiklian that he had been engaging government departments on behalf of developers. They contended that that must have been concerning enough of itself, but all the more so in circumstances where those activities were entirely unrelated to his electoral district and had attracted the attention of the Commission.

13.200. The Commission accepts that submission. As is apparent from the outset of the 5 July 2018 conversation, the fact that Mr Maguire had been summonsed to appear before the Commission had come as a great shock to Ms Berejiklian. This is understandable, not just because of their close personal relationship, but because of her knowledge of the activities in which he had been engaged in attempting to "pull off deals" to secure his financial future. Even though she had assured him they could have a life beyond retirement without him having to improve his financial position, and she had sought to avoid detailed knowledge of the "deals" he was seeking to "pull off", it is apparent from her determined questioning of him that she could see their future lives together crumbling if those activities came to light at the Commission.

13.201. Ms Berejiklian's submission that as far as she was concerned, there was nothing secret about the fact that Mr Maguire had interests in property development, and that he had made money from it in the past, rests on a fragile foundation. It was apparently based on her assumption that this was a matter of public record, recorded on the Register of Ministerial Interests. However, she simply assumed his private interests "would be disclosed in the appropriate way". She had never inspected his disclosures. It must have occurred to her, if she turned her mind to it at the time, that the idea that he would have disclosed moneys earned, for example in relation to his activities in respect of Badgerys Creek, was improbable.

13.202. The Commission rejects Ms Berejiklian's submission that her reliance on Mr Maguire's protestations that "he'd done nothing wrong so therefore I didn't need to go any further" was inherently plausible and ought to be accepted. At a stage before Mr Maguire had actually given evidence before the Commission, Ms Berejiklian must at least have been left in a state of uncertainty. As already discussed, there was sufficient background information of which Ms Berejiklian was aware to give her reason to be concerned that he was, in fact, being called to give evidence because his activities were the subject of investigation. He told her enough about

the matters that were being investigated, in respect of which he had clearly had some involvement, for her to form the view he may have been engaged in corrupt conduct. That proposition was not "far-fetched", as Ms Berejiklian submitted.

13.203. Ms Berejiklian's evidence was that she would not "have recalled in full" the conversation of 5 July 2018 a week later when dealing with the fallout from Mr Maguire's evidence on 13 July 2018. It might be accepted that Ms Berejiklian would not recall the detail of every part of the conversation, but the Commission does not accept Ms Berejiklian did not recall the gist of it: of Mr Maguire discussing his close contact with people who were clearly property developers; of referring properties with development approval to Country Garden and of their discussions about whether he had ever made any money out of it; and of her describing the people with whom he was clearly closely associated as "dodgy" and people from whom she always kept her distance and in respect of whom, when Mr Maguire mentioned specific individuals such as Mr Hawatt or Mr Demian, she said, "I don't want to know" – a response reminiscent of that she had given Mr Maguire on 7 September 2017.

13.204. Ms Berejiklian suggested that the information relayed to her in the 5 July 2018 call was "insignificant", such that she did not need to seek advice from either her chief of staff or any lawyers within, or separate from, government about whether she should report what she was told to the Commission. In the Commission's view, this evidence is not credible. It is clear from the intensely forensic questions Ms Berejiklian asked Mr Maguire during this conversation that she did not regard the information Mr Maguire gave her as insignificant at all. She recognised the risks of Mr Maguire being associated with "dodgy" people, of assisting Country Garden – a property developer – and of him being involved with an area or areas which were remote from his electorate. As is apparent from the events concerning UWE, Ms Berejiklian was sensitive to issues concerning members of Parliament making representations about matters outside their electorates. Moreover, Ms Berejiklian must have appreciated that the question of whether the information relayed to her in the 5 July 2018 call was "insignificant" was something which was better left to the Commission to determine and was precisely the reason for the s 11 duty.

13.205. In the Commission's view, Ms Berejiklian did not seek the advice from either her chief of staff or any lawyers about whether she should report what she was told to the Commission because it would most probably have raised questions about how she had come to know such matters. As will be apparent from what follows, Ms Berejiklian was concerned not to reveal to her staff that she was in a contemporaneous relationship with Mr Maguire.

13.206. The Commission accepts Counsel Assistings' submission that the information Mr Maguire shared with Ms Berejiklian on 5 July 2018 could only have served to confirm suspicions that she must already have held by then regarding possible corrupt conduct on Mr Maguire's part.

"The little green man, it leaves no trace"

13.207. On 9 July 2018, Ms Berejiklian and Mr Maguire exchanged a series of text messages in which he encouraged her both to obtain a private telephone and a communications app which could not be traced. The exchanges proceeded as follows:

MAGUIRE:	*I'm chatting with my friends on WeChat now! There are more than a billion people who use WeChat around the world. Download it now at http://wechat.com/dl/80g7xILSY9I%3D and add me via WeChat ID…* [redacted]
MAGUIRE:	*Download the app*

BEREJIKLIAN:	*Ok I'll try! What about what's app?* [sic] *That's easy too*
BEREJIKLIAN:	*I'll do it tomorrow as don't know my password for apps*
MAGUIRE:	*You need to get a private phone*
BEREJIKLIAN:	*Ok. Is everything ok*
MAGUIRE:	*Yep got the bugbears on the rum* [sic]
BEREJIKLIAN:	*What does that mean*
	…
MAGUIRE:	*Means I got more info and data than them*
MAGUIRE:	*They can read texts but not the little green man, it leaves no trace.*

13.208. Ms Berejiklian said she had never used WeChat, whose icon Counsel Assisting suggested was green. Ms Berejiklian said she was "not really" concerned that Mr Maguire was suggesting the use of a private telephone, as many colleagues had also suggested that to her. This answer is belied by her reaction on 9 July 2018 to Mr Maguire's suggestion to which she asked, "Is everything ok?". She was clearly concerned about why Mr Maguire would make this suggestion, particularly in the context of the recent 5 July 2018 conversation in which he suggested, "big brother, you know, they can, they can tap into every phone conversation there is, absolutely unfetted [sic] power, no one has any privacy. They could probably actually listen to any calls that were being made between me and this phone and any individual that I choose to talk to including you", to which she had responded, "Is that gonna be a problem?"

13.209. Ms Berejiklian submitted that it was reasonable for her to have considered Mr Maguire was reflecting (amongst other things) on whether his communications were being monitored. When it was suggested to her that Mr Maguire might be raising this matter having regard to his mention of what "big brother" could do during the 5 July 2018 conversation, she said she could not remember what she thought at the time. She said she "would have assumed it was only for privacy reasons, for no other reason. Not because of any wrongdoing, but because he, he may not have wanted and didn't want private conversations to be communicated". In the Commission's view, it is an available inference that the possibility "big brother" might want to tap Mr Maguire's telephone would itself raise suspicions in her mind as to the nature of his activities.

13.210. As Counsel Assisting submitted, devoid of any other context that is a plausible possibility. However, here Mr Maguire's suggestion about "the little green man, it leaves no trace" came on the heels of him having been summonsed to appear before the Commission and having shared details of at least a level of association with people whom Ms Berejiklian regarded as "dodgy".

13.211. Counsel Assisting submitted that the timing of Mr Maguire's suggestion that Ms Berejiklian "get a private phone" and adopt a form of communication that he said "leaves no trace" could only have served to amplify Ms Berejiklian's suspicions regarding his conduct. They contended that these were further factors that, when taken in conjunction with events both before and after, must have caused Ms Berejiklian to form a suspicion that Mr Maguire may have been involved in corrupt conduct through the misuse of his office.

13.212. Ms Berejiklian submitted that it did not follow, and the Commission would not find, that Ms Berejiklian's reaction to Mr Maguire's newfound concern about their communications would have been a suspicion of corrupt conduct. The reaction she did have – that he was concerned about his (and her) private communications being monitored, and he wanted to ensure that they could communicate privately – is inherently likely and ought be accepted by the Commission.

13.213. Ms Berejiklian also submitted that perhaps the most significant point to be made was she did not act upon these messages. There is no suggestion that Ms Berejiklian got a private telephone or that they moved their communications to WeChat.

13.214. The Commission accepts that there is no evidence that Ms Berejiklian got a private telephone or that the couple moved their communications to WeChat. However, as is apparent from their conversation, Ms Berejiklian was prepared to do so once she got her password for applications. Indeed, she also suggested to Mr Maguire that they could try WhatsApp.

13.215. While the Commission accepts that Ms Berejiklian's colleagues had two telephones – one private, one business – it does not accept her submission that in that context, there was no reason to think she assumed anything suspicious in Mr Maguire's suggestion. Nor, for the reasons Counsel Assisting advanced, does it accept Ms Berejiklian's submission that Mr Maguire was only concerned with privacy issues. The more probable explanation is that following their extensive discussion four days earlier about his imminent appearance before the Commission, some of which for her part had been to try to work out if he was under investigation for corruption, this suggestion would have triggered renewed concerns on her part that Mr Maguire had something to hide beyond mere issues of privacy.

13.216. The Commission accepts Counsel Assistings' submission that in the context of the conversation four days earlier, Mr Maguire's suggestion about her acquiring a telephone service which "leaves no trace" could only have served to amplify Ms Berejiklian's suspicions as to whether he had engaged in corrupt conduct. If he had in fact done nothing wrong, as she contended she believed, why did he want a telephone service which "leaves no trace"?

Friday 13 July 2018 – Mr Maguire gives evidence in Operation Dasha

A very bad look

13.217. Mr Maguire was called to give evidence in Operation Dasha at 1 pm on 13 July 2018.

13.218. During his evidence, he admitted that he and Mr Hawatt were going to share, or were planning on sharing, commissions obtained from property developers who sold their properties to clients of Mr Maguire to whom they were introduced. This included commissions from introductions on behalf of Mr Demian. The way such commission might be earned was either by Mr Hawatt identifying properties which could be sold to interests that Mr Maguire had contact with, such as Country Garden, with a view to money being made by him and Mr Hawatt, and/or from Mr Maguire introducing a joint venture partner – an introduction which might otherwise not have occurred. The value Mr Maguire could bring to the process, as he explained to Mr Hawatt, was that he had "more chance of opening the door to our friends than" Mr Hawatt had. Mr Maguire was to make appointments with people, for example, involved in planning issues, but told Mr Hawatt that he was to take "them to planning and people like that because you can do that". Mr Maguire's evidence concluded at 4.39 pm. He accepted that it was the subject of considerable political controversy.

13.219. On the day Mr Maguire gave evidence in Operation Dasha, Ms Berejiklian was on her first day of leave. Accordingly, the deputy premier, Mr Barilaro, was acting premier. Ms Berejiklian's chief of staff, Ms Cruickshank, was also on leave.

13.220. Within a short time of Mr Maguire's evidence being given, Ms Berejiklian was contacted by Mr Burden, her acting chief of staff, who told her the general nature of his evidence. He conveyed to her "that it was a very bad look, that [Mr Maguire had] been caught up … in some people who'd likely been, had been done some wrongdoing". She was upset and shocked.

13.221. Ms Berejiklian said she understood that the evidence showed that Mr Maguire had been closely associating himself with people who, in all likelihood, were doing things improperly and "that he'd been caught up with people who were accused of doing wrong things and that was a major concern". She was also concerned that "he was definitely in [the orbit]" of "individuals and with people in respect of whom there were shadows cast". This was in the context that at that time, as Ms Berejiklian accepted, "as should be the case, there was concern about members of parliament being involved too closely … with people of that nature".

13.222. Ms Berejiklian also considered the possibility that Mr Maguire had "admitted that he was engaged in a money-making exercise for his own benefit, along with one of the people who were being investigated in Operation Dasha". She said she "just didn't know", but "certainly around the day, 13 July and the next few days [she] was very concerned as to what might be occurring". Ms Berejiklian agreed that the "gist" of the evidence on the public record was that Mr Maguire had admitted to being engaged in a money-making exercise along with Mr Hawatt, who was then a member of Canterbury City Council.

13.223. Ms Berejiklian assumed that Mr Maguire had been lying to her in the past concerning his association with property developers, albeit she said she "wasn't sure". From a public perspective, clearly there were questions to be answered.

13.224. This process involved her racking her brains about anything she knew, about whether Mr Maguire had been truthful, and to what "extent he'd been truthful and, and secondly to what extent the investigation was, was going to reveal anything further about his activities".

13.225. Asked whether she questioned what Mr Maguire had told her on 5 July 2018 considering what was revealed on 13 July 2018, Ms Berejiklian said:

> *Absolutely. I questioned everything. I questioned anything that I may have known, I questioned everything. That was, I can't imagine, I can't express what a shock it was to the system because you have a certain view of somebody and, and that view is then questioned, was enormously shocking and I did, I thought long and hard about everything. I thought long and hard for a number of days about what he'd said and what I, what, what he had said to me and, and, and what had occurred and, and that for me was a very, very difficult period and I was trying to rationalise what had occurred at the hearing, his protestations of presumption of innocence and, and, and what my responsibilities were.*

13.226. In response to the suggestion that she should have reported to the Commission everything that she knew regarding Mr Maguire's dealings, for example, with property developers, Ms Berejiklian said:

> *Yep. If I'd known anything, of course I would have done that. I would have done it at the time that I knew that. But I racked my brain. On 13 July I looked back and, and spent many days thinking is there anything, did I know anything, do I need to report anything? Of course all of that went through my mind. Of course all of that did. But I had nothing to report. There was nothing that I knew. Nothing that I remembered, nothing that I thought was of any relevance. And if there was, I would not have hesitated … if there was anything that I had to report, anything specific or any concern, I would have done that. But there was nothing I could remember, nothing that I knew, no detail which I could provide.*

13.227. In response to the suggestion that she could have reported to the Commission Mr Maguire's "attempt to obtain a commission in relation to the Badgerys Creek stuff of $1.5 million, making representations, trying to get the location proposal, roads changed and things of that kind", Ms Berejiklian said:

I did not, did not assume for a second that any of that was corrupt, and I did not assume for a second that he was doing wrongdoing. And if I had, if I had, I would have reported it. I would have reported it at the time that it emerged or subsequently on 13 July. But I had no cause because I trusted him and there wasn't anything that I believed was specific or, or a concern or, or I don't know what I would have reported. I don't know what I would have said to this body.

13.228. Ms Berejiklian said that what particularly shocked her about Mr Maguire's evidence on 13 July 2018 was "that, clearly, this body had cause to investigate that particular council and their activities, and what shocked me was the level of, I guess, association he had with these people who were accused of wrongdoing". When it was put to her that she "knew about that on 5 July because Mr Maguire told [her] over 52 minutes", Ms Berejiklian replied:

But he'd told me he'd done nothing wrong… Just because, because you associate with somebody doesn't necessarily mean you've done anything wrong, and I trusted him and believed him, and on the 13th I did question all of that. I did question to what extent he'd been telling me the truth and I thought about every, tried to remember every conversation we had, I tried to remember everything because I was shocked that this was something, in my view, out of character for him. It was something I did not expect him to be involved with and I questioned everything.

13.229. When it was put to Ms Berejiklian that by 13 July 2018, she had assumed that Mr Maguire's assurance on 5 July 2018 that there was nothing to worry about in respect of him "hanging out with dodgy people" was a lie, she responded:

Well, I certainly assumed that it should come under question. I certainly assumed that something may have been awry, and, and the shock of, the shock of what had transpired did cause me to think has he lied to me, is there something wrong, is there something awry? And I racked my brain as to whether there was anything specific I knew or anything that I needed to report in terms of obligations. I came to the conclusion that there wasn't anything I knew. I came to the conclusion that I wasn't sure what he was up to, he was still protesting his innocence to me and I had, and I felt that I had in subsequent days gave him that presumption of innocence because I was confident that this body, this body would be able to determine to what extent that cloud should be dissipated or otherwise.

13.230. When it was suggested to Ms Berejiklian that she could have reported to the Commission "What he told [her] about his association with Mr Hawatt and other people which led you to instruct him not to engage with these dodgy people", she replied, "Yeah, but what he told me was that he wasn't doing anything wrong." When it was suggested that by 13 July 2018, she might "have had reason to believe that that was a suspicious statement", Ms Berejiklian replied:

But I don't know what I would have reported. He told me he did nothing wrong, he told me his association with these people was limited and I believed him. And then clearly on 13 July that wasn't the case, but I, I didn't assume he'd done anything wrong. There was, I didn't feel there was anything I could add. I didn't feel there was anything I could report.

"You'll have to resign "

13.231. Ms Berejiklian said she decided "in a short amount of time that the best course of action was to ask [Mr Maguire] to stand aside until the matter was investigated".

13.232. There is some difference, of no particular note, about who of Ms Berejiklian or Mr Maguire rang whom on the afternoon of 13 July 2018.

13.233. Ms Berejiklian said she could not recall "whether I called Mr Maguire first, or whether I called somebody else first. But the gist of it was, when I rang him, I said – he was professing his innocence, saying he'd done nothing wrong, it was a misunderstanding, so he was trying to defend his position to me, quite strenuously. And I've said, 'Well, no, we don't know yet what's, what this is about.' I was rather distraught, and I said, 'It's best you stand aside until we understand what is happening.'"

13.234. Mr Maguire said that after he gave his evidence he contacted Mr Barilaro, but Mr Barilaro said, "Well, it's a matter for you and the Premier."

13.235. Mr Maguire said he then telephoned Ms Berejiklian on the afternoon of 13 July 2018. He said she was "very upset" and he professed his innocence. She told him, "You'll have to resign." That direction appears to have applied to Mr Maguire's position as parliamentary secretary.

13.236. That day, Chris Stone, the state director of the Liberal Party, demanded that Mr Maguire resign from the Liberal Party, which he had done by 15 July 2018.

13.237. On Sunday, 15 July 2018, Ms Berejiklian issued a "Statement regarding Daryl Maguire" in which she said:

> *I was shocked by the events of Friday and I spoke to Mr Maguire late that afternoon to express in the strongest possible terms my deep disappointment.*
>
> *He has let down his constituents, the people of NSW and the NSW Liberal Party.*
>
> *Over the weekend, I have spoken with the State Director of the NSW Liberal Party and asked him to seek Mr Maguire's resignation from the Party. I am advised Mr Maguire has resigned his membership.*
>
> *We will also be bringing forward the opening of nominations for the seat of Wagga Wagga so that an appropriate new candidate for the Liberal Party can be preselected.*
>
> *Whilst it is for Mr Maguire alone to determine whether he stays on as the elected Member until next March, I would encourage him to think carefully as to whether he can effectively represent the people of Wagga Wagga from here on in.*

13.238. Notwithstanding her 15 July public statement, between 16 and 18 July 2018, Mr Maguire and Ms Berejiklian exchanged text messages in which Mr Maguire told Ms Berejiklian what she should do in the difficult political circumstances following his Operation Dasha evidence. As Ms Berejiklian said, he was never backward in giving his advice on these matters.

13.239. The first, on 16 July 2018, from Mr Maguire was "Hokis, get stuck into me. Kick the shit out of me. Good for party morale."

13.240. The next three were all exchanged on 18 July 2018 at about 9.15 pm as follows:

MAGUIRE:	*You have some tough decisions to make! Soon*
BEREJIKLIAN:	*Like*
MAGUIRE:	*Expelling me from the house*

13.241. By 25 July 2018, Mr Maguire had announced his intention to resign from Parliament.

13.242. Mr Maguire formally resigned from Parliament on 3 August 2018. Mr Maguire said that the former premier, Mr O'Farrell, said he should do so.

Disclosing the relationship

Ms Cruickshank

13.243. Ms Cruickshank was seconded to the position of Ms Berejiklian's chief of staff from her permanent role in the DPC in early 2017, soon after Ms Berejiklian became premier. She continued in that role until February 2020.

13.244. As well as being Ms Berejiklian's chief of staff, Ms Cruickshank was a long-term acquaintance of Ms Berejiklian. They had some connection with each other during student politics back in university days, although they drifted apart for a period of time but then came to know each other a little bit later on. They had mutual friends.

13.245. On the evening of 13 July 2018, while she was out to dinner with friends, Ms Cruickshank received a telephone call from Ms Berejiklian and stepped away to take it. Ms Cruickshank was formally on leave at the time, although, as she observed, "it's hard to ever be on leave as a chief of staff".

13.246. Ms Cruickshank formed the view that Ms Berejiklian was in a state of distress when she called. Ms Berejiklian told her she was phoning to let Ms Cruickshank know there had been an historic relationship between her and Mr Maguire. Ms Berejiklian told Ms Cruickshank she was letting her know because a mutual friend had suggested that she needed to do so because Ms Cruickshank was her chief of staff and Ms Cruickshank needed to be aware of the fact.

13.247. During the conversation, Ms Berejiklian told Ms Cruickshank that she had had an historical relationship or friendship with Mr Maguire (and Ms Berejiklian "definitely used the word 'historic'"), that "it was before I became Premier" (which Ms Berejiklian said more than once), that Ms Berejiklian was concerned people may have seen her out with Mr Maguire at a lunch or dinner and drawn the conclusion that she was close to him (which may have been politically damaging to her given the controversy surrounding Mr Maguire) and that she had been told by a mutual friend of theirs to advise Ms Cruickshank of the fact of the historic relationship. Ms Cruickshank said she was "[a]bsolutely clear" that Ms Berejiklian indicated to her that it was an historical relationship before she had become Premier and later, in response to questioning from Ms Berejiklian's counsel, stated that Ms Berejiklian "was categorically clear with me it [her relationship with Mr Maguire] was before she was Premier". Ms Berejiklian also told Ms Cruickshank a number of times she had never had reason to believe that Mr Maguire had done anything untoward.

13.248. Ms Cruickshank did not believe Ms Berejiklian asked her for any advice as to what she should do, or perhaps what Ms Cruickshank should do as her chief of staff, in the light of the information about the relationship, nor seek her counsel as to whether there was anything proactive that Ms Berejiklian should do in light of the information she was telling her, about the historical relationship.

13.249. Ms Cruickshank did not think she had ever had a conversation with Ms Berejiklian in which Ms Berejiklian told her that she could not remember details of things she discussed with Mr Maguire or that she was not paying attention at the time.

