Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Berejiklian v Independent Commission Against Corruption [2024] NSWCA 177**
Hearing dates:	26-27 February 2024
Date of orders:	26 July 2024
Decision date:	26 July 2024
Before:	Bell CJ and Meagher JA at [1]; Ward P at [311]
Decision:	Amended Summons dismissed with costs.
Catchwords:	ADMINISTRATIVE LAW — judicial review of “serious corrupt conduct” findings made by Independent Commission Against Corruption against former Premier — where Commission’s report adopted findings of credibility made by person who presided at public inquiries — where the appointment of the person who presided at public inquiries as an Assistant Commissioner expired after conclusion of those public inquiries and that person appointed as a consultant and accordingly officer of Commission prior to report being finalised — whether assistance of presiding officer as consultant in preparation of report outside limits of her authority — whether Commission could adopt credibility assessments made by presiding officer after her appointment as Assistant Commissioner had expired ADMINISTRATIVE LAW — judicial review of “serious corrupt conduct” findings made by Independent Commission Against Corruption against former Premier — whether “no evidence” to support finding applicant influenced by her private interest in maintaining close personal relationship — whether non-pecuniary personal relationship capable of being “private interest” giving rise to conflict of interest and public duty — whether applicant as parliamentarian and Minister of the Crown had legally enforceable positive duty to act only according to what she

believed to be in public interest — whether Commission made findings about merits of funding proposals — whether s 7 of NSW Ministerial Code and cll 10-12 of Schedule to code applies to Premier — whether applicant's conduct in relation to funding decisions constrained by duty to act impartially — whether finding of partial conduct requires finding that but for unacceptable reason conduct would not have occurred — whether finding of partial conduct requires comparative exercise — whether Commission reached illogical or irrational result by making "serious corrupt conduct" finding but also refusing to recommend advice be sought as to whether to prosecute applicant — whether "dishonest" in s 8(1)(b) of *Independent Commission Against Corruption Act 1988* (NSW) requires person to realise his or her conduct dishonest according to standards of ordinary people

Legislation Cited:

Constitution Act 1902 (NSW), s 35E(1)
Evidence Act 1995 (NSW), s 55(1)
Independent Commission Against Corruption Act 1988 (NSW), ss 2A, 3(1), 4(1), 5(1), 6, 6A, 7(1), 8, 9, 11, 13, 17, 18(2), 20, 30, 31, 31B, 55, 57B, 74, 74A-74D, 75, 77, 77A, 104B, 107, 111, 112(1), Sch 1, cl 5(4)
Interpretation Act 1987 (NSW), s 35
Restart NSW Fund Act 2011 (NSW), s 3
Supreme Court Act 1970 (NSW), ss 48, 51(2), 69

Independent Commission Against Corruption Regulation 2017 (NSW), cl 5
NSW Ministerial Code of Conduct, Preamble, cll 1, 3, 4, 11, ss 1, 4, 6-12, Sch, cll 2(3)(c), 3(5)(c), 10-13, 27

Cases Cited:

Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461
Amaba Pty Ltd v Booth [2010] NSWCA 344
Attorney-General (NSW) v Quin (1990) 170 CLR 1; [1990] HCA 21
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321; [1990] HCA 33
Ballina Shire Council v Knapp [2019] NSWCA 146
Balog v Independent Commission Against Corruption (1990) 169 CLR 625; [1990] HCA 28
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34
Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36
D'Amore v Independent Commission Against Corruption [2013] NSWCA 187
Edge v Pensions Ombudsman [2000] Ch 602

Farah Constructions Pty Limited v Say-Dee Pty Limited (2007) 230 CLR 89; [2007] HCA 22
Greiner v Independent Commission Against Corruption (1992) 28 NSWLR 125
Hartnett t/as Hartnett Lawyers v Bell as Executor of the Estate of the late Mabel Dawn Deakin-Bell (2023) 112 NSWLR 463; [2023] NSWCA 244
Hocking v Director-General of the National Archives of Australia (2020) 271 CLR 1; [2020] HCA 19
Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64
IW v City of Perth (1997) 191 CLR 1; [1997] HCA 30
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1
Kostas v HIA Insurance Services Pty Ltd (2010) 241 CLR 390; [2010] HCA 32
Local Government Board v Arlidge [1915] AC 120
Macdonald v R; Obeid v R; Obeid v R (2023) 112 NSWLR 402; [2023] NSWCCA 250
Macleod v The Queen (2003) 214 CLR 230; [2003] HCA 24
Maitland v R (2019) 99 NSWLR 376; [2019] NSWCCA 32
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611; [2010] HCA 16
New South Wales v Bardolph (1934) 52 CLR 455; [1934] HCA 74
Peters v The Queen (1998) 192 CLR 493; [1998] HCA 7
Boardman v Phipps [1967] 2 AC 46
Project Blue Sky Inc v The Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales [2021] NSWCA 64
R v Boston (1923) 33 CLR 386; [1923] HCA 59
R v Ghosh [1982] QB 1053
R v Love (1989) 17 NSWLR 608
R v Maudsley (2021) 9 QR 587; [2021] QCA 268
R v Obeid (No 2) [2015] NSWSC 1380
Re Day (No 2) (2017) 263 CLR 201; [2017] HCA 14
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57
South Australia v O'Shea (1987) 163 CLR 378; [1987] HCA 39

	Taylor v Public Service Board (New South Wales) (1976) 137 CLR 208; [1976] HCA 36 *Washer v Western Australia* (2007) 234 CLR 492; [2007] HCA 48 *Wilkinson v Osborne* (1915) 21 CLR 89; [1915] HCA 92 *Woodham v Independent Commission Against Corruption* (1993) 30 ALD 390 *Workers Compensation Nominal Insurer v Hill* [2020] NSWCA 54 *Xiao v BCEG International (Australia) Pty Ltd* (2023) 111 NSWLR 132; [2023] NSWCA 48
Texts Cited:	Anne Twomey, *The Constitution of New South Wales* (2004, Federation Press) Explanatory Note to Independent Commission Against Corruption Bill 1988 (No 2) (NSW) Independent Commission Against Corruption Bill 1988 (No 2) (NSW) Independent Commission Against Corruption, *Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel)* (June 2023) Sir Frederick Jordan, *Chapters on Equity in New South Wales* (6th ed, 1947, Thomas Henry Tennant)
Category:	Principal judgment
Parties:	Gladys Berejiklian (Applicant) Independent Commission Against Corruption (Respondent)
Representation:	Counsel: B Walker SC and H Cooper (Applicant) S Free SC and J Kennedy (Respondent) Solicitors: Johnson Winter Slattery (Applicant) Corrs Chambers Westgarth (Respondent)
File Number(s):	2023/302494
Publication restriction:	Nil

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The applicant, Ms Berejiklian, was first elected as a member of the New South Wales Legislative Assembly on 22 March 2003. Subsequently, she became a Minister of the Crown. She was the Treasurer between 2 April 2015 and 23 January 2017, and Premier between 23 January 2017 and 5 October 2021.

The member representing the electorate of Wagga Wagga between 27 March 1999 and 3 August 2018 was Mr Daryl Maguire. Ms Berejiklian and Mr Maguire were in a "close personal relationship" which commenced before 2016 and ended in September 2020.

Conduct

At all relevant times, Mr Maguire was and regarded himself as the principal proponent within the State government of funding proposals for two entities in the Wagga Wagga electorate — the Australian Clay Target Association (ACTA) and the Riverina Conservatorium of Music (RCM).

In the case of ACTA, by January 2016 funding was sought to build a new clubhouse/national administration office complex on ACTA's national clay target shooting ground in Wagga Wagga. In early December 2016, the applicant as Treasurer approved this funding request being included on the agenda for an Expenditure Review Committee (ERC) meeting on 14 December 2016. At that meeting, a grant of $5.5 million to ACTA was approved.

In relation to RCM, by August 2015 funding was sought for the construction of a new conservatorium of music, initially on an area of council land in Wagga Wagga, and later on a government-owned site in that city. In February 2017, RCM submitted a further proposal for its relocation to the government-owned site and refurbishment of existing buildings on that site, and for the later demolition of two buildings on that site and the construction of a new wing containing a recital hall and commercial facilities. On 12 April 2018, the ERC, attended by the applicant as Premier, approved the transfer of the government-owned site to "Arts NSW" for the purpose of relocating RCM there. On 24 April 2018, the ERC endorsed grant funding of $10 million to RCM for the purpose of refurbishing that site. In late August 2018, in the context of a by-election for the seat of Wagga Wagga, the applicant and the then Treasurer agreed to a funding reservation of up to $20 million for the construction of a new recital hall for RCM.

Findings

In late June 2023, the applicant was the subject of adverse findings made in a two-volume report of the Independent Commission Against Corruption (the Commission) titled "Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel)" (the Report). The

Commission made five findings of “serious corrupt conduct” by the applicant for the purposes of the *Independent Commission Against Corruption Act 1988* (NSW) (the Act). The first four findings related to the funding proposals described above.

The first and third findings included that the applicant had engaged in a “breach of public trust” by exercising her official functions in relation to decisions made concerning funding promised and or awarded to ACTA and RCM without disclosing her close personal relationship with Mr Maguire when she was in a position of conflict between her public duty and private interest.

The second and fourth findings included that the applicant had engaged in the “partial” (as distinct from impartial) exercise of her official functions in relation to the ACTA funding and in relation to the RCM funding decision in August 2018. That partial conduct was exercising her official functions influenced by her close personal relationship with Mr Maguire, and her desire to advance or maintain that relationship.

The fifth finding was that the applicant had engaged in conduct which constituted or involved a dishonest or partial exercise of official functions. The specific conduct was the applicant’s failure and refusal to discharge her statutory obligation to report her actual suspicions that Mr Maguire’s activities in relation to three subject matters concerned or might have concerned corrupt conduct. Those subject matters were Mr Maguire’s relationships with particular property owners or developers, from whom it was said that Mr Maguire, with others, had the prospect of receiving commissions.

Preparation of the Report

The Hon Ruth McColl AO SC as an Assistant Commissioner presided over the two public hearings giving rise to the Report. Her appointment as Assistant Commissioner was extended on four occasions, and expired on 31 October 2022. From that date, Ms McColl was engaged as a consultant to the Commission (and thereby continued to be an officer of the Commission) for the purpose of providing it with “services, information or advice”. During the period of her appointment as a consultant, Ms McColl continued her participation in the drafting process which preceded the finalisation of the Report. The draft reports contained assessments as to the credibility of witnesses, including the applicant. The drafts were the subject of a substantive review by a panel presided over by the Chief Commissioner, who had ultimate responsibility for the making of the Report.

The Report was finalised in late June 2023, and on 29 June 2023 presented to the Presiding Officers of the Legislative Council and Legislative Assembly. The Report was accompanied by a letter signed by the Chief Commissioner which described the Report as “the Commission’s report on its investigation” into the conduct of Mr Maguire, the applicant and others.

The application for judicial review

The applicant’s Amended Summons contains 13 grounds of review.

With the exception of ground 1, which is directed to the role of Ms McColl in the preparation or making of the Report, each ground raises a basis upon which it is said the Commission made a material error of law in or in relation to its findings supporting one or more of the five "ultimate" findings that Ms Berejiklian had engaged in "serious corrupt conduct".

The principal issues raised by the 13 grounds are as follows:

(i) whether the assistance provided to the Commission by Ms McColl as a consultant in the preparation of the Report, and specifically in relation to findings involving the assessment of the credibility of witnesses, was outside the limits of her authority;

(ii) whether there was any evidentiary material to support the Commission's findings as to whether the applicant had a private interest in, and was influenced by a desire of, maintaining or advancing her close personal relationship with Mr Maguire;

(iii) whether under the general law and under the NSW Ministerial Code (the Code) a non-pecuniary personal relationship was capable of amounting to a "private interest" that could give rise to a conflict of interest and public duty;

(iv) whether the applicant as a Minister owed a legally enforceable positive duty to act only according to what she believed to be in the public interest, as opposed to a negative obligation not to use her position to promote her own pecuniary interest in circumstances of conflict;

(v) whether the applicant's non-disclosure of her personal relationship with Mr Maguire constituted a breach of public trust for the purposes of s 8(1)(c) of the Act;

(vi) whether the Commission exceeded its authority and institutional competence by purporting to make findings about the merits of the ACTA and RCM funding proposals;

(vii) whether s 7 of the Code and cll 10-12 of the Schedule to the Code (the Schedule) applied to and imposed obligations on the applicant whilst she was Premier;

(viii) whether the applicant's exercises of ministerial power in connection with the promising and awarding of funding were constrained by a legal duty to act impartially;

(ix) whether the Commission erred in finding that the applicant had engaged in partial exercises of her official functions within s 8(1)(b) of the Act in the absence of a finding that but for an unacceptable reason the applicant would not have engaged in that conduct;

(x) whether the Commission erred in finding that the applicant had engaged in partial exercises of her official functions without having first engaged in a comparative exercise addressing how she would have treated "relevantly identical" funding requests;

(xi) whether the duty to disclose in s 11(2) of the Act needs to be confined to a "matter" involving some specified subject matter;

(xii) whether the Commission reached an illogical or irrational result in finding that the applicant failed to discharge her obligations under s 11(2) of the Act, despite also deciding *not* to make a statement that consideration be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the applicant for misconduct in public office; and

(xiii) whether a finding that the exercise of official functions was "dishonest" for the purposes of s 8(1)(b) requires that the person the subject of investigation appreciated or realised that his or her conduct was dishonest according to the standards of ordinary people.

The Court (Bell CJ and Meagher JA, Ward P dissenting as to issue (i) and as to the consequential orders to be made) dismissed the application, holding:

As to (i):

(Bell CJ and Meagher JA)

1. The assistance provided by Ms McColl was not outside the limits of her authority, and in making the Report the Commission did not act beyond its authority or power in obtaining Ms McColl's assistance as a consultant. That assistance was to the Chief Commissioner in exercising his function of "making" the final report. That function had not been delegated to Ms McColl as an Assistant Commissioner. The Chief Commissioner's task was to determine the findings, opinions, recommendations and reasons to be made or given in the final report to Parliament. His powers were not expressly qualified as to the sources from which he might acquire information or advice to be taken into account in doing so: Bell CJ and Meagher JA at [79]-[80].

2. Ms McColl was assisting the Chief Commissioner in that task by engaging in the drafting process. She initially did so as an Assistant Commissioner who had presided over the public inquiries, but to whom the function of making a report had not been delegated. Although the Act contemplates such circumstances, it does not expressly provide for how, in those circumstances, the presiding officer's credibility assessments might be communicated to the Commissioner making the report. The applicant accepts that, as an Assistant Commissioner, Ms McColl could have done so by participating in the process of preparing a report, including through a drafting process by making findings of fact and proposing assessments as to the credibility of witnesses, and notwithstanding that Ms McColl had not been delegated the function of making the report: Bell CJ and Meagher JA at [79].

3. The question raised by the applicant's argument is whether that outcome could also be achieved by Ms McColl, who had presided at the public hearings, being appointed as a consultant to participate in the process of preparing a report after her appointment as an Assistant Commissioner had expired in circumstances where it could not be renewed. A principal function and power of the Commission is to make findings and form opinions "on the basis of the results of its investigations". There is no warrant to read down the Commission's powers to have ongoing access to assistance and

information concerning its investigations. Section 104B of the Act in terms provides that a suitably qualified person may be engaged as a consultant (and, accordingly, an officer) to provide the Commission with “services, information or advice”. Having presided over the two public inquiries, Ms McColl continued to be the person best placed to make assessments as to the credibility of witnesses and communicate them to the Chief Commissioner. The Commission did not act beyond its authority or power in obtaining such services from Ms McColl, and in taking the product of those services, and any information or advice, into account in making the findings, recommendations, reasons and opinions in the Report: Bell CJ and Meagher JA at [82]-[86].

(Ward P in dissent)

4. The Commission’s “adoption” of witness credibility assessments made by Ms McColl in a draft report amounted to her assessments being the relevant findings of fact at least on aspects of evidence given in the public hearings. The language of “adopt” used in the Report at [2.37] demonstrates that Ms McColl’s assistance went beyond the provision of “services, information or advice”, and constituted the making of findings that Ms McColl as a consultant did not have power to make. The communication of those findings, in circumstances where they were explicitly adopted by the Commission, amounted in effect to an impermissible delegation of the Chief Commissioner’s task of determining all necessary findings in the making of the Report. The Commission acted beyond its authority or power by in effect delegating to Ms McColl the responsibility for assessing witness credibility and making findings as to that subject: Ward P at [336]-[341].

As to (ii):

5. There was evidentiary material capable of supporting each of the challenged findings, as well as the underlying findings and inferences on which they were based: Bell CJ and Meagher JA at [113]-[143]; Ward P at [343].

As to (iii):

6. It was open to the Commission to find that the close personal relationship between the applicant and Mr Maguire was, from her perspective, a “private interest” that gave rise to a conflict of interest and duty. Under the general law, members of Parliament have a duty to “act according to good conscience, uninfluenced by other considerations, especially personal financial considerations”. Such considerations could be pecuniary or non-pecuniary. The position under the Ministerial Code is not relevantly different: Bell CJ and Meagher JA at [151]-[161]; Ward P at [343].

> *Re Day (No 2)* (2017) 263 CLR 201; [2017] HCA 14; *Wilkinson v Osborne* (1915) 21 CLR 89; [1915] HCA 92, considered.

As to (iv):

7. A Minister's obligation not to breach public trust is expressed more broadly than an obligation prohibiting the promotion of private pecuniary interests in circumstances where there is a conflict of interest and public duty. That public duty is sufficiently identified as being "to serve and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community", and "to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations": Bell CJ and Meagher JA at [165]-[174]; Ward P at [343].

> *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41; [1984] HCA 64; *Chan v Zacharia* (1984) 154 CLR 178; [1984] HCA 36; *R v Boston* (1923) 33 CLR 386; [1923] HCA 59; *Re Day (No 2)* (2017) 263 CLR 201; [2017] HCA 14; *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1; [2020] HCA 19; *Boardman v Phipps* [1967] 2 AC 46; *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461; *R v Obeid (No 2)* [2015] NSWSC 1380, considered.

As to (v):

8. The Commission did not find that the applicant had breached her duty of public trust under s 8(1)(c) simply by not disclosing her relationship. The breaches of that provision as found by the Commission were that she had exercised her official functions whilst in a position of conflict of duty and personal interest: Bell CJ and Meagher JA at [183]-[185]; Ward P at [343].

As to (vi):

9. The Commission did not decide for itself the merits of any of the funding proposals. Rather, it had regard to evidence as to the merits or otherwise of those proposals *as perceived at the time* by those whose task it was to consider critically the proposals as a circumstance relevant to whether the applicant acted with partiality and was influenced in doing so by her relationship with Mr Maguire: Bell CJ and Meagher JA at [189]-[199]; Ward P at [343].

As to (vii):

10. In its terms the Code applies to all current and future Ministers, and should be construed, if at all possible, so that it has that consequence. The language of cl 27(5) of the Schedule provides the mechanism by which that is to be achieved, providing for "rulings" by the Cabinet when the Minister in question is the Premier. That mechanism permits s 7 of the Code and cll 10-12 of the Schedule to apply consistently to all Ministers, including the Premier: Bell CJ and Meagher JA at [208]-[217]; Ward P at [343].

As to (viii):

11. The Commission did not err in proceeding on the basis that in participating in the funding decisions the applicant was required to act in the public interest and to exercise any relevant power for the purpose for which it was conferred and consistently with any

eligibility or assessment criteria. At the same time, the applicant was required not to take into account any extraneous or irrelevant purpose or consideration: Bell CJ and Meagher JA at [228]-[235]; Ward P at [343].

> *Re Day (No 2)* (2017) 263 CLR 201; [2017] HCA 14; *R v Boston* (1923) 33 CLR 386; [1923] HCA 59; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Edge v Pensions Ombudsman* [2000] Ch 602, considered.

As to (ix):

12. Having a conflicting private interest which is capable of influencing, and does influence, the exercise of a function or power is sufficient to constitute a "partial" exercise of the power under s 8(1)(b), and irrespective of whether the outcome of that exercise would not have been different in the absence of the private interest. This is consistent with the authorities that hold that a member of Parliament and Minister is to act in exercising public functions and powers "uninfluenced" by other considerations, and with "fidelity and with a single-mindedness for the welfare of the community": Bell CJ and Meagher JA at [246]-[257]; Ward P at [343].

> *Re Day (No 2)* (2017) 263 CLR 201; [2017] HCA 14; *R v Boston* (1923) 33 CLR 386; [1923] HCA 59; *Wilkinson v Osborne* (1915) 21 CLR 89; [1915] HCA 92; *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Macdonald v R; Obeid v R; Obeid v R* (2023) 112 NSWLR 402; [2023] NSWCCA 250; *Maitland v R* (2019) 99 NSWLR 376; [2019] NSWCCA 32, considered.

As to (x):

13. Undertaking a comparison in determining whether a public official has engaged in partial conduct may assist in identifying preferences or advantages, depending on the nature of the power. It does not follow that such an approach should be mandatory. In the broad scope of circumstances to which the section might apply, there is no reason in the language of s 8(1)(b) or otherwise for construing the reference to "partial conduct" as confined only to treatment which is different from the treatment of other persons or things in "relevantly identical" circumstances: Bell CJ and Meagher JA at [262]-[264], [273]; Ward P at [343].

> *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125; *Woodham v Independent Commission Against Corruption* (1993) 30 ALD 390, considered.

As to (xi):

14. The present facts do not require the determination of the scope of the word "matter" in s 11 as each of the matters which are the subject of the relevant findings involved specific subject matter: Bell CJ and Meagher JA at [279], [290]; Ward P at [343].

As to (xii):

15. There was no illogical or irrational result as the two conclusions can be readily explained. Different rules of evidence apply before the Commission and before a criminal court; the relevant standard of proof is different; and the criminal offence requires proof of elements not essential to the "serious corrupt conduct" findings. Furthermore, the applicant's argument presupposes that any illogicality or irrationality which might explain the asserted inconsistency is only in relation to the finding of "serious corrupt conduct", and not in relation to the Commission's declining to make a statement that advice be sought from the Director of Public Prosecutions: Bell CJ and Meagher JA at [298]-[300]; Ward P at [343].

As to (xiii):

16. There is no reason for construing "dishonest" in the Act other than in its ordinary sense. It follows that conduct is "dishonest" for the purposes of s 8(1)(b) when it would be regarded as such according to the standards of ordinary, decent people. It is not necessary that the accused have also appreciated or realised that his or her conduct would be regarded by such people as "dishonest": Bell CJ and Meagher JA at [307]-[308]; Ward P at [343].

> *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7; *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89; [2007] HCA 22; *Macleod v The Queen* (2003) 214 CLR 230; [2003] HCA 24, considered.

JUDGMENT

1 **BELL CJ AND MEAGHER JA:** The applicant, Ms Berejiklian, was first elected as a member of the New South Wales Legislative Assembly for the electorate of Willoughby on 22 March 2003. Between 2 April 2015 and 23 January 2017, Ms Berejiklian was also Treasurer and Minister for Industrial Relations. On the latter date, she relinquished those earlier positions and assumed the position of Premier. Ms Berejiklian resigned as Premier on 5 October 2021 and from Parliament on 30 December 2021.

2 In late June 2023, the applicant was the subject of adverse findings made in a two-volume report of the respondent (ICAC or the Commission) titled "Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel)" (the Report). The member representing the electorate of Wagga Wagga between 27 March 1999 and 3 August 2018 was Mr Daryl Maguire. The adverse findings against Ms Berejiklian included that she had engaged in "serious corrupt conduct" in the exercise of her official functions in connection with funding promised and or awarded in 2016 and 2017 to the Australian Clay Target Association (ACTA) and in 2018 to the Riverina Conservatorium of Music (RCM) in two stages.

3 The applicant seeks judicial review of the Commission's adverse findings against her. She does so by raising 13 grounds of review. For the reasons which follow, each of these 13 grounds must be rejected, and the proceedings dismissed with costs.

The present proceedings

4 The proceedings before this Court invoke the Supreme Court's supervisory jurisdiction under *Supreme Court Act 1970* (NSW), s 69. Under s 48(2) of that Act, proceedings invoking that jurisdiction in respect of any matter before a "specified tribunal" (as to which see s 48(1)(a)) are assigned to the Court of Appeal. ICAC is not such a tribunal. Nevertheless, the present proceedings were commenced in the Court of Appeal exercising that original jurisdiction, and as such were to be taken as "well commenced", and, subject to any order of the Court of Appeal remitting the proceedings for hearing by a judge in a Division of the Supreme Court, were able to be continued and disposed of in this Court (s 51(2)). Because of the public importance of the proceedings, when they were first before this Court for directions, no order was made for their remission to a Division, the result being that they should continue in, and be disposed of by, the Court of Appeal exercising the Supreme Court's supervisory jurisdiction.

5 That jurisdiction is confined to ensuring that the Commission carried out its investigative and reporting functions, including with respect to the making of findings of "serious corrupt conduct", in accordance with the statutory provisions which govern the performance of those functions and exercise of the relevant powers. As Brennan J said in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; [1990] HCA 21, "[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power".

6 The consequence is that the present proceedings are not an opportunity for this Court to undertake a "merits" review of the Commission's findings, as it might do in its appellate jurisdiction in an appeal by way of rehearing. As Brennan J also said in *Quin* (at 36):

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
>
> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the *extent of power and the legality of its exercise*. (Emphasis added.)

7 In this context, it is important to note that the making of findings of fact where there is "no evidence" in support of the finding is an error of law going to the legality of the exercise of the Commission's fact-finding function (*Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32 at [91]). Moreover, as Brennan J observed in *Quin* at 36, the extent or exercise of statutory powers conferred on a repository may be subject to "implied limitations". Such implications could support the application in judicial review proceedings of a "standard of legal reasonableness" (*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 at [66] (Hayne, Kiefel and Bell JJ)) to the ultimate decision of the tribunal or fact-finder. The position is less clear in relation to the application of such a standard to a step in the reasoning to such a decision (see *Public Service Association and Professional Officers' Association*

Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales [2021] NSWCA 64 at [70] (Bathurst CJ, Bell P, Leeming JA)). In any event, none of this involves substituting a court's view as to the factual merits of a decision for that of the decision-maker (*Li* at [66] (Hayne, Kiefel and Bell JJ), citing *Quin* at 36-37).

Brief overview of factual background

Mr Maguire and the ACTA and RCM funding proposals

8 At the relevant times, Mr Maguire was and regarded himself as the "principal proponent" within the State government of the ACTA and RCM funding proposals (Report at [11.3]). In the case of ACTA, by January 2016 funding was sought to build a new clubhouse/national administration office complex on ACTA's national clay target shooting ground in Wagga Wagga ([11.23]). In early December 2016, the applicant as Treasurer approved this funding request being included on the agenda for the Expenditure Review Committee (ERC) meeting on 14 December 2016. At that meeting, a grant of $5.5 million to ACTA was approved unanimously. The Commission made factual findings that, subsequently, Ms Berejiklian "caus[ed] steps to be taken by staff from her office to follow up on the progress" of that proposal ([11.460.4]).

9 In relation to RCM, by August 2015 funding was sought for the construction of a new conservatorium of music, initially on an area of council land in Wagga Wagga, and later on a government-owned site in that city ([12.6]-[12.13]). In February 2017, RCM submitted a further proposal for its relocation to the government-owned site and refurbishment of existing buildings on that site (together referred to as RCM Stage 1); and for the later demolition of two buildings on that site and the construction of a new wing containing a recital hall and commercial facilities (together referred to as RCM Stage 2) ([12.21]).

10 On 12 April 2018, the ERC, attended by the applicant as Premier, approved the transfer of the government-owned site to "Arts NSW" for the purpose of relocating RCM there ([12.84]). On 24 April 2018, the ERC endorsed grant funding of $10 million to RCM for the purpose of refurbishing and repurposing that site ([12.90]). In late August 2018, in the context of the election campaign preceding the by-election in Wagga Wagga in September 2018 (resulting from Mr Maguire's resignation from Parliament), the applicant as Premier and the then Treasurer, Mr Perrottet, agreed to a funding reservation of up to $20 million for the construction of the recital hall component of RCM Stage 2 ([12.136]-[12.137]).

The "close personal relationship"

11 The Commission found that Ms Berejiklian and Mr Maguire were in a "close personal relationship" which ended in September 2020. The Commission found that this relationship, being "one of mutual love and a mutual close emotional connection", had

the “capacity… to influence” Ms Berejiklian’s conduct “both personally and in the performance of her public duties” ([10.38]).

12 In assessing the nature of the relationship, the Commission relied in part on lawfully obtained recordings of telephone conversations and electronic copies of text messages between the applicant and Mr Maguire, as well as its assessment of the applicant’s evidence. One such exchange via telephone occurred on 14 February 2018 ([10.20], partially extracted below at [115]). Referring to that exchange and the applicant’s evidence explaining it, the Commission reasoned (at [10.29]):

> … this evidence is relevant to the consideration of her exercise of her official functions in relation to the [ACTA] and 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.

The Commission’s findings of “serious corrupt conduct”

13 Ms Berejiklian’s Amended Summons (Judicial Review) identifies the decisions sought to be reviewed by this Court as the Commission’s findings that she engaged in “serious corrupt conduct”. Those findings are set out at [1.5] of the Report:

> 1.5. The Commission finds that Ms Berejiklian engaged in serious corrupt conduct by:
>
> 1.5.1. in 2016 and 2017, breaching public trust by exercising her official functions in relation to funding promised and/or awarded to the Australian Clay Target Association (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:
>
> 1.5.1.1. causing the ACTA proposal to be included on the agenda for the Expenditure Review Committee (ERC) meeting of 14 December 2016
>
> 1.5.1.2. supporting the ACTA proposal in the ERC meeting of 14 December 2016
>
> 1.5.1.3. communicating her support for and interest in the ACTA proposal to NSW Treasury staff, at least one ministerial colleague (John Barilaro) and staff within her office
>
> 1.5.1.4. 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 benefit cost ratio calculation of 0.88 by the Department of Premier and Cabinet Investment Appraisal Unit be revisited
>
> 1.5.2. in 2016 and 2017, partially exercising her official functions 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 (chapter 11)
>
> 1.5.3. in 2018, breaching public trust by exercising her official functions in relation to decisions concerning the Riverina Conservatorium of Music (“the RCM”) proposal which she knew was advanced by Mr Maguire in:
>
> 1.5.3.1. 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
>
> 1.5.3.2. participating in the 24 April 2018 ERC decision concerning RCM Stage 1 in relation to the funding granted to RCM Stage 1

1.5.3.3. determining to make a funding reservation of $20 million in relation to RCM Stage 2

1.5.3.4. 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

1.5.4. in 2018, in connection with funding promised and awarded to RCM Stage 2 engaging in conduct constituting or involving the partial exercise of 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 (chapter 12)

1.5.5. 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 (chapter 13).

14 The applicant asks this Court to quash these "serious corrupt conduct" findings or, in the alternative, to make a declaration that the Commission's determination that she had engaged in "serious corrupt conduct" was made "without or in excess of jurisdiction, and is a nullity". Further, or again in the alternative, the applicant seeks a declaration that on the facts as found the Commission's determination that she had engaged in any "serious corrupt conduct" was wrong in law.

The Commission and the ICAC Act

15 ICAC was constituted by the *Independent Commission Against Corruption Act 1988* (NSW) (the Act). The principal objects of that Act include "to promote the integrity and accountability of public administration" by the creation of an "independent and accountable body to investigate, expose and prevent corruption involving or affecting public authorities and public officials" (s 2A). The principal functions of the Commission include investigating complaints as to corrupt conduct and any matter referred to the Commission by both Houses of Parliament, and communicating to appropriate authorities the results of its investigations (s 13(1)). They also include specific powers to make findings and form opinions as to whether particular persons have engaged in "corrupt conduct" (s 13(3)(a)). The powers conferred on the Commission to enable it to perform these functions include to conduct investigations, and, where necessary, to conduct compulsory examinations and public inquiries (ss 20, 30, 31).

16 The central provisions of the Act and other legislation relevant to the Commission's findings of "serious corrupt conduct" are set out below.

ICAC Act

17 For the purposes of the Act "corrupt conduct is any conduct which falls within the description of corrupt conduct in section 8, but which is not excluded by section 9" (s 7(1)).

18 Section 8 relevantly provides:

8 General nature of corrupt conduct

> (1) Corrupt conduct is—
>
> …
>
> > (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
> >
> > …

19 A "public official" as defined means any individual "having public official functions or acting in a public official capacity", and relevantly includes a Minister of the Crown (s 3(1)).

20 Section 9 limits the nature of corrupt conduct, providing:

> (1) Despite section 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.
>
> …
>
> (3) For the purposes of this section—
>
> > ***applicable code of conduct*** means, in relation to—
> >
> > (a) a Minister of the Crown or Parliamentary Secretary—a ministerial code of conduct prescribed or adopted for the purposes of this section by the regulations…

21 Clause 5 of the Independent Commission Against Corruption Regulation 2017 (NSW) prescribes the NSW Ministerial Code of Conduct (which is set out in the Appendix to that regulation) (the Ministerial Code or Code) as an "applicable code of conduct for the purposes of section 9 of the Act". The effect of its doing so is considered below at [32]ff.

22 Section 11(2) of the Act imposes a duty on persons, including any Minister of the Crown, "to report to the Commission any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct".

23 Section 13 describes the "principal functions" of the Commission, which include:

> (3) …
>
> > (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
> >
> > (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.
>
> (3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9(1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

24 Sections 13(4) and 74BA contain a further limitation on the Commission's power to make a finding of "serious corrupt conduct". Section 13(4) states:

> The Commission is not to make a finding, form an opinion or formulate a recommendation which section 74B or 74BA prevents the Commission from including in a report, but section 9(5) and this section are the only restrictions imposed by this Act on the Commission's powers under subsection (3).

25 Section 74 concerns the making of reports by the Commission to Parliament:

> **74 Reports on referred matters etc**
>
> (1) The Commission may prepare reports in relation to any matter that has been or is the subject of an investigation.
>
> (2) The Commission shall prepare reports in relation to a matter referred to the Commission by both Houses of Parliament, as directed by those Houses.
>
> (3) The Commission shall prepare reports in relation to matters as to which the Commission has conducted a public inquiry, unless the Houses of Parliament have given different directions under subsection (2).
>
> (4) The Commission shall furnish reports prepared under this section to the Presiding Officer of each House of Parliament.
>
> (5), (6) (Repealed)
>
> (7) A report required under this section shall be furnished as soon as possible after the Commission has concluded its involvement in the matter.
>
> (8) The Commission may defer making a report under this section if it is satisfied that it is desirable to do so in the public interest, except as regards a matter referred to the Commission by both Houses of Parliament.
>
> (9) (Repealed)

26 A report under s 74 is not to include findings or opinions that a person has committed a criminal or disciplinary offence (see s 74B). Section 74BA(1) provides:

> The Commission is not authorised to include in a report under section 74 a finding or opinion that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct.

The NSW Ministerial Code

27 Following a preamble, which does not form part of the Code but to which regard may be had in the interpretation of its provisions (Code, s 12(1)), s 1(2) provides that the Code applies "to all current and future Ministers and Governments".