13.250. Ms Cruickshank left the conversation with the impression that the relationship between Ms Berejiklian and Mr Maguire was more than just a few dinners, that it was close but did not get the sense it was a full-blown intense relationship. She had the impression that there had been something, but what that something was and the extent of the something, she did not know.

13.251. Ms Cruickshank's "takeout" of the conversation, that is to say as to why she was being told about the relationship, was that "it was clearly potentially newsworthy if a member of parliament has suddenly been engulfed in a scandal, and then if that person was no longer just a member of the government but actually somebody who was a close friend of the Premier".

13.252. Ms Cruickshank thought Ms Berejiklian was telling her in case there were enquiries through the media about, "wasn't Mr Maguire close to the Premier or weren't they friends or something like that".

13.253. Ms Cruickshank was shocked when Ms Berejiklian gave evidence in the First Public Inquiry about her close personal relationship with Mr Maguire because she had no idea that the relationship had continued into the time that she was Premier or even up until 2020. She was surprised that it had been in place during the time Ms Berejiklian was the premier, because she had never seen "any hide nor hair of it", and she had been told it predated Ms Berejiklian being premier.

13.254. When Ms Berejiklian divulged what Ms Cruickshank said she called an "historic" relationship or friendship on 13 July 2018, Ms Cruickshank understood that she was being frank with her. As noted, she understood Ms Berejiklian was communicating the information to her for it to be conveyed to the media if necessary that this was an historic relationship. When Ms Cruickshank heard Ms Berejiklian's evidence at the First Public Inquiry, she became aware that Ms Berejiklian had been less than frank with her on 13 July 2018 – that Ms Berejiklian had lied to her.

13.255. Ms Cruickshank was "quite clear" she was told Ms Berejiklian's relationship with Mr Maguire had come to an end before she became the premier because her reaction would have been different if Ms Berejiklian had told her the relationship was ongoing. In the event Ms Berejiklian had said to her, on or around 13 July 2018, what she ultimately said in the First Public Inquiry about the nature and duration of her relationship with Mr Maguire, Ms Cruickshank would have sat down with her and gone through whether or not there were any implications for things that she had done. She thought they would have relatively quickly got to her asking the question of whether or not Ms Berejiklian had made relevant disclosures under the ministerial code as to conflicts of interest. Ms Berejiklian accepted that Ms Cruickshank would have done that.

13.256. Such disclosure would probably also have meant Ms Cruickshank would have suggested that there may be "optical concerns" around anything that the premier was involved in that related to Wagga Wagga. She said: "I would have thought the optics of this is such that you need to be very careful that you're not seen to be potentially doing, making a decision that favours Wagga, and so you manage those things by making sure that if there's a particular meeting about something, then, you know, like a Cabinet meeting or an ERC meeting, that the disclosure or the potential conflict of interest is noted or you would make sure that if XYZ organisation is getting funding, that it's different ministers who sign off."

13.257. Ms Cruickshank did not tell anybody else about her conversation with Ms Berejiklian. After it occurred, they got on to focusing on the by-election.

13.258. In a subsequent conversation in which Ms Cruickshank and Mr Burden were giving Ms Berejiklian their "free character assessments" of Mr Maguire and saying, "Don't have anything to do with him," Ms Berejiklian told them, "He texts me sometimes," or something like that and they said, "Don't talk to him, don't have anything to do with him."

13.259. Ms Cruickshank said Ms Berejiklian did not ask her for any advice as to whether she should make any report to anyone in light of what had occurred on 13 July 2018. Nor did it occur to Ms Cruickshank to suggest that Ms Berejiklian consider making relevant disclosures as, on her understanding of what she was told, the relationship dated from before Ms Berejiklian's time as

premier and, accordingly, before Ms Cruickshank's time as chief of staff. Moreover, she had no reason to suggest that Ms Berejiklian needed to make declarations or for that matter to think she had not already made declarations that were appropriate.

13.260. Ms Berejiklian agreed Ms Cruickshank was "an honest, diligent person", and described her as "one of the most outstanding people I've ever had the honour to work with". When pressed with the disparity between their respective recollections of their 13 July 2018 conversation, and the fact that Ms Cruickshank's conduct after 13 July 2018 was consistent with a belief that the relationship with Mr Maguire was not ongoing, Ms Berejiklian said, "All I can say is I don't think it's uncommon for two people who trust each other to have a different recollection of the exact nature of the conversation. I can only recall what I thought I told her and she can only recall what she thought I told her." She agreed that she had told Ms Cruickshank during the by-election that Mr Maguire "keeps contacting me all the time", and that Ms Cruickshank had told her "to not have any contact with him", and that she had not taken her advice. She also agreed that from the time of the 13 July 2018 conversation, Ms Cruickshank had never enquired about how the relationship was going.

Mr Harley

13.261. Ms Berejiklian was served with a summons to attend a compulsory examination at the Commission in August 2020. When that occurred, Ms Berejiklian had a conversation with Mr Harley, who was by that stage her chief of staff, in which she disclosed her close personal relationship with Mr Maguire. This was the first Mr Harley knew of the relationship.

13.262. Mr Harley said, "it was a very difficult conversation for both of us. A very private matter for the former Premier, who is inherently a very private person." They did not go into detail about when the relationship commenced or when it finished, but they talked in broad terms about the nature of the relationship and the fact that it went beyond what might normally be regarded as a relationship between a premier and other members of Parliament. Mr Harley left the meeting with the impression that the relationship was an historical one as distinct from an ongoing or recently ended one. Ms Berejiklian did not challenge Mr Harley's account of their conversation.

13.263. The information came as a surprise to Mr Harley. He had never observed Ms Berejiklian to have treated Mr Maguire any differently from any other member of Parliament. Nor could he recollect an occasion from the time he joined Ms Berejiklian's office in 2017 when she raised Mr Maguire with him. He did not observe her to act in a manner which was partial towards Mr Maguire.

13.264. Ms Berejiklian did not deny the conversation she had with Mr Harley. In a compulsory examination conducted on 19 September 2021, she said she told him about the existence of the close personal relationship, but she could not remember precisely when she did so. This conversation clearly took place, as Mr Harley said, after she received the summons to attend the compulsory examination as she was concerned that she should not tell him anything which might breach the non-disclosure requirements in such a summons.

13.265. Ms Berejiklian described Mr Harley as "a man of his word". She said that "in the fullness of time, at the appropriate time, I divulged what I had to do, what I had to divulge at all times". When it was pointed out to her that Mr Harley had said virtually the same thing as Ms Cruickshank in terms of what she had said, "that it was a past relationship, not that it was a continuing relationship", her response was, "Well, well, obviously, I'd had those conversations with Mr Harley and, and he's provided his evidence and that's where it stands."

Ms Berejiklian

Evidence at the Second Public Inquiry

13.266. When she gave evidence at the Second Public Inquiry, Ms Berejiklian agreed that the events of 13 July 2018 caused her to contact Ms Cruickshank the same day. She may have done so at the suggestion of a mutual friend. She hesitated to call Ms Cruickshank because she was still "technically on leave" but felt it important enough to contact her. Prior to 13 July 2018, she had not shared with Ms Cruickshank the fact that she was in a close personal relationship with Mr Maguire. She was impelled to do so at that time because, she said, "what had happened was quite shocking and quite public and I felt that I needed to at least share with her how close Mr Maguire and myself were". Ms Berejiklian said she wanted to give Ms Cruickshank "an assurance that I didn't know anything to report and I didn't have anything to, to provide this body … and she would have accepted that".

13.267. Ms Berejiklian denied that her reason for informing Ms Cruickshank of the existence of the relationship on 13 July 2018 was a concern that if it became known that she was in a personal relationship with Mr Maguire, the cloud that was then over Mr Maguire might also encompass her. However, she agreed that could have been a consideration. She reiterated that her "major concern was to relay to [Ms Cruickshank] firstly the closeness of our relationship, or close personal relationship, but also that there was nothing I knew or nothing I felt or nothing I understood or suspected that I needed to report".

13.268. Another aspect of Ms Berejiklian informing Ms Cruickshank about her close personal relationship with Mr Maguire in respect of whom there was a significant cloud, was to put her on notice of that fact so that she would be able to deal with, and was not taken aback by, any potential political controversy that arose from that circumstance. This was, no doubt, a realisation that the political controversy she had feared during the 5 July 2018 conversation might erupt if it was suggested in public that Mr Maguire had something to do with making money in connection with property developments, was about to come to pass.

13.269. Ms Berejiklian said she did not seek Ms Cruickshank's advice, but that Ms Cruickshank did tell her, "Stop having anything more to do with him" and "Don't have anything more to do with him", but that she "did not take that bit of advice, obviously."

13.270. Ms Berejiklian could not remember the exact conversation and could not recall whether she told Ms Cruickshank that the relationship was an historical one. Her "recollection was that [she told Ms Cruickshank] we were very close personal friends … and the nature of the relationship and it was off-again/on-again and that's my recollection". She said she had "left [Ms Cruickshank] in no doubt that … I was very close to Mr Maguire and, and, you know, the exact words were used or what we spoke about, I can't confirm but that's just my personal recollection. I remember two things. The two things I remember are disclosing my close personal relationship with Mr Maguire and, secondly, the point that I, I felt that I didn't know anything or needed to report anything but I can't, that's just my personal recollection on those two brief conversations that we had."

13.271. Ms Berejiklian agreed that the fact of her then relationship with Mr Maguire would have been politically explosive. She asserted that that would have been the case "irrespective of the longevity or how intense it was". She did not accept that the question of whether the relationship was ongoing or historical, in the sense of being before she was premier, was apt to have a very significant impact on the level of political explosiveness of any information about their relationship. She asserted that "[w]hether or not the relationship was at a particular stage at any given time was irrelevant. I had a close association with him, a close ongoing association and relationship with him. How you define that is, is subjective, because I know exactly, you know, what my position

was. But irrespective of how close or not it was at any particular time, as premier I had a close relationship with him."

13.272. Ms Berejiklian said she had not told Ms Cruickshank, or her preceding chiefs of staff, about her relationship with Mr Maguire before 13 July 2018 "because I'm a very private person and I, and I assumed that was private business". She added, "I didn't feel I had a commitment in that relationship that would cause me to, to tell anybody outside, anybody that I worked with".

13.273. Ms Berejiklian denied lying to Ms Cruickshank regarding the timing of the relationship.

Evidence at a compulsory examination

13.274. As Counsel Assisting submitted, Ms Berejiklian's account at a compulsory examination on 18 September 2021 of the conversation with Ms Cruickshank on 13 July 2018 differed from the account she gave at the Second Public Inquiry. At the compulsory examination, her evidence was:

[Assistant Commissioner]: *What was it about that occasion, Ms Berejiklian, which led you to disclose the relationship to Ms Cruickshank?*

[Ms Berejiklian]: *My absolute shock at what had occurred that day. It, it, it was a shock to the system that he would be involved in anything like that and I, I was shocked to the core and I, I,* ***I asked her advice and I, and I divulged to her that I didn't know any of what had gone on by that we were close, had been in a close relationship, or close personal relationship****, and I, I did that on the day that, that, that information came out because I was just completely shocked as to what had happened.*

[Q]: *And very distressed, I assume?*

[A]: *Oh, overly, beyond distressed because it just shook my world, my, my understanding of who this person was completely blew apart and I, I rang – well, and* ***I sought her advice as to whether I should do anything further and she said, "Let the events take their course." I, I said, I don't, I confessed to her that I didn't know anything. I said, "Apart from odd things he had mentioned to me, I had never been aware of these matters.****" I was extremely distressed and shocked. I sacked him first and then told her, she was the only person I disclosed to and I,* ***I was at a loss as to whether I should proactively say anything. I said, "I don't know anything," and she said, "Let matters obviously take their course****."*

…

[Counsel Assisting]: *Does it follow from what you've just said that you would reject any suggestion that any exercise or non-exercise of your official functions was ever influenced by your personal feelings for Mr Maguire?*

[Ms Berejiklian]: *I would reject that. But I should also state that I did trust him, but I did not have anything specific, but if I did I would report that. I don't want to take away from the fact that I've known him a long time, and in fact, I would suggest a number of my colleagues also trusted him. He'd been part of the furniture for*

> *many years, and – but had I, had I, anything come across my desk, or had any suspicion been aroused, of course I would have, but there was nothing specific that I – I didn't feel I had any specific information, and* ***in fact, I disclosed that to my chief of staff. I said to her when, on 13 July, I, I explained to her what the situation was. I said I don't have anything specific to report. I said I don't know all these people he may have mentioned to me. I don't know, I always assumed he took care of his disclosures. I assumed he did everything by the book, and I disclosed that to her.*** *And even now, if there was anything that I remembered or anything that I felt, at, from the time that would contribute to that, that inquiry, I, I would have.*
>
> (Emphasis added)

13.275. It is significant in this account of the conversation with Ms Cruickshank that Ms Berejiklian speaks in past tense in saying she told Ms Cruickshank she "had been in a close relationship, or close personal relationship" with Mr Maguire. This, of course, accords with Ms Cruickshank's recollection of the conversation. It is corroborated by Mr Harley's evidence that he left the meeting at which Ms Berejiklian told him about the relationship with Mr Maguire with the impression that the relationship was an historical one as distinct from an ongoing or recently ended one.

Who should be believed?

13.276. Counsel Assisting submitted that Ms Cruickshank's account of her conversation with Ms Berejiklian on the evening of 13 July 2018 should be accepted for the following reasons.

13.276.1. Ms Cruickshank gave evidence that she had given Ms Berejiklian what she described as "free character assessments" of Mr Maguire (in context, adverse assessments) subsequent to his resignation from Parliament and prior to Ms Berejiklian's public evidence before the Commission in Operation Keppel revealing the ongoing nature of her relationship with Mr Maguire. That Ms Cruickshank saw fit to give such assessments is entirely consistent with her understanding that Ms Berejiklian's relationship with Mr Maguire was, to Ms Cruickshank's understanding, an historic one.

13.276.2. Ms Cruickshank's evidence is consistent with and supported by the evidence of the mutual friend referred to above.

13.276.3. Ms Cruickshank's evidence that she was "surprised" upon hearing Ms Berejiklian's evidence in the First Public Inquiry that the relationship was ongoing during Ms Berejiklian's tenure as premier is consistent with her having understood the relationship as being an historic one.

13.276.4. When Ms Berejiklian disclosed her relationship with Mr Maguire to Mr Harley in 2020, he was also left with the impression that it was "a relationship that had concluded and was a relationship in the past"; his impression was that it was the "distant past".

13.276.5. Ms Cruickshank presented as a credible and reliable witness who gave honest and frank evidence in difficult circumstances having regard to her personal and professional relationship with Ms Berejiklian.

13.276.6. Ms Berejiklian's account of her conversation during her compulsory examination in September 2021 was substantially different from the evidence that she gave at the Second Public Inquiry a month or so later.

13.276.7. Ms Berejiklian was not a satisfactory witness.

13.277. Ms Berejiklian submitted that the Commission could not be satisfied of the "correct" version of the conversation, and accordingly no finding should be made about it – certainly not that Ms Berejiklian lied to Ms Cruickshank.

13.278. Ms Berejiklian relied on McLelland CJ in Eq's well-known observations in *Watson v Foxman* concerning the fallibility of human memory, such that, having regard to the passage of time and intervening events, "[a]ll too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed." She also relied on the not uncommon phenomenon of the "plasticity of memory imped[ing] the truth finding process". Finally she pointed to a statement by the Commission that:

> *Evidence as to verbal statements allegedly made by a person several years before, in the absence of corroborative evidence, is evidence that demands the exercise of caution by the relevant tribunal of fact. The reasons for that include the possibility of faulty recollection and/or fading memory for detail over time, and whether the narrator of past conversations has a particular cause or interest to advance along with other possible factors.*

13.279. Ms Berejiklian submitted that each of these considerations was squarely engaged in any attempt by the Commission to make findings about the precise content of the conversation between Ms Berejiklian and Ms Cruickshank, "based on their recollection of the conversation more than three (very crowded) years later".

13.280. Ms Berejiklian expressly eschewed any suggestion that Ms Cruickshank was deliberately misleading. Nevertheless, she submitted there were good reasons to treat the reliability of Ms Cruickshank's account of details of the 13 July 2018 conversation with caution.

13.281. The first matter Ms Berejiklian pointed to in this respect was the fact that during a compulsory examination, Ms Cruickshank had been uncertain when the conversation actually took place, first placing it at a week, two weeks, three weeks after Mr Maguire's evidence in the Commission in Operation Dasha, then placing it on the Saturday or Friday after his evidence. In the Second Public Inquiry, she had been certain the conversation occurred on the Friday Mr Maguire gave evidence.

13.282. Ms Berejiklian submitted that Ms Cruickshank's vagueness and variation in recollection as to when the conversation took place illustrated the fallibility of her memory about this conversation, and the risk of making serious adverse findings on the basis of one witness' recollection.

13.283. Secondly, Ms Berejiklian submitted that, like her own acknowledgment that she could "not recall properly what the conversation was … not … every detail of it", when asked to give her account of the conversation, Ms Cruickshank said, "I'm not going to remember precise detail, but I remember the gist of it. So I'll tell you the gist of what I, the conversation, with the qualifier it was after dinner, so I'd had a few wines."

13.284. Thirdly, Ms Berejiklian pointed to what she contended was Ms Cruickshank's uncertainty about the strength of her relationship with Mr Maguire, ranging from saying in a compulsory examination that she "didn't come away from the conversation with a sense of it was anything more than a few dinners", to what Ms Berejiklian submitted was directly contradictory evidence given by Ms Cruickshank at the Second Public Inquiry:

> *I left the conversation with the impression that it was more than just a few dinners, but that it was, it was close but not, how would I say this, I, I didn't get the sense it was a full-blown intense relationship but, but I'm just reading that. I, like, I don't, I don't know.*

13.285. Fourthly, Ms Berejiklian submitted that Ms Cruickshank's evidence was not a genuine independent recollection of the conversation itself, but a reconstruction influenced by "conscious consideration of what should have been said or could have been said". This was based on Ms Cruickshank's evidence that while she was adamant that Ms Berejiklian conveyed that her relationship with Mr Maguire was only historical in nature, that was because of her evidence that she was clear about that "because my reaction would have been different if she had told me it was ongoing".

13.286. While Ms Berejiklian accepted that Ms Cruickshank came away from the 13 July 2018 conversation with the impression that the relationship between Ms Berejiklian and Mr Maguire was historical, and that this was consistent with her subsequent conduct, she submitted that it did not mean that there was a basis to find, as Counsel Assisting urged, that Ms Berejiklian deliberately lied to Ms Cruickshank in the conversation.

13.287. Finally, Ms Berejiklian submitted that Ms Cruickshank's impression may easily have been attributable to a misunderstanding having regard to the facts that she took the call while she was at dinner with friends, after "a few wines" and gleaned from Ms Berejiklian's manner that "she was in a state of distress at the time when she called". She referred to the same dynamics being observed by Mr Harley when Ms Berejiklian told him about the relationship: "I took it to be distant past but that was just my impression. It was a, as you can imagine, a very difficult discussion to have, so at that time after initially finding out I, I took it to be something that was more historic in nature."

13.288. The Commission rejects Ms Berejiklian's submission that Ms Cruickshank's evidence was unreliable or a reconstruction. None of the matters to which Ms Berejiklian points in this respect detract from Ms Cruickshank's evidence that she was "[a]bsolutely clear" that Ms Berejiklian indicated to her that it was a "historical relationship" before she had become premier and was "categorically clear with [her]" Ms Berejiklian told her that her relationship with Mr Maguire was before she was premier. That was consistent with the account of the relationship Ms Berejiklian gave in the compulsory examination.

13.289. Ms Berejiklian's evidence that she felt that she needed to share with Ms Cruickshank how close Mr Maguire and she were as if the relationship was ongoing, is inherently implausible. Ms Berejiklian had not disclosed the fact of her relationship with Mr Maguire to anyone up until 13 July 2018, with the exception, it appears, of her close friend who worked in corporate affairs. It appears that that friend had advised Ms Berejiklian that she should advise her chief of staff of her relationship with Mr Maguire so that they could conduct a "risk assessment" type exercise.

13.290. Even then, in the Commission's view, Ms Berejiklian could not bring herself to tell Ms Cruickshank that the relationship was ongoing.

13.291. As noted earlier, when asked if she was concerned that if it became known that she was in a relationship with Mr Maguire, the cloud that was then over Mr Maguire might also encompass her as well, Ms Berejiklian first answered, "[i]t wasn't my main concern". When pressed as to this prospect being at least a consideration, Ms Berejiklian said, "It could have been. I can't remember", and said:

> *…my main concern was I was wanting to assure her that I didn't know anything about what had transpired and what had gone on. I guess that my major concern was to relay to her firstly the closeness of our relationship, or close personal relationship, but also that there was nothing I knew or nothing I felt or nothing I understood or suspected that I needed to report.*

13.292. Ms Berejiklian realised that the disclosure of the fact of her then relationship with Mr Maguire would have been politically explosive. The suggestion Ms Berejiklian would have disclosed the full nature and extent of her relationship with Mr Maguire, including that it was ongoing, at a time when Mr Maguire had just been disgraced before the Commission, had a cloud hanging over his head and had, to use the words of her public statement, "let down his constituents, the people of NSW and the NSW Liberal Party", smacks of reconstruction and wishful thinking.

13.293. Ms Cruickshank's account of the historic nature of Ms Berejiklian's relationship with Mr Maguire is corroborated by what Ms Berejiklian told Mr Harley two years later after receiving the summons in about August 2020 to appear at a compulsory examination. What she told him, in what was admittedly a "very difficult discussion to have", left him with the impression it was an historical relationship which "went beyond what we might normally regard as a relationship between, you know, a Premier and other members of parliament," and was "a relationship that had concluded and was a relationship in the past"; his impression was that it was the "distant past".

13.294. Ms Cruickshank's account is also corroborated by her behaviour after the 13 July 2018 conversation. As she said, and Ms Berejiklian accepted, had Ms Cruickshank known the relationship was ongoing, she would have sat down with Ms Berejiklian and gone through whether or not there were any implications for things that she had done. Ms Cruickshank thought they would have relatively quickly got to her asking the question of whether or not Ms Berejiklian had made relevant disclosures under the ministerial code as to conflicts of interest. Ms Berejiklian accepted that Ms Cruickshank would have done that. The Commission has no doubt that one of the reasons Ms Berejiklian did not tell anyone the relationship with Mr Maguire was continuing was because she had never disclosed it at any Cabinet or ERC meeting, and she was concerned about the ramifications for herself if that became known, even just to her colleagues.