28 Section 4 of the Code requires compliance with the Schedule to the Code (the Schedule), and provides that a "substantial breach" of the Schedule, if done knowingly, is a "substantial breach" of the Code. Part 3 of the Schedule, headed "Conflicts of interest", addresses among other topics the duty to disclose conflicts of interest (cl 10), the form of disclosure (cl 11), and the obligation of a Minister to abstain from decision-making in the face of a conflict of interest (cl 12).

29 Sections 6 and 7 of the Code provide:

> **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.
>
> **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.

30 Section 11 of the Code contains definitions which also apply to the Schedule, in each case "unless the context otherwise requires". The definition of "Minister" includes "any Member of the Executive Council of New South Wales". Section 11 defines "conflict of interest" as having "the meaning given by section 7(3) of this Code".

31 A "private benefit" is defined in s 11 to mean:

> … 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.

The effect of prescribing the Ministerial Code under s 9(3) of the Act

32 As set out at [20] above, s 9(1)(d) of the Act provides that conduct of a Minister falling within the scope of s 8 does not amount to "corrupt conduct" unless, in the case of a Minister of the Crown, it could constitute or involve *inter alia* a "substantial breach of an applicable code of conduct", relevantly the Ministerial Code.

33 The effect of prescribing the Code under s 9(3) of the Act as "an applicable code of conduct" is, according to the note which follows s 1 of the Code:

> … that a suspected breach of the Code may be investigated by the Independent Commission Against Corruption and, if substantiated, give rise to a finding of corrupt conduct. …

34 That conduct amounting to a substantial breach of the Code could give rise to a finding of "corrupt conduct" would appear to follow only if, consistently with the scheme of ss 8 and 9 of the Act, the relevant breach of the Code was *also* "corrupt conduct" within the more general language of s 8(1), (2) or (2A). That observation is not controverted by the note because regard can only be had to the note in the interpretation of provisions of the Code (s 12(1)), and not those of the Act, and because the note does not form part of the Act for the purposes of *Interpretation Act 1987* (NSW), s 35.

The five findings of “serious corrupt conduct”

35 The Commission’s five findings of “serious corrupt conduct” by the applicant are contained in [1.5.1]-[1.5.5] of the Report, extracted above at [13].

36 The first and third of those findings (at [1.5.1] and [1.5.3]) are that the applicant engaged in what amounted to conduct by a public official that constituted or involved a “breach of public trust” (s 8(1)(c) of the Act) ([11.460], [12.223]), which was a substantial breach by a Minister of s 7(2) of the Code, and cll 10(1), 11 and 12 of the Schedule (see s 9(1)(d) and (3), and s 13(3A) of the Act) ([11.489]-[11.491], [12.256]-[12.258]), and constituted “serious corrupt conduct” within s 74BA(1) of the Act ([11.513], [12.263]-[12.264]). That conduct was exercising her official functions in relation to decisions made concerning funding promised and or awarded to ACTA and RCM Stages 1 and 2 without disclosing her close personal relationship with Mr Maguire, when she was in a position of conflict of interest between her public duty and private interest which could objectively have the potential to influence the performance of her public duty.

37 The second and fourth of those findings (at [1.5.2] and [1.5.4]) are that the applicant engaged in what amounted to conduct by a public official that constituted or involved the partial (as distinct from impartial) exercise of that person’s official functions (s 8(1)(b) of the Act) ([11.594], [12.314]), which was a substantial breach by a Minister of s 6 of the Code (see s 9(1)(d) and (3), and s 13(3A) of the Act) ([11.624]-[11.626], [12.328]-[12.331]), and constituted “serious corrupt conduct” within s 74BA(1) of the Act ([11.636], [12.341]). That conduct was exercising her official functions in relation to ACTA and RCM Stage 2 funding influenced by her close personal relationship with Mr Maguire and her desire to advance or maintain that relationship.

38 The fifth of those findings (at [1.5.5]) is that the applicant engaged in what amounted to conduct by a public official that constituted or involved the dishonest or partial exercise of her official functions (s 8(1)(b) of the Act) ([13.389]), which was a substantial breach of s 6 of the Code (see s 9(1)(d) and (3), and s 13(3A) of the Act) ([13.402]-[13.404]), and constituted “serious corrupt conduct” within s 74BA(1) of the Act ([13.405]). That conduct was the applicant’s failure and refusal to discharge her obligations under s 11(2) of the Act to report her actual suspicions that Mr Maguire’s activities in relation to the “Badgerys Creek land deal”, “Country Garden and Mr Hawatt” and “Mr Demian” subject matters (as to which see [282]-[289] below) concerned, or might have concerned, corrupt conduct.

The grounds of review: overview

39 There are 13 grounds of review. With the exception of ground 1, which is directed to the role of the Hon Ruth McColl AO SC in the preparation or making of the Report, each ground raises a basis upon which it is said the Commission made a material error of law in or in relation to its findings supporting one or more of the Commission’s “ultimate” findings that Ms Berejiklian engaged in “serious corrupt conduct”. Ground 2,

the "no evidence" ground, is said to relate to each of the Commission's above findings of "serious corrupt conduct". Grounds 3, 4, 5, 6 and 7 are directed (not necessarily exclusively) to the findings of a breach of "public trust". Grounds 6, 8, 9 and 10 relate to the findings as to a partial exercise of official functions; and grounds 9, 11, 12 and 13 to the finding as to a breach of the duty under s 11 of the Act.

40 These grounds of review are dealt with below in the order in which they arise.

Ground of review 1

41 In terms, this ground is:

> The Report dated June 2023 was prepared by the Hon Ruth McColl AO SC beyond her authority under the ICAC Act, in circumstances where she was not authorised to exercise the function of preparing or making a report from 1 November 2022 onwards, as that function was exclusively exercisable by a Commissioner or (through a delegation under s 107(6) of the ICAC Act) an Assistant Commissioner. The Commission's purported "*adopt[ion]*" of Ms McColl AO SC's findings and opinions in the Report, including as to witness credibility assessments (R [2.37]), was not a valid means of curing Ms McColl AO SC's lack of authority, and those opinions and findings cannot amount to opinions and findings of the Commission.

42 The following provisions of the Act have particular relevance for this ground.

Relevant statutory provisions

43 The Commission is a corporation and consists of a Chief Commissioner and two other Commissioners (ss 4(1), 5(1)). With few exceptions, the functions of the Commission are exercisable by a Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by a Commissioner is taken to have been done by the Commission (s 6(1)). The exceptions include a decision to conduct a public inquiry under s 31, which must be authorised by the Chief Commissioner and at least one other Commissioner (s 6(2)). However, where a Commissioner considers there may be a conflict of interest in such a matter, the Commissioner may request an Assistant Commissioner to give that authorisation (s 6(4)).

44 With the concurrence of the Chief Commissioner, the Governor may appoint one or more Assistant Commissioners who may exercise the "functions conferred or imposed on an Assistant Commissioner by or under this or any other Act" (ss 6A(1), (2)). An Assistant Commissioner is "to assist the Commission, as the Chief Commissioner requires" (s 6A(3)). In addition, s 104B provides that the Commission "may engage any suitably qualified person to provide the Commission with services, information or advice".

45 As stated at [15] above, the principal functions of the Commission include to investigate allegations or complaints as to corrupt conduct, to investigate any matter referred to the Commission by both Houses of Parliament, and to communicate to appropriate authorities the results of those investigations (s 13(1)). Those functions also include the

making of findings "on the basis of the results of its investigations" (s 13(3)(a)). They may include findings that particular persons "have engaged, [or] are engaged… in corrupt conduct", as well as findings of fact more generally (s 13(3), (5)).

46 As also stated at [15] above, the Commission may for the purposes of an investigation conduct a compulsory examination (s 30) or a public inquiry (s 31). Such an inquiry is to be conducted by a Commissioner or by an Assistant Commissioner, as determined by the Chief Commissioner (s 31(4)).

47 By the terms of s 6(1), the Commission's function of making a report (s 74) is exercisable by a Commissioner, including the Chief Commissioner.

48 In relation to a matter referred to the Commission by both Houses of Parliament, the Commission is required to "prepare" a report "as directed by those Houses" (s 74(2)). The Commission is also required to "prepare" a report in relation to a matter which has been the subject of a public inquiry unless the Houses of Parliament give different directions (s 74(3)). More generally, the Commission "may prepare" reports in relation to any matter that has been or is the subject of an investigation (s 74(1)).

49 The Commission must "furnish" all reports prepared under s 74 to the Presiding Officer of each House of Parliament (s 74(4)). Such reports "shall be furnished" as soon as possible after the Commission has concluded its involvement in the matter (s 74(7)). Other than in respect of a matter referred to the Commission by both Houses of Parliament, the Commission "may defer making a report" if it is satisfied that it is desirable to do so in the public interest (s 74(8)).

50 Sections 74A to 74D contain matters which the Commission either "is authorised to include in a report under section 74" (see ss 74A, 74C, 74D) or "is not authorised to include" in such a report (ss 74B, 74BA). The matters in s 74A(1) include statements as to the Commission's "findings, opinions and recommendations" and statements as to the "Commission's reasons for any of its findings, opinions and recommendations". The matters which the Commission may *not* include in a report extend to any findings or opinions "that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence" (s 74B(1)(a)), as well as any findings or opinions "that any conduct of a specified person is corrupt conduct unless the conduct is serious corrupt conduct" (s 74BA(1)).

51 As to delegation, s 107(1) permits the Chief Commissioner to "delegate any function of the Commission to an Assistant Commissioner or an officer of the Commission", "officer" referring to any of a Commissioner, an Assistant Commissioner, a member of staff of the Commission or a person engaged under s 104B (s 3(1)). Section 107(2) empowers a Commissioner to delegate "any of his or her functions to an Assistant Commissioner or an officer of the Commission", other than the authorisation of a

decision of the Commission under s 6(2). Each of these powers is subject to s 107(4), which relevantly precludes the delegation of "a power of delegation conferred by this section" and "a function of making a report" under the Act.

52 The prohibition on delegation in s 107(4) does not apply to a delegation to an "Assistant Commissioner (and to an Assistant Commissioner only) if the Chief Commissioner is of the opinion that there would or might be a conflict of interest or that there would or might be a conflict of interest, or that it would be in the interests of justice to do so" (s 107(6)). It follows that in the absence of such a conflict, the function of making a report must be exercised by a Commissioner, notwithstanding that a public inquiry relating to an investigation may be (or have been) conducted by an Assistant Commissioner (s 31(4)).

53 Section 104B confers a power on the Commission to engage "any suitably qualified person to provide the Commission with services, information or advice". A person appointed under s 104B may be delegated any function of the Chief Commissioner or a Commissioner except, relevantly, the functions of "making a report under [the] Act" (in *any* circumstances — cf s 107(6)) or the powers of the Commission or a Commissioner to conduct a compulsory examination or public inquiry under Div 3 of Pt 4 of the Act. A person engaged by the Commission under s 104B to provide the Commission with services, information or advice is an "officer of the Commission" (s 3(1)).

The Operation Keppel investigation and preparation of the Report

54 The investigation which became known as Operation Keppel was conducted on the Commission's own initiative arising from evidence obtained in another investigation (Operation Dasha). Initially, Operation Keppel concerned the conduct of Mr Maguire. On 1 September 2020, the Commission announced that it would hold a public inquiry as part of its investigation into allegations concerning Mr Maguire. Following the first public inquiry (which concluded on 16 October 2020), the Commission became aware of further allegations concerning grants of public moneys made to ACTA in 2016, and on two occasions to RCM in 2018. In each case, Mr Maguire had been an advocate for those grants, and the applicant had presided over or been a member of the ERC which had approved them. In addition, during its investigation of Mr Maguire, the Commission had become aware of the relationship between Mr Maguire and the applicant. On 30 September 2021, the Commission determined to conduct a further public inquiry for the purpose of investigating allegations involving the applicant. That second public inquiry commenced on 18 October 2021 and concluded on 1 November 2021.

55 Earlier, on 15 July 2020, Ms McColl had been appointed an Assistant Commissioner of ICAC on a part-time basis commencing on that day and until 28 February 2021. By an instrument dated 16 July 2020, the then Chief Commissioner, the Hon Peter Hall QC, delegated to Ms McColl certain powers and functions. Those powers and functions included the powers of the Commission and of a Commissioner under Div 2 of Pt 4 of the Act (Investigations); Div 3 of Pt 4 (Compulsory examinations and public inquiries)

except the power to issue a warrant for the arrest of a person; the functions of the Commission under Div 5 of Pt 4 (Miscellaneous), which are not presently relevant; and the powers of a Commissioner under Pt 10 in dealing with contempt of the Commission (except for the power to issue a warrant for the arrest of a person). Finally, and again not presently relevant, the power of the Commission to direct non-publication (s 112(1) of the Act) was also conferred. Most significantly, the Chief Commissioner's delegation did *not* include the function of "making a report under this Act".

56 Ms McColl's appointment as an Assistant Commissioner was extended on four occasions: on 17 February 2021, to 30 June 2021; on 26 May 2021, to 31 December 2021; on 15 December 2021, to 30 June 2022; and on 8 June 2022, to 31 October 2022. That last date was after Ms McColl had presided over the two Operation Keppel public inquiries, the first concerning conduct of Mr Maguire, and the second concerning that conduct, as well as conduct of the applicant. Following that second inquiry, written submissions were received from Counsel Assisting and affected parties, including the applicant. The last of those submissions was received on 18 October 2022.

57 On 31 October 2022, Ms McColl was engaged under s 104B of the Act as a "suitably qualified person" to provide the Commission with "services, information or advice". It was common ground that the reason why Ms McColl was not reappointed as an Assistant Commissioner from 1 November 2022 was that cl 5(4) of Sch 1 to the Act provided that a person may not hold the office of Assistant Commissioner "for terms totalling more than 5 years", Ms McColl having held previous appointments as an Assistant Commissioner in the late 1990s.

58 The fact of Ms McColl's engagement as a consultant in relation to Operation Keppel was announced by a media release issued by the Commission on about 28 October 2022. That release described those services as "required for the purposes of her finalising the Operation Keppel report, including participating in the review and editing processes of that report". By a further press release dated 11 January 2023, the Commission provided an "Operation Keppel update" in which it was said that Ms McColl was "working to complete a draft of the report as soon as possible but, given these matters, it [was] not possible to specify a date by which it will be completed". It also stated that "once the report has been drafted it will need to be subjected to the Commission's review, editing and production processes".

59 The "review panel", consisting of, among others, the Chief Commissioner (the Hon John Hatzistergos AM) and Commissioners the Hon Helen Murrell SC and the Hon Paul Lakatos SC, received a draft report from Ms McColl on 8 February 2023. The members of that panel then met in late February and in early March 2023 to discuss that draft report. Meetings were then held between the Chief Commissioner and Ms McColl to discuss the panel's primary concerns, suggestions and recommendations and how Ms McColl proposed to address them. The review panel then provided comments to Ms McColl in relation to the draft report, and Ms McColl provided

responses to those comments, a process resulting in the production of further drafts. Ms McColl had no further involvement after 6 April 2023. The Report then went through further review, editing and checking, and was finalised on 26 June 2023.

60 The two-volume Report was furnished to the Presiding Officer of each of the Legislative Council and Legislative Assembly on 29 June 2023. Page 3 of Volume 1 of the Report is a signed letter from the Chief Commissioner, the Hon John Hatzistergos AM, to the President of the Legislative Council and the Speaker of the Legislative Assembly, which stated:

> In accordance with s 74 of [the Act] I am pleased to present the Commission's report on its investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel).
>
> Assistant Commissioner, the Hon Ruth McColl AO SC, presided at the two public inquires held in aid of this investigation.

Disposition of ground 1

The evolving arguments regarding ground 1

61 The formulation of ground 1 and the argument in support of it focus on Ms McColl's participation in the drafting and preparation of what became the Report at a time after she had ceased to be an Assistant Commissioner on 31 October 2022. As that argument evolved, it concentrated on Ms McColl's participation in the process of making of credit assessments of witnesses, and specifically Ms Berejiklian. Ultimately, it is contended that Ms McColl, who had conducted the public inquiries as an Assistant Commissioner, was the only person in a position to make such credit assessments of witnesses based on demeanour. As Ms McColl's participation in the preparation of draft reports extended beyond her appointment as Assistant Commissioner, questions arise as to whether she could assist in the making and communications of such observations and assessments for the benefit of the Chief Commissioner, and do so while a consultant rather than an Assistant Commissioner, and whether the Commission could in the Report adopt or take into account observations and assessments made or communicated by Ms McColl whilst a consultant to the Commission.

62 As Assistant Commissioner, Ms McColl had not been delegated the function of "making a report" under the Act. In that capacity, as an officer of the Commission, she was required to "assist the Commission, as the Chief Commissioner requires" (s 6A(3)). Where the Chief Commissioner had not conducted the public inquiries but had the function of "making a report" in relation to the Operation Keppel investigations, Ms McColl's role whilst an Assistant Commissioner included providing the Chief Commissioner with the benefit of her observations and assessments as to the credibility of witnesses.

63 Ms McColl made such assessments, and communicated them to the Commission's review panel in the form of a draft report or reports. In the Report at [2.37]-[2.38], the Commission described how it had adopted or taken into account assessments made by

Ms McColl, making clear that what was contained in the Report were findings of fact, including witness assessments, of the Commission:

> **Witness credibility**
>
> 2.37. During this investigation, the Commission heard evidence from a large number of witnesses, some of whom gave evidence on more than one occasion. Aside from independent or objective evidence against which the credibility of witnesses may be assessed, including contemporaneous notes or other records – such as lawfully intercepted telephone calls, emails and text messages, evidence given by disinterested witnesses, the incontrovertible facts and the probabilities involved – the Commission adopts assessments made by the presiding Assistant Commissioner, the Hon Ruth McColl AO SC, who has had regard to other factors in determining the credibility of a witness and the evidence they gave. These factors include the responsiveness or otherwise of answers, a reluctance or otherwise to make appropriate concessions, whether the evidence given was direct or obfuscatory, and whether the witness was cooperative or argumentative.
>
> 2.38. Assessments as to witness credibility and reliability are important factors *for the Commission to consider* in properly weighing the evidence and making findings of fact that are available on that evidence. Witness assessments are included in the relevant chapters of this report. (Emphasis added.)