13.295. In addition, about a week after 13 July 2018, Ms Cruickshank and her strategy director, Mr Burden, gave Ms Berejiklian their "free character assessments" of Mr Maguire and told her, "Don't have anything more to do with him. Don't talk to him." When Ms Berejiklian told them "'He texts me sometimes', or something like that", they said, "Don't talk to him, don't have anything to do with him." Ms Berejiklian agreed Ms Cruickshank had done this, but asserted this was immaterial to her, rather than a strange thing for Ms Cruickshank to do if she had believed Ms Berejiklian was still in a continuing personal relationship with Mr Maguire.

13.296. In the Commission's view, it is highly implausible that Ms Cruickshank would have been speaking so frankly about Mr Maguire if she had thought Ms Berejiklian was still in a close personal relationship with him. As she said, she was "slightly mortified" when she heard the evidence from the First Public Inquiry about Ms Berejiklian's close personal relationship with Mr Maguire having regard to the "free character assessments" of Mr Maguire she had given to Ms Berejiklian subsequent to his resignation from Parliament.

13.297. Equally implausible is the proposition that if she had known the relationship was ongoing, Ms Cruickshank would have been advising Ms Berejiklian not to have anything to do with him. Once again, Ms Berejiklian asserted that she did not find this was "strange or unusual" and that she just "listened quietly" and did not take her advice. Ms Berejiklian accepted that Ms Cruickshank was giving her her "best political advice" and said it was "for me to accept it or otherwise". It is apparent that the strength of Ms Berejiklian's relationship with Mr Maguire was such that she was prepared to continue it, despite the fact her chief of staff was telling her, in substance, that any contact with him was politically unwise.

13.298. In addition, after the 13 July 2018 conversation, Ms Cruickshank never enquired as to how the relationship with Mr Maguire was going or invited Ms Berejiklian to bring him to social functions.

Ms Berejiklian asserted Ms Cruickshank would not have done so because "that wasn't the type of relationship I had with Mr Maguire". Yet, Ms Berejiklian asserted she had informed Ms Cruickshank on 13 July 2018 how close her relationship was with Mr Maguire. As a matter of ordinary experience, the proposition that a friend, given a history of a close personal relationship which had been ongoing for some years and was continuing, would not invite someone's partner to a social event is highly unusual. Rather, such behaviour is consistent, in the Commission's view, with Ms Cruickshank understanding that Ms Berejiklian's relationship with Mr Maguire was historic.

13.299. Contrary to Ms Berejiklian's submissions, the fact that Ms Cruickshank could not give any particular detail about how close Ms Berejiklian and Mr Maguire were, is consistent with Ms Berejiklian not providing any detail of that aspect of the relationship to her. Rather, Ms Cruickshank was left with the impression of an historic (pre-premier) friendship involving a few dinners. It is apparent Ms Berejiklian sought to downplay the relationship as much as possible, no doubt in an attempt to place as much distance as she could between herself and Mr Maguire. The closer the relationship appeared to be, the more probable it became that questions may be asked about the extent to which she was aware of his activities.

13.300. The Commission finds that on 13 July 2018, Ms Berejiklian told Ms Cruickshank that she had had a relationship with Mr Maguire before she was premier which amounted to them having a few dinners together from which Ms Cruickshank understood that the relationship was historic and not ongoing.

13.301. The Commission finds that in so doing, Ms Berejiklian lied to Ms Cruikshank about her relationship with Mr Maguire and its nature, length and intimacy. The most significant reason for her doing so was probably Ms Berejiklian's concern that telling the truth about those matters may implicate her in, or suggest she may have knowledge of, some of Mr Maguire's activities which had been exposed in his Operation Dasha evidence. Ms Berejiklian's many protestations that she did not know anything specific about Mr Maguire's activities, which she might report to the Commission, reflected her wilful blindness in September 2017, when she told Mr Maguire she did not "need to know that bit", and again on 5 July 2018, when she told him, "Don't, don't talk … I don't, I don't want to know any of that stuff". As the Commission has found, Ms Berejiklian refrained from obtaining the final confirmation because she wanted, in the event, to be able to deny knowledge of his activities. That thought was most probably uppermost in her mind on 13 July 2018 and continued at least until the time when she told Mr Harley about the relationship in about August 2020 in a conversation which left him with substantially the same impression as Ms Cruickshank about its length and intimacy.

The significance of the lie

13.302. Counsel Assisting submitted that a question arises as to why Ms Berejiklian would have lied to Ms Cruickshank about the time frame of her relationship with Mr Maguire. They observed that Ms Berejiklian did not offer an explanation. Rather, she maintained that she neither lied to, nor misled, Ms Cruickshank in that regard. She suggested that there may have been some level of misunderstanding, miscommunication or mistaken recollection on their respective parts as to what was said. Counsel Assisting submitted that Ms Cruickshank's recollection and understanding of the conversation should be accepted as accurate.

13.303. Counsel Assisting submitted there were several plausible reasons for Ms Berejiklian having lied to Ms Cruickshank.

13.304. First, Ms Cruickshank was someone who was likely to insist upon Ms Berejiklian adopting an assiduous approach to compliance with her disclosure obligations. Had her relationship with Mr Maguire been exposed at that point, it would have been likely to inflict significant political

damage both upon Ms Berejiklian personally and upon the Coalition more generally, given her status and standing as premier.

13.305. Secondly, exposure of the existence of the relationship during the currency of Ms Berejiklian's period as premier would have, at least, raised questions as to whether Ms Berejiklian had complied with her own obligations while making decisions touching upon Mr Maguire and his electorate.

13.306. Thirdly, Ms Berejiklian may have been experiencing a level of shame regarding the relationship for a variety of reasons: she had kept it secret from Ms Cruickshank despite their friendship and their close professional relationship; Ms Cruickshank did not hold Mr Maguire in high regard; and Mr Maguire had just become the subject of significant controversy.

13.307. Fourthly, revelation of the relationship and its length and intimacy may have caused questions to be raised as to the extent to which (if at all) Ms Berejiklian was aware of Mr Maguire's activities.

13.308. Ms Berejiklian submitted that if the Commission were to find that she deliberately misled Ms Cruickshank into thinking that the relationship was not ongoing, such a finding did not hold the significance for which Counsel Assisting contended. Rather, she submitted that there were a number of potential reasons for this having happened. She argued that by far the most likely explanation would be one of personal embarrassment. Aside from being a mutual friend, Ms Cruickshank was only the second person in the world to whom Ms Berejiklian had disclosed the relationship. Ms Berejiklian submitted she obviously had a deep aversion to discussing it.

13.309. Ms Berejiklian also submitted that she knew that Ms Cruickshank disliked Mr Maguire. In circumstances where Ms Berejiklian considered she had no need to disclose the relationship to anyone, for her to give Ms Cruickshank the impression the relationship was historic did not carry the cynical connotations that Counsel Assisting advanced. In particular, Ms Berejiklian submitted such an untruth would not have the qualities nor was it told in the circumstances such as to permit a conclusion that it was told out of a consciousness of guilt (that is, suspicion of corrupt conduct by Mr Maguire).

13.310. The Commission does not accept Ms Berejiklian's submissions. Her lie was told in the context, as she said, that:

> *… in terms of public office, in, in public life, it wasn't just the facts of what we were dealing with and* [the] *investigation that was under way, but it was also the perception of what he may have been caught up in. At the very least, if there's a cloud of that nature, one would be expected to sit on the crossbench, to relieve themselves of their responsibilities, until the matter came to a conclusion…*
>
> *… On 13 July what erupted was* [Mr Maguire's] *close association with people who were accused of doing wrongdoing, and his association and interest with these people. And that, in public life, that's sufficient cloud for you to step aside until that cloud is dealt with positively or negatively.*

13.311. The Commission finds that Ms Berejiklian was concerned about a number of possibilities on 13 July 2018 in the aftermath of Mr Maguire's evidence. In addition to those for which Counsel Assisting contended, which the Commission adopts, another possibility was, as Ms Berejiklian agreed, that in the event a journalist might pick up a photograph that showed herself and Mr Maguire together that might cause the cloud over him to encompass herself, or at least cause questions to be asked, she would want her chief of staff to know about things of that kind. She wanted Ms Cruickshank to have some information about the relationship because as her chief of staff, Ms Cruickshank would have been expected to manage that situation. Better that Ms Cruickshank believe the relationship was in the distant past, than ongoing.

13.312. The second possibility with which Ms Berejiklian would have been concerned, a slight variation on the first, was that in the event the relationship was disclosed as continuing, there was a possibility that she might be a "victim" of the same perception as that to which, on her assertion, Mr Maguire had succumbed: her close association with somebody who was accused of wrongdoing being a sufficient cloud for her to have to step aside with consequent political damage not just to herself, but also to the Liberal Party.

13.313. The third possibility was that revelation of the close personal relationship, its true length, intimacy and the fact it was continuing, may have caused questions to be raised as to the extent to which Ms Berejiklian was aware of Mr Maguire's activities, and possibly, cause Ms Cruickshank to enquire about whether Ms Berejiklian had any information which should be communicated to the Commission. Ms Berejiklian must have realised that disclosing matters to the Commission may cause it to question what else she may know and that she could possibly be drawn into any investigation about him.

13.314. All of these possibilities were reasons for Ms Berejiklian to engage in a form of damage control: to tell Ms Cruickshank about the relationship but to downplay its significance and to place it at a time remote from the events which were engulfing Mr Maguire. They also militated against Ms Berejiklian making a report to the Commission to discharge her s 11 duty.

13 July 2018 – the aftermath

13.315. Counsel Assisting submitted that by July 2018, there were strong grounds for suspecting that Mr Maguire may have been engaged in corrupt conduct and the Commission should find that Ms Berejiklian, in fact, had such a suspicion as would enliven her s 11 duty to report her suspicions to the Commission.

Section 11 disclosures

13.316. Following Mr Maguire's evidence on 13 July 2018, the DPC contacted Ms Cruickshank. It drew her attention to the fact that a previous operation of the Commission had meant that there were ministerial officers and staff who may have seen or heard things that concerned them. They suggested that Ms Cruickshank put a similar mechanism in place for the ministerial officers in the Berejiklian/Barilaro government. At the first chiefs of staff meeting, probably a week later, Ms Cruickshank told her fellow chiefs of staff, "Please make sure that you tell your members of staff that they should feel completely comfortable and in fact should be encouraged to come forward if they have any concerns about Mr Maguire. Obviously, we've learnt things that none of us would have expected of Mr Maguire and we want to make sure that everybody knows that if they have things to report that they should." Ms Cruickshank said they set in place "a situation that … meant that all ministerial staff … or for that matter anybody but I was communicating with chiefs and through them to their staff, they could go to the Department of Premier and Cabinet and pass on any concerns that they had and that the Department of Premier and Cabinet would then refer those automatically to the Commission". Involving the DPC meant the process was an arm's-length process, at least from the political arms of government.

Briefing the premier

13.317. The consultation between the DPC and Ms Cruickshank was reflected in two briefings for the premier prepared by general counsel in the Cabinet and Legal Group advising Ms Berejiklian that the secretary of the DPC was providing information to the Commission that may be relevant to Operation Dasha.

13.318. The first briefing was dated 23 July 2018. It described Operation Dasha as a "current investigation by ICAC into Canterbury Council and other public officials". It identified the issue it addressed as being advice from a ministerial adviser employed in the office of the minister for education who held information that "may be relevant" to Operation Dasha. It noted the obligation of ministers and heads of government to report to the Commission "any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct". It pointed out that the purpose of the briefing was to inform the premier that the secretary of the DPC was providing information to the Commission that may be relevant to Operation Dasha.

13.319. Under the heading, "Background", the briefing reiterated the information about the nature of Operation Dasha. It noted that "Darryl [sic] Maguire has announced his intention to resign from Parliament as a result of this investigation". It advised that a staff member who had worked as an adviser to the minister for planning in 2016 had contacted the DPC about information "which may be relevant to Operation Dasha". It also noted that the DPC had been informed there may be former staff members who may also hold relevant information. It set out the express obligation of ministers and the principal officer of a public authority in s 11(2) of the ICAC Act and the opportunity under s 11(3A) for a minister to comply with their s 11(2) obligation by reporting the matter either to the Commission or to the head of any agency responsible to the minister. It advised that the DPC had advised the staff member that the information should be promptly provided to the Commission.

13.320. A handwritten note in a box for "Premier's comments", which Ms Berejiklian accepted was in her handwriting, bore the date 25/7/18 and stated, "The Secretary's role in this instance should be replicated for all future declarations." As this briefing would have been returned to the DPC, this was an instruction that the secretary should continue to provide information to the Commission as it might be provided through the process that Ms Cruickshank set up.

13.321. Ms Berejiklian accepted during a compulsory examination conducted on 19 September 2021 that she would have assumed that this briefing related to Mr Maguire:

> *[Counsel Assisting]:* *As at the time that you got this briefing, you understood that the information that was being referred to in the recommendation section was information concerning Mr Maguire. Is that right?*
>
> *[Ms Berejiklian]:* *Well, obviously it related to Operation Dasha, so that would have been my assumption, yes.*

13.322. Ms Berejiklian did not respond in a like manner during the Second Public Inquiry. She said she could not remember what she thought when she saw the briefing, making the point that even though it referred to Mr Maguire announcing his intention to resign as a member of Parliament and said that the staff member was providing information in relation to Operation Dasha, "it doesn't tell me what specifically it's about … but clearly I knew it was to do with Operation Dasha".

13.323. Having been reminded of the answer she gave in the compulsory examination, Ms Berejiklian said her assumption was the briefing "could" have concerned Mr Maguire, "yes, definitely, because that was Operation Dasha". As Counsel Assisting submitted, this realisation must have caused Ms Berejiklian to reflect on whether her own s 11 duty was engaged. Notwithstanding, she made no report to the Commission.

13.324. The second briefing for the premier was expressed in similar terms to the first, save that the notifying staff member worked in the office of the minister for trade and industry. In the box for "Premier's comments", the word, "Noted" appeared. At the bottom of the document there was a handwritten note, "Returned by Premier's Office 1/8/18." against which were the initials "SC". These were the initials of an assistant who worked for the legal counsel.

13.325. Ms Cruickshank thought that the hand-written "Noted" "look[ed] like" Ms Berejiklian's handwriting. However, Ms Berejiklian denied having seen the document and denied that the handwriting was hers. Ms Berejiklian said the note indicated she had not seen this briefing as, had she seen it, she would have signed and dated it. Accordingly, Counsel Assisting submitted that the Commission was not in a position to be able to find whether or not Ms Berejiklian did see the briefing. The Commission accepts that submission.

"Very alive to my obligation"

13.326. Ms Berejiklian partly framed her conversation with Ms Cruickshank on 13 July 2018 around the fact of her being "very alive to my obligation" to report to the Commission under s 11. However, quite how she connected that with the conversation with Ms Cruickshank was difficult to discern from the answer in which this statement is found.

13.327. Ms Berejiklian claimed she had not paid close attention "even to this day" as to the nature of the evidence, or part of it, given by Mr Maguire at Operation Dasha which was that he was, in effect, trying to share commissions with Mr Hawatt. That evidence is contradicted by other evidence she gave indicating she had a shrewd idea of what he had admitted: namely, that the "gist" of the evidence on the public record was that Mr Maguire had admitted to being engaged in a money-making exercise along with Mr Hawatt, who was then a member of Canterbury City Council.

13.328. Notwithstanding her asserted lack of knowledge of Mr Maguire's evidence on 13 July 2018, it was sufficient for her to issue the public statement on 15 July 2018 stating that Mr Maguire had "let down his constituents, the people of New South Wales and the New South Wales Liberal Party", to ask the state director of the NSW Liberal Party to seek Mr Maguire's resignation from the party and, in effect, suggest that Mr Maguire resign from the Parliament. However, in the latter respect, it is apparent Ms Berejiklian did get advice, from what may appear to be an unlikely source, Mr Maguire, who told her on 18 July 2018, she should expel him from the House.

13.329. Ms Berejiklian said that she gave close consideration in the days following 13 July 2018 as to whether or not she had a duty to report to the Commission or a head of an agency responsible to her. She came to the view that she did not have a duty to report, a conclusion she reached without obtaining any advice from either her chief of staff or any lawyers within government or separately from government. In particular, Ms Berejiklian did not seek any political advice from anyone as to what to do in light of the events of 13 July 2018 following the information she had about Mr Maguire's contacts and dealings with property developers, other than as to how to issue public statements.

13.330. Ms Berejiklian said she did not seek advice as to her duty to report pursuant to s 11, "[b]ecause in my mind there was nothing I knew, there was no information I knew that I could convey to say that this is what I know. I'm not quite sure what I would have, what I would have reported. There is no specific thing that I felt that I knew or understood or assumed or suspected."

13.331. Ms Berejiklian also said in the context of being asked whether she suspected Mr Maguire had engaged in corrupt conduct, "I didn't have enough detail. I hadn't read what was happening. I can't remember what I thought at that time."

13.332. These are the circumstances in which one might think a person would seek advice to resolve any uncertainty. Nevertheless, Ms Berejiklian came to the conclusion herself that there was nothing that she had any knowledge of to report.

13.333. If Ms Berejiklian was, in fact, "very alive to [her] obligation" pursuant to s 11, one would have expected her to familiarise herself with Mr Maguire's evidence, or at least ask her staff to provide her with a briefing about it. Rather, it is apparent Ms Berejiklian sought to shut her eyes to the detail of his evidence in a manner reminiscent of her behaviour in September 2017 and on 5 July 2018 when she stopped Mr Maguire from giving her details of his conduct.

13.334. Ms Berejiklian was asked whether she was concerned that if she sought advice from either her chief of staff or any lawyers within government or separately from government, the cloud which Mr Maguire was under might shift to her. She responded, "No, because I knew in my heart that I had never, ever, ever done anything wrong. In fact, anyone who's worked with me or knows me knows I'm not capable of that. Absolutely. But if I had any suspicion whatsoever that, that I knew anything or suspected anything, of course I would not have hesitated."

13.335. The Commission rejects this explanation. It cannot sit with the lie Ms Berejiklian told Ms Cruickshank and Mr Harley about the historic relationship with Mr Maguire. It is patent that Ms Berejiklian was concerned to distance herself publicly as much as possible from Mr Maguire to ensure the political controversy which had erupted with his evidence did not engulf her as well.

13.336. Ms Berejiklian submitted that there was no evidence that she turned her mind to, or saw any of her knowledge of, the Badgerys Creek matters "in a different light" following the 5 July 2018 conversation or Mr Maguire's evidence on 13 July 2018.

13.337. The Commission does not accept that submission. As already found, in the Commission's view, it is probable Ms Berejiklian turned her mind to the Badgerys Creek matter when they talked on 5 July 2018, and there was discussion about whether Mr Maguire had ever made any money out of dealings with property developers.

13.338. Even if that is not correct, it is highly improbable in the light of Ms Berejiklian's evidence that she "racked her brain" as she graphically explained after 13 July 2018, "questioned everything" and "thought about every, tried to remember every conversation we had, I tried to remember everything", "over many days", that Ms Berejiklian did not then join the dots. The parallels between Mr Maguire's conduct in relation to Badgerys Creek and the $1.5 million he was to earn in "just one sale" she learned about in 2017, and his efforts on Ms Waterhouse's part in relation to her land at Badgerys Creek and what she was learning in 2018, what he had told her on 5 July 2018 about what he had done for Country Garden, and his evidence on 13 July 2018, were manifest.

13.339. As already noted, Ms Berejiklian said that she was "trying to rationalise what had occurred at the 13 July 2018 hearing, [Mr Maguire's] protestations of presumption of innocence and … what my responsibilities were".

13.340. Ms Berejiklian's attempts to rationalise these matters and her decision not to report Mr Maguire's conduct to the Commission must be understood against the following background:

13.340.1. Ms Berejiklian came to the view immediately after Mr Maguire's evidence that he had let down his constituents, the people of NSW and the NSW Liberal Party.

13.340.2. She also came to the view that Mr Maguire was, at the very least, under a dark cloud constituted by the perception of what he may have been caught up in as a result of which one would be expected to sit on the crossbench, to relieve themselves of their responsibilities, until the matter came to a conclusion.

13.340.3. Ms Berejiklian appreciated there was a risk that the cloud over Mr Maguire might encompass herself, or at least cause questions to be asked.

13.340.4. Ms Berejiklian told Mr Maguire she believed him when he told her on 5 September 2017 that he was close to getting a land deal done which would give him enough money to pay off his debts of $1.5 million.

13.340.5. Ms Berejiklian was aware, as at 1 September 2017, that Mr Maguire claimed to have debts of around $1.5 million. That awareness was, at least, derived from two conversations between the couple on that date.

13.340.6. Ms Berejiklian said that this information did not cause her to suspect that Mr Maguire may have been engaged in corrupt conduct as she did not "pay too much attention", "he was always talking big" and she "trusted him as a colleague and as a close personal friend".

13.340.7. On 5 July 2018, in their lengthy conversation, Ms Berejiklian was critical of Mr Maguire's association with Mr Hawatt and other people who she described as "dodgy people" from whom she "always kept my distance".

13.340.8. She did not report to the Commission the information Mr Maguire gave her in the conversation on 5 July 2018 during which she told him not to engage with these "dodgy people" because he told her he had done nothing wrong.

13.340.9. On 13 July 2018, Ms Berejiklian questioned what Mr Maguire told her on 5 July 2018 when he said he had done nothing wrong. She questioned "whether he'd lied to me, he must have lied about his association or must have lied about something, but [she] didn't come to the conclusion that it was corrupt conduct … In fact, it was the responsibility, respectfully, of [the Commission] … to come to those conclusions."

13.340.10. Ms Berejiklian said that even though clearly on 13 July 2018 what Mr Maguire told her on 5 July 2018 about not having done anything wrong and that his association with these "dodgy people" was limited, "wasn't the case", "she didn't assume he'd done anything wrong".