64 The Commission declined to make a global finding about the credibility of the applicant, instead making the following more general observations:

> 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. (Footnote omitted; emphasis added.)

65 The applicant contends that it cannot be said with any confidence whether the witness assessments adopted or otherwise taken into account by the Commission in "making" the Report were made by Ms McColl *in her capacity as an Assistant Commissioner* as opposed to being made in her subsequent capacity *as a consultant*. On the applicant's argument, it was accepted that there would not have been any "problem" with the validity of findings and opinions such as those expressed above, which rely on such assessments, if the evidence had been capable of establishing that Ms McColl had made those assessments at a time when she was an Assistant Commissioner, and, presumably, if she had also continued to be available to provide assistance to the Commission in that capacity up to the time when the Report was furnished to Parliament.

66 To that end, senior counsel for the applicant submitted:

> It is the Commission who makes a report, and an Assistant Commissioner who may be required to conduct public hearings and may be required to assist the Commission in general, but obviously therefore including [in the] very important function of making reports.
>
> By statute [there is] … a person that Parliament contemplates may form the impressions that the person conducting the hearing may form, but [those impressions] are not available to be formed by those who didn't conduct the hearing. But by statute, that assistance can be given. It's an assistance as Assistant Commissioner.

> …
>
> It is the person who is doing the statutory task who needs to hold the office to which that task appertains. The task is assisting, in this case with respect to witness assessments. You can't do that unless you're an Assistant Commissioner.

67 The following exchange occurred shortly before that submission:

> BELL CJ: … The difference then is she'd ceased to be an Assistant Commissioner at a point in time we know and what we don't know is whether she had formed the assessments before or after that time and the question is whether it matters. Really, that's the question.
>
> WALKER: And I accept that that is the analysis.

68 This argument is different from that made in the applicant's written submissions, both in chief and reply, which instead described the real question as being whether, following the expiration of her commission on 31 October 2022, Ms McColl herself undertook the function of "making a report" by proposing findings and assessments that were adopted by the Chief Commissioner. This argument directed attention to the scope of the function of "making a report", which was said to include the functions of preparing and furnishing a report. It also required consideration as to whether Ms McColl undertook the function of "making a report" so understood.

The arguments as formulated in the written submissions

69 The applicant's written submissions contended that the function of "making a report" in s 107(4)(b) and the expression "making a report" in s 74(8) are each to be understood as a "compendious term encompassing the twin functions of 'prepar[ing]' and 'furnish[ing]' reports". In this context, "preparing" was said to include Ms McColl's producing and amending a draft report, and her participating in the review or editing process which resulted in the publication of the Report. On this construction of that expression, Ms McColl, as an Assistant Commissioner to whom the function of "making" the Report had not been delegated, would not have been authorised to participate in a drafting process that included her providing witness credibility assessments.

70 The expression "making a report" is used in ss 18(2)(c), 74(8) and 107(4)(b) of the Act, and is to be contrasted with the language "prepare reports" and "furnish reports" used in s 74(1)-(4). Statements that the Commission may or shall "prepare" reports describe a process and outcome likely to involve various officers and staff, as well as resources, of the Commission, and over a significant period of time. The function of "making a report" is much more specific. The report is directed to a particular body, in this case Parliament, and the function of making it is to be exercised by a Commissioner, that being the default position as stated in s 6(1), unless that function has been delegated to an Assistant Commissioner in the circumstances described in s 107(6). The exercise of that function includes, from the perspective of a Commissioner as ultimate decision-maker, undertaking responsibility for the final form of a report, including its findings, opinions, recommendations and reasons. As the Commission submits, the "making" of

a report describes the exercise of “presenting findings to Parliament [concerning the outcome of an investigation] to which some significance is then attached”, and is not merely a reference to the logistical exercise of preparing or drafting a report.

71 That the expression “making a report” describes the exercise embodied in deciding upon the final form of a report containing the Commission’s findings, opinions and recommendations, and communicating it to the Parliament, finds some support in the decision in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 633-634; [1990] HCA 28. Section 18(2) of the Act permits the Commission to “defer making a report”. The Court identified the purpose for which that discretion was conferred as being to protect criminal proceedings before a court from interference arising from the making public of a report containing the findings and observations of the Commission about the same or a related subject matter. The “dangers” which the Court identified the legislature sought to avoid would ordinarily only manifest upon the communication of the final form of a report, not in the preparation of any draft.

72 The applicant’s argument as ultimately made does not contend that Ms McColl, acting either as an Assistant Commissioner or as a consultant, purported to exercise the function of “making” the Report, notwithstanding that in each capacity she had participated in the drafting process by suggesting findings, opinions and recommendations. It was accepted that in allowing Ms McColl to undertake that role in the drafting process as an Assistant Commissioner the Commission did not thereby delegate to her the task of “making” the Commission’s findings in respect of witness credibility assessments, notwithstanding that the Chief Commissioner may ultimately have “adopted” those assessments as findings or assessments of the Commission. Nor is it controversial that this drafting process involved the Chief Commissioner bringing his judgment to bear in relation to any suggested findings, opinions and recommendations contained in a draft report, with a view to his determining the final content of the Commission’s Report.

73 The applicant’s written submissions also suggested that, in circumstances where the Commission was required to address substantial issues of credit in making findings, the principles of natural justice precluded the Chief Commissioner as decision-maker from merely adopting a consultant’s assessment of the credibility of the relevant witnesses. In oral argument, it was made clear that the notion of procedural fairness was invoked in this context solely in support of the proposition that the only person who could provide such assistance to the Chief Commissioner was the person who presided at the inquiry, and only whilst he or she remained an Assistant Commissioner. It was said not to be sufficient that he or she was a consultant at the time such assistance was

provided. Such a limitation is not apparent in s 6A(3), which simply says that "[a]n Assistant Commissioner is to assist the Commission, as the Chief Commissioner requires".

74 It is also important to note here that it was *not* contended by the applicant that she was denied procedural fairness by the adoption of a process in which the person making the Commission's findings and assessments was not the person who conducted the public inquiry and could directly make demeanour-based assessments. Whilst natural justice does not permit the implication of authority to delegate the hearing function with respect to the exercise of judicial power, the position is not necessarily the same in relation to an administrative body undertaking an investigative inquiry. See *Local Government Board v Arlidge* [1915] AC 120 at 132-134 (Viscount Haldane LC); *Taylor v Public Service Board (New South Wales)* (1976) 137 CLR 208 at 221-222 (Mason J); [1976] HCA 36. See also *South Australia v O'Shea* (1987) 163 CLR 378; [1987] HCA 39 where Brennan J said at 409-410:

> It is not a general rule of administrative procedure as it is of judicial procedure that the person who hears should decide. A need for a further hearing by a repository of a power after a hearing by an expert board may arise if, in the particular circumstances, the interests of a party are affected by some new fact or matter which the decision-maker proposes to take into account and which the party has had no opportunity to deal with. …
>
> If a statute provides for the facts relevant to a decision to be ascertained and evaluated by a board and for the board to report and make a recommendation to the decision-maker, prima facie there is no room for an implication that the power to make the decision is conditioned on the giving of an opportunity for a further hearing. To impose such a condition without statutory warrant would be to force a judicial model on the administrative process. That is not the function of a court. (Citations omitted.)

The arguments as ultimately made

75 As the terms of ground 1 show, the applicant *initially* contended that the Chief Commissioner's "adoption" of Ms McColl's findings and opinions, including as to witness credibility assessments, was not a valid means of curing her lack of authority to "make" such findings and opinions on behalf of the Commission. In effect, it was said that the Report merely recorded findings and opinions of Ms McColl, which had not been actually formed or made by someone authorised to do so on behalf of the Commission (s 6(1)). However, as finally put, the applicant's argument focused on the Commission's adoption of Ms McColl's assessments in the making of its findings as to credibility, rather than the proposition that Ms McColl had made those findings, and the fact that those assessments were made or communicated to the Chief Commissioner at a time when Ms McColl was a consultant. It was not argued that by agreeing to and participating in such a drafting process, both before and during Ms McColl's appointment as a consultant, the Commission had "in effect" delegated to her (contrary to s 107(4)) part of the function of "making" a report, namely that of making findings involving witness credibility assessments.

76 As put by counsel for the applicant, the following distinction was to be drawn between the character of Ms McColl's participation before and during her appointment as a consultant:

> … of course it's proper for drafts to be considered prepared by others, of course. It really does go without saying but there is the world of difference between drafting something where you are, however competent, an amanuensis and your opinion being taken by the decision maker as his her or its opinion, that is fine if you are a constitutive element and there is whatever collegial process follows with the Chief Commissioner, as we know, having the whip hand in terms of decision making by the Commission.
>
> It's equally fine if there is a statutory function of assisting, but when there is neither, and that is this case, in our submission, what you have is somebody whose opinion is being adopted in a critical fashion, and I don't want to go back over why it's critical…

77 There is no factual controversy as to the process that generated the Report. In terms, it contains findings, opinions and recommendations of the Commission, as well as statements as to the Commission's reasons for those findings, opinions and recommendations (as the extracts at [63]-[64] above show). That process involved the provision of draft reports to the Commission's review panel, whose members included the Chief Commissioner. That panel considered the drafts, provided written and oral comments to Ms McColl, resulting in suggestions and recommendations which were then addressed before the final report was made by the Chief Commissioner in the name of the Commission.

78 The applicant's remaining argument, identified at [61] above, is that the Commission was not entitled to rely on and adopt Ms McColl's credibility assessments made or communicated after she had ceased to be an Assistant Commissioner. In the absence of evidence establishing that those assessments were only made and communicated while Ms McColl was an Assistant Commissioner, it must be assumed that this occurred after that appointment had ceased.

79 Until 31 October 2022, when Ms McColl's appointment as a part-time Assistant Commissioner concluded, the Chief Commissioner was able to require her assistance in that capacity (s 6A(3)) in relation to the drafting of the Report, which process would include her suggesting findings of fact and proposing assessments as to the credibility of witnesses. The applicant accepts that there would have been no want of authority or power in the Chief Commissioner so proceeding in making the Report.

80 In terms of function, authority and power, up to this time the Chief Commissioner was overseeing the preparation of a draft report. In doing so, he was putting himself in a position where he could discharge his function of "making" the final report (s 6(1)), a function he had not delegated to Ms McColl. His ultimate task included determining the findings, opinions, recommendations and reasons to be made or given in the report to Parliament. His power to make such findings (s 13(3), (3A)) was not expressly qualified as to the sources from which he might acquire information or advice to be taken into account.

81 At the same time, Ms McColl was assisting the Commission (and the Chief Commissioner) in that task by engaging in the drafting process. The Act provides for an Assistant Commissioner to conduct a public inquiry (s 31(4)), and expressly acknowledges that issues of witness credibility are likely to arise in the course of the investigation undertaken by that inquiry (s 31B(2)(c)). More significantly, in circumstances where the Act contemplates that a presiding officer (being an Assistant

Commissioner) may not be the person having the function of "making the report", it does not in terms provide for how the presiding officer's witness credibility assessments might be provided to the relevant Commissioner and taken into account in the preparation of a report as required by s 74(3).

82 From the Commission's perspective, one obvious way of achieving that outcome is by the Chief Commissioner requiring the presiding officer, if still an Assistant Commissioner, to provide that assistance, if necessary exercising the power under s 6A(3). The question raised by the applicant's argument, ultimately one of construction, is whether that is the only way of achieving that outcome; or whether it can be achieved by the presiding officer being appointed as a consultant to provide that service, information or advice after his or her appointment as an Assistant Commissioner has expired, including in circumstances where it cannot be renewed because of the time limitations in s 5(4) of the Act and cl 5(4) of Sch 1 to the Act.

83 The Act does not in terms state that the only means by which the Commission might secure that assistance in the preparation of its report is from the presiding officer whilst still an Assistant Commissioner. However, it does in terms provide that a suitably qualified person may be engaged to provide the Commission with "services, information or advice" (s 104B), and in doing so it does not limit in any way the subject matter of the "services, information or advice" which might be provided.

84 Nor does the Act describe the function of providing such assistance as one to be performed by an Assistant Commissioner as part of the function of presiding at a public inquiry or otherwise.

85 There is no warrant to read down the language of s 13(3)(a), which includes as a principal function and power of the Commission the making of findings and forming of opinions "on the basis of the results of its investigations". In relation to the exercise of that function, acceptance of the applicant's argument would impose an unwarranted limit upon the Commission's ongoing access to assistance and information concerning its investigation.

86 For these reasons, this argument should be rejected. The appointment of Ms McColl as a consultant under s 104B was valid and effective. Her assistance in the drafting process was the provision of "services". It also involved Ms McColl providing "information" or "advice" as to her assessments of the credibility of witnesses. Having presided at the two public inquiries, she continued to be an officer of the Commission (s 3(1)) following her appointment under s 104B, and was the person best placed to make those assessments. Those assessments were "important factors for the Commission to consider in properly weighing the evidence and making [its] findings of fact" ([2.38], extracted at [63] above). In providing those assessments to the Chief Commissioner, Ms McColl was communicating information concerning the results of one part of the Commission's investigation. The Commission, in making the Report, did not act beyond

its authority or power in obtaining services, information or advice from Ms McColl and taking the product of such services or any information or advice into account in the making of its findings, opinions, recommendations and reasons as part of the Report.

87 Ground of review 1 is rejected.

Ground of review 2

88 Ground 2 is:

> Further or in the alternative to ground 1, the Commission's finding that Ms Berejiklian had a private interest in, and was influenced by a desire of, maintaining or advancing her close personal relationship with Mr Maguire was not supported by any probative evidence (R [11.619])…

89 The above extract of ground of review 2 does not include the eight subparagraphs to that ground, which identify the five "ultimate" and three other findings to which the challenged findings are said to be "material". The "ultimate" findings are those summarised at [35]-[38] above and three other findings are those of "substantial breach" of the Ministerial Code, being intermediate findings supporting the first, third and fifth of those "ultimate" findings.

90 There is an issue as to whether the applicant's written submissions mischaracterise the findings made in the Report for the purpose of establishing the materiality of the findings for which there is said to be no probative evidence. It is convenient first to address that question and then, having done so, to address whether those findings were supported by any probative evidence.

Threshold issue: whether findings mischaracterised

Submissions

91 The applicant's written submissions identify two findings as made without any probative evidence. The first challenged finding is that the applicant had a private interest in maintaining or advancing her close personal relationship with Mr Maguire, which she "deliberately" preferred over her public duty. That finding is said to be "critical" to the two findings of "serious corrupt conduct" arising from breaches of public trust (s 8(1)(c)), which are the ultimate findings at [1.5.1] and [1.5.3], described at [36] above. The conduct in each case was exercising official functions in relation to decisions made concerning the ACTA and RCM Stages 1 and 2 funding whilst in a position of conflict of interest and public duty.

92 The second challenged finding is that the applicant engaged in partial conduct "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". That finding is said to be "critical" to the two findings of "serious corrupt conduct" arising from breaches of s 8(1)(b) (partial conduct) and the finding of "serious corrupt conduct" arising from the applicant's breach of s 11 (duty to notify possible corrupt conduct), which are the ultimate findings at [1.5.2], [1.5.4] and [1.5.5] respectively, described at [37]-[38] above. The conduct to which the partial conduct findings were directed was the partial exercise

of the applicant's official functions in relation to the ACTA and RCM Stage 2 funding influenced by her close personal relationship with Mr Maguire and her desire to maintain or advance that relationship. The conduct to which the s 11 finding relates was the applicant's failure and refusal to discharge her obligations by reporting her actual suspicions of Mr Maguire's activities in relation to the three matters described at [38] above.

93 Addressing the asserted "mischaracterisation" of the Report's findings, the Commission says that the findings of "serious corrupt conduct" arising from breaches of public trust were that the applicant exercised her functions whilst in a position of conflict of interest and duty. It submits that those findings of breach did *not* depend on any finding that the applicant had "deliberately preferred her private interest… over her public duty". Nevertheless, the Commission did make such a finding at [12.196], although not material to the s 8(1)(c) finding in the paragraph that follows. In relation to the breach of s 11, its findings were said to be that the applicant did not report her actual suspicions as to Mr Maguire's activities, and that she did so in order to protect either Mr Maguire's interests or her own interests, but *not* in furtherance of her interest in maintaining or advancing their relationship.

94 The Commission accepts that the conduct that it found constituted or involved breaches of s 8(1)(b) was the "partial" exercise of the applicant's official functions influenced by her close personal relationship with Mr Maguire and her desire to advance or maintain that relationship. Accordingly, the Commission's position is that ground of review 2 is only material to the "ultimate" findings based on a breach of s 8(1)(b) (partial conduct).

95 In reply, the applicant says that the above analysis is based on an incomplete account of the reasoning leading to the "ultimate" findings. In doing so, that argument makes reference to findings not challenged by the ground of review. First, as to the ultimate findings arising from the breaches of public trust, it is said those findings could not have been made unless the conduct in breach of s 8(1)(c) was found to answer the description of "*serious* corrupt conduct" (emphasis added) (s 74BA(1)). The findings supporting the Commission's conclusion to that effect in respect of the ACTA funding included that the applicant "knew [that] or was reckless as to whether" she had to notify her position of conflict, and nevertheless concealed that relationship "over an extended period of time" ([11.507]). In respect of the RCM funding, the finding was that the applicant knew she was in a position of conflict but, "wilfully and in bad faith, deliberately did not disclose it" ([12.261]).