13.340.11. Ms Berejiklian continued her relationship with Mr Maguire until September 2020. During the period after 13 July 2018, she took advice from him on expelling him from Parliament, and in relation to the Wagga Wagga by-election despite Ms Cruickshank and Mr Burden telling her not to have anything to do with him. He also retained a key to her house.

13.341. Ms Berejiklian submitted that her evidence that she did not have specific information capable of being the subject of a s 11 report, "I don't know what I would have said to this body", should be accepted.

13.342. The Commission does not accept that submission. Ms Berejiklian had specific knowledge about Mr Maguire's activities in relation to the Badgerys Creek land deal, including the efforts he made on Ms Waterhouse's behalf to facilitate her getting road access to her Smartwest.Sydney site at Badgerys Creek. In addition, she knew the admissions he had made in the 5 July 2018 conversation in relation to his dealings with Country Garden. Having regard to his admissions on 13 July 2018, she had reason to believe he had lied to her on 5 July. Such a lie most probably included his statement to her that he "never accepted a dollar, I never asked for a dollar um…". She knew the latter statement was a lie because of the Badgerys Creek land deal.

13.343. When it was put to Ms Berejiklian that she did not know the extent of the information the Commission had and that for all she knew, the information Mr Maguire had imparted to her on 5 July was something which could have assisted the Commission with its inquiry, Ms Berejiklian responded that she "had no knowledge as to what, any, any wrongdoing he was doing. And I, I don't even think that I would have recalled in full the conversation on 5 July" and "what would I have reported?" When it was suggested she could have informed the Commission about what Mr Maguire told her about his association with Mr Hawatt and other people which led her to, in effect, tell him to keep his distance from the "dodgy people" with whom he had been associating, Ms Berejiklian's response was, "Yeah, but what he told me was that he wasn't doing anything wrong."

Whether Ms Berejiklian suspected Mr Maguire may have been engaged in corrupt conduct on or after 13 July 2018

13.344. During a compulsory examination on 18 September 2021, Ms Berejiklian was asked about the events following her learning about Mr Maguire's evidence on 13 July 2018, being her conversation with Mr Burden in which he told her the gist of Mr Maguire's evidence. She said she was "shocked at, at what happened … incredibly distraught and upset". She decided "in a short amount of time that the best course of action was to ask [Mr Maguire] to stand aside until the matter was investigated". She communicated that decision to Mr Maguire and was "rather distraught" at the time she did so.

13.345. There was then the following exchange between Counsel Assisting and Ms Berejiklian:

[Counsel Assisting]: *Is it right that at that point in time, you suspected that Mr Maguire had been engaged in corrupt conduct?*

[Ms Berejiklian]: ***I didn't know**, I couldn't make any assumption at that stage. He was professing his innocence, and saying it was a misunderstanding. But I also knew, I also knew that, given the dramatic way in which the information had been revealed and what it could mean, I wasn't sure. But under the circumstances, given he was a parliamentary secretary, I thought it appropriate to ask him to stand aside until the matters were investigated.*

[Q]: *I'm not asking whether you were sure. **What I'm asking is whether at that point in time when you asked Mr Maguire for his resignation**, whether you suspected that Mr Maguire had been engaged in corrupt conduct.*

[A]: ***I didn't know.***

[Q]: *I'm not asking whether you knew. I'm asking you whether at that point in time you suspected that Mr Maguire was engaged in corrupt conduct, or had been engaged in corrupt conduct.*

[A]: *I, **I didn't know**, I didn't know what–I was in shock, I didn't know what to think. I didn't, I didn't, **I didn't have enough detail. I hadn't read what was happening. I can't remember what I thought at that time.***

[Q]: *Let me ask you precisely. As at the time that you asked Mr Maguire for his resignation, did you suspect that Mr Maguire had been engaged in corrupt conduct?*

[A]: ***I didn't know.***

[Q]: *I'm not asking whether you knew. I'm asking whether at the time you asked for Mr Maguire's resignation you suspected that he may have been engaged in corrupt conduct.*

[A]: *I, I, I didn't, I didn't,* ***I didn't know. I was, I wasn't sure.***

[Q]: *No, I'm not asking whether you knew or whether you were sure. I'm asking whether, at the time you asked for his resignation–?*

[A]: *Well, I didn't,* ***I didn't know****.*

[Q]: *Just let me finish my question. I'm not asking whether you knew. I'm asking about the state of your suspicion or otherwise. Did you at that point in time suspect that Mr Maguire may have engaged in corrupt conduct?*

[A]: ***No.***

(Emphasis added)

13.346. Counsel Assisting submitted that it was notable that Ms Berejiklian did not claim to have either overlooked or been ignorant of her s 11 duty. Instead, Ms Berejiklian's evidence was to the effect that she directly turned her mind to it but formed the view that she did not have "anything specific" to bring to the attention of the Commission. Counsel Assisting also submitted that Ms Berejiklian sought to evade answering the direct question of whether she suspected that Mr Maguire may have been engaged in corrupt conduct by responding "I didn't know" or "I wasn't sure" on multiple occasions before finally answering "no". They contended that this response was lacking in credit having regard to, *inter alia*, the prevarication that preceded it and the attendant demeanour of Ms Berejiklian upon giving it.

13.347. Counsel Assisting submitted there were a number of reasons for not accepting Ms Berejiklian's evidence in this respect:

13.347.1. The idea that Ms Berejiklian did not even suspect that Mr Maguire may have engaged in corrupt conduct did not sit comfortably with her evidence that she was variously "shocked to the core" and "beyond distressed" while her "understanding of who this person was completely blew apart" following Mr Maguire's evidence as part of Operation Dasha on 13 July 2018.

13.347.2. Her position was inconsistent with the action she took and the words that she used publicly to describe Mr Maguire's conduct: seeking his resignation and publicly stating that he had "let down his constituents, the people of NSW and the NSW Liberal Party".

13.347.3. It must have been apparent to Ms Berejiklian that Mr Maguire had, at least to some extent, lied to her on 5 July 2018 regarding the level of his involvement with developers, the focus of Operation Dasha, and had lied about the extent to which he was seeking financial gain in connection with his involvement. Mr Maguire's lies in that regard, which were exposed by telephone intercepts played in Operation Dasha, must have raised at least a suspicion in Ms Berejiklian that Mr Maguire may have engaged in corrupt conduct in connection with those activities.

13.347.4. In the 5 July 2018 telephone call, Mr Maguire had directly advised Ms Berejiklian that he had made representations on behalf of developers. He also acknowledged that an "incentive payment" for his introduction and assistance was within his contemplation. Ms Berejiklian accepted that for a member of Parliament to use their public office for

private financial gain would be wrong, yet Mr Maguire intimated to her that he had done as much during the call of 5 July 2018.

13.347.5. Mr Maguire had shared with Ms Berejiklian at least some details of his extra-parliamentary activities over several years during the course of their relationship, including his expectation of receiving a substantial sum of money (capable of paying off his debts in excess of $1 million) in connection with a land deal at Badgerys Creek.

13.347.6. Ms Berejiklian had asked questions of Mr Maguire on 5 July 2018 which in themselves suggested a level of suspicion on her part.

13.347.7. Mr Maguire had behaved in a suspicious manner between the call of 5 July 2018 and his evidence of 13 July 2018: he had encouraged Ms Berejiklian to switch to an encrypted messaging service and get a private telephone and had made cryptic remarks about having the "bugbears on the rum [sic]" and "having more information and data than them".

13.347.8. Mr Maguire's activities in connection with developers the subject of Operation Dasha were plainly of interest to a body charged with the investigation of allegations of corrupt conduct.

13.347.9. Ms Berejiklian's evidence that she spent "days" contemplating whether there was anything specific she knew was entirely inconsistent with her not having held a suspicion that Mr Maguire may have engaged in corrupt conduct: why would she engage in such an exercise of self-reflection if she did not even suspect it may have been so?

13.347.10. Ms Berejiklian was sufficiently concerned by events which occurred that she was moved to disclose her relationship with Mr Maguire to Ms Cruickshank for the first time and, in the process of doing so, lied to Ms Cruickshank about the status of her relationship. That was consistent with Ms Berejiklian wishing to keep the true nature of her relationship with Mr Maguire a secret at that point out of a concern as to the potential consequences to Ms Berejiklian of its exposure. That same concern explained why Ms Berejiklian did not take steps to make any report in discharge of her s 11 duty following Mr Maguire's evidence of 13 July 2018 coming to Ms Berejiklian's attention.

13.348. Counsel Assisting submitted the collective weight of these factors was such that the Commission should reject Ms Berejiklian's evidence to the effect that she did not, at the time she asked for his resignation, suspect that Mr Maguire may have been engaged in corrupt conduct.

13.349. Ms Berejiklian submitted that the exchange was of little assistance in resolving the question prescribed by s 11 of the ICAC Act. She contended the questions Counsel Assisting asked were broad and abstract. She contended that in order to engage s 11(2), it was necessary to identify the "matter" in relation to which it was suggested Ms Berejiklian held such suspicion. She contended that the generalised questions about Mr Maguire were of almost no probative value, that the questioning immediately preceding concerned the events after 13 July 2018 and that other than referring to Mr Maguire, there was no limitation in subject-matter implied by the context of the questioning. Given this open-endedness, Ms Berejiklian argued it was unsurprising her answers did not appear to grasp the gravamen of the question.

13.350. The Commission does not accept this submission. Immediately before the exchange set out above, Ms Berejiklian was asked how she found out what evidence Mr Maguire gave on 13 July 2018. She said she "remember[ed] it distinctly because ironically I was on the first day of my holidays, and I'd literally landed and got off the plane, was going off to my hotel room, and I got a call from my, one of my staff". That staff member was her acting chief of staff, Mr Burden, who told her

"that the evidence provided or what had come out was … wasn't a good look". At some stage he told her the gist of what had happened as "otherwise I wouldn't have been able to decide what the best course of action was". It will be recalled that Ms Berejiklian agreed the "gist" of the evidence on the public record of which she was aware was that Mr Maguire had admitted to being engaged in a money-making exercise along with Mr Hawatt, who was then a member of Canterbury City Council.

13.351. Clearly the seriousness of Mr Maguire's conduct which came to Ms Berejiklian's attention was sufficient that "in a short amount of time [she decided] that the best course of action was to ask him to stand aside until the matter was investigated".

13.352. The Commission has no doubt that Ms Berejiklian knew precisely what she was being asked. She did not ask for any clarification of the questions. Rather, she sought to avoid answering directly by engaging in the evasive and obfuscatory responses she gave to similar questions set out above under the heading, "A very bad look".

13.353. When Ms Berejiklian's evidence is taken as a whole, looking not just at the events of 13 July 2018, but the conduct of Mr Maguire of which she was aware throughout the course of their relationship, and the clearly shrewd questions she asked him during the 5 July 2018 conversation, it is, with regret, impossible not to conclude that she lied when she answered "no" to Counsel Assisting's last question.

13.354. When asked if she suspected that Mr Maguire may have been engaged in corrupt conduct at the time of the 5 July 2018 conversation, Ms Berejiklian said, "No, I did not. And if I had, I would have reported it." The Commission rejects this evidence. In the Commission's view, Ms Berejiklian was concerned that if she reported Mr Maguire's activities as outlined above to the Commission, it might give rise to questions as to how she had acquired that knowledge which, in turn, may have exposed the fact that she was in a close personal relationship with a person who may have engaged in corrupt conduct.

13.355. Ms Berejiklian denied that her failure to make a report to the Commission about Mr Maguire's activities was in any way influenced by her relationship with, or by her personal feelings for, Mr Maguire. Ms Berejiklian also said that the fact that she did not make a report to the Commission was not in any way influenced by a concern on her part that the taint that had attached itself to Mr Maguire may attach itself to her. The Commission does not accept that these factors did not influence Ms Berejiklian's decision not to report Mr Maguire's activities to the Commission. Rather, in the Commission's view, the evidence strongly points to the opposite conclusion.

13.356. While disbelief in a witness does not mean the opposite is the case, all the circumstances to which the Commission has referred lead it to conclude that Ms Berejiklian did suspect that Mr Maguire may have engaged in corrupt conduct. She chose not to disclose her suspicion for reasons no doubt both in Mr Maguire's interests and her own. She knew the truth would be harmful to her as much as to Mr Maguire.

13.357. Ms Berejiklian also submitted that it was noteworthy that she had remained in a relationship with Mr Maguire after his 13 July 2018 evidence, contending she was a "stickler" who cared a lot about probity, and as premier she simply would not have remained in a relationship with someone she suspected of corruption.

13.358. The Commission rejects this submission. Ms Berejiklian remained in the relationship with Mr Maguire when there were clearly matters about his activities which troubled her as early as September 2017, and about which she did not want to know. Ms Berejiklian knew on 5 July 2018 that Mr Maguire had been engaging with "dodgy" people. The Commission does not accept

that on 5 July 2018 Ms Berejiklian did not have an inkling that Mr Maguire may have engaged in corrupt conduct with "dodgy" people, yet she did not walk away from the relationship. She also lied to Ms Cruickshank about the relationship, knowing that if she had revealed its true extent, Ms Cruickshank would have enquired into the question about whether Ms Berejiklian had complied with her conflict of interest obligations. She left Mr Burden with the same impression she had given to Ms Cruickshank about the relationship. As far as the evidence reveals, she did not disclose the relationship to anyone other than the mutual friend referred to earlier, Ms Cruickshank and Mr Harley. She only told these two staff members when it was clear the circumstances compelled her to do so. When Ms Cruickshank and Mr Burden told her not to have anything to do with Mr Maguire, she did not say anything to the effect that she did not believe he had done anything wrong.

13.359. Staying in a relationship Ms Berejiklian had kept secret for four or more years continued the status quo. To reveal that she had been in a relationship for four or more years with someone publicly suspected of corrupt conduct, and whom she had come to suspect of corrupt conduct, would be an anathema to her, and most probably be the death of her political career. The less anyone, not least the Commission, knew about the relationship, the better from Ms Berejiklian's point of view in terms of avoiding the cloud, which had engulfed him, doing the same to her.

13.360. Rather than being a point in her favour, the fact that Ms Berejiklian chose to end her relationship with Mr Maguire shortly before the First Public Inquiry, at which her relationship with Mr Maguire was likely to become publicly known leading to the inevitable political consequences of her association with him which she had sought successfully to keep secret since 13 July 2018, bespeaks a last minute attempt on her part at damage control.

13.361. The Commission is of the view that Ms Berejiklian's justification for not reporting Mr Maguire's conduct pursuant to s 11 cannot be accepted. The reasons she gave for not doing so were evasive and obfuscatory. They strained credulity, were inconsistent, circular, and at times bordered on the irrational, for example, in not reporting to the Commission a suspicion that Mr Maguire may have engaged in corrupt conduct "[b]ecause clearly this body had, had all that knowledge and information".

13.362. The Commission does not accept the rationales Ms Berejiklian advanced to explain why she had not reported Mr Maguire's conduct in relation to Badgerys Creek and the 5 July 2018 conversation to the Commission. It is contrary to the information she had as outlined above, and the extensive exercise in which she claimed to have engaged, that she did not realise the importance of those facts for the Commission's investigation of his conduct. The compelling inference is that she did realise the significance of those facts and decided not to report them to the Commission, both to protect him, and to ensure that the cloud he was under did not extend to herself.

13.363. The Commission also finds persuasive the reasons Counsel Assisting advanced to support the submission that there were substantial reasons for not accepting Ms Berejiklian's evidence denying that at the time she asked Mr Maguire to step aside, she suspected that he may have engaged in corrupt conduct.

13.364. Even if it be accepted that Ms Berejiklian had not on 5 July 2018 formed the requisite s 11 suspicion, the Commission is persuaded in all the circumstances that by the time Ms Berejiklian learned about the evidence Mr Maguire had given on 13 July 2018, and having regard to all the thought processes in which she said she engaged to test his conduct, to question every conversation they had had (which indicates she had a good memory of them) and her belief that he had lied to her, she did, in fact, suspect that his activities in respect of the Badgerys Creek land deal and his activities concerning Mr Hawatt and Country Garden (and probably also Mr Demian

who Mr Maguire mentioned on 5 July, and on whose behalf she knew Mr Maguire had made representations to members of Parliament and statutory instrumentalities) concerned, or might have concerned, corrupt conduct.

13.365. The Commission also finds that at each stage it has concluded Ms Berejiklian held the requisite s 11 suspicion, that suspicion was based upon reasonable grounds.

13.366. Having regard to Ms Berejiklian's evidence that she was very alive to her obligations under s 11 of the ICAC Act to report suspicions of conduct which concerned, or might concern, corrupt conduct to the Commission, the Commission finds that having formed the requisite s 11 suspicion, Ms Berejiklian deliberately determined not to report that conduct to the Commission.

Conclusion

13.367. The Commission finds that:

13.367.1. By at least September 2017, Ms Berejiklian had reached a state of actual suspicion that Mr Maguire's activities in relation to the Badgerys Creek land deal concerned, or might have concerned, corrupt conduct.

13.367.2. From at least September 2017, Ms Berejiklian had reached a state of actual suspicion that Mr Maguire's activities in relation to the Badgerys Creek land deal concerned, or might have concerned, corrupt conduct.

13.367.3. After the 5 July 2018 conversation, Ms Berejiklian had reached a state of actual suspicion that Mr Maguire's activities in relation to the Badgerys Creek land deal and Country Garden and Mr Hawatt concerned, or might have concerned, corrupt conduct.

13.367.4. After his 13 July 2018 evidence before Operation Dasha, Ms Berejiklian had reached a state of actual suspicion that Mr Maguire's activities in relation to:

13.367.4.1. the Badgerys Creek land deal, and/or

13.367.4.2. Country Garden and Mr Hawatt, and/or

13.367.4.3. Mr Demian

concerned, or might have concerned, corrupt conduct.

13.368. The Commission finds that in refusing to report these suspicions to it, Ms Berejiklian failed to discharge her s 11 duty.

Corrupt conduct

Section 8(1)(b), ICAC Act

13.369. Counsel Assisting submitted that if the Commission found that Ms Berejiklian breached her s 11 duty, the Commission should further find that Ms Berejiklian's conduct involved the dishonest or partial exercise of an official function for the purposes of s 8(1)(b) of the ICAC Act.

13.370. The principles concerning dishonesty for the purposes of s 8(1)(b) are set out in chapter 5 but are repeated here for convenience.

13.371. For the purposes of s 8(1)(b), the "dishonest" element would appear to require determining whether the public official's conduct was dishonest according to the standards of ordinary, decent people.[443] It is not essential that the person accused of dishonesty appreciated her or his act or omission to be dishonest according to the standards of ordinary people.[444]

13.372. In the case of failure to act,[445] the question of whether such a failure is dishonest:

> *is usually answered by considering whether that failure was motivated by a desire to conceal the truth or to obtain an advantage to which the person concerned knew he or she was not entitled.*[446]

13.373. Counsel Assisting submitted that any failure by Ms Berejiklian to discharge her s 11 duty was only reasonably explicable by either or both of two related matters: her concern for the consequences that would or may flow to Mr Maguire in the event she made a report to the Commission in relation to Mr Maguire; and/or her concern for the consequences that would or may flow to herself, including the potential exposure of her relationship with Mr Maguire and the consequent political fallout that may result. Counsel Assisting suggested that, in all likelihood, Ms Berejiklian's failure to discharge her s 11 duty was a combination of both of these considerations to varying degrees at the different points in time identified on the previous page (with self-interest considerations coming to the fore at the point of Mr Maguire's exposure in Operation Dasha).

13.374. Counsel Assisting submitted that whatever Ms Berejiklian's reasons for keeping her relationship with Mr Maguire "secret" (in the sense of not publicly known) prior to 13 July 2018, a powerful additional motivation emerged on that date. They argued that Ms Berejiklian recognised that there could have been political consequences had her relationship with Mr Maguire – who was under at least a taint – become public. She agreed with the proposition that revelation of the relationship would have been "politically explosive", although she did not accept that the scale of the "explosion" would be significantly impacted by the distinction between whether the relationship was ongoing as distinct from historical. Counsel Assisting noted that Ms Berejiklian went so far as to say that she did not think the distinction "would have made a difference whatsoever".

13.375. Counsel Assisting submitted that Ms Berejiklian's evidence in this respect was disingenuous. They contended that Ms Berejiklian was a highly successful politician who had sufficient political savvy and acumen to rise to the most senior political office in the state. They added that it defied belief that Ms Berejiklian could not appreciate that heightened political fallout would result from an ongoing and previously undisclosed relationship between the premier and a member of Parliament who was under a public taint. They submitted, further, that this assertion did not sit comfortably with the fact that Ms Berejiklian chose to end her relationship with Mr Maguire shortly before the First Public Inquiry at which her relationship with Mr Maguire was likely to become publicly known.

13.376. Counsel Assisting noted, in contrast to Ms Berejiklian's evidence, that Ms Cruickshank agreed with what, they submitted, should have been an entirely uncontroversial proposition that – had it become public knowledge that Mr Maguire was in a close personal relationship with the premier of

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[443] See *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7 (at [18]) per Toohey and Gaudron JJ.

[444] *Farah v Say-Dee* (2007) 230 CLR 89; [2007] HCA 22 at [173] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ; *McCarthy v St Paul International Insurance Co* (2007) 157 FCR 402 at 415 [34] per Kiefel J citing *Peters v The Queen* at [15].

[445] Noting that under the ICAC Act, "conduct" includes "neglect, failure or inaction": see s 3(1), ICAC Act.

[446] *McCann v Switzerland Insurance* (2000) 203 CLR 579; [2000] HCA 65 (at [56]) per Gaudron J.

the day – that would have added to the political controversy surrounding Mr Maguire's evidence given as part of Operation Dasha. Ms Cruickshank said the relationship "would have become a focus given the scandal that was surrounding Mr Maguire at the time".

13.377. Counsel Assisting submitted it would plainly have been damaging to Ms Berejiklian's political standing to be so closely associated with an individual who was then in the process of being pilloried by both the media and his political colleagues. They contended this was clearly a matter that would have been operating on Ms Berejiklian's mind at the time. Ms Berejiklian would not even accept that she appreciated a distinction between ongoing and historic in this context. They submitted that evidence did not present as genuine coming from someone of Ms Berejiklian's political experience and acumen.