96 Finally, in relation to the breach of s 11, the Commission found that in refusing to discharge that duty the applicant, motivated by self-interest to conceal the truth about what she knew or suspected so as to protect herself, as well as to protect Mr Maguire from further investigation, breached s 6 of the Ministerial Code ([13.387], [13.388], [13.395], cf [13.398]).

Disposition of the threshold issue

97 The Commission was right to accept that a finding that Ms Berejiklian had a private interest in, and was influenced by a desire to, maintain or advance her close personal relationship with Mr Maguire was necessary for its conclusions as to partial conduct. The relevant findings are at [11.594] with respect to ACTA, and [12.314] with respect to RCM Stage 2, and are in terms that the applicant exercised her official functions "influenced by the existence of her close personal relationship with Mr Maguire and by a desire on her part to advance or maintain that relationship".

98 In relation to its conclusion as to these breaches of s 8(1)(b), the Commission also found concerning the ACTA funding that the applicant had "consciously preferred" Mr Maguire for an "unacceptable reason" ([11.587]), and concerning the RCM Stage 2 funding that the applicant had "consciously preferred Mr Maguire" ([12.313]). Each of those findings is in substance the same as the first of the findings referred to in the applicant's written submissions (see [91] above).

99 However, as concerns the breach of public trust and s 11 findings, notwithstanding that the applicant has pointed to further findings in support of her submission that the asserted error raised by this ground of review is also material to the "ultimate" findings, she has not sought to amend the ground as formulated. In these circumstances, it is not strictly necessary to consider the additional finding referred to in [92] above. However, in what follows the Court has considered whether that further finding was open on the evidence.

Relevant principles for the "no evidence" ground

100 Properly understood, the "no evidence" ground is that there is no evidentiary material which could rationally affect the decision-maker's assessment of the probability of the relevant fact or facts in issue (see *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187 at [235] (Basten JA, Bathurst CJ agreeing), which in turn cites the earlier decision in *Amaba Pty Ltd v Booth* [2010] NSWCA 344 at [22]-[24] (Basten JA, Beazley and Giles JJA agreeing)). A finding of fact when there is "no evidence" in support of that finding is an error of law (*Kostas* at [91]).

101 As to whether there is evidence to "support" a particular finding, Basten JA makes the following observations in *Booth* at [23]-[24] in a passage cited with approval in *Ballina Shire Council v Knapp* [2019] NSWCA 146 at [38] and *Workers Compensation Nominal Insurer v Hill* [2020] NSWCA 54 at [19]:

> [23] Implicit in the statement that there is no evidence to 'support' a particular finding, is the characterisation of a relationship between the evidence and the finding. It is the same relationship inherent in the concept of 'relevance', on which the laws of evidence depend. That relationship depends on a process of reasoning which must be logical or rational. Thus, evidence is relevant which, if accepted, 'could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding': *Evidence Act 1995* (NSW), s 55(1). As explained by Gleeson CJ, Heydon and Crennan JJ in *Washer v Western Australia* [2007] HCA 48; 234 CLR 492 at [5]:

> 'The word 'rationally' is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.'

> [24] Whether an inference is reasonably open, in the sense of being logically available, involves an evaluative judgment, which is to be assessed by the court exercising appellate or supervisory jurisdiction.

102 In respect of inferences drawn from facts as found, the position is as described by Mason CJ in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 356; [1990] HCA 33:

> … at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is *some* basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place. (Emphasis in original.)

103 The applicant does not otherwise contend that any of the Commission's ultimate decisions could be characterised as illogical or irrational (other than by ground of review 12). Nor does she contend that in determining the facts, by way of primary findings and the drawing of inferences, the Commission's reasoning process was flawed as illogical or irrational (cf the discussion in *D'Amore* at [227]-[231]).

104 Accordingly, the findings addressed below on the "no evidence" ground are:

- that Ms Berejiklian had a private interest in, and was influenced by a desire of, maintaining or advancing her close personal relationship with Mr Maguire; and
- that Ms Berejiklian engaged in partial conduct influenced by the existence of that relationship, and did so for her own private benefit, which she deliberately preferred over her public duty.

The respective arguments

105 It is not contested that the applicant and Mr Maguire were in a "close personal relationship". However, it is said that evidence beyond the mere existence of the relationship was required to support the "grave" finding that the applicant's exercise of public functions was influenced by that relationship, or a desire to maintain or advance it. The applicant asserts that there is no such evidence.

106 It is submitted that only the presence of an "existential threat" to the relationship could "logically" justify a finding that the applicant was influenced by a desire to "maintain" that relationship. Such a broad statement as to likely human behaviour cannot be accepted as true. As a matter of common sense and experience, people in personal relationships act towards each other for all manner of reasons, including because what they do might be well-received by, or please, the other party, and in that respect be

conducive to maintaining the relationship. It is certainly not the case that people act in that way only where it is believed to be necessary to do so for the survival of a relationship.

107 As to "advancing" a relationship, the applicant contends that there was no evidence to support a finding that the applicant believed that exercising her public functions was "capable of deepening or strengthening" the relationship. In response the Commission relies on evidence as to the dynamics of the relationship, which suggested that the applicant was conscious of a need to accommodate and assuage Mr Maguire's insecurities by supporting him and projects for which he was a strident advocate (see [10.29]).

108 The applicant specifically refers to the Commission's recording (at [11.556]) of Counsel Assisting's submissions as to matters which "tended in favour of" a conclusion that the applicant had exercised her official functions preferentially in favour of the ACTA proposal influenced by a desire to maintain or advance the relationship:

> … [Counsel Assisting] 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
>
> 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.

109 As to these eight subparagraphs, the applicant submits that: the first refers only to the existence of the relationship; the second to fourth refer to matters about Mr Maguire's position, and do not go to the issue of the applicant's state of mind; the fifth and eighth

refer merely to an absence of evidence; the sixth is question-begging; and the seventh is neutral as to why Mr Maguire's involvement would be a factor, he also being the local member.

110 Finally, the applicant says that "[i]n the absence of any specific evidence supporting the finding that the applicant was influenced by her relationship in her public functions" Counsel Assisting's arguments were based on supposition.

111 In response the Commission submits that there was probative evidence upon which its findings were based and from which it drew inferences.

112 Whether that is so requires this Court to consider the evidence referred to by the Commission and whether it provides support for the finding that the applicant was influenced in the exercise of her public functions concerning the ACTA and RCM funding proposals by a desire to maintain or advance her relationship with Mr Maguire.

Disposition of ground 2

113 It is convenient to address the questions of supporting evidence, and availability of inferences, by reference to the following matters which substantially cover those in Counsel Assisting's submission as recorded at [11.556].

The nature and dynamics of the relationship

114 The Commission considers the nature of the relationship between [10.8] and [10.38]. Its findings include that it "was one of considerable intensity accompanied by mutual and deep feelings of love" ([10.9]), and that the messages between the two were "consistent with physical and emotional intimacy and a romantic relationship having developed" between them ([10.13]).

115 On 14 February 2018, there was a recorded telephone exchange between the applicant and Mr Maguire, which included the following ([10.20]):

> 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 [sic].
>
> 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.

116 This exchange was the subject of the question to the applicant and her answer recorded at [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 [who] 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.* (Italics in original.)

117 In the light of this evidence, it was open to the Commission to make the findings made at [10.28]-[10.29], which include the finding accepting the submission of Counsel Assisting at [10.23]:

> 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.
>
> …
>
> 10.28. … 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. … 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. (Emphasis added.)

Mr Maguire's "lobbying" to the applicant

118 There was evidence that Mr Maguire pressed the applicant to exercise her public functions in particular ways to support his causes, and that the applicant responded accordingly. In doing so Mr Maguire had direct, immediate and informal means of communicating with the applicant and did so without any suggestion that there was some "boundary" between their personal or private lives and their interactions concerning the exercise by the applicant of her public functions.

119 For example, the applicant intervened with Treasury to support funding for the Wagga Wagga Base Hospital on 16 May 2018 after Mr Maguire had been told that "[his] 170 million" dollar funding request was "not a line item". As he described it to the applicant

(then Premier) in a recorded telephone call, the relevant Minister had said to him "I haven't seen it. I don't know, it's up to Treasury", to which Mr Maguire had replied "you better fucking make sure Wagga's got money otherwise there's gonna be a riot on your hands" ([11.528]). The applicant responded to Mr Maguire that she would "deal with it" and "fix it" ([11.529]).

120 The exchanges which then occurred are at [11.530]-[11.532]. They also include reference to funding for the Tumut Hospital:

> 11.530. Less than two hours later [than the exchange referred to above], 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*** *–*

… (Italics and emphasis in original.)

121 These exchanges are capable of supporting findings both as to the extent to and manner in which Mr Maguire pressed the applicant to exercise her public functions to support his causes, as well as the applicant's preparedness to respond by doing so.

122 Another instance of the applicant's responding to Mr Maguire's urgings involved the RCM proposal as it stood in November 2017. The applicant accepted that at that time she was considering "sacking" a Mr Barnes, who was at that time deputy secretary of Regional NSW within the Department of Premier and Cabinet ([12.47]). In that context, the following recorded telephone conversation occurred ([12.46]):

MAGUIRE: Well I had ahh what's his name Gary 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: Gary 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.

123 As is recorded at [12.47], the applicant agreed that "it was possible that one of the reasons that she decided not to sack [Mr Barnes] immediately was the fact that Mr Maguire wanted him to 'fix' his conservatorium".

124 A further example of the interactions between Mr Maguire and the applicant also concerned the RCM proposal. The following recorded telephone conversation occurred on 1 May 2018, at a time after the ERC decisions concerning Stage 1 had already been made (on 12 and 24 April 2018), though before the decision concerning Stage 2 made on or shortly before 24 August 2018 ([12.95]):

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.

125 On 30 July 2018, following Mr Maguire's evidence at the Operation Dasha public inquiry on 13 July 2018 ([13.217]-[13.218]) and his subsequent resignation announcement, to take effect on 3 August 2018, the following telephone exchange occurred ([12.103]):

> 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.)

126 Mr Maguire's evidence was that the "three top things" included RCM Stage 2; and the applicant agreed that Mr Maguire said that one of the things the government "should announce" was building a large recital hall for the RCM ([12.104]).

127 There was also evidence that by 31 July 2018 Mr Maguire had advised Dr Wallace (the chair of RCM) that Stage 2 would be funded. He agreed that his confidence as to that being announced was justified because he knew Ms Berejiklian would "accept his advice regarding the three top things" to announce in the by-election campaign ([12.110], [12.112]).

128 It was open on this evidence to find that, as one would expect, in their personal relationship the applicant and Mr Maguire discussed matters being supported or proposed by Mr Maguire; that he would press the applicant for a particular outcome in respect of such matters; and that the applicant made decisions and gave instructions as Treasurer or Premier which had the consequence or effect of giving that matter some immediate preference or priority which it was not otherwise likely to have achieved.

Mr Maguire as principal proponent of the ACTA and RCM proposals

129 In relation to the ACTA proposal generally, Mr Maguire agreed that from time to time he spoke to the applicant about it, and that he would have "encouraged her to take a close interest in it" ([11.543]). There was evidence that he was regarded by senior members of ACTA as its "champion within government" ([11.3], [11.372]). He was also Patron of the NSW Clay Target Association, and agreed that he had a long-term association with ACTA and was the "principal proponent" of its projects to government between at least 2016 and 2018 ([11.371]-[11.373]).

130 As to RCM, the applicant's evidence was that Mr Maguire had raised the funding for its moving premises, and its later recital hall proposal, over a period of years and on a number of occasions, and that she believed that he had a "particular passion" for the funding of the RCM proposal ([12.79], [12.182]). Dr Wallace described Mr Maguire as RCM's "go-to person within government" ([12.166]). In turn, Mr Maguire believed that he was the "principal proponent of that project within government" ([12.167]).

131 It was open to the Commission to find on this evidence that the applicant understood or believed that by supporting these two proposals she would please Mr Maguire, and give him a sense of satisfaction and achievement, and thereby strengthen or secure their underlying relationship.

The degree of involvement of the applicant in the ACTA and RCM funding proposals; the adoption of irregular, atypical or unusual processes in the treatment of those proposals; and the involvement of the applicant in influencing their outcome

132 *In relation to the ACTA proposal:* The Commission found that the circumstances in which this funding application came onto the ERC agenda were "within [the applicant's] control" and "bespeak irregularity" ([11.572]). As described below, those circumstances were supported by evidence:

> 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 [an adviser within the applicant's office] 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 [Minister for Sport] 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.

133 The ERC decision was subject to conditions. The evidence of those involved in the implementation of that decision, specifically Mr Barnes, was that the frequency of requests for updates from the Premier's office about its progress was "atypical" ([11.554]); and, according to Mr Hangar (then a director within the Department of Industry), the way in which the project had come forward and the speed at which his department was required to procure the business case (which had to be revisited) all indicated that there was a "strong interest" from the Premier's office regarding the project ([11.555]).

134 The applicant accepted that her support for the ACTA proposal "could have been" influenced by the fact that it was being advanced by Mr Maguire ([11.194]). This left for the fact-finder the assessment of whether that evidence, which is extracted in part immediately below, was to be understood as referring only to influence arising from his being the local member, and not to influence arising from their close personal relationship ([11.549]):

> This submission finds support in Ms Berejiklian['s] 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.* (Italics in original.)

135 It was open on this evidence, in the context of the other findings available to the Commission, to find that Ms Berejiklian's strong support of the ACTA proposal was influenced, first, by the fact that it was being advanced by Mr Maguire and had been for

some time; and, secondly, by the fact that the granting of that funding would constitute a successful outcome to Mr Maguire's lobbying for which she was in part responsible. She could reasonably expect that the outcome and her participation in it would please Mr Maguire, and be conducive to maintaining their close relationship.

136 *In relation to the RCM Stage 2 proposal:* The applicant was the effective decision-maker, and set in train the process leading up to the execution of the reservation of funds letter written on or before 24 August 2018, all of which was consistent with her having assured or agreed with Mr Maguire on 30 July 2018 that this funding would be granted, and that this could occur without the support of the "bureaucrats" (see [125] above).

137 As at August 2018, the was no evidence of any assessment having been made at the departmental level as to the feasibility or otherwise of the RCM Stage 2 proposal prior to the applicant approving it for funding. In this respect, the evidence was that none of the witnesses called from the Premier's office could identify any person within that office other than the applicant who was supportive of the proposal ([12.276]). The evidence of Ms Cruickshank, the applicant's chief of staff, and Mr Harley, the then head of the parliamentary liaison office in the Premier's office, was that they were not supportive of the proposal ([12.287]).

138 The RCM Stage 2 funding reservation was announced before the September 2018 by-election. The evidence of Mr Burden, the director of strategy in the applicant's office, was that he was concerned that by announcing the funding it might be seen that the government was trying to "buy" the election outcome ([12.121]). The evidence also included was that none of the "political staffers" in the applicant's office supported the announcement of the funding during the by-election. Specifically, the evidence of Ms Cruickshank and Mr Burden was that they thought that the applicant should have nothing to do with Mr Maguire ([12.211]).

139 In relation to RCM Stage 2, there was also evidence that as at 24 August 2018 the scope of works for that project had not been finalised, whether it met the relevant fund guidelines was unknown, and a final business case had not been approved ([12.137]).

140 This evidence as to the applicant's commitment to the RCM Stage 2 funding reservation, in the absence of any support from "political" or other staffers and absent any business case or assessment of the project at a departmental level, permitted a finding that she was influenced in doing so by the fact that RCM was a "passion" of Mr Maguire and that the outcome would be seen as an acknowledgement of his continuing political "relevance" and as confirming her commitment to their relationship.

Disclosures of conflicts

141 Finally, with respect to a finding that the applicant had "consciously" or "deliberately" preferred her private interests, it is not controversial that the applicant did not disclose her relationship with Mr Maguire, notwithstanding that at each of the ERC meetings there was a request for disclosure of any conflicts of interest. There was also evidence

as to the applicant having made disclosures of potential conflicts of interest in circumstances where the relationship disclosed was that of an acquaintance or family member, in each case much less intense, immediate and relevant than that of her relationship with Mr Maguire. Those disclosures included ([11.427]):

> 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]'.

142 The evidence was that the applicant was well aware of her obligation to disclose conflicts of interest and duty ([12.194]). In addition, the applicant gave a number of reasons for not having done so, thereby suggesting that she had considered those matters in deciding not to do so ([11.439]). As the Commission noted at [11.440], many of the factual premises underlying those "reasons" were contradicted by other evidence. Thus, it was open to the Commission to find that the applicant had turned her mind to the question of disclosure and "deliberately" and "consciously" determined not to do so, thereby preferring her private interest or benefit to her public obligation to disclosure the conflict.

Conclusion to ground 2

143 There was evidentiary material capable of supporting each of the challenged findings (see [104] above), and the underlying findings and inferences on which they were based.

144 Accordingly, the "no evidence" ground of review is not made out.

Ground of review 3

145 This ground is:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding that Ms Berejiklian's non-pecuniary personal relationship with Mr Maguire was capable of amounting to a relevant private interest capable of giving rise to a conflict of interest on Ms Berejiklian's part (R [10.175])…

146 This ground is directed only to the first and third of the Commission's findings of "serious corrupt conduct", which relate to the applicant's participation as a Minister in decisions made concerning funding promised and or awarded to ACTA and RCM whilst in a position where her private interest "in maintaining or advancing her close personal

relationship" with Mr Maguire conflicted with her public duty. The applicant's participation in that decision-making without disclosing that conflict was found to constitute or involve a "breach of public trust" within s 8(1)(c) of the Act.

147 This ground contends that the applicant's "non-pecuniary personal relationship" with Mr Maguire was not capable in law of constituting a "private interest" which was in turn capable of giving rise to a conflict of interest and duty in the exercise of the applicant's official functions. In relation to the "serious corrupt conduct" findings arising in relation to breaches of public trust, findings that there was such a conflict were relevant to establishing breaches of public trust for the purposes of s 8(1)(c) of the Act, as well as breaches of s 7(2) of the Ministerial Code for the purposes of s 9(1)(d) of the Act.

148 The applicant's contention provides for two steps in an inquiry as to whether there is a conflict of private interest and public duty in breach of s 8(1)(c) of the Act, or a "conflict of interest" as defined in s 7(3) of the Ministerial Code. The first is whether the supposed "private interest" is capable *in law* of giving rise to such a conflict. The second, adopting the language in s 7(3), is whether that private interest "could objectively have the potential to influence the performance of [the Minister's] public duty". It is accepted that the second step requires an evaluative judgment based on the relevant factual circumstances and context.

149 In relation to the first step in this inquiry, the applicant submits that "private interest" is not a term of "unlimited denotation" and that "where, as here, there is no pecuniary interest whatsoever, and no more than a personal connection with a person involved in a matter in his official capacity, there is no private interest". However, it is not said in support of this proposition that such a "private interest" could not in any relevant circumstances have the potential to influence the performance of a Minister's public duty. Rather, as the Commission submits, the applicant's argument asserts that as a matter of law "a conflict can only arise where there is an 'interest' involving some pecuniary aspect *and* which is more than a personal connection" (emphasis added).

150 The Commission submits in response that there is no basis in law for concluding that in order for a Minister of the Crown to be in a position of conflict of interest and duty, the Minister's "private interest" must at least be as contended for by the applicant. The Commission says that under the general law, and under the Ministerial Code, there is only one question, and that is whether the supposed "private interest" is capable of influencing the exercising of the Minister's public function in a way which conflicts with the proper exercise of his or her public duty.

151 That submission is correct and must be accepted. The position under the general law is sufficiently stated in *Re Day (No 2)* (2017) 263 CLR 201; [2017] HCA 14 at [49], where Kiefel CJ, Bell and Edelman JJ describe the content of the duty of a member of Parliament (in a representative parliamentary democracy) as a "duty as a representative of others to act in the public interest", that duty including "an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations" (citing *Wilkinson v Osborne* (1915) 21 CLR 89 at 98-

99; [1915] HCA 92). Two things should be noted. First, although the principal as stated expressly *extends* to being influenced by "personal financial considerations", it is not *confined* to being so influenced. Secondly, "personal financial considerations" were not in play, as far as the applicant was concerned.

152 That duty is breached if a member and or Minister is influenced in the exercise of a public function or power by considerations other than proper considerations, and irrespective of whether those other considerations arise from a pecuniary or non-pecuniary private interest.

153 The position under the Ministerial Code is not relevantly different. A "private benefit" (s 11 of the Code) as defined means "any financial *or other advantage*" (emphasis added), with limited exceptions. Section 6 of the Code prohibits a Minister from acting "improperly" for "their private benefit or the private benefit of any other person".

154 The definition of "conflict of interest" in s 7(3) also applies in the Schedule to the Code (s 11 of the Code). It describes the circumstances in which a conflict of public duty and private interest will arise for a Minister. In such circumstances, the Minister must abstain from making or participating in any decision with respect to the particular matter; and must also abstain from taking or participating in any action in relation to the matter (Sch cl 12(1)).

155 In this context, the references to a "private interest" of a Minister are to "private benefits" which could reasonably be expected to be conferred on the Minister or a "family member" as a consequence of the making of a decision or the taking of any action in the exercise of a public function or power (s 7(3) of the Code). A "family member" includes a person with whom the Minister "is in an intimate personal relationship" (s 11).

156 Most relevantly, whether there is a conflict between the Minister's public duty and private interest depends solely on whether that interest (being the expectation of the private benefit) "could objectively have the potential to influence the performance of [the Minister's] public duty".

157 The Code and Schedule contain no provisions which indicate that a close personal relationship, and any benefit enjoyed or secured by maintaining and advancing it, is not capable of constituting a "private interest" within the meaning of the Code. Clause 13 of the Schedule contemplates that Ministers "may" if they have "some other substantial personal connection" with a matter, or for any other reason, disclose an interest, even if the interest "might not comprise a conflict of interest". Other provisions in the Code describe "private benefits" in terms which are capable of including non-pecuniary advantages (see, for example, s 8, the reference there being to "*any* private benefit", as well as ss 9 and 10). Indeed, it is worth repeating that the definition of "private benefit" in s 11 is "any financial *or other advantage to a person*…" (emphasis added).

158 Ultimately, the applicant's argument as put by reference to the terms of the Code misconstrues the expression "private interest" where used in the definition of "conflict of interest" in s 7(3) of the Code. The argument starts from the position that this

expression does not include every kind of non-pecuniary interest; and concludes with the bare assertion that, where there is no more than a personal connection, there is no "private interest". This construction of that expression would have the effect of excluding from the circumstances in which there might be a conflict of interest within s 7(3) any non-pecuniary "interest" of a Minister, which is no more than a personal connection, notwithstanding that the nature and extent of that interest is such that it could objectively have the potential to influence him or her in the making of any decision or taking of any action. There is no warrant in s 7(3) or the Code more generally for treating the expression "private interest" as doing more than referring to *any* personal interest of a Minister, leaving the question whether that interest is sufficient to give rise to a conflict of interest, to which the Code applies, to the factual evaluation required by s 7(3).

159 That evaluative exercise is to be undertaken objectively and by reference to the underlying circumstances, including the nature of the interest and its potential to influence the performance of the relevant public duty arising with respect to the making of a decision or taking of any action.

160 The Commission's findings as to the "close personal relationship" between the applicant and Mr Maguire are at [10.8]-[10.38]. The Commission accepted Counsel Assisting's submission that an aspect of that relationship was the applicant's "concern to address what she perceived as Mr Maguire's insecurities", which, as a matter of human experience, was "expected to have manifested itself in a continuing desire to assuage his feelings and support him to the best of her ability" ([10.29]). The Commission found that the relationship between Ms Berejiklian and Mr Maguire, "being one of mutual love and a mutual close emotional connection", was capable of influencing and, as discussed in relation to ground 2, in the case of Ms Berejiklian did "influence her conduct both personally and in the performance of her public duties" ([10.38]).

161 It was open to the Commission to find that the close personal relationship between the applicant and Mr Maguire was, from her perspective, a "private interest" that gave rise to a conflict of interest and duty. Whether it did so called for an evaluative judgment, which it was within the Commission's authority to undertake.

162 In the result, ground of review 3 is rejected.

Ground of review 4

163 This ground is:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding that Ms Berejiklian had a legally enforceable positive duty to act only according to what she believed to be in the public interest (R [10.207], [10.210], [11.409]). Properly understood, Ms Berejiklian's public duty comprised a negative obligation

> proscribing the use of her position to promote her own pecuniary interests, or those of certain third parties, in circumstances of a conflict, or a real or substantial possibility of a conflict, between those interests and her duty to the public…

164 The applicant's position before the Commission (see [3.59]) and in this Court is that, properly understood, a breach of public trust in s 8(1)(c) reduces to breach of a negative obligation proscribing self-interested conduct. That negative obligation is said to have been correctly formulated by Beech-Jones J in *R v Obeid (No 2)* [2015] NSWSC 1380 when considering the duties of a parliamentarian in the context of a prosecution for misconduct in public office. At [75], his Honour said that:

> … the nature and scope of a parliamentarian's duty reduce to a negative obligation not to use their position to promote their own pecuniary interests… in circumstances in which there is a conflict, or a real or substantial possibility of a conflict, between those interests and their duty to the public.

165 This statement adopts Mason J's formulation of the proscriptive duty of a fiduciary (*Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 at 103; [1984] HCA 64) and applies it by analogy to a member of Parliament. While the statement in *R v Obeid (No 2)* treats a parliamentarian like a fiduciary in his or her relation to the state, it does not purport to describe the more general "duty to the public" in respect of which any "conflict" might arise. Nor does it adopt the wider "conflict rule" or extend to the promotion or pursuit of non-pecuniary interests whilst in a position of conflict.

166 Thus, the statement in *R v Obeid (No 2)* describes the "conflict" as being between a parliamentarian's pecuniary interests and his or her "duty to the public", the latter necessarily being something other than the proscriptive duty.

167 That proscriptive duty described prohibits the promotion or pursuit of personal interest, as do the formulations of a fiduciary's "liability to account" in *Chan v Zacharia* (1984) 154 CLR 178 at 198-199 (Deane J); [1984] HCA 36. However, as Deane J observed (at 198), in *Boardman v Phipps* [1967] 2 AC 46 at 123, Lord Upjohn said with respect to the fiduciary's duty to account and the wider "conflict rule":

> Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case. The relevant rule for the decision of this case is the fundamental rule of equity that a person in a fiduciary capacity must not make a profit out of his trust which is *part of the wider rule that a trustee must not place himself in a position where his duty and his interest may conflict*. (Emphasis added.)

168 As is made clear in *Chan v Zacharia* (at 198 (Deane J)) and *Hospital Products* (at 103 (Mason J)), the "wider" conflicts rule referred to by Lord Upjohn – that a person is not to allow a conflict to arise between his or her duty and interest – is not a rule of equity but rather, in the words of Sir Frederick Jordan (*Chapters on Equity in New South Wales* (6th ed, 1947, Thomas Henry Tennant) at 115), a "counsel of prudence".

169 Lord Upjohn continued at 124, referring to Lord Cranworth LC's statement of a fiduciary's duty in *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq 461 at 471:

> And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.

170 As Lord Cranworth LC's formulation of the fiduciary's obligation makes clear, it is necessary to identify the interests of those whom the fiduciary is "bound to protect". The fiduciary's duty in respect of those interests arises where the fiduciary has undertaken "to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense". The fiduciary thereby "comes under a duty to exercise [that] power or discretion in the interests of the person to whom it is owed" (*Hospital Products* at 96-97 (Mason J)).

171 The Commission proceeded on the basis that it is a breach of public trust for a parliamentarian to exercise powers or functions whilst in a position where his or her private interests may conflict with the proper exercise of his or her public duty. For this purpose, that public duty is sufficiently described by Isaacs and Rich JJ in *R v Boston* (1923) 33 CLR 386 at 400; [1923] HCA 59 as "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community" (italics in original). As has already been said at [151] above, in *Re Day (No 2)* at [49], that obligation is described by Kiefel CJ, Bell and Edelman JJ as including the duty "to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations". See also *Re Day (No 2)* at [179] (Keane J) and [269] (Nettle and Gordon JJ), and *Hocking v Director-General of the National Archives of Australia* (2020) 271 CLR 1; [2020] HCA 19 at [243], where Edelman J observes that the "loose references" to public powers being exercised "as it were upon trust" are "expressions of the duty of loyalty owed by holders of public offices created 'for the benefit of the State'".

172 The findings made by the Commission included that the applicant's conduct constituted breaches of public trust (s 8(1)(c)) because she had participated in ERC decisions concerning the ACTA and RCM funding proposals whilst in a position where her private interest in her relationship with Mr Maguire, the proponent of those proposals, conflicted with her public duty. The Commission formulated that public duty in positive

terms and as requiring that the applicant act only in accordance with what she believed to be the public interest, uninfluenced by other considerations ([11.409]). The Commission cited in support of that conclusion *Re Day (No 2)* at [49].

173 The Commission also referred (at [11.410]) to cl 1 of the Preamble to the Ministerial Code, which provides that Ministers must "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".

174 In this context, the applicant's contention that there was a material error by the Commission in formulating the broad content of her "public trust" duty must be rejected. First, a Minister's obligation not to breach public trust is expressed more broadly than an obligation prohibiting the promotion of private pecuniary interests in circumstances where there is a conflict of interest and public duty. Secondly, that public duty is sufficiently identified in the cases cited above, including *R v Boston* and *Re Day (No 2)*. The Commission did not err in identifying the nature of that duty for the purpose of determining whether there was a conflict of interest and duty. Nor did it err in concluding that the applicant's having exercised powers and functions whilst in a position of conflict of interest and duty would constitute a breach of public trust within s 8(1)(c).

175 The analysis impugned by this ground was relevant to two points in the Commission's reasoning in support of each of these "ultimate" findings. The first was in making findings of a breach of public trust under s 8(1)(c) by exercising functions whilst in a position of conflict. In relation to ACTA, that finding is at [11.460]. In relation to RCM Stages 1 and 2, those findings are at [12.223]. The second was in addressing s 9(1)(d) in relation to the conduct found to constitute a breach of s 8(1)(c). In that analysis, which required attention to whether there was a substantial breach of the Ministerial Code, the Commission held that the applicant was in a position of conflict between her public duty "as a representative of others to act in the public interest" and her private interest. In relation to ACTA, the finding is at [11.452]; and in relation to RCM Stages 1 and 2, it is at [12.225]. The Commission concluded for the purposes of s 9(1)(d) that there were substantial breaches of s 7(2) of the Code and of cll 10(1), 11 and 12 of the Schedule to the Code in relation to the ACTA funding ([11.489]) and RCM Stages 1 and 2 ([12.255]).

176 It follows that there was no material error of the kind alleged by this ground in the Commission's findings of "serious corrupt conduct" relying on breaches of public trust within s 8(1)(c).

177 It is unnecessary to enter further into any debate as to whether the obligations of a fiduciary are only proscriptive or, depending on the relationship, can include affirmative obligations such as that of a company director who is said to owe a fiduciary duty to exercise powers bona fide in the interests of the company a whole (see *Xiao v BCEG International (Australia) Pty Ltd* (2023) 111 NSWLR 132; [2023] NSWCA 48 at [111]-

[114] (Gleeson JA)). What is clear, however, is that there is a difference between the fiduciary obligation prohibiting the pursuit of personal interest and the affirmative public duty of a Minister to exercise powers and functions "with fidelity and with a single-mindedness for the welfare of the community" (*R v Boston* at 400).

178 This ground is not made out.

Ground of review 5

179 This ground is:

> Further or in the alternative to ground 1, the Commission erred in law in finding that Ms Berejiklian engaged in conduct constituting a breach of public trust by failing to "*act only according to what she believed to be in the public interest*", with such conduct constituted by her non-disclosure of her non-pecuniary personal relationship with Mr Maguire (R [11.446]-[11.451], [12.181], [12.195]-[12.197], [12.222])… (Emphasis added.)

180 This ground addresses the findings as to the conduct found to be in breach of s 8(1)(c) and characterised as "serious corrupt conduct". It is said that the material conduct in which the Commission found the applicant had engaged, and in breach of s 8(1)(c), was the applicant's non-disclosure of her personal relationship with Mr Maguire.

181 The issue between the applicant and Commission is whether, as the applicant contends, the Commission found that the breaches of s 8(1)(c) were the applicant's non-disclosure of her personal relationship, which constituted a failure to "act only according to what she believed to be in the public interest".

182 In the applicant's written submissions, it is said not that the Commission made such a finding, but rather that the Commission "*treated*" the applicant's non-disclosure as itself amounting to such a breach.

183 Reference to the Commission's findings shows that the breach found in the case of the ACTA and RCM Stages 1 and 2 funding was "exercising her official functions in relation to funding promised and/or awarded… without disclosing her close personal relationship with Mr Maguire when she was in a position of conflict of interest between her public duty and her private interest" (as to ACTA, see [11.460]; as to RCM Stages 1 and 2, see [12.223]). Having made those findings, the Commission then turned to s 9(1)(d) and recorded its findings in relation to the breach of s 8(1)(c) as being that "Ms Berejiklian was in a position of conflict when she exercised her official functions" in relation to each of ACTA and RCM (as to the former, see [11.464]; as to the latter, see [12.225]).

184 In considering the question of substantial breach of the Ministerial Code, the lack of disclosure, which the Commission found was "wilful" (as to ACTA, see [11.464]; as to RCM Stages 1 and 2, see [12.196] and [12.221] respectively), informed the

Commission's assessment of whether the applicant's conduct involved breaches of s 7(2) of the Ministerial Code and cll 10(1), 11 and 12 of the Schedule to the Code, as well as whether those breaches were substantial.

185 For these reasons, ground of review 5 is not made out. The Commission did not find that the applicant breached her duty of public trust under s 8(1)(c) simply by not disclosing her relationship with Mr Maguire. The breaches as found were exercising her official functions whilst in a position of conflict of duty and interest. That involved no error of law. Findings were then made in relation to breaches of the Ministerial Code, which included failures to disclose. However, those findings of breach were made for the purposes of s 9(1)(d) rather than s 8(1)(c).

Ground of review 6

186 This ground is:

> Further or in the alternative to ground 1, the Commission exceeded its authority and institutional competence by purporting to make findings as to the merits of the decisions concerning the ACTA and RCM proposals, and using those findings as a basis to assess whether Ms Berejiklian believed her conduct to be in accordance with the public interest (R [11.394]-[11.395], [11.456]-[11.457], [11.609], [12.205], [12.213]-[12.214]). The assessment of the merits of such decisions, and whether they are in fact in the public interest, is the exclusive province of the elected representatives responsible for them…

187 The applicant submits that the Commission assessed for itself whether the exercises of power in relation to the ACTA and RCM funding proposals were in the public interest. Specifically, it is said that the Commission purported to assess the merits of the proposals, and then used those findings as a means of assessing whether the applicant supported them because she believed they were in the public interest. Particular reference is made to 11 paragraphs in the Report. It is said that this assessment of whether these proposals were in the public interest was "beyond ICAC's institutional competence" and was the "exclusive province of the elected representatives responsible for them". It is also said that the Commission "was neither equipped for nor tasked with reviewing the merits of such decisions", and that the Commission erred in law in seeking to do so.