13.378. Ms Berejiklian submitted that if the Commission concluded that her s 11 duty was enlivened, the Commission would not find such breach constituted "corrupt conduct" within s 8 of the ICAC Act. She contended that Counsel Assistings' contention that her failure to make a report constituted corrupt conduct because it involved the "dishonest or partial exercise" of her official functions within the meaning of s 8(1)(b) of the ICAC Act required an assessment of Ms Berejiklian's motive, which she accepted in her submissions was a matter of inference.

13.379. Ms Berejiklian submitted that Counsel Assistings' submission that she failed to comply with her s 11 duty for fear of the relationship becoming public did not withstand scrutiny. She submitted that her adamant evidence about her prioritisation of probity weighed heavily against such a conclusion as, too, did the fact that any report to the Commission would be confidential.

13.380. Secondly, Ms Berejiklian submitted that Counsel Assistings' alternative hypothesis that she was motivated by "her concern for the consequences that would or may flow to Mr Maguire … or … to herself" of her reporting the matter was also not borne out by the evidence. She argued that such a motive would only make sense if she genuinely believed that she possessed relevant and damaging information about Mr Maguire's conduct. She repeated her submission that she did not hold such a belief. She also relied on the fact that her evidence was replete with statements of her "genuinely held belief" that the information Mr Maguire had imparted to her was "insignificant" and would not have materially assisted the Commission.

13.381. The fallacy of this submission is that at this stage of the report, the Commission has already found that Ms Berejiklian did have an actual suspicion that Mr Maguire's activities, as explained, concerned, or might have concerned, corrupt conduct. Frequent repetition by Ms Berejiklian of her protestations that she did not believe the information Mr Maguire gave her was significant and would not materially assist the Commission have been rejected. The Commission has also rejected Ms Berejiklian's evidence that she had that subjective belief and, in the absence of her admitting she held that actual suspicion, has inferred in all the circumstances that she did.

13.382. Contrary to Ms Berejiklian's submission that her subjective belief at the time was based on snippets of events and names mentioned by Mr Maguire which were highly unlikely to be of any substantial assistance to the Commission's investigation, the Commission has also found that Ms Berejiklian had sufficient information about the matters referred to in the previous section to have formed the relevant actual suspicion. It has also held that she had that knowledge in part because of what Mr Maguire actually told her, as well as her wilful blindness.

13.383. And finally, the Commission has found that Ms Berejiklian engaged in a form of damage control: telling Ms Cruickshank about the relationship but downplaying its significance by lying about its nature, its length and intimacy, and placing it at a time remote from the events which were engulfing Mr Maguire. That was, in itself, dishonest behaviour.

13.384. In relation to Badgerys Creek, Ms Berejiklian realised it was probable that Mr Maguire's activities concerned, or may have concerned, corrupt conduct but refrained from obtaining the final confirmation because she wanted in the event to be able to deny knowledge of that fact.

13.385. In relation to the 5 July 2018 conversation, the Commission has found that in addition to what Mr Maguire told Ms Berejiklian about his dealings with various people she regarded as "dodgy" and kept her distance from, she deliberately sought to avoid the receipt of additional information that she apprehended would only serve to confirm suspicions she already held about Mr Maguire based on a concern on her part, again, that Mr Maguire's activities as discussed on that occasion in connection with Country Garden, Mr Hawatt and Mr Demian concerned, or may have concerned, corrupt conduct.

13.386. Insofar as Ms Berejiklian relied on the fact that any report to the Commission would be confidential, Ms Berejiklian must also have realised that the probable consequence of such a report would be that the Commission would investigate what she reported and that that could lead to public exposure in the same manner as had Mr Maguire's appearance in Operation Dasha – a clearly unpalatable prospect.

13.387. In the Commission's view, Ms Berejiklian's conduct in failing to discharge her s 11 duty was motivated by self-interest, in the sense of a desire to conceal the truth about what she knew, and suspected, about Mr Maguire's conduct to protect herself, as well as by personal concern for Mr Maguire, to protect him from further investigation by the Commission. It was thereby dishonest.

13.388. The Commission also concludes that Ms Berejiklian's conduct in failing to discharge her s 11 duty was partial in the sense discussed above. She preferred Mr Maguire by concealing his conduct which she suspected concerned, or might have concerned, corrupt conduct for unacceptable reasons, which was to conceal the truth about what she knew, and suspected, about his conduct to protect him from further investigation by the Commission.

13.389. The Commission finds that Ms Berejiklian engaged in corrupt conduct constituting or involving the dishonest or partial exercise of her official functions within the meaning of s 8(1)(b) of the ICAC Act by refusing to discharge her duty under s 11 of the ICAC Act to notify the Commission of her suspicion that Mr Maguire had engaged in activities which concerned, or might have concerned, corrupt conduct.

Section 9(1)(d), ICAC Act

13.390. Counsel Assisting submitted that if the Commission concluded that Ms Berejiklian refused to discharge her s 11 duty either dishonestly or partially in the sense that she was motivated by self-interest and a personal concern for Mr Maguire, the Commission would also conclude that, by that conduct, Ms Berejiklian committed a substantial breach of the ministerial code.

13.391. Counsel Assisting also submitted that if the Commission were to conclude that Ms Berejiklian's refusal to discharge her s 11 duty was either dishonest or partial, the Commission would further conclude that her refusal to exercise those official functions was improper and for her own private benefit – namely, the benefit in maintaining or advancing her close personal relationship with Mr Maguire and the benefit of concealment of her association with Mr Maguire from the public. On that basis, they contended it would follow that Ms Berejiklian breached clause 6 of the ministerial code.

13.392. Clause 6 of the ministerial code provides:

> *A Minister, in the exercise or performance of their official functions, must not act dishonestly, must act only in what they consider to be the public interest, and must not act improperly for their private benefit or for the private benefit of any other person.*

13.393. Counsel Assisting contended that such a breach by Ms Berejiklian would properly be regarded as "substantial" for the purposes of s 9(1)(d) of the ICAC Act given that it would involve wilful misconduct born out of self-interest.

13.394. Ms Berejiklian submitted that the Commission would not find that her conduct constituted a substantial breach of clause 6 of the ministerial code for the purposes of s 9(1)(d) of the ICAC Act. She relied on her submissions in relation to the same contention concerning her conduct in respect of the ACTA proposal and the RCM proposal. To the extent those submissions appear relevant to the s 11 issue, the Commission understands Ms Berejiklian's contention to be that it was absurd to contend that she knowingly exercised her public powers for the purpose of advancing her personal life because that contention: was contrary to her evidence; contrary to the very weighty responsibilities and duties of the position she held; and contrary to the evidence of those who observed her executing her public duties as a "stickler", without ever acting in a manner suggestive to anyone (including her staff and then premier, Mr Baird) that she treated Mr Maguire favourably.

13.395. The present circumstance is very different from that concerning the ACTA proposal and the RCM proposal. As already found, in the s 11 context, Ms Berejiklian's personal interest in protecting herself as well as acting in Mr Maguire's interest was very much in play. The idea that it would be absurd to suggest that in those circumstances she might not act in substantial breach of the ministerial code cannot be accepted.

13.396. Ms Berejiklian also relied again upon her submission that any report to the Commission would be confidential. As the Commission has already found, Ms Berejiklian must also have realised that the probable consequence of such a report would be that the Commission would investigate what she reported and that that could lead to public exposure in the same manner as had Mr Maguire's appearance in Operation Dasha – a clearly unpalatable prospect.

13.397. The circumstances in which Ms Berejiklian refused to discharge her duty under s 11 of the ICAC Act were serious. On the Commission's findings, Ms Berejiklian formed an actual suspicion that Mr Maguire's conduct concerned, or might have concerned, corrupt conduct. She deliberately refused to report that conduct to the Commission.

13.398. In doing so, Ms Berejiklian acted dishonestly and partially in breach of clause 6 of the ministerial code. In the latter respect Ms Berejiklian, in the exercise or performance of her official functions, acted improperly for her private benefit – namely, the benefit in maintaining or advancing her close personal relationship with Mr Maguire.

13.399. That breach was substantial for the purposes s 9(1)(d) of the ICAC Act because, as already found in relation to the ACTA and RCM proposals, improperly exercising public functions in order to maintain or advance one's personal life is a serious matter that could not properly be regarded as amounting to an insubstantial breach of the ministerial code. That is so given the extent to which such conduct undermines the high standards of probity that are sought to be achieved and maintained by the code. It is an intrinsically serious matter for a public official to engage in the dishonest exercise of their public powers, particularly in circumstances where they are driven by self-interest.

13.400. In addition, at the time Ms Berejiklian failed to report her suspicions to the Commission, she was the premier of the state. For the premier of the state to act dishonestly and improperly for their private benefit is egregious. Ms Berejiklian must have known that she was not entitled to refuse to exercise her official functions for her own private benefit, or for the benefit of Mr Maguire. To do so to conceal conduct she suspected concerned, or might have concerned, corrupt conduct on the part of Mr Maguire, another member of Parliament, both to protect herself and him from the Commission exercising its investigative powers was grave misconduct. To breach the ministerial code which, as premier, Ms Berejiklian substantially administered, flouted the very instrument enacted to fill the "significant loophole (the absence of an identifiable standard by which any alleged breach by a Minister of the Crown could be determined) in the ICAC Act".[447]

13.401. As Beech-Jones J said in sentencing Edward Obeid Sr:

> *The more senior the public official the greater the level of public trust in their position and the more onerous the duty that is imposed. Under this State's constitutional arrangements, and leaving aside the third arm of government, only Ministers occupy a more senior position than that occupied by parliamentarians.*[448]

13.402. For the purposes of s 9(1)(d) of the ICAC Act, and having regard to these considerations and in the circumstances described above, the Commission finds that there are grounds on which it could objectively be found that Ms Berejiklian's conduct in dishonestly and partially breaching clause 6 of the ministerial code by refusing to discharge her duty under s 11 of the ICAC Act to notify the Commission of her suspicion that Mr Maguire had engaged in activities which concerned, or might have concerned, corrupt conduct could constitute or involve a substantial breach of that code, being an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act.

Section 13(3A), ICAC Act

13.403. The Commission determines for the purposes of s 13(3A) of the ICAC Act that it is satisfied that Ms Berejiklian's conduct in dishonestly and partially breaching clause 6 of the ministerial code by refusing to discharge her duty under s 11 of the ICAC Act to notify the Commission of her suspicion that Mr Maguire had engaged in activities which concerned, or might have concerned, corrupt conduct constituted or involved a substantial breach of clause 6 of that code, that being an applicable code of conduct for the purposes of s 9(1)(d) of the ICAC Act.

13.404. Accordingly, the Commission is satisfied that the jurisdictional requirements of s 13(3A) of the ICAC Act are satisfied.

Section 74BA, ICAC Act

13.405. The Commission is satisfied, for the purposes of s 74BA of the ICAC Act, that Ms Berejiklian's refusal to discharge her duty under s 11 of the ICAC Act is serious corrupt conduct for the reasons already set out above as to whether her breach of the ministerial code was substantial.

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[447] *Investigating Corruption* (at [11.185]); see also Independent Commission Against Corruption (Amendment) Bill, Parliamentary Debates (Hansard), Second Reading Speech, 22 September 1994.

[448] *R v Obeid* (No 12) [2016] NSWSC 1815 at [79].

Corrupt conduct conclusion

13.406. The Commission finds Ms Berejiklian engaged in serious corrupt conduct constituting or involving the dishonest or partial exercise of her official functions by refusing to discharge her duty under s 11 of the ICAC Act to notify the Commission of her suspicion that Mr Maguire had engaged in activities which concerned, or might have concerned, corrupt conduct.

Section 74A(2) statement

13.407. Counsel Assisting submitted that as Ms Berejiklian is plainly a person against whom substantial allegations have been made in the course of Operation Keppel, a statement pursuant to s 74A(2) of the ICAC Act must be included in the report in relation to her, as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for a specified criminal offence in relation to her refusal to exercise her duty under s 11(2) of the ICAC Act.

13.408. Counsel Assisting submitted that because conduct which constituted or involved a substantial breach of the ministerial code could potentially constitute or involve the common law offence of misconduct in public office, and given the Commission's duty under s 74A(2), the Commission should consider whether it should state that in all the circumstances it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for the offence of misconduct in public office in relation to her s 11 duty.

13.409. The elements of the offence of misconduct in public office have been set out in chapter 3. Counsel Assisting submitted in relation to that element requiring the prosecutor to prove that the accused has "wilfully misconduct[ed]" her or himself, that it is only regarded as proven where it is established that the accused knew that (or was reckless as to whether) her or his conduct constituted misconduct and that the accused would not have engaged in the impugned conduct but for her or his improper purpose.

13.410. Counsel Assisting submitted that as Ms Berejiklian gave her evidence to the Commission under objection, it would not be admissible against her in any criminal proceedings for an offence of misconduct in public office. As a result, proof of her mental state, including as to the question of whether any misconduct by her was "wilful", would be left to inference from the circumstances. However, they submitted that there is a considerable body of evidence independent of Ms Berejiklian's from which inferences could be drawn as to her state of mind and from which potentially innocent hypotheses could be excluded in relation to her failure to exercise her s 11 duty.

13.411. Counsel Assisting submitted that there is sufficient admissible evidence to warrant the Commission stating that consideration should be given to obtaining the advice of the DPP with respect to the prosecution of Ms Berejiklian for an offence of misconduct in public office, including evidence that may be capable of establishing Ms Berejiklian's awareness that Mr Maguire was involved in seeking and obtaining commissions in connection with the sale of land, making representations on behalf of property developers, involving himself in the use of his public office outside his electorate and in the advancement of private interests, and that he stood to make a substantial sum of money in connection with a land deal at Badgerys Creek.

13.412. In addition, Counsel Assisting submitted that there is evidence capable of establishing that Ms Berejiklian was, at least as at 9 July 2018, sufficiently concerned about Mr Maguire's position and his suggestion that he needed to get a "private phone" to ask whether everything was "ok". She took immediate steps to remove him from the Liberal Party following his evidence in

Operation Dasha on 13 July 2018 and, that same day, lied to Ms Cruickshank about the ongoing nature of her relationship with Mr Maguire, telling Ms Cruickshank it was an historic relationship. Counsel Assisting further submitted that Ms Berejiklian must have considered her s 11 duty at least in the context of receiving the briefing note on 25 July 2018 concerning a referral of information to the Commission in connection with Operation Dasha.

13.413. Ms Berejiklian submitted that even if the Commission were satisfied that she breached her s 11 duty, it is at least reasonably clear that any advice from the DPP as to a prosecution for misconduct in public office in relation to that conduct would be that there should be no such prosecution. She submitted, first, that in this circumstantial case, the prosecutor would inevitably fail in proving the *mens rea* element of the offence. The prosecutor would need to prove, relying solely on inference – as Counsel Assisting acknowledged – not only that Ms Berejiklian had reached the required state of suspicion under s 11(2) of the ICAC Act, but that she appreciated that fact at the relevant time and decided not to report it to the Commission.

13.414. Ms Berejiklian submitted that the prosecutor would need to disprove any other reasonable hypothesis raised at trial for her failure to report, or, as Counsel Assisting acknowledged, would be required to show her guilt was "the only rational inference that the circumstances would allow them to draw". Ms Berejiklian submitted that the absence of a plausible nefarious motive on her part not to comply with her s 11 duty would be an additional obstacle for a prosecutor to prove a wilful intent on her part.

13.415. Secondly, Ms Berejiklian submitted that there was a real question whether the prosecutor could prove that element of the offence of misconduct in public office requiring that the impugned conduct be "so serious as to merit criminal punishment". She submitted that her conduct in relation to her s 11 duty was not capable of meeting such a high bar. She submitted that the absence of a nefarious motive on her part would be fatal to any prosecutor making out this element and further, that a "reckless failure" to comply with s 11(2), even if capable of being proved and satisfying the *mens rea* element, would not be "so serious as to merit criminal punishment".

13.416. The Commission accepts Ms Berejiklian's overall submission that the obstacles to a prosecution would be so formidable as to make it reasonably clear that any advice from the DPP with respect to the matter would be to the effect that no prosecution would be commenced. The offence of misconduct in public office requires proof of elements not essential to the matters which constitute corrupt conduct under the ICAC Act. For example, as explained in this report, it is unnecessary to establish such matters as a nefarious motive.

13.417. The Commission is satisfied on the evidence before it to the requisite standard on the balance of probabilities that inferences can be drawn from the facts and circumstances to establish that Ms Berejiklian wilfully failed to comply with her s 11 duty. The Commission concludes, however, that there is insufficient admissible evidence, particularly in the absence of Ms Berejiklian's evidence, for inferences to be drawn that would prove the *mens rea* of the offence of misconduct in public office to the required standard of beyond reasonable doubt in any criminal prosecution.

13.418. In all the circumstances, it is reasonably clear to the Commission that any advice from the DPP with respect to the matter would be that no prosecution should be commenced. For that reason, the Commission declines to make a s 74A(2) statement in relation to Ms Berejiklian.

Chapter 14: Corruption prevention

Introduction

14.1. The previous chapters in this report set out the Commission's findings of fact, including regarding the conduct of Mr Maguire and Ms Berejiklian. The principal functions of the Commission include the powers to make findings and form opinions on the basis of the results of its investigations, and to formulate recommendations. In this chapter, the Commission makes recommendations directed to reducing the likelihood of corrupt conduct and promoting the integrity and good repute of public administration.

14.2. The recommendations address the codes of conduct that govern the conduct of members of Parliament, improving the training of members of Parliament and staff and improving the integrity of grant schemes. The recommendations seek to address systemic weaknesses identified in this investigation and reinforce NSW Parliament's ethical culture. The ultimate goal is to improve and enhance the reputation of the NSW parliamentary system to the betterment of the people of the state through the adoption of the recommendations.

14.3. The Commission proposes 18 recommendations to address the issues identified, which are directed to the following agencies and individuals:

- the NSW Government and/or the premier with the assistance of the DPC[449]
- the NSW Parliament's Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics and its Legislative Council Privileges Committee ("the NSW Parliament's designated committees"),
- the Speaker of the Legislative Assembly and the President of the Legislative Council ("the Presiding Officers"), and
- the heads of the relevant parliamentary departments.

[449] As noted earlier, the Premier has announced that the DPC will be dissolved from 1 July 2023. It will be replaced by the Cabinet Office and a new separate Premier's Department.

Regulatory reforms

Role of members of Parliament

14.4. The office of a member of Parliament carries significant authority and involves holding a position of public trust. It is imperative that members lead by example concordant with community and wider public sector expectations of such a high office. Whether citizens have trust in government depends on public perceptions about the actions of public officials and public institutions.

14.5. The most recent Australian Election Study shows that honesty and trustworthiness are the characteristics that voters value most in political leaders.[450] Similarly, long-running research by James Kouzes and Barry Posner into leadership identifies honesty as the top characteristic that people seek.[451] This is why parliamentarians should model a culture of integrity.

Promoting an ethical culture via principles and values

Rationale for principles and values

14.6. The members code and the ministerial code seek to reinforce the importance of abiding by the precepts of conduct contained in them. They are central documents that prescribe the proper conduct of members of Parliament.

14.7. One of the best-known sets of principles of conduct to apply to public officials was developed by the United Kingdom's Committee on Standards in Public Life in 1995. It comprises seven general principles of conduct which should underpin public life:

- selflessness
- integrity
- objectivity
- accountability

[450] S Cameron, I McAllister, S Jackman, J Sheppard, *The 2022 Australian Federal Election: Results from the Australian Election Study*, Australian National University, Canberra, December 2022, 14.

[451] Kouzes J and Posner B, *The Leadership Challenge*, 6th edition, 2017, 30.

- openness
- honesty
- leadership.[452]

14.8. The descriptors to the principles were amended by the Committee on Standards in Public Life in the committee's 23rd report, *Upholding Standards in Public Life*, in November 2021.[453]

Exposure of conduct and weaknesses

14.9. The community may conclude that the applicable codes of conduct had little or no effect in discouraging the conduct of Mr Maguire and Ms Berejiklian identified in this report.

Rationale for reforms

14.10. A greater emphasis on ethical values and principles is required to enhance public confidence and trust in government and the institution of the NSW Parliament. The existing references to principles and values interspersed in the members' code and the ministerial code should be emphasised by making them more prominent and comprehensive.

14.11. In striving for best practice, the NSW Parliament should develop a comprehensive set of principles of conduct and descriptors to encourage and guide ethical conduct and decision-making. In addition, the members' code should explicitly articulate the three guiding values of public trust, public interest and public duty.

14.12. The articulation of such principles and values would set a positive "tone from the top", provide a clear framework within which public officials could interpret the members' code and encourage members to act within the spirit as well as the letter of that code.

14.13. Previously, the Commission has made similar proposals, including in its submission to the inquiry "Review of the Code of Conduct for Members, 57th Parliament" by the Standing Committee on Parliamentary Privilege and Ethics. The subsequent December 2022 report of the committee noted that references to fiduciary-like obligations, ethical principles and values in the members' code may be helpful, but not necessary.[454]

14.14. The Commission maintains that an explicit set of values and principles would promote adherence to ethical practices.

14.15. The members' code applies to all members whether or not they are ministers. To reinforce the same principles and values among ministers, there should be parallel amendments to the ministerial code.

[452] Committee on Standards in Public Life, *Nolan Report: Standards in Public Life*, May 1995, 3, 14 ("the Nolan Report").

[453] Committee on Standards in Public Life, *Upholding Standards in Public Life: Final report of the Standards Matter 2 review*, November 2021, 92, appendix 1.

[454] Standing Committee on Parliamentary Privilege and Ethics, *Review of the Code of Conduct for Members*, NSW Legislative Assembly, Report 4/57, December 2022, 2ff.

RECOMMENDATION 1

14.16. That the Code of Conduct for Members and the NSW Ministerial Code of Conduct be amended to provide for a set of principles of conduct and guiding values addressing the:

- seven general principles of conduct which underpin public life developed by the United Kingdom's Committee on Standards in Public Life (and the 2021 descriptors to those principles)
- three guiding values of public trust, public interest and public duty.

Promoting an ethical culture via conflicts of interest reforms

Rationale for conflicts of interest regime

14.17. A conflict of interest exists when a reasonable person might perceive that a public official's personal interest(s) could be favoured over their public duties. The test is an objective, or "reasonable person", test.[455] A personal relationship that is more than one of mere acquaintance is a personal interest that *could* conflict with a public official's duties. As noted in chapter 3, this means that a non-pecuniary interest of a public official may create a conflict of interest. In the Commission's experience, public officials struggle to take an objective view of the status of their personal relationships. It is imperative that they view their circumstances through the eyes of others.[456]

14.18. The timely disclosure of conflicts of interest is fundamental to the avoidance of corruption. Many forms of corrupt conduct involve a conflict of interest. This investigation has demonstrated that members must be vigilant about conflicts of interest.

Current regime

14.19. As outlined in chapter 3, the NSW Parliament has adopted conflict of interest disclosure requirements via separate codes of conduct for members and for parliamentary secretaries/ministers. The ministerial code is the responsibility of the Executive Government.

14.20. Clause 16 of the Disclosure Regulation, which is applicable to both codes, states that a member of Parliament may, at their discretion, disclose any direct or indirect benefit, advantage or liability, whether pecuniary or not that "might appear to raise a conflict" between their private interests and their public duty. Such disclosure is merely discretionary.

14.21. The 2020 version of the members' code ("the 2020 members' code") introduced an additional clause 7 titled "Conflicts of interest", which expanded the statements in previous members' codes concerning conflicts of interest. It states that "Members **must** take reasonable steps to avoid, resolve or disclose any conflict between their private interests and the public interest" (emphasis added). The 2020 members' code also clarified that members must disclose a conflict of interest "in any communication" including with public officials.

14.22. Another change introduced by the 2020 members' code is that members must not only disclose, but also take reasonable steps to avoid and resolve, any conflict of interest. The clear implication is that members must disclose their conflicting interests at the relevant time so the conflict can be considered and managed. The mandatory requirement in the members' code is consistent with the obligations in the ministerial code.

[455] NSW ICAC, *Managing conflicts of interest in the NSW public sector*, April 2019, 4.

[456] Ibid, 16.

Exposure of conduct and weakness

14.23. This investigation demonstrates that conflicts of interests may arise from:

- having outside paid work or other business interests
- engaging in lobbying practices, including being lobbied by close associates
- having close networks (such as the network of contacts relating to the APFG)
- planning for a post-parliamentary career
- having a close personal relationship.

Commission recommendations pending implementation

14.24. The Commission's July 2022 report, *Investigation into the conduct of the local member for Drummoyne* (Operation Witney), identified a range of systemic weaknesses relating to the conflicts of interest regime applicable to members of Parliament.

14.25. The Commission made recommendations in the Operation Witney report that the members' code be amended to include a clear, consistent and comprehensive conflict of interest definition and that the Disclosure Regulation be amended to provide for a mandatory registration of conflicts of interest for members of Parliament.[457]

14.26. A premier's media release of 5 November 2022 announced that the government supported a new key requirement that all members of Parliament "publicly disclose any conflicts of interest".[458] The NSW Government has taken steps to implement the recommendations and the NSW Parliament has passed the *Integrity Legislation Amendment Act 2022*. The Second Reading Speech of the Integrity Legislation Amendment Bill 2022 stated that the government has "instructed the Parliamentary Counsel's Office to draft changes to the disclosure regulation to require: members of Parliament to disclose expanded pecuniary interests, including interests in trusts and the interests of immediate family members, on an ongoing basis; members of Parliament to disclose conflicts of interest; and the Clerks to publish the disclosures of members of Parliament electronically".[459]

14.27. The Privileges Committee considered the recommendations made by the Commission,[460] and supported the inclusion of a definition of conflict of interest in the commentary section of the members' code that takes account of the Commission's views concerning the definition of a conflict of interest.[461] Regarding the Commission's proposal for a mandatory conflicts of interest register, the Privileges Committee proposed further consultation.[462] The December 2022 report

[457] NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, July 2022, recommendations 3 and 4, at 179.

[458] Perrottet Government strengthens integrity safeguards | NSW Government. Note that this webpage is no longer accessible. The same media release by the now former premier Mr Perrottet of 5 November 2022 is still accessible via https://nswliberal.org.au/news/perrottet-government-strengthens-integrity-safeguards.

[459] Hansard, NSW Legislative Assembly, 9 November 2022.

[460] NSW Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct* (2022), Report 90, November 2022.

[461] Ibid, 15.

[462] Ibid, 16.

by the Standing Committee on Parliamentary Privilege and Ethics included a substantially similar observation and supported further consultation with members and other stakeholders.[463]

Rationale for reforms

14.28. In the Commission's view, members' complex working environment requires detailed guidelines and clear processes to assist them to navigate ethical challenges involving conflicts of interest. As highlighted by the Commission in Operation Witney, ideally, the separate conflicts of interest regimes should be internally consistent about core aspects, including consistency in the:

- definition of a conflict of interest
- approach to the principles and values, and the ways to avoid, recognise, disclose and manage conflicts of interest
- approach to maintaining centralised register(s) of conflicts of interest.

14.29. As steps have been taken to introduce these reforms, the Commission will not reiterate its earlier recommendations regarding the need for a clear, consistent and comprehensive conflict of interest definition and the mandatory registration of conflicts of interest by members of Parliament. However, this investigation again demonstrates the importance of these reforms.

14.30. The Commission has developed a control framework to assist public agencies to control the risks posed by conflicts of interest. It emphasises that disclosure is just one of the elements of the recommended conflicts of interest framework.[464] The Commission proposes that the mechanisms to disclose and manage conflicts of interest for members be improved in line with the Commission's conflicts of interest framework by providing for greater:

- consistency and clarity regarding what constitutes a conflict of interest and the level of detail that is required in a disclosure
- consistency and clarity on how to make a disclosure
- consistency and clarity on how disclosures should be managed
- emphasis on avoiding conflicts of interest
- transparency and accountability by requiring continuous updating of registered interests
- enforcement mechanisms
- ongoing professional education to raise awareness and promote an ethical culture.

14.31. The current members' code requires that members "take reasonable steps" regarding conflicts of interest. It does not elaborate on what this might entail. Nor is detailed guidance to be found in the 2010, 2015 or 2017 versions of the *Legislative Assembly Handbook* and/or *Members' Guide*. This lack of detail stands in contrast to the procedures outlined in the ministerial code, which have been outlined in detail in chapter 10.

14.32. The existing regime could be improved by providing further guidance and practical examples of how to avoid, resolve, disclose and manage a conflict of interest.

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[463] NSW Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Review of the Code of Conduct for Members*, Report 4/57, December 2022, 15.

[464] NSW ICAC, *Managing conflicts of interest in the NSW public sector*, 2018, 8.

14.33. The Commission's existing conflicts of interest framework could be utilised by the NSW Government and the NSW Parliament as the basis for practical guidance if tailored to the circumstances faced by members. Practical guidance should include the management of personal financial and non-financial interests (such as those detailed in this report and Operation Witney). Detailed processes for managing conflicts of interest could be incorporated in guidance publications, such as the *Legislative Assembly Members' Guide*.

14.34. The Commission would welcome consultation with the NSW Parliament to adapt the Commission's conflicts of interest control framework to the workings of the legislature.

14.35. The Privileges Committee's report of November 2022 considered a recommendation concerning further guidance regarding members' conflict of interest obligations, which was made in the Operation Witney report.[465] It also recommended the preparation of greater guidance material for members on how to manage conflicts of interest.[466] The December 2022 report by the Standing Committee on Parliamentary Privilege and Ethics acknowledged that "more could be done to assist and educate Members on areas that have been identified by the ICAC including … conflicts of interest".[467] The Standing Committee supported working with the Commission to develop integrity awareness and educational initiatives for members.[468]

14.36. The responses made by the NSW Parliament's designated committees regarding the development of education and awareness material are addressed below, under the subheading relating to training and professional development.

RECOMMENDATION 2

14.37. That the NSW Parliament, in consultation with the Commission, develops a comprehensive framework applicable to members that addresses the avoidance, disclosure and management of conflicts of interest. The framework should provide members with practical guidance about how to avoid, disclose and manage common conflicts of interest.

Promoting the proper use of public resources

Rationale for proper use of public resources

14.38. Everyone working in the public sector has a responsibility to act in the public interest. The proper use of public resources is part of this obligation.[469] Public resources include tangibles (such as office equipment or stationery) and intangibles (such as employee time). The misuse of resources can amount to a breach of public duty, and, if serious and deliberate, can also constitute corrupt conduct and misconduct in public office.

[465] NSW Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct* (2022), Report 90, November 2022, 16.

[466] Ibid, 16

[467] NSW Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Review of the Code of Conduct for Members*, Report 4/57, December 2022, 20ff.

[468] Ibid, 20.

[469] See s 6 of the *Government Sector Employment Act 2013* (NSW). The principle of accountability as outlined in s 7 includes the core value to "Be fiscally responsible and focus on efficient, effective and prudent use of resources".

Current regime

14.39. As outlined in chapter 3 of this report, clause 4 of the members' code (adopted in 2011, 2015 and 2019) is titled "Use of public resources". It stated:

> *Members must apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.*

14.40. Following the 2020 revision of the members' code, the relevant clause 3 titled "Use of public resources" now states:

> *The use of public resources should not knowingly confer any undue private benefit on the Member or, on any other person, or entity.*
>
> *Members must take reasonable steps to apply the public resources to which they are granted access according to any guidelines or rules about the use of those resources.*

14.41. Section 3 of the *Parliamentary Remuneration Act 1989* (NSW) defines "parliamentary duties", and has been discussed in chapter 3 of this report. The *Annual report and determination* by the Parliamentary Remuneration Tribunal (PRT) states that the definition of "parliamentary duties" has been under review since 2019.[470]

14.42. For the purposes of the members' code, guidelines and rules about the use of public resources include those mentioned in the *Members' Entitlements Handbook* ("the Handbook"). In turn, the Handbook refers to the guidelines and determination of the PRT concerning the intermingling of a member's parliamentary duties and private activities and includes a statement that "Some intermingling of a Member's parliamentary duties and private activities is, in practical terms, not always easily avoided".

14.43. However, the Handbook also states that there are some resources that should not be intermingled under any circumstances. These include:

- parliamentary staff
- parliamentary offices
- stationery
- allowances relating to travel.

14.44. The "reasonable assessment" approach and related tests concerning the intermingling of parliamentary duties is discussed in chapter 3.

14.45. In addition, "guiding principles" for the use of entitlements were adopted by Parliament in 2020.[471] These are detailed in the subsequent editions of the Handbook. The guiding principles include a reminder that "entitlements should not be used for private, commercial, non-electorate or non-parliamentary purposes". The Handbook sets out further factors to consider when making a "reasonable assessment" of whether or not an expenditure could invoke public criticism.

[470] *Parliamentary Remuneration Tribunal: Annual report and determination*, 24 May 2022, as published in the Government Gazette, Number 240, 3 June 2022, 17 [82].

[471] Parliamentary Remuneration Tribunal determination 2022, 17 [84].

14.46. Section 14 of the *Members of Parliament Staff Act 2013* stipulates that a member may employ a person to assist the member in exercising his or her functions as a member of Parliament. The Code of Conduct for Members' Staff, dated June 2006, applies to parliamentary staff and electorate staff. It states that the role of staff is "to support the electorate, the constituents and the Parliamentary role of your member". The *Electorate Office Guide* expressly states "that staff cannot undertake activities of a direct electioneering or campaign nature during work time" and electorate offices are not to be used "for any electioneering, campaigning or fundraising purposes". However, it does not contain general guidance that would assist staff in delineating how they are able to assist the member in exercising his or her functions as a member of Parliament.

Exposure of conduct and weaknesses

14.47. Mr Maguire used public resources, including his parliamentary office, parliamentary staff, the parliamentary letterhead (which included the NSW coat of arms) and his parliamentary email address, with a view to gaining benefits for G8wayInternational. He also used his parliamentary business card that displayed the NSW Government logo to promote private interests.

14.48. The NSW Parliament has published a *Summary of ICAC investigations into the conduct of members of Parliament* ("the Summary"), summarising previous Commission reports dealing with the conduct of members. The Summary noted that a recurring theme was the failure of members to comply with the guidelines and rules relating to the use of public resources.

14.49. The intermingling of public duties with private activities is an obvious but common corruption risk. It can include a public official:

- misusing public resources for private purposes
- using public resources to support private employment (for example, work time, vehicle, staff, entitlements, stationery, tools, email and telephone)
- using the authority and privileges that come with public office to leverage private gain.

14.50. In its February 2022 report, *Investigation into political donations facilitated by Chinese Friends of Labor in 2015* (Operation Aero), the Commission found that the conduct of a former member of Parliament amounted to "misuse of privileges and resources attached to his office, in carrying out an unlawful scheme" and was a breach of public trust.[472] The resources that had been misused included a parliamentary office and parliamentary email. Further, in the Operation Witney report, the Commission raised concerns about the use of public resources by a member of Parliament, such as the use of his parliamentary email address and his electorate office.[473]

14.51. Considering the conduct disclosed in this investigation, and other recent reports involving members of Parliament,[474] in the Commission's view the threshold of "undue private benefit" in the members' code is set too low. It fails to consider that misuse of parliamentary resources may be an abuse of public funds even if the member does not ultimately gain a tangible "private benefit", such as a financial benefit.

[472] NSW ICAC, *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*, (Operation Aero), February 2022, 223.

[473] NSW ICAC, *Investigation into the conduct of the local member for Drummoyne*, above, 180.

[474] NSW ICAC, *Investigation into political donations facilitated by Chinese Friends of Labor in 2015*, above, and *Investigation into the conduct of the local member for Drummoyne*, above.

14.52. Confusion may arise because the PRT's determination says that "Some intermingling of a Member's parliamentary duties and private activities is, in practical terms, not always easily avoided", but the Handbook states that there are a number of (specific) resources that must not be intermingled under any circumstances.

Rationale for reforms

14.53. The Commission accepts that in some cases it is difficult to avoid the intermingling of parliamentary duties and private activities. The pursuit of high ethical standards should not require that common sense be abandoned. Like most other workers, a politician should be able to make occasional, limited personal use of publicly-provided resources. This may include making some personal telephone calls, limited internet use and running errands, in circumstances where to do otherwise would be impractical and where it is not conducive to corruption and improper conduct. The relevant codes of conduct need to address this issue unambiguously.

14.54. The Commission's investigation has not located any formal guidance material or procedure about use of the coat of arms, including on official letterheads. There are risks associated with members of Parliament using their parliamentary letterhead when purporting to speak on behalf of the government. In Mr Maguire's case, this was done to advance his personal interests. In her evidence, Ms Cruikshank told the Commission, "in practice it's well known that unless you're the portfolio holder … you don't go round expressing opinions on behalf of the government on that particular portfolio issue". Any proscription that certain official parliamentary resources must not be intermingled with private interests should include an express reference to the parliamentary crest and coat of arms.[475]

14.55. The Commission notes that the December 2022 review by the Standing Committee on Parliamentary Privilege and Ethics of the relevant clause of the members' code regarding the use of public resources, noted the possibility of amending that code or, alternatively, addressing the issue through further guidance, education and training. It made the following finding:

> *Consideration should be given in the 58th Parliament as to whether to amend the Code to provide a more proscriptive list of public resources that cannot be intermingled with private resources under any circumstances, or whether more guidance, education and training is sufficient.*[476]

14.56. Given members of Parliament are not prohibited from having outside employment (which differs from the prohibitions for ministers, as per Part 1 of the Schedule to the ministerial code), the corruption risks concerning the misuse of public resources remain significant. An amendment of the members' code as well as further guidance is needed to address this risk.

RECOMMENDATION 3

14.57. That the NSW Parliament's designated committees review and amend the Code of Conduct for Members and the *Members Entitlements Handbook* (1 July 2022) in relation to the use of public resources, to clarify the limited circumstances in which it is acceptable to intermingle parliamentary duties with personal or private activities. In particular, this review should address the use of:

[475] The Commission notes that s 6 of the *State Arms Symbols & Emblems Act 2004* prohibits the use of the state symbols in certain circumstances, including in connection with business.

[476] NSW Legislative Assembly, Standing Committee on Parliamentary Privilege and Ethics, *Review of the Code of Conduct for Members*, Report 4/57, December 2022, 20ff.

- parliamentary staff
- parliamentary offices
- stationery
- allowances relating to travel.

RECOMMENDATION 4

14.58. That the relevant parliamentary department reviews and amends the Code of Conduct for Members' Staff in relation to the use of public resources, to clarify the limited circumstances in which it is acceptable to intermingle parliamentary duties with personal or private activities. In particular, this review should address the use of:

- parliamentary staff
- parliamentary offices
- stationery
- allowances relating to travel.

RECOMMENDATION 5

14.59. That the Presiding Officers and Department of Parliamentary Services ensure that relevant guidance material clarifies that the parliamentary crest and coat of arms, including on official letterheads and business cards, must only be used for parliamentary duties, and in accordance with established practices and conventions.

Promoting an ethical culture via reforms for parliamentary friendship groups

Parliamentary friendship groups

14.60. As noted in chapter 7, parliamentary friendship groups are groups of members who meet to raise awareness of and promote particular issues or stakeholder groups. Friendship groups are always bi-partisan and are open to members of both the Legislative Assembly and Legislative Council. They are required to provide an annual report to the Presiding Officers, and are formally recognised and approved by the Presiding Officers for the term of a Parliament.

14.61. Participation in an authorised parliamentary group, such as the APFG, is specifically mentioned in the PRT's guideline as an example of activity coming within the definition of "parliamentary duties". The PRT guideline is reproduced in the Handbook.

14.62. The APFG was founded in December 1999. According to a summary of the APFG's history provided for the premier, its focus is on the nations surrounding Australia, with a particular interest in providing assistance to underprivileged areas.

Current regime

14.63. The primary control mechanism for parliamentary friendship groups is the Parliamentary Friendship Groups Policy. In relation to Mr Maguire's conduct, there were three relevant versions of this policy, dated May 2011, April 2015 and August 2017.

14.64. All versions of the policy include a section subheaded "Criteria for approval", which stipulates a range of criteria, including that "the Parliamentary Friendship Group must not undertake activities of a commercial nature (other than obtaining sponsorship for charitable donations)".

14.65. The 2015, 2017 and 2019 versions of the policy include a clause which states: "The activities of a Parliamentary Friendship Group must not confer or be seen to be conferring a material benefit to a commercial endeavour."

Exposure of conduct and weaknesses

14.66. The APFG was a convenient guise for Mr Maguire to pursue his private interests, which he failed to disclose to other members of the group.

14.67. All versions of the policy expressly prohibited Mr Maguire's attempt to utilise the friendship group to advance his commercial endeavours.

14.68. The 2015, 2017 and 2019 versions included the following requirement: "When undertaking activities under the auspices of a Parliamentary Friendship Group, Members must be mindful of the Code of Conduct for Members and the Members' Handbook". In the Commission's view, the phrase "must be mindful" is too vague.

Rationale for reforms

14.69. Members of parliamentary friendship groups should comply with codes of conduct and related guidelines. The clause requiring members to "be mindful" of the members' code and the Handbook should be strengthened. As friendship groups use public resources, and are permitted to use the official parliamentary crest, the standard of conduct expected of such groups should align with that applicable to all members.

14.70. The members' code states that "it applies to Members in all aspects of public life". To remove any doubt, the members' code should state that it applies to the activities of parliamentary friendship groups.

14.71. The current Parliamentary Friendship Groups Policy should state that members of friendship groups should actively inform other members of activities associated with the friendship group (for a detailed list, see recommendation 6, below). A requirement of timely communication would:

- promote transparency and accountability
- encourage inclusiveness
- assist with reporting of all activities.

RECOMMENDATION 6

14.72. That the Presiding Officers review the Parliamentary Friendship Groups Policy and amend it to include a requirement that, in an active and timely manner, members keep each other informed of all activities involving a parliamentary friendship group, including:

- **travel on behalf of the parliamentary friendship group**
- **sending invitations**
- **offering hospitality**
- **offering assistance**
- **hosting events and visitors**
- **making representations on behalf of the friendship group.**

RECOMMENDATION 7

14.73. To further clarify that the Code of Conduct for Members applies to parliamentary friendship groups, it is recommended:

- **that the Presiding Officers strengthen the Parliamentary Friendship Groups Policy to specify that all activities undertaken by members under the auspices of a parliamentary friendship group must be in accordance with the Code of Conduct for Members and related guidelines and procedures**
- **that the NSW Parliament's designated committees consider amending the Code of Conduct for Members to specifically mention that its application extends to activities involving parliamentary friendship groups.**

Section 111E of the ICAC Act

Rationale of corruption prevention recommendations made by the Commission

14.74. Section 13(1) of the ICAC Act sets out the Commission's principal functions, one of which is "to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct". This means that some of the Commission's recommendations are aimed at introducing or amending NSW laws. These cannot be implemented by an individual public authority but require consideration by the NSW Government and the NSW Parliament.

Current regime pursuant to s 111E of the ICAC Act

14.75. Section 13(2)(c) of the ICAC Act provides that the Commission conducts its investigations with a view to determining "whether any methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct". Section 13(3)(b) of the ICAC Act provides that the Commission may formulate recommendations in relation to the findings of its investigations.

14.76. Section 111E(1) of the ICAC Act requires that the Commission, as soon as practicable after it has made recommendations under s 13(3)(b) of the ICAC Act, provides the relevant public authority and minister with a copy of these recommendations.

14.77. As required by s 111E(2) of the ICAC Act, a public authority must inform the Commission in writing within three months (or such longer period as the Commission may agree to) after receiving the recommendations whether it proposes to implement any plan of action in response to the recommendations, and if so, provide the Commission with a copy of that plan.

Exposure of weaknesses of s 111E of the ICAC Act

14.78. Some reports, such as the Commission's recent reports following Operation Witney, the *Investigation into the regulation of lobbying, access and influence in NSW* (Operation Eclipse) and Operation Aero, contain recommendations directed to the NSW Government rather than individual public authorities.