188 The Commission maintains that the applicant's argument is based upon a misconstruction of its reasons. It says that it did *not* decide for itself the merits of any of the ACTA or RCM proposals in making its findings of "serious corrupt conduct". Rather, in assessing whether the applicant had engaged in "partial" conduct in breach of s 8(1)(b), it had regard to contemporaneous assessments and appraisals made by participants engaged in the consideration process which called into question the merits of those proposals. The Commission considered that any such "*perceived* lack of merit and enthusiasm for the proposals" (emphasis added) was a circumstance to be taken into account and contrasted with the applicant's support for the proposals, thereby suggesting a degree of partiality on her part. Insofar as the Commission made

reference to the perceived merits of any of the proposals in confirming its findings arising from breaches of public trust, it submits that these references were not material to those findings.

189 Eight of the 11 paragraphs in the Report relied on by the applicant in support of this ground (being those identified in the ground of review, plus [11.393] and [11.583]-[11.584]) relate to ACTA. The remaining three relate to RCM.

190 At [11.393]-[11.394], the Commission records the applicant's submissions as to the relevance of the merits of any of the proposals. First, the applicant submitted that the merits of the ACTA proposal had "little, if any, rational bearing on the allegations against her". Secondly, it was said that it was beyond the function or role of the Commission to make any "concluded finding as to the merits" of either the ACTA or RCM proposals. Thirdly, it was said that there was "simply no utility" in "dredging through, and making findings on, historical concerns of departmental officers who may have been sceptical as to the merits of the proposal" in circumstances where the ACTA proposal was actively promoted by the relevant Minister (Mr Ayres, the then Minister for Sport) and the subject of a unanimous ERC decision.

191 In response, at [11.395] the Commission states that it had "not itself determined [the ACTA] proposal's merits"; rather, it had considered evidence of those who were involved in the approval process, politically and administratively, as part of its investigatory process. The Commission maintained that the merits of the proposal — in this context referring to the merits as perceived at the time by those whose task it was to consider critically the merits or otherwise of such a proposal — were "demonstrably germane" to that investigation.

192 When considering whether it should be inferred that the applicant "went out of her way" to ensure the ACTA proposal went forward because of her relationship with Mr Maguire, and not because of its "inherent merits", the Commission at [11.456] described those inherent merits as "flimsy, if not non-existent", but not by reference to its own assessment (see, for example, the summary of a Treasury analysis at [11.457]). Earlier, at [11.399], the Commission had also summarised contemporaneous Treasury views concerning the ACTA proposal:

> … 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'.

193 There was nothing irrational or otherwise impermissible in the Commission's reasoning process making reference to the merits of the ACTA or RCM proposals as they were perceived at the time by those charged with the making of such assessments. That was a circumstance which could be taken into account in forming a view about the larger question as to whether the applicant's support for the proposals was partial. It was

obviously not the only factor, and, relevantly to this ground, doing so did not involve the Commission impermissibly attempting to form its own view as to the merits of the proposals.

194 At [11.583] and [11.584], the Commission noted, principally by reference to a memorandum of Mr Blunden, the director of strategy of then Premier Baird, dated 12 December 2016, that 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". That somewhat colourful memorandum is dealt with more fully by the Commission at [11.153] to [11.169]. Mr Blunden recommended that the proposal be opposed. His view was 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 doing so wisely ([11.155]).

195 As to the perceived merits of the ACTA proposal, the Commission found that from the outset Mr Blunden suggested the proposal be removed from the ERC agenda. It was removed, but later restored. There was a question as to whether the applicant was involved in its being restored. None of this involved the Commission making findings as to the merits of the decisions concerning the ACTA proposal. The fact that the memorandum was prepared and circulated was a circumstance that could be taken into account when considering the question of partiality.

196 Finally in relation to the ACTA proposal, the Report at [11.609] contained general observations by the Commission as to its authority to investigate matters arising under the Code, including those identified in cl 6 of the Schedule to the Code. It contains no finding as to the merits of either of the funding proposals or as to whether it was in the public interest for them to proceed.

197 With respect to the RCM proposal, at [12.205] the Commission noted the advice of Mr Bolton (director, Riverina Murray, Department of Premier and Cabinet Regional) that this proposal was "by no means a top order priority for the community and could [be] seen as quite a 'political' announcement".

198 At [12.213] and [12.214], the Commission notes that the applicant "pressed ahead" with her support of the RCM Stage 2 proposal, understanding that the announcement of that funding on 24 August 2024, during the by-election for Mr Maguire's seat, was not supported by any of her political staffers.

199 None of these findings and observations involves the Commission deciding for itself the merits of either proposal, and doing so for the purpose of assessing whether the exercises of power were in fact in the public interest. Rather, it has had regard to evidence as to the perceived merits or otherwise of the proposals at the time as a circumstance relevant to whether the applicant acted with partiality and was influenced in doing so by her relationship with Mr Maguire.

200 It follows that this ground of review is not made out.

Ground of review 7

201 This ground is:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding that cl 7, and cll 10-12 of the Schedule of the Ministerial Code imposed disclosure obligations on Ms Berejiklian when she occupied the office of Premier (R [10.124]). Properly understood, the Premier's role in the conflict disclosure regime prescribed by the Ministerial Code is the recipient of disclosures, and the maker of rulings as to when Ministers are permitted to act following disclosure. This finding was material to:
>
> > a. the ultimate finding that Ms Berejiklian engaged in serious corrupt conduct in connection with decisions concerning the RCM proposal, involving a substantial breach of the Ministerial Code for the purposes of s 9(1)(d) of the ICAC Act (R [1.5.3], [12.255]).

202 Ms Berejiklian accepted that the Ministerial Code applied to her when she was Treasurer, and accordingly at the time the ACTA funding was dealt with at the ERC meeting on 14 December 2016 ([10.76]). However, she maintained that it did not apply to her when she was Premier, and accordingly at the time when the RCM Stage 1 decisions were made at ERC meetings on 12 and 24 April 2018 ([12.84], [12.90]), and when the RCM Stage 2 recital hall funding reservation and commitment were made on 24 August 2018 ([12.137], [12.153]).

203 Each of the findings as to "serious corrupt conduct" involving a "breach of public trust" included for the purposes of s 9(1)(d) that there were also breaches of s 7(2) of the Ministerial Code (as well as breaches of cll 10(1), 11 and 12 of the Schedule to the Code).

204 For convenience, the immediately relevant provisions of the Code are as follows:

> **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… and be seen to pursue the best interests of the people of New South Wales to the exclusion of any other interest.
>
> …
>
> 3 Ministers have a responsibility to maintain the public trust that has been placed in them by performing their duties with honesty and integrity… 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.
>
> …
>
> 11 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.
>
> **1 Preliminary**
>
> (1) This is the NSW Ministerial Code of Conduct.
>
> (2) The NSW Ministerial Code of Conduct applies to all current and future Ministers and Governments.
>
> …
>
> **4 Compliance with the Schedule to the NSW Ministerial Code of Conduct**
>
> 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.

…

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.

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.

…

11 Definitions

In this Code (including the Schedule), and unless the context otherwise requires:

…

family member, in relation to a Minister, means:

…

(e) any other person with whom the Minister is in an intimate personal relationship.

…

Minister includes:

(a) any Member of the Executive Council of New South Wales, and

…

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

…

Part 3 Conflicts of interest

10 Duty to disclose

(1) A Minister must promptly give notice to the Premier of any conflict of interest that arises in relation to any matter.

…

11 Form of disclosure

(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.

12 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.

13 Discretion to disclosure 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.

…

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.

…

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

205 The applicant submitted before the Commission and submits to this Court that the conflicts of interest provision in s 7 of the Code is to be construed as not applying to the Premier. That was said to be the position notwithstanding that the definition of “Minister” includes “any Member of the Executive Council of New South Wales” (s 11), and accordingly the Premier; and notwithstanding that s 1(2) of the Code states that it “applies to all current and future Ministers and Governments”. Moreover, s 35E(1) of the

Constitution Act 1902 (NSW), a provision inserted in 1987, makes express reference to the Premier as being a Minister of the Crown. See also *New South Wales v Bardolph* (1934) 52 CLR 455 at 507; [1934] HCA 74, where Dixon J noted that "in New South Wales the Premier is a Minister of the Crown known to the law"; and Anne Twomey, *The Constitution of New South Wales* (2004, Federation Press) at 690-691.

206 The argument in support of this submission is as follows. The "key" provisions (s 7 and Sch cl 12) set up a "dichotomy" between Ministers (other than the Premier), on the one hand, and the Premier, on the other. That dichotomy is apparent in s 7(1) and (2), and in a "regime" which provides for the Premier to superintend a Minister's obligations, receiving their disclosures (Sch cl 10) and making rulings as to whether a potential conflict so disclosed prevents the relevant Minister from continuing to act (s 7(2), Sch cl 12(2)).

207 The Commission rejected this construction of the Code ([10.84]-[10.126]). It did not err in doing so.

208 As the Commission contends, there is no such dichotomy between a Minister, other than the Premier, and the Premier when s 7 of the Code is read together with cl 12 of the Schedule. Section 7(3) in its terms applies to all Ministers, including the Premier. All are "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 the first sentence of s 7(3) or s 7(3)(a) and (b) are satisfied. Under cl 12(1) of the Schedule, any Minister having such a conflict of interest must abstain from making or participating in a decision, or from taking or participating in any action in relation to the matter.

209 The obligation to abstain is subject to cl 12(2) and (3). The process in cl 12(2) does not address the position of the Premier, who accordingly could not be subject to a procedure providing for the making of a ruling by him or her. However, that is not the case in relation to cl 12(3), which addresses conflicts arising during a meeting of the Executive Council, the Cabinet or a Cabinet Committee, in which case the Minister having the conflict must abstain from participating, subject to the Premier, *or the chair of the meeting in the absence of the Premier*, otherwise approving. The application of the ruling regime in cl 12(2) to the Premier is provided for by cl 27(5) of the Schedule, which deals with the subject "Rulings", and provides that a "ruling in respect of the Premier may be given if approved by the Cabinet".

210 This construction of these provisions is not strained, and gives effect to the language of s 1(2) of the Code. That subsection provides that the Code is to apply to *all* current and future Ministers, including the Premier, as the definition of "Minister" in s 11 provides.

211 Section 4 of the Code makes a knowing breach of cl 12(1) of the Schedule (which requires a Minister with a "conflict of interest" as defined in s 7(3) of the Code to abstain from decision-making) a substantial breach of the Code by the Minister concerned. As has already been observed, the Code contains provisions that give the Premier a role in managing and dealing with conflicts of interest, in each case being conflicts other than those of the Premier, which would prevent the relevant Minister from making or

participating in the relevant decision or making or participating in any action concerning it. Those provisions in relation to conflicts of interest include s 7(2) of the Code and cll 11(2)(c), 12(2) and (3)(b) of the Schedule.

212 Finally, there is cl 27 of the Schedule, which concerns "rulings" generally, and as described in cl 27(5) contemplates a "ruling in respect of the Premier" that may be given "if approved by the Cabinet". The definition of "ruling" in s 11 of the Code is "a ruling by the Premier" under certain clauses of the Schedule, including cl 12(2). However, the application of that definition is qualified by the words "unless the context otherwise requires" at the beginning of s 11. The "ruling" referred to in cl 27(5) is one which on its face is capable of applying to the Premier (as first Minister) with respect to the application of cl 12(2) of the Schedule, and accordingly the prohibition in cl 12(1), which is in the same terms as s 7(2).

213 As counsel for the Commission contended, there are in the universe of possibilities three ways of resolving how these provisions are to be understood with respect to their application to the Premier. The first is that contended for by the applicant. As the Premier cannot sensibly be the subject of the permissive regime contemplated or provided for by s 7(2) of the Code and cll 2(3)(c), 3(5)(c) and 12(3)(b) of the Schedule, cl 12(1) should be read down as not applying to the Premier at all, notwithstanding the emphatic language of s 1(2) and 4 of the Code and the language of cll 1, 3, 4 and 11 of the Preamble to the Code (extracted at [204] above). The second is that the Premier is subject to substantially the same restrictions in s 7(2) and cl 12(1) without any mechanism for him or her to seek dispensation. The third possibility is that the power in cl 12(2) to make a ruling authorising the Minister to continue to act may be exercised by the Cabinet where the Minister with the conflict is the Premier, and where such a ruling is made, that ruling would also satisfy the requirement for a written approval in s 7(2).

214 In its terms the Code applies to all current and future Ministers, and should be construed, if at all possible, so that it has that consequence. The language of cl 27(5) of the Schedule provides the mechanism by which that is to be achieved, providing for "rulings" by the Cabinet when the Minister in question is the Premier. That mechanism permits the Code and Schedule to apply consistently to all Ministers, including the Premier. The third of the three possible constructions is clearly to be preferred.

215 Adopting that interpretation, the duty to act honestly and in the public interest, imposed by s 6 of the Code, applies to all Ministers, including the Premier. The description of what constitutes a "conflict of interest" (s 7(3)) in its terms is capable of applying to all Ministers, including the Premier. Section 7(2) in its terms applies to the Premier, except

in relation to the obtaining of the "written approval of the Premier". Clause 12(1) of the Schedule would also apply in those circumstances, and a ruling under cl 12(2), approved by the Cabinet, would prevail and allow the Premier to continue to act.

216 Clause 10(1) requires a Minister who has a conflict of interest to give notice to the Premier in a form required by cl 11(1), and to place that form on the Ministerial Register of Interests.

217 If a matter arises in which a Minister has a conflict of interest during a meeting of the Executive Council, Cabinet or a Cabinet Committee, cll 11(2) and 12 require the Minister, including the Premier, to abstain from participating and being present unless the Premier or chair of the meeting, in the absence of the Premier (including because the Premier is the subject of the conflict), approves otherwise.

218 It follows that none of the material findings made by the Commission with respect to the applicant's conduct after 23 January 2017 involves an error of law because they treated the relevant provisions of the Ministerial Code as applying to the applicant as Premier.

219 Those specific findings are with respect to ACTA at [11.474], and in respect of RCM Stages 1 and 2 at [12.255]. The following findings, common to each, were made. No notice as required by cll 10(1) and 11 of the Schedule was given to the Cabinet or placed on the Ministerial Register of Interests; the applicant did not abstain from participating in decision-making, thereby breaching cl 12(1) of the Schedule as well as s 7(2) of the Code; and the applicant did not seek a ruling from the Cabinet as provided by cl 12(2). In relation to RCM, a further finding was made that the applicant, in breach of cl 11(2), did not comply with her obligations to disclose a conflict of interest in a meeting of the Cabinet or of a Cabinet Committee ([12.241.4]). A similar finding was made with respect to ACTA ([11.474.1.4]).

220 Each of these findings was found to be a substantial breach of the Ministerial Code for the purpose of s 9(1)(d).

221 This ground of review is not made out.

Ground of review 8

222 This ground is:

> Further or in the alternative to ground 1, the Commission, having found that a finding of partial conduct under s 8(1)(b) of the ICAC Act must relate to a duty to act impartially (R [11.570]), made a material error of law in finding that Ms Berejiklian's conduct in connection with funding promised and awarded to ACTA and RCM Stage 2 was constrained by a legal duty to act impartially (R [10.363])…

223 It is necessary first to place this ground in context. It is directed to funding promised and or awarded to ACTA and RCM Stage 2. The ground is that there was no legal duty upon the applicant to act impartially when exercising her official functions in relation to those funding proposals.

224 The Commission accepted at [11.570] that a "finding of partial conduct must relate to a duty to act impartially". That statement harks back to the Commission's discussion at [10.351]-[10.363], which was in turn directed to Gleeson CJ's observation in *Greiner v*

Independent Commission Against Corruption (1992) 28 NSWLR 125 at 144 that "the references to partial and impartial conduct in s 8 [of the Act] must be read as relating to conduct where there is a duty to behave impartially".

225 At [10.363] the Commission said:

> … 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.

226 The Commission considered and proceeded on the basis that there was "no doubt that Ministers must act impartially when allocating public funds" (see [11.570] in relation to ACTA and [12.303] in relation to RCM Stage 2). In each case the Commission concluded that the applicant consciously preferred the relevant proposal for a reason which was unacceptable, namely "her close personal relationship with Mr Maguire".

227 The applicant maintains by this ground that as Treasurer and member of the ERC exercising the power to grant funding in relation to ACTA, and as Premier exercising the power to reserve funds in respect of RCM Stage 2, that she had no duty to act impartially. It is said that in determining whether the exercise of a Minister's functions is subject to a duty to be impartial it is necessary to identify the specific conduct to which the duty attaches.

228 In *Greiner*, the conduct the subject of investigation involved the appointment of a person to a position in the public service where there was a statutory requirement for that appointment to be made on the basis of merit. Gleeson CJ and Mahoney JA were satisfied that the duty to act impartially was engaged.

229 At 160, Mahoney JA described the mischief the Parliament sought to deal with by its proscription of partiality as being the misuse of public power. As to that misuse, he observed:

> 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…

230 The Court of Appeal of England and Wales made the same point in *Edge v Pensions Ombudsman* [2000] Ch 602 at 627 in the context of the obligation of the trustees of a pension scheme:

> … the so-called duty to act impartially—on which the ombudsman placed such reliance —is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant…

231 It is not controversial that the fundamental obligation of a member of Parliament is "*the duty to serve* and, in serving, to act with fidelity and with a single-mindedness for the welfare of the community" (emphasis in original) (*R v Boston* at 400 (Isaacs and Rich JJ)). As has already been said at [151] and [171] above, the content of that duty includes "an obligation to act according to good conscience, uninfluenced by other considerations, especially personal financial considerations" (*Re Day (No 2)* at [49]

(Kiefel CJ, Bell and Edelman JJ)). That duty extends, a fortiori, to a Minister to whom specific powers and functions are conferred and supports the existence of a duty to be impartial in circumstances where there are purposes for which those powers and functions may be exercised, as well as standards, criteria or other factors which are to be considered or taken into account in the exercise of those powers and functions. Here, the relevant member of Parliament was the Treasurer or Premier exercising specific powers in relation to the allocation of public funds for variously described purposes.