14.79. Although the Commission can formulate recommendations regarding any public authority or public official, only a "public authority" and the "Minister" are mentioned in s 111E of the ICAC Act. This means that, where the Commission directs a recommendation to the "NSW Government" or the "NSW Parliament", there is no requirement under s 111E to inform the Commission of any proposed course of action. The Commission notes that, in practice,

the government usually responds to the Commission's recommendations. However, it would be preferable to clarify s 111E.

14.80. This issue was identified by the Commission in its submission to the inquiry "Review of aspects of the *Independent Commission Against Corruption Act 1988*" by the Committee on the Independent Commission Against Corruption, which commenced on 9 June 2022. It was drawn to attention at the public hearing. However, the issue was not explored or addressed in the final report.[477]

14.81. Further, the current *Legislative Council Practice* refers to advice dated 21 December 2009 from the Crown Solicitor regarding the "Application of ICAC Act to Parliament", which indicates that there is a lack of clarity concerning whether a House of Parliament is a "public authority". It states:[478]

> *It is unclear whether the Legislative Council is a "public authority" within the meaning of section 3(1) of the* Independent Commission Against Corruption Act 1988.

14.82. Additionally, as noted by Elizabeth Broderick in her August 2022 report, *Leading for Change*, "The range of roles, responsibilities and accountabilities of people working within Parliament House means that change is a particularly complex exercise, with no central source of authority or leadership that can drive reform on its own".[479] Hence, there is a need for a mechanism to address any recommendations the Commission might direct to the NSW Parliament.

Rationale for reform

14.83. The Commission's functions include making recommendations concerning law reform proposals, yet there is a lack of clarity concerning whether and how the legislature and the NSW Government should respond to these recommendations.

RECOMMENDATION 8

14.84. That the NSW Government considers amending s 111E of the *Independent Commission Against Corruption Act 1988* to set requirements for the premier on behalf of the NSW Government and Presiding Officers of each House of Parliament to respond to the corruption prevention recommendations of the Commission.

The Constitution (Disclosure by Members) Regulation 1983

Rationale for compliance framework

14.85. An effective compliance program seeks to ensure adherence to the relevant rules, values and standards of conduct and that breaches of the members' code and the Disclosure Regulation are addressed; members of Parliament and the public should have confidence that misconduct has consequences.

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[477] Committee on the Independent Commission Against Corruption, *Review of aspects of the Independent Commission Against Corruption Act 1988*, Report 6/57, 15 December 2022.

[478] *New South Wales Legislative Council Practice*, Second Edition, Federation Press, 2021, 245, note 201.

[479] E Broderick, *Leading for Change: Independent Review of Bullying, Sexual Harassment and Sexual Misconduct in NSW Parliamentary Workplaces 2022*, Elizabeth Broderick & Co. August 2022, 3.

Current compliance framework

14.86. The members' code is adopted for the purposes of s 9 of the ICAC Act by each House of the NSW Parliament after a state election. A substantial breach of an applicable code of conduct can amount to corrupt conduct, provided that the conduct also falls within s 8 of the ICAC Act (see s 9(1)(d) of the ICAC Act).

14.87. As outlined in chapter 3, s 14A(2) and s 14A(3) of the Constitution Act provide for a mechanism whereby the relevant House of Parliament can take the action of declaring a member's seat vacant for wilfully contravening the Disclosure Regulation. Potential contraventions of the Disclosure Regulation can be referred by the relevant House of Parliament to its parliamentary committee for investigation and report. However, as noted above, in *Obeid v R 2015* the Court rejected the proposition that s 14A of the Constitution Act supports the exclusive jurisdiction of a House of Parliament.[480]

14.88. Clause 23 of the Disclosure Regulation states that "A contravention of this Regulation shall not attract any criminal or civil liability, except to the extent expressly provided by s 14A of the Act."

Weaknesses

14.89. As observed in chapter 3, clause 23 of the Disclosure Regulation may be invalid, to the extent it falls outside s 14A of the Constitution Act and seeks to limit the jurisdiction of courts or investigative bodies.

14.90. In any event, this clause could send the message that a contravention of the Disclosure Regulation is, to some degree, permissible. Clause 23 could undermine the goal of deterrence.

14.91. Unlike appointed public officials, elected members are not in a contract of employment and are not subject to a manager who can dismiss or discipline them for transgressions. The members' code and the Disclosure Regulation rely heavily on self-regulation.

14.92. An effective compliance program requires effective deterrence. The NSW Government could consider reforms to ensure that clause 23 of the Disclosure Regulation does not undercut the message of s 14A(2) of the Constitution Act that a contravention of the Disclosure Regulation has consequences.

RECOMMENDATION 9

14.93. That the NSW Government reviews the wording of clause 23 of the Constitution (Disclosures by Members) Regulation 1983 to ensure consistency with section 14A of the *Constitution Act 1902* (NSW).

Training and professional development reforms

Evidence about training and reporting systems

14.94. As outlined, Mr Maguire's conduct took place over an extended period of time (from 2012 to 2018) and involved representations to, and conversations with, a number of public officials concerning matters in which he had a private interest that he failed to disclose.

[480] At [47].

14.95. When Mr Maguire was appointed parliamentary secretary, he received three letters explaining his obligations under the ministerial code. In addition, he attended an individual briefing session on 11 September 2014, and group briefing sessions with the DPC on 24 June 2014 and 11 May 2016. Nevertheless, he did not recall receiving training from the DPC concerning the ministerial code.

14.96. Several public officials, whose roles commenced some time ago, gave evidence at both public inquiries. They had scant, if any, recollection of receiving training regarding codes of conduct. Staff used by Mr Maguire to conduct G8wayInternatioal business did not recall receiving any induction or training when they started working for Mr Maguire.

14.97. The Code of Conduct for Members' Staff provides advice on reporting corrupt conduct.

14.98. Public officials gave a variety of answers when asked to whom they would report concerns about potential wrongdoings or how they would be dealt with. The variability of responses may have been affected by their different work experiences and levels of seniority:

- Ms Berejiklian's evidence was that if anything had come to her attention, she would have notified the Commission, or the secretary of the relevant department.
- A former minister expected that Mr Maguire's conduct would be taken care of through the correct channels.
- Ms Berejiklian's former chief of staff said that, had she known of Mr Maguire's personal interest in a matter for which he was advocating, she would have contacted the relevant minister, the relevant Presiding Officer in the NSW Parliament or raised her concerns with Mr Maguire directly. In addition, at least, she would have consulted with the DPC, given it keeps a register of conflicts of interests; depending on the DPC's advice, the matter may have been referred to the Commission.
- Two of Mr Maguire's former electorate officers mentioned the option of reporting concerns to the clerk of the Legislative Assembly.
- Other former electorate officers were uncertain with whom to raise their concerns.

14.99. Some people did raise concerns regarding Mr Maguire's conduct, for example:

- A former CEO of the Greater Sydney Commission wrote a detailed file note and a ministerial briefing note following a meeting attended by Mr Maguire and Ms Waterhouse.
- A former chief of staff for the minister for planning said that he contacted the Department of Planning about information provided by Mr Maguire regarding the Independent Hearing and Assessment Panels, and that he advised the secretary about the incident at the next briefing meeting; in addition, he said he forwarded the Greater Sydney Commission's ministerial briefing note to the premier's office.
- A former senior policy advisor for the minister for trade said he raised his concerns, regarding Mr Maguire's proposal to travel to China, with his chief of staff as well as the premier's office.

14.100. On occasions, electorate and parliamentary staff, in performing their duties, followed the instructions provided by Mr Maguire without questioning whether the instructions were appropriate. For example, a former electorate officer said she performed work relating to G8wayInternational because Mr Maguire had asked her to do it, and another parliamentary staffer said she followed Mr Maguire's instructions and did not question whether these related to business activities. Information provided by electorate staff in interviews with Commission officers further demonstrates this practice.

Training arrangements

14.101. Training for new members occurs every four years, after each state election. Attendance is optional but the Commission was advised that it would be unusual for new members not to attend.

14.102. An education program and information sessions for members were held in 2011 and a similar program commenced in 2019. Ongoing advice is available to members. The Department of Parliamentary Services provides an advisory service regarding the appropriate use of parliamentary entitlements, and members have access to the parliamentary ethics adviser (see below for further information about this role).

14.103. The clerks have no formal role in ensuring members comply with their disclosure obligations pursuant to the Disclosure Regulation. However, as part of their administrative functions, the clerks provide members with reminder letters and forms about their disclosure obligations. A template of such a letter for newly elected members mentions the legal requirements set out in the Disclosure Regulation noting that "any wilful contravention of those requirements is a contempt of the Parliament, subject to investigation and the possible consequence of the House declaring your seat vacant". The template letter also reminds incoming members of their obligations pursuant to the members' code, and that the obligations are tied to the definition of what could amount to corrupt conduct pursuant to the ICAC Act.

14.104. In 1998, the Legislative Council and the Legislative Assembly resolved to appoint a parliamentary ethics adviser to assist members with ethical issues and concerns. In providing advice, the parliamentary ethics adviser is guided by the members' code, as well as determinations of the PRT, and any other guidelines or policies adopted by the relevant House of Parliament.

14.105. Pursuant to Part 7A of the ICAC Act, designated committees of the Legislative Assembly and the Legislative Council undertake education relating to the ethical standards applying to members. They also provide advice in response to requests by the Houses of Parliament for advice about ethical standards. The committees conduct ad hoc seminars for members. For example, there were seminars for members following the adoption of the revised members' code in 2020.[481]

14.106. The recently established role of an independent complaints officer (ICO) also includes an education function. The resolution by the Legislative Assembly that established this position stated:

> *2 (c) Educational presentations*
>
> *The Independent Complaints Officer shall assist the Privileges Committee, Parliamentary Ethics Adviser and the Clerk as requested in relation to the education of members about their obligations under the Code of Conduct for Members and the Constitution (Disclosures by Members) Regulation 1983.*[482]

14.107. In 2021, the Australian Parliament established a publicly accessible Members' Training Program Register, showing completion of safe and respectful workplaces training.[483]

[481] NSW Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct (2022)*, Report 90, November 2022, 6.

[482] Hansard, NSW Legislative Assembly 29 March 2022, 25.

[483] Parliament of Australia, Members' Training Program Register available at: https://www.aph.gov.au/Senators_and_Members/Members/Training.

14.108. It appears that initial induction, and regular ongoing professional education, is offered to electorate staff; it is optional, although staff are encouraged to attend. The NSW Parliament has prepared material relating to the induction and training of staff, including an *Electorate Office Guide*, and regularly sends out memoranda to remind members and their staff about the proper use of public resources in election periods.

Weaknesses

14.109. Training and ongoing professional education might not affect the behaviour of some individuals who intentionally disregard and circumvent their obligations. However, their dishonest behaviour does not happen in a vacuum. Many factors contribute to failures by public officials to manage private interests. These include work culture and the expectations of their superiors, peers and staff.

14.110. If more people had spoken up about Mr Maguire's various activities, and had this information reached the Commission or others who had the potential to influence him, Mr Maguire's conduct may have been exposed at a much earlier point. As it was, his conduct continued unimpeded for the six years the subject of this investigation. Ms Berejiklian failed to discharge her duty pursuant to s 11 of the ICAC Act to report suspicions of corrupt conduct to the Commission. To effectively counter corruption, any organisation, including the NSW Parliament, needs effective lines of communication and an environment in which people feel comfortable to speak up.

14.111. The investigation raises the question of whether an expanded professional development program should be implemented that supports a culture of ethical behaviour for elected public officials and their staff, noting that training for neither members, nor members' staff, is mandatory. The NSW Parliament could mandate staff training and promote members' participation in educational events by publishing minimum expectations for attendance, and by tracking, recording and publishing attendance records (similar to the Members' Training Program Register established by the Australian Parliament).

14.112. Effective education programs are a core element of an effective compliance program. They would support the orderly conduct and effective functioning of both Houses as well as protecting the dignity of Parliament. The values and conduct embodied in codes of conduct need to be integrated and implemented and become second nature.

14.113. The current practice of providing reminder letters to members about the disclosure requirements could be expanded to provide members with ongoing guidance and information or "nudges", including about potential consequences of non-compliance; that one potential consequence of a member contravening their disclosure obligations is that their seat could be declared vacant, and another is exposure through an ICAC investigation.

14.114. The education role of the clerks could be assisted by educational presentations involving the ICO, and the parliamentary ethics adviser.

14.115. The November 2022 report by the Privileges Committee indicated that it "intends to pursue a more active role in educating members about the Code".[484] Similarly, the Standing Committee on Parliamentary Privilege and Ethics in its December 2022 report made the following finding:

> *While there are currently resources and training opportunities for Members, more could be done to assist and educate Members on areas that have been identified by the ICAC including disclosure obligations, conflicts of interest and proper exercise of power; and on other aspects of the Code. The Committee should continue to work with the ICAC to develop integrity awareness educational initiatives for Members.*

[484] NSW Legislative Council, Privileges Committee, *Review of the Members' Code of Conduct (2022)*, Report 90, November 2022, 6.

14.116. The Commission welcomes these comments and looks forward to working in partnership with the NSW Government and the NSW Parliament in developing educational and training opportunities and material as well as educational standards.

14.117. Parliamentary and electorate staff are in a difficult and vulnerable position, as their employment is at the discretion of the individual member but paid for by the NSW Parliament.[485] They may be more inclined to question directions given by their member if they have a clear understanding that their role is limited to supporting the parliamentary role of their member and excludes assistance related to private activities.

14.118. The current *Electorate Office Guide* states "that staff cannot undertake activities of a direct electioneering or campaign nature during work time" and electorate offices are not to be used "for any electioneering, campaigning or fundraising purposes". However, it does not provide much more by way of assisting staff to recognise boundaries and address breaches. For example, it does not contain guidance on undertaking private work for a member. It does not contain guidance on seeking advice or making a complaint. The *Electorate Office Guide* refers to further resources, such as the Electorate Office Gateway. However, staff would benefit from a comprehensive guide.

14.119. The following recommendations are aimed at strengthening training and education at NSW Parliament to drive an organisational culture that embraces ethical principles and values.

RECOMMENDATION 10

14.120. That the Presiding Officers, NSW Parliament's designated committees and the relevant parliamentary departments devise a permanent ongoing professional education program for members.

RECOMMENDATION 11

14.121. That the Presiding Officers, NSW Parliament's designated committees and the relevant parliamentary departments ensure that the existing induction program and the ongoing education development program for members address the obligations and duties of elected public officials, including (but not limited to):

- **a) principles and values that guide members in performing their public role**
- **b) disclosing interests via registration**
- **c) how to avoid, resolve and manage a conflict of interest**
- **d) guidance on secondary employment or outside business interests**
- **e) disclosing gifts and benefits**
- **f) the prohibition on improper influence**
- **g) guidance on the use of public resources**
- **h) guidance on the proper use of confidential information**
- **i) enforcement mechanisms**
- **j) risks and processes relating to lobbying**
- **k) restrictions on post-parliamentary careers**
- **l) procedures for reporting suspected corrupt conduct.**

[485] *Members of Parliament Staff Act 2013*.

RECOMMENDATION 12

14.122. That the NSW Parliament should incentivise participation in education, for example, by developing standards and publishing attendance records.

RECOMMENDATION 13

14.123. That letters and forms by the Clerk of the Legislative Assembly and the Clerk of the Legislative Council provided to members about their disclosure obligations contain clear warnings about potential consequences for non-compliance under the *Constitution Act 1902* (NSW), the Constitution (Disclosures by Members) Regulation 1983 and the *Independent Commission Against Corruption Act 1988*.

RECOMMENDATION 14

14.124. That the Presiding Officers and the relevant parliamentary departments review the training program for members' staff to ensure its content includes:

- the limits of the terms of their employment as outlined in the *Members of Parliament Staff Act 2013*, which stipulates that the role of a member of Parliament's staff is limited to assisting the member in exercising his or her functions as a member of Parliament
- the content of the Code of Conduct for Members' Staff
- the content of the Code of Conduct for Members
- who to contact internally and externally for confidential advice about working for a member
- the processes relating to making a public interest disclosure, both internally and externally under the *Public Interest Disclosures Act 1994* (and the *Public Interest Disclosures Act 2022*, once it is in force)
- minimum or recommended training standards.

RECOMMENDATION 15

14.125. That the Presiding Officers and the relevant parliamentary departments ensure induction and regular ongoing training for members' staff (conducted at least every two years) and make such training mandatory.

RECOMMENDATION 16

14.126. That the Presiding Officers and the relevant parliamentary departments review and strengthen guidance for parliamentary and electorate staff with a view to minimising the risk of staff being asked by a member to support private activities or other misuse of their public office. Position descriptions should be reviewed accordingly. The *Electorate Office Guide* should be reviewed to ensure it includes guidance about:

- the role of electorate and/or parliamentary staff, including more detailed advice concerning what is acceptable assistance and what is not
- the *Members of Parliament Staff Act 2013*
- seeking advice and lodging a complaint.

Promoting integrity in grants administration

14.127. A robust grant-funding framework is essential to maintaining public confidence in government decisions and the delivery of value for public money.

14.128. This investigation demonstrates that a conflict of interest can arise from a close personal relationship and that it can affect funding decisions. In this instance, there were failures by Ms Berejiklian regarding her conflict of interest obligations in relation to the ACTA grant application, as well as the RCM proposal. Further, the RCM Stage 2 funding reservation proposal, which involved the sum of $20 million, was approved without Ms Berejiklian declaring a conflict of interest.

General obligations and guidelines

14.129. NSW legislation emphasises the importance of probity and integrity in the expenditure of public funds. For example, the *Government Sector Finance Act 2018*[486] ("the GSF Act") promotes accountability and the aims of developing an efficient and effective government sector. The GSF Act also promotes sound financial management and appropriate stewardship of government resources and related money.[487]

14.130. A proponent seeking a government grant typically prepares a business case. At the time of the ACTA grant application, NSW Treasury had developed *Guidelines for Capital Business Cases* (TPP08-5) for public sector agencies and a circular (TC12/19) to promote best practice and help establish a clear and consistent approach to preparing business cases. The most current version of the business case guidelines is known as *NSW Government Business Case Guidelines* (TPP18-06), while circular TC12/19 remains in force. These documents, however, do not deal specifically with grants nor do they apply to non-government organisations.

14.131. A proponent's business case may contain a benefit–cost ratio (BCR) analysis, which is a resource prioritisation tool. Where applicable to a grant scheme, an additional BCR analysis is also prepared by either Treasury experts or members of the government's Investment Appraisal Unit (IAU). The NSW Government's current guidance with respect to BCR analysis is contained in a Treasury paper known as the *TPG23-08 NSW Government Guide to Cost-Benefit Analysis*.

14.132. At the relevant time, the 2010 *Good Practice Guide to Grants Administration*, developed by the DPC, was available to assist NSW public authorities to apply consistent practices for grants programs. The guide provided good practice tools and resources for use by grants program managers. However, compliance with the *Good Practice Guide to Grants Administration* was not mandatory.

The decision to award the ACTA funding

14.133. As discussed in chapter 11, on or about 29 June 2016, Mr Ayres approved grant funding totalling $40,000 to ACTA for the preparation of a business case in support of its funding proposal for building works. There was no evidence ACTA could not afford to fund its own business case.

14.134. ACTA forwarded the business case to Mr Ayres' office under cover of a letter dated 12 September 2016. Mr Ayres said that it was his view that this business case was sufficient to support a proposal for funding. The BCR (which was not calculated by applying NSW Treasury guidelines) was, Mr Ayres said, the "main justification" for his continuing to advance ACTA's proposal.

[486] *Government Sector Finance Act 2018* s 1.3.

[487] *Government Sector Finance Act 2018* s 1.3.

14.135. Mr Toohey, who it will be recalled was a director in the Office of Sport, considered that the ACTA business case "didn't stack up". Mr Toohey's view was shared by Mr Doorn, then an executive director in the Office of Sport, who believed he communicated that view to Mr Ayres' office.

14.136. One of the conditions imposed on the 14 December 2016 ERC's approval of expenditure to provide grant funding to ACTA was the "finalisation of a satisfactory business case". Mr Barnes, who was a deputy secretary in the DPC at the time, understood this to be necessary as the cost-benefit analysis contained in the initial GHD business case was "utterly non-compliant with NSW Treasury guidelines".

14.137. As a result, the government expended additional funds on a further business case.

14.138. As outlined earlier in the report, those close to the implementation of the ERC ACTA decision observed that Ms Berejiklian's office seemed to be particularly interested in the ACTA proposal, including that such a degree of attention was atypical.

Integrity concerns raised by the decision to award the ACTA grant

14.139. The awarding of the ACTA grant raises several concerns, including that:

- the funding was sourced from the Regional Growth–Environment and Tourism Fund (RGETF), despite the fact this fund had not yet been fully established and it was envisaged that the RGTEF would operate as a contestable grant scheme where applications were assessed first on an expression of interest basis, then against published criteria. This was outlined in detail in chapter 11. Such premature awarding of funding monies may have meant that other well-deserving bodies missed out on funding, or at least missed the opportunity to compete for that funding
- the ERC pathway used to approve the ACTA grant, in combination with the adoption of a non-contestable selection methodology, meant the proposal progressed along a more direct route to achieve funding compared to a public service-controlled process. The possibility that a grant can be awarded via an alternative decision-making route has the potential to undermine consistency in government decision-making. The adoption of an ERC decision-making pathway to fund a non-competitive grant also meant the processes and procedures designed to ensure that adequate due diligence is conducted could more easily be avoided
- it was questionable whether the ACTA funding decision provided value for money as issues such as whether the proposal represented the best and most cost-effective way to achieve a particular policy objective were not considered
- there was no available guidance for proponents concerning the preparation and assessment of business cases specifically in relation to grant funding
- the involvement of Mr Minucos (who it will be recalled was a political staffer in Mr Barilaro's office) was an important part of the "peculiar" circumstances in which a further revision of the GHD business case was procured
- public officials who were involved in the implementation of the ERC ACTA decision observed that Ms Berejiklian's office seemed to be particularly interested in the ACTA proposal, which is an example of the public sector being subtly influenced by the level of support and priority they perceive from within the premier's office.

Reform of grant administration in NSW

14.140. In April 2022, the NSW Government and the NSW Productivity Commissioner completed a review of the administration of grants ("the April 2022 Review"). The April 2022 Review made 19 recommendations to improve the integrity of grants administration, which the NSW Government has supported, or supported in principle. The recommendations were aimed at providing robust decision-making frameworks to ensure the accountability of those involved in grants administration and enhanced probity requirements. The April 2022 Review also delivered an updated *Grants Administration Guide*, which was published in the *Government Gazette* on 19 September 2022[488] and issued under Premier's Memorandum M2022-07 *Grants Administration Guide*.[489] Compliance with the guide is a legislative requirement under clause 31 of Schedule 1 to the GSF Act. The guide provides principles-based guidance and includes some mandatory requirements for officials, ministers and ministerial staff.

14.141. This updated 2022 *Grants Administration Guide* specifically mentions the standards of ethical behaviour required of ministers pursuant to the existing ministerial code, including in relation to conflicts of interest.

14.142. The April 2022 Review also proposed the creation of a central grants website where information relating to all grant programs will be available. Government agencies are now required to publish information about grants on the NSW Government's *Grants and funding* page.[490]

14.143. The April 2022 Review examined weaknesses in the current grant administration framework that are relevant to the processes involved in the awarding of the 2016 ACTA grant. The April 2022 Review addressed these weaknesses and included a range of recommendations that address the integrity and probity concerns outlined above.

14.144. Given these reforms have been put into train, the Commission will not make further recommendations about integrity and probity in grants administration at this stage, except in relation to the funding of the business case.

14.145. It is not common practice for the NSW Government to fund business cases submitted by private entities. However, to remove any ambiguity, there would be benefit in addressing circumstances where this is permissible and to ensure that funding for the preparation of business cases occurs in a meritorious, transparent and equitable manner.

RECOMMENDATION 17

14.146. That the NSW Government develops and publishes guidelines for the preparation and funding of business cases by government in respect of applications for grants by non-government entities.

Political decisions and announcements

14.147. This section is concerned with the Wagga Wagga by-election commitment made on 24 August 2018 and the subsequent funding reservation of $20 million for the construction of a recital hall (RCM Stage 2).

[488] *Government Gazette of the State of New South Wales*, Number 438, 19 September 2022.

[489] Premier's Memorandum, *M2022-07 Grants Administration Guide*, 19 September 2022.

[490] Available at https://www.nsw.gov.au/grants-and-funding.

14.148. The evidence that this could be seen as a political announcement was outlined in chapter 12. Executive power must be used in the public interest and not for the primary purpose of advancing political objectives, such as an interest in re-election. Mahoney JA in *Greiner v ICAC* provided specific examples to illustrate the limitations of public power, namely:

- that public power to appoint to a public office must be exercised for a public purpose not for a private or a political purpose
- that public power cannot be exercised in relation to the location of a public facility because it will assist the re-election of a party member, rather than it being the proper place for it.[491]

14.149. The Second Public Inquiry also revealed that public officials held other concerns in relation to the RCM Stage 2 proposal, namely:

- there were a number of regional conservatoria that received some level of government support and there might be a concern that the RCM was being treated more favourably if it was gifted a substantial asset
- there was no assurance that the RCM would be capable of administering a facility in the nature of a world-class recital hall
- there were concerns about how the operational and maintenance costs of a facility of that type could be met and whether it would require ongoing government funding, which Mr Barnes agreed was a "critical matter" to consider when funding capital works.

14.150. The obligations placed on ministers pursuant to clause 6 of the ministerial code have been discussed elsewhere in this report. Based on the evidence obtained in relation to RCM Stage 2, members of Parliament and ministers would benefit from additional training in relation to the management of political objectives when exercising public power. This is a significant corruption risk for elected public officials. It should be the subject of ongoing professional development.

RECOMMENDATION 18

14.151. That the NSW Government, the Presiding Officers, NSW Parliament's designated committees and the relevant parliamentary departments ensure that the induction and ongoing education programs for ministers and members address the management of political interests when exercising public power. For example, members should be aware that public power to appoint to a public office must be exercised for a public purpose, not for a private or a political purpose. Further, a public power cannot be exercised in relation to the location of a public facility because it will assist the re-election of a party member, rather than it being the proper place for it.

14.152. These recommendations are made pursuant to s 13(3)(b) of the ICAC Act and, as earlier noted, will be furnished to the NSW Government and/or the premier, the DPC, the NSW Parliament's designated committees, the Presiding Officers and the heads of relevant parliamentary departments.

14.153. As required by s 111E(2) of the ICAC Act, each of those recipients who is a public authority must inform the Commission in writing within three months (or such longer period as the Commission may agree in writing) after receiving the recommendations, whether it proposes to implement any plan of action in response to the recommendations and, if so, of the plan of action.

[491] *Greiner v ICAC* per Mahoney JA at 164.

14.154. In the event a plan of action is prepared, each public authority is required to provide a written report to the Commission of its progress in implementing the plan 12 months after informing the Commission of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the first report.

14.155. The Commission will publish the response to its recommendations, any plan of action and progress reports on its implementation on the Commission's website, www.icac.nsw.gov.au.

Appendix 1: The role of the Commission

The Commission was created in response to community and Parliamentary concerns about corruption that had been revealed in, inter alia, various parts of the public sector, causing a consequent downturn in community confidence in the integrity of the public sector. It is recognised that corruption in the public sector not only undermines confidence in the bureaucracy but also has a detrimental effect on the confidence of the community in the processes of democratic government, at least at the level of government in which that corruption occurs. It is also recognised that corruption commonly indicates and promotes inefficiency, produces waste and could lead to loss of revenue.

The Commission's functions are set out in s 13, s 13A and s 14 of the ICAC Act. One of the Commission's principal functions is to investigate any allegation or complaint that, or any circumstances which in the Commission's opinion imply that:

i. corrupt conduct (as defined by the ICAC Act), or

ii. conduct liable to allow, encourage or cause the occurrence of corrupt conduct, or

iii. conduct connected with corrupt conduct,

may have occurred, may be occurring or may be about to occur.

The Commission may also investigate conduct that may possibly involve certain criminal offences under the *Electoral Act 2017*, the *Electoral Funding Act 2018* or the *Lobbying of Government Officials Act 2011*, where such conduct has been referred by the NSW Electoral Commission to the Commission for investigation.

The Commission may report on its investigations and, where appropriate, make recommendations as to any action it believes should be taken or considered.

The Commission may make findings of fact and form opinions based on those facts as to whether any particular person has engaged in serious corrupt conduct.

The role of the Commission is to act as an agent for changing the situation that has been revealed. Through its work, the Commission can prompt the relevant public authority to recognise the need for reform or change, and then assist that public authority (and others with similar vulnerabilities) to bring about the necessary changes or reforms in procedures and systems, and, importantly, promote an ethical culture, an ethos of probity.

The Commission may form and express an opinion as to whether consideration should or should not be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of a person for a specified criminal offence. It may also state whether it is of the opinion that consideration should be given to the taking of action against a person for a specified disciplinary offence or the taking of action against a public official on specified grounds with a view to dismissing, dispensing with the services of, or otherwise terminating the services of the public official.

Appendix 2: Making corrupt conduct findings

Corrupt conduct is defined in s 7 of the ICAC Act as any conduct which falls within the description of corrupt conduct in s 8 of the ICAC Act and which is not excluded by s 9 of the ICAC Act.

Determining corrupt conduct

Section 8 defines the general nature of corrupt conduct. Subsection 8(1) provides that corrupt conduct is:

(a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or

(b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or

(c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or

(d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Subsection 8(2) specifies conduct, including the conduct of any person (whether or not a public official), that adversely affects, or that could adversely affect, either directly or indirectly, the exercise of official functions by any public official, any group or body of public officials or any public authority, and which, in addition, could involve a number of specific matters which are set out in that subsection.

Subsection 8(2A) provides that corrupt conduct is also any conduct of any person (whether or not a public official) that impairs, or that could impair, public confidence in public administration and which could involve any of the following matters:

(a) collusive tendering,

(b) fraud in relation to applications for licences, permits or other authorities under legislation designed to protect health and safety or the environment or designed to facilitate the management and commercial exploitation of resources,

(c) dishonestly obtaining or assisting in obtaining, or dishonestly benefitting from, the payment or application of public funds for private advantage or the disposition of public assets for private advantage,

(d) defrauding the public revenue,

(e) fraudulently obtaining or retaining employment or appointment as a public official.

Subsection 9(1) provides that, despite s 8, conduct does not amount to corrupt conduct unless it could constitute or involve:

(a) a criminal offence, or

(b) a disciplinary offence, or

(c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or

(d) in the case of conduct of a Minister of the Crown or Parliamentary Secretary or a member of a House of Parliament – a substantial breach of an applicable code of conduct.

Subsection 9(1)(d) was inserted into the ICAC Act by the *Independent Commission Against Corruption (Amendment) Act 1994*. The object of the Bill which became the Act was to amend the ICAC Act so that conduct of a minister or member of Parliament that substantially

breaches a code of conduct is capable of being classified as corrupt conduct. The subsection was again amended in 2022 to include the office of parliamentary secretary.

In *Greiner v ICAC* (1992) 28 NSWLR 125 (at 136, 143) Gleeson CJ said the following in relation to s 9:

> *Reference has been made above to the conditional nature of a conclusion reached in relation to s 9(1). An accurate understanding of the operation of the word "could" in s 9 is essential to a proper performance of the task of evaluation required by that section…. However, it is of some assistance to an understanding of the way in which s 9(1) operates to consider what might be its effect in relation to a case where it is said that the conduct in question could constitute or involve a criminal offence.*
>
> *It was common ground in these proceedings that, in determining whether conduct could constitute or involve a criminal offence, the Commissioner would be required to go through the following process of reasoning. First, he would be required to make his findings of fact. Then, he would be required to ask himself whether, if there were evidence of those facts before a properly instructed jury, such a jury could reasonably conclude that a criminal offence had been committed. (It is not necessary for present purposes to examine what happens in a case where the Commissioner's findings depend in a significant degree upon evidence that would be inadmissible at a criminal trial.) I will return below to the significance of the approach to be taken to s 9(1).*
>
> …
>
> *… s 9(1) must be applied by the Commission, and by this Court, in a manner that is consistent with the purpose of the legislature, which was that the standards by which it is applied must be objective standards, established and recognised by law, and its operation cannot be made to depend upon the subjective and unexaminable opinion of the Commissioner.*

Section 13(3A) of the ICAC Act

Section 13(3A) was inserted into the ICAC Act in 2005 by the *Independent Commission Against Corruption Amendment Act 2005*. It provides that the Commission may make a finding that a person has engaged or is engaged in corrupt conduct of a kind described in paragraphs (a), (b), (c), or (d) of s 9(1) only if satisfied that a person has engaged or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

In *D'Amore v ICAC* [2012] NSWC 473 at [75] McClellan CJ at CL described s 13(3A) (and s 9(5), referred to below) as creating jurisdictional facts. He held:

> *In those circumstances, the jurisdictional facts created by ss 13(3A) and 9(5) will be found to exist where the Commission forms, in good faith, an evaluative judgment that the person under investigation has committed an offence or breached an identified law, provided the Commission has properly construed relevant criteria such as the elements of the offence or the requirements of the identified law.*

The application of s 13(3A) was also considered by the Court of Appeal in *D'Amore v ICAC* [2013] NSWCA 187. Basten JA said the following at [221]:

> *That leaves open the question as to the matter about which the Commission must be satisfied under s 13(3A). It would clearly be inconsistent with both the function of the Commission and the structure of the Act generally to hold that the Commission must be satisfied beyond reasonable doubt that an offence has been committed. The Commission is not a criminal court and is not required to*

reach conclusions on the basis of material which would constitute admissible evidence in a criminal proceeding: cf s 17(1). So understood, s 13(3A) requires that the Commission be satisfied that the conduct has occurred and that it is conduct of a kind which constitutes a criminal offence. The combined purpose of ss 13(4) and 74B, is to emphasise that the Commission is not delivering a verdict on a criminal charge.

In *Duncan v ICAC* [2016] NSWCA 143 Beazley P held, at [469]:

Effectively, therefore, there are two requirements at play. First, pursuant to s 9(1), conduct will only constitute corrupt conduct if it could constitute or involve conduct of the kinds specified in paras (a) to (d). Second, pursuant to s 13(3A), the power of the ICAC to make a finding of corrupt conduct is conditioned on the ICAC being satisfied that the relevant conduct constitutes or involves an offence or thing of the kinds specified in paras (a) to (d) of s 9(1). Thus, whilst the provisions overlap, there is a distinction between the meaning of corrupt conduct, which engages ss 7, 8 and 9 and the subsequent conditioning of power on the relevant state of satisfaction within the meaning of s 13(3A): see Bathurst CJ at [164]-[165]; Basten JA at [598].

Basten JA (with whom Beazley P agreed) held at [598]:

Section 8(2) and s 9(1)(a) of the ICAC Act refer to conduct which "could constitute or involve" a criminal offence; s 13(3A) requires the Commission to be satisfied that a person "has engaged in … conduct that constitutes or involves an offence". It is clear from the legislative scheme identified above that s 13(3A) does not impose an obligation to be satisfied that an offence has in fact been committed. Rather, that as to which the Commission must be satisfied is the capacity of the facts found to constitute an offence, if proved by admissible evidence to the satisfaction of the appropriate court.

Subsections 9(4) and (5) of the ICAC Act

Subsection 9(4) of the ICAC Act provides:

Subject to subsection 9(5), conduct of a Minister of the Crown or Parliamentary Secretary or a member of a House of Parliament which falls within the description of corrupt conduct in section 8 is not excluded by this section if it is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

Subsection 9(5) of the ICAC Act provides:

Without otherwise limiting the matters that it can under section 74A(1) include in a report under section 74, the Commission is not authorised to include a finding or opinion that a specified person has, by engaging in conduct of a kind referred to in subsection (4), engaged in corrupt conduct, unless the Commission is satisfied that the conduct constitutes a breach of a law (apart from this Act) and the Commission identifies that law in the report.

These subsections were inserted into the ICAC Act by the *Independent Commission Against Corruption (Amendment) Act 1994* to extend the grounds on which a finding of corrupt conduct could be made against a minister of the Crown or a member of Parliament.

At the time subsections 9(4) and (5) were inserted, s 13(3A) was not yet part of the ICAC Act. As noted above, it was inserted in 2005. Section 13(3A) does not apply to conduct characterised as corrupt by the operation of s 9(4) and s 9(5).

The application of subsections 9(4) and (5) was considered by the Commission in its June 2004 *Report on investigation into conduct of the Hon J. Richard Face*. At page 45 of that report the Commission noted the following:

It is clear from the words in s.9(4) that the provision was intended to catch conduct which fell within the description of corrupt conduct in s.8, but which would otherwise be excluded by s.9.

…

As a matter of construction, s.9(4) and (5) extend the range of permissible findings of corrupt conduct beyond those already contained in s.9(1) to those which would otherwise be excluded, but which fall within s.9(4) and (5).

…

…it is not necessary to undertake, in the context of the present investigation, a detailed analysis of the meaning of the term "breach of a law (apart from this Act)" in s.9(5). It seems clear, however, that "breach of a law" in s.9(5) ought to be construed as meaning breach of a civil, and not a criminal, law.

Support for this interpretation is found in the judgment of McClellan CJ at CL in *D'Amore v ICAC* [2012] NSWC 473 at [22] that:

In relation to conduct of a Minister of the Crown or a member of Parliament, s 9(4) creates a limited "carve-out" from the operation of s 9(1)…

Although this "carve-out" is not subject to the limitation in s 13(3A), it is expressly subject to s 9(5)…

His Honour identified both s 9(5) and s 13(3A) as jurisdictional facts.

Subsection 9(4) was amended in 2022 to include the office of parliamentary secretary.

Accordingly, the effect of subsections 9(4) and 9(5) is that the Commission may make a finding that a minister of the Crown, a parliamentary secretary or a member of a House of Parliament has engaged in corrupt conduct where, although that conduct does not come within s 9(1), it comes within subsections 9(4) and (5).

Section 74BA of the ICAC Act

Section 74BA of the ICAC Act provides that the Commission is not authorised to include in a report under s 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The path to findings

The Commission adopts the following approach in determining findings of corrupt conduct.

First, the Commission makes findings of relevant facts on the balance of probabilities (see below).

The Commission then determines whether relevant facts as found by the Commission come within the terms of any of subsections 8(1), 8(2) and/or 8(2A) of the ICAC Act.

If they do, the Commission then considers whether the conduct comes within s 9 of the ICAC Act.

In the case of subsection 9(1)(a), the Commission considers whether, if the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) were to be proved on admissible evidence to the requisite standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could reasonably conclude that the person has committed a particular criminal offence.

In the case of subsections 9(1)(b) and 9(1)(c), the Commission considers whether, if the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal could find that the person has engaged in conduct that constitutes or involves a matter of the kind described in those sections.

In the case of subsection 9(1)(d), the Commission considers whether, having regard to the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) and the provisions of the relevant applicable code of conduct, there are grounds on which it could objectively be found that a minister of the Crown or parliamentary secretary or a member of a House of Parliament has substantially breached the relevant applicable code of conduct.

If the Commission finds that the relevant conduct could constitute or involve a matter set out in s 9(1)(a) – (d) of the ICAC Act, the Commission concludes that its findings for the purposes of any of subsections 8(1), 8(2) and/or 8(2A) are not excluded by s 9.

If the Commission finds the s 8 conduct is not excluded by s 9(1) – (d), the Commission considers the requirements of s 13(3A).

In the case of subsection 9(1)(a) the Commission determines whether it is satisfied that, if the facts as found were to be proved on admissible evidence to the criminal standard of beyond reasonable doubt and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that the person has committed a particular criminal offence.

In the case of subsections 9(1)(b) and 9(1)(c) the Commission determines whether it is satisfied that, if the facts as found were to be proved on admissible evidence to the requisite standard of on the balance of probabilities and accepted by an appropriate tribunal, there would be grounds on which such a tribunal would find that the person has engaged in conduct that constitutes or involves a thing of the kind described in those sections.

In the case of subsection 9(1)(d) the Commission determines whether on the facts as found it is satisfied there are grounds on which it would objectively be found that a person has engaged in or is engaging in conduct that constitutes or involves a substantial breach of an applicable code of conduct.

In the case of subsection 9(4) the Commission considers whether the conduct of a minister of the Crown or parliamentary secretary or a member of a House of Parliament which falls within the meaning of any of subsections 8(1), 8(2) and/or 8(2A) is conduct that would cause a reasonable person to believe that it would bring the integrity of the office concerned or of Parliament into serious disrepute.

In the case of subsection 9(5) the Commission identifies the relevant civil law and determines whether, having regard to the facts as found in relation to any of subsections 8(1), 8(2) and/or 8(2A) and the provisions of the relevant civil law, it is satisfied there are grounds on which it could objectively be found that a minister of

the Crown or parliamentary secretary or a member of a House of Parliament has breached that law.

If satisfied the requirements of s 13(3A) have been met, the Comission then determines whether, for the purpose of s 74BA of the ICAC Act, the conduct the subject of the Commission's finding for the purposes of any of subsections 8(1), 8(2) and/or 8(2A) is serious corrupt conduct.

The Commission then determines whether, for the purpose of s 74BA of the ICAC Act, the conduct the subject of the Commission's finding for the purpose of any of subsections 8(1), 8(2) and/or 8(2A) is serious corrupt conduct.

If the above requirements are satisfied, the Commission may make a finding of serious corrupt conduct.

Standard of proof

A finding of corrupt conduct against an individual is a serious matter. It may affect the individual personally, professionally or in employment, as well as in family and social relationships. In addition, there are limited instances where judicial review will be available. These are generally limited to grounds for prerogative relief based upon jurisdictional error, denial of procedural fairness, failing to take into account a relevant consideration or taking into account an irrelevant consideration and acting in breach of the ordinary principles governing the exercise of discretion. This situation highlights the need to exercise care in making findings of corrupt conduct.

In Australia there are only two standards of proof: one relating to criminal matters, the other to civil matters. Commission investigations, including hearings, are not criminal in their nature. Hearings are neither trials nor committals. Rather, the Commission is similar in standing to a Royal Commission and its investigations and hearings have most of the characteristics associated with a Royal Commission. The standard of proof in Royal Commissions is the civil standard, that is, on the balance of probabilities. This requires reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as is required in criminal matters. The civil standard is the standard which has been applied consistently by the Commission when making factual findings. However, because of the seriousness of the findings which may be made, it is important to bear in mind what was said by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362:

> *…reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or fact to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.*

This formulation is, as the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 at 171, to be understood:

> *…as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct.*

See also *Rejfek v McElroy* (1965) 112 CLR 517, the *Report of the Royal Commission of inquiry into matters in relation to electoral redistribution*, Queensland, 1977 (McGregor J) and the *Report of the Royal Commission into An Attempt to Bribe a Member of the House of Assembly, and Other Matters* (Hon W Carter QC, Tasmania, 1991).

Findings set out in this report have been made applying the principles detailed in this Appendix.

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Appendix 3: Summary of responses to adverse findings

Section 79(A)(1) of the ICAC Act provides that the Commission is not authorised to include an adverse finding against a person in a report under s 74 unless:

(a) the Commission has first given the person a reasonable opportunity to respond to the proposed adverse finding, and

(b) the Commission includes in the report a summary of the substance of the person's response that disputes the adverse finding if the person requests the Commission to do so within the time specified by the Commission.

Counsel Assisting the Commission made written submissions setting out, *inter alia* , what adverse findings they contended it was open to the Commission to make against Mr Maguire, Ms Berejiklian and others. These were provided to relevant parties on 15 February 2022.

All submissions in response made on behalf of the parties were received by 9 May 2022. Additional submissions on discrete issues were provided by the Commission to selected parties on 27 April 2022 and 6 October 2022. Respective responses were received on 4 May 2022 and 18 October 2022.

The Commission considers that, in these circumstances, all parties have had a reasonable opportunity to respond to proposed adverse findings.

Where adverse findings have been made in the body of this report, submissions made in response by individual parties to that finding have been included, if requested by the party, or if the Commission determined they ought to be reproduced.

I·C·A·C

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