232 The Commission described the ERC as a "committee of Cabinet" whose role was "to assist Cabinet and the treasurer in framing the fiscal strategy and budget for Cabinet's consideration" and to consider "proposals with financial implications brought forward by ministers" ([11.170]). The applicant as Treasurer caused the ACTA proposal to be included on the agenda for the ERC meeting of 14 December 2016, which resulted in that committee approving the $5.5 million grant.

233 The grant as approved was to be sourced from the Regional Growth-Environment and Tourism Fund (RGET Fund), which was a part of the Restart NSW Fund, which in turn was established for the purpose of "setting aside funding for and securing the delivery of major infrastructure projects and other necessary infrastructure" (*Restart NSW Fund Act 2011* (NSW), s 3). At the time of the ERC ACTA decision, the RGET Fund was a "new fund", the guidelines of which had not yet been finalised ([11.245]-[11.246]). That fund was formed under the *Restart NSW Fund Act 2011* (NSW), and the relevant Minister for that Act was the Treasurer ([11.241]-[11.246]). Although it was proposed that the majority of that funding would go through "competitive grounds based programs", Mr Barnes' evidence was that there were "two or three" exceptions to this occurring, including the ACTA funding proposal ([11.249]).

234 In these circumstances the Commission did not err in proceeding on the basis that in participating in decisions concerning any grant allocation from the RGET Fund to ACTA the applicant was required to act in the public interest and to exercise the relevant power for the purpose for which it was conferred and consistently with any eligibility and assessment criteria. At the same time, the applicant was required not to take into account any extraneous or irrelevant purpose or consideration.

235 The position was similar in relation to the RCM Stage 2 proposal. A further $20 million in funding for this stage was the subject of a commitment and funding reservation recorded in the letter on the Premier's letterhead and signed by Mr Perrottet as Treasurer on or shortly before 24 August 2018. That $20 million was "reserved" against the Regional Communities Development Fund (RCD Fund), which was a "competitive fund" launched through the Regional Growth Fund ([12.137], [12.156]). The effect of that reservation was that available funding in that amount could not be spent on other projects unless the reservation was released.

236 Ground of review 8 should be rejected.

Ground of review 9

237 The terms of this ground are as follows:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding partial exercises of Ms Berejiklian's official functions within the meaning of s 8(1)(b) of the ICAC Act, in the absence of a finding that the conduct would not have been engaged in but for an unacceptable reason (R [10.349]-[10.350])…

238 Section 8(1)(b) provides that "corrupt conduct" includes "any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions". The applicant submitted before the Commission that conduct is only partial, and thus corrupt, within the meaning of s 8(1)(b) where that conduct would not have been engaged in "but for" the partiality ([10.340]-[10.341]).

239 Limiting the application of s 8(1)(b) to conduct which would not have been engaged in but for the partiality would exclude from the scope of that provision some exercises of a public power or function that were partly but not solely influenced by the prohibited private interest. That would be so because the blunt "but for" test would exclude from the scope of s 8(1)(b) any exercise of a power or function that would have occurred even if the prohibited private interest had not influenced the public official.

240 At this point, the Commission's findings as to partial conduct in breach of s 8(1)(b) should be recalled. As to the ACTA funding, they are at [11.572] and [11.593]-[11.594], and in the following terms:

> 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…
>
> …
>
> 11.593. 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.

241 In relation to RCM Stage 2, the relevant findings are at [12.313]-[12.314]:

> 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.

242 In relation to the breach of the s 11 duty, the relevant findings are at [13.387]-[13.389]:

> 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.

243 The ground of review contending that the applicant did not have a duty to act impartially has been rejected (see [222]-[236] above). As has already been repeatedly observed, in *Re Day (No 2)* at [49], Kiefel CJ, Bell and Edelman JJ described a member of Parliament's "duty as a representative of others to act in the public interest" as including "an obligation to act according to good conscience, *uninfluenced by other considerations*, especially personal financial considerations" (emphasis added). The duty in s 8(1)(b) and its prohibition of the "partial exercise" of official functions is directed to *any* exercise of those functions which is influenced by a private interest conflicting with that public duty.

244 In support of a "causal test", the applicant relies on a statement of Mahoney JA in *Greiner* at 161. In his discussion of the meaning of "partial" in s 8, Mahoney JA identifies at least five elements that, if present, would be "a sufficient indication of what is involved in partiality of the present kind". The last of those elements is 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" (*Greiner* at 161).

245 It is submitted that this element involves "an assessment of the relevant causal role of the reasons for the official's conduct", and that where the exercise of the relevant function was also engaged in for a proper or permitted purpose, it would not matter that there was also some perception of partiality, which did not in fact "cause" the conduct. In other words, and in the context of a decision to appoint someone to a position (as in *Greiner*), it is said that a Minister would not engage in partial conduct in breach of s 8(1)

(b) if he or she prefers a particular applicant over another for private gain where more probably than not in the absence of the promise of private gain the Minister would still have chosen the same person.

246 Contrary to the applicant's submission, however, Mahoney JA's analysis does not descend into or require any assessment of the "causal" role of the purposes "extraneous" to a proper exercise of a power. Rather, his Honour's analysis focuses on the purposes and motives of the relevant public official in exercising the power or function, and whether there was any consideration of a purpose which is "extraneous" or a reason which is "unacceptable". In doing so, his Honour recognised that the form of preference or advantage conferred as a result of partial conduct may lie merely in the process leading to the exercise of a power rather than the conferring of a benefit by the exercise itself. In either case, the critical matter was whether in the decision-making process there was a conscious and intentional preferring or advantaging for an unacceptable reason (at 161-162).

247 In *Macdonald v R; Obeid v R; Obeid v R* (2023) 112 NSWLR 402; [2023] NSWCCA 250, the Court of Criminal Appeal (Bell CJ, Basten AJA and Button J) considered the elements of the common law offence of "wilful misconduct (or misfeasance) in public office" ([58]). The Court did so in circumstances where it had been submitted, in reliance on the earlier decision in *Maitland v R* (2019) 99 NSWLR 376; [2019] NSWCCA 32, that one element of that offence required that it be established that the public official would not have done the charged acts "but for" an identified improper purpose (*Macdonald* at [55], [56]).

248 In considering that question, the Court in *Macdonald* made plain (at [63]-[66]) that no causative requirement forms part of any breach of a duty of confidentiality or of impartiality of a public official. In doing so, the Court cited Isaacs and Rich JJ in *R v Boston* at 396-397, where the following was said about a member of Parliament agreeing for pecuniary remuneration to violate the law regulating his duties in that capacity:

> Such violation may be positive or negative: it may consist of improper action or improper inaction. *It is wholly independent of the merits of the matter in respect of which it takes place*. A Judge who agrees for personal advantage to decide a cause in one prescribed way commits a crime, notwithstanding that as between the parties that decision might be just. A public ministerial officer who for private gain prefers one applicant to another is guilty of a crime, even though such preference would be otherwise fully justifiable. And equally, *if a member of Parliament agrees for private advantage to act contrary to law in relation to his duty with respect to the public acquisition of land, it is utterly immaterial that the land has not been overvalued or that, apart from the illicit agreement, the same result might, or even would, have followed*. (Emphasis added.)

249 Having referred to *Maitland* at [82] and [83], where there is reference to claims to relief for breaches of fiduciary duty and to remedies for unauthorised exercises of administrative power, in each case where the fiduciary or officer has taken into account both impermissible and permissible purposes, the Court of Criminal Appeal in *Macdonald* continued:

> [65] … Neither involved a deliberate breach of a duty of confidentiality, nor a breach of a duty of impartiality. To release confidential information in circumstances where you know you should not release it cannot usefully engage a test of 'causation'. In the case of impartiality, both statute and common law principles dictate a different approach. The relevant administrative law principles are those in relation to bias, which encompasses both prejudgment and partiality based upon an interest or association. Both actual bias and a reasonable apprehension of bias disqualify a decision-maker and, if a decision has been made, invalidate the decision. In a statement of principle adopted by Gummow J in *IW v City of Perth* [(1997) 191 CLR 1 at 51; [1997] HCA 30]:
>
> > 'Even though the decision-maker may in fact be scrupulously impartial, the appearance of bias can itself call into question the legitimacy of the decision-making process.'
>
> [66] Public confidence in public administration justifies such a principle, which cannot be diminished by asking whether the decision-maker would have made the same decision absent the appearance of bias.

250 The applicant's submission as to the "causal test" contended for was rejected by the Commission at [10.340]-[10.350]. Its reasons for doing so included that the language of s 8(1)(b) referring to conduct of a public official that constitutes or involves the partial exercise of an official function is not to be read down or as not applying to or including such conduct where the outcome of the exercise of the official function would have been the same, but for the intrusion and influence of the private interest. The Commission considered that to do so "would not promote the integrity objects of the ICAC Act but, rather, would limit the field of conduct which would fall within its terms" ([10.341]).

251 Focusing on the interactions of ss 8 and 9 of the Act, the Commission also said at [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 [in *Greiner* at 182, 184] 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'. 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. (Footnote omitted.)

252 The reference to "issues such as any mental element of a criminal … offence" harks back to [10.340], where reference is made to the decision in *Maitland* at [84] and [87]. In that case, the offence with which the Minister was charged was wilful misconduct in public office. There was an issue as to whether the trial judge had misdirected the jury in relation to the mental element of that offence in circumstances where the Minister had embarked on a transaction for purposes which included proper purposes and an improper purpose (so that the improper purpose was not the sole purpose). The Court held that the direction to the jury was not adequate. Fundamentally, it was necessary for the prosecutor to establish beyond reasonable doubt that the Minister exercised and intended to exercise the relevant power for the purpose of conferring the extraneous benefit, that not being the sole purpose. That meant that the prosecutor had to exclude as a reasonable possibility that the power was exercised for the other purpose or purposes.

253 At [84], the Court in *Maitland* concluded:

> … it seems to us that the direction as to the mental element of the offence should have been that Mr Macdonald could only be found to have committed the crime (subject to the other elements being made out) if the power would not have been exercised, except for the illegitimate purpose of conferring a benefit on Mr Maitland and DCM.

254 The Queensland Court of Appeal reached a similar conclusion in *R v Maudsley* (2021) 9 QR 587; [2021] QCA 268 at [30].

255 The question for this Court is whether the conduct found by the Commission was capable of constituting a "partial exercise" of any of the applicant's official functions. That conduct was that the applicant had consciously preferred the ACTA and RCM Stage 2 funding proposals, and concealed from the Commission Mr Maguire's conduct which she suspected concerned or might have concerned "corrupt conduct", for an "unacceptable" reason. The early High Court authorities of *R v Boston* and *Wilkinson v Osborne*, and recent High Court authority of *Re Day (No 2)*, to which reference has been made above, hold that a parliamentary member and Minister is to act in exercising public functions and powers "uninfluenced" by other considerations, and with "fidelity and with a single-mindedness for the welfare of the community".

256 Under s 8(1)(a), "corrupt conduct" includes any conduct that *could* adversely affect, directly or indirectly, the honest or impartial exercise of official functions. Similarly, having a conflicting private interest which is capable of influencing, and does influence, the exercise of a function or power is sufficient to constitute a "partial" exercise of the power under s 8(1)(b), and irrespective of whether the outcome of that exercise would not have been different in the absence of the private interest. In such circumstances, the position remains that the power has been exercised "influenced" by other considerations.

257 This conclusion is supported by the reasoning in *Macdonald* and the often cited and applied dicta of Isaacs and Rich JJ in *R v Boston* at 396-397.

258 Ground of review 9 should be rejected.

Ground of review 10

259 This ground is as follows:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding that Ms Berejiklian's conduct in connection with funding promised and awarded to ACTA and RCM Stage 2 involved the partial exercising of her official functions, without engaging in any comparative exercise addressing how Ms Berejiklian had or would have treated relevantly identical funding requests (R [10.301]-[10.334])…

260 As with ground 8, this ground is advanced as an error of law vitiating the Commission's partial conduct findings in relation to the funding promised and or awarded to ACTA ([11.594]) and in relation to the funding reserved and or awarded to RCM Stage 2 ([12.314]). The argument made is that for the Commission to make a valid finding of partial conduct it was legally necessary that it undertake a comparison between the

treatment said to involve or constitute partial treatment and the treatment of other persons or things "in relevantly identical circumstances". It is said that there was no such consideration by the Commission when making the findings referred to above.

261 The same argument was made to and rejected by the Commission ([10.301]-[10.339]). Relying on Mahoney JA's reasons in *Greiner* at 161, it was submitted on behalf of the applicant that a finding under s 8(1)(b) required "a comparison between the person granted the so-described 'partial' treatment and treatment of other persons in relevantly identical circumstances" ([10.301]). This language adopts a statement made by Grove J in *Woodham v Independent Commission Against Corruption* (1993) 30 ALD 390 at 396 (see [10.295]). That statement was directed to the absence of evidence in that case supporting a finding of "partiality" in the sense described by Mahoney JA in *Greiner* at 161. In doing so, Grove J does not say or suggest in *Woodham* that such a comparison has to be undertaken if there is to be a legally valid finding of a "partial" exercise of any official function within s 8(1)(b).

262 The adoption of a such a prescriptive rule is not supported by Mahoney JA's reasons or the likelihood that in many cases there will not be a relevantly identical comparator to the preferred or advantaged person or thing. The official function being exercised in *Greiner* was the appointment of a person to a senior position in the public service. Having described "partiality" by reference to the five elements which together were said to be "a sufficient indication of what is involved in partiality *of the present kind*" (emphasis added), Mahoney JA continued (at 161-162):

> In describing partiality in this way, I am conscious that exceptions, qualifications and explanations may be necessary for the application of the term in particular cases…
>
> 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…
>
> 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.

263 As these observations make plain, partiality involves a preference or advantage for an unacceptable reason, which may or may not occur in circumstances such as those in an appointment to public office, where the alleged partiality may be between identified individuals or classes whose comparative merits are amenable to analysis. Undertaking a comparison in such circumstances may assist in identifying preferences or advantages, depending on the nature of the power. It does not follow, however, that such an approach should be mandatory, and irrespective of the circumstances in which the alleged preference or advantage has been conferred.

264 The Commission correctly described, "without being exhaustive", the test generally to be applied (at [10.334]):

> … 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'.

265 In applying that test, and in concluding that there was partial conduct in relation to the ACTA and RCM Stage 2 findings, the Commission relied upon a number of matters as bespeaking "irregularity", whereby each of those proposals received advantages or preferences in the process leading to the exercise of power, in its exercise, and in subsequent events.

266 The Commission found that, with respect to the ACTA funding proposal, the circumstances in which it came onto the agenda for the ERC meeting on 14 December 2016 included to following, which are extracted at [132] above and again included here for convenience:

> 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 [an adviser within the applicant's office] 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 [Minister for Sport] 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'.
>
> …
>
> 11.572.11. When the matter was taken off the ERC agenda, Mr Maguire 'fired up', and Ms Berejiklian reinstated it.

267 As to the period following that ERC decision, the Commission made the following findings:

> 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. … 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…

> …
>
> 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.

268 As to the RCM Stage 2 funding proposal, the Commission held that, at the time the applicant as Premier approved the funding reservation on or shortly before 24 August 2018: she had no support from either the relevant departmental officers or her own staff ([12.276], [12.313]); there was no evidence of any assessment as to the feasibility or otherwise of RCM Stage 2 having been made at the departmental level ([12.276]); and the applicant accepted it was possible that her decision to support it was either contrary to or in the absence of departmental advice ([12.281]).

269 Specifically, Mr Harley did not have any recollection of advice sought or received from the department regarding the merits or otherwise of RCM Stage 2 ([12.282]). Ms Cruickshank and Mr Harley were not supportive of the proposal ([12.287]). Mr Burden could not recall anyone within the Premier’s office other than the applicant “wanting to push the project” ([12.289]).

270 As to the sequence of events, as extracted above at [125] on 30 July 2018 the applicant in a recorded telephone conversation with Mr Maguire undertook to him to “throw money at Wagga … lots of it”, and to do so in respect of Mr Maguire’s “three top things”, one of which was RCM Stage 2 ([12.103]-[12.104], [12.277]). From 30 July 2018, the applicant as Premier was the ultimate decision-maker with respect to funding commitments preceding the Wagga Wagga by-election in September 2018 ([12.128]). On or shortly before 24 August 2018, the then Treasurer, Mr Perrottet, signed a letter to Mr Barilaro on the applicant’s letterhead stating that he and the applicant had agreed to the reservation of up to $20 million from the RCD Fund in favour of RCM Stage 2

([12.137]). As at 24 August 2018, the scope of works for that project had not been finalised. Whether it met the RCD Fund guidelines was unknown, and a final business case had not been approved ([12.137]).

271 At that time, the view of Mr Barnes, then a deputy secretary of Regional NSW, was that the funding was not in the public interest ([12.124]); Ms Cruickshank said she was "definitely not pushing RCM Stage 2" ([12.130]).

272 There was no evidence that anyone other in Government than Mr Maguire supported RCM Stage 2 ([12.133]). Ms Cruickshank said that she would have been "surprised" if she had been aware that Mr Maguire had been consulted regarding any by-election commitments; and Mr Harley agreed that it would have been "a little bit strange" where Mr Maguire was by that time "persona non grata" ([12.280]).

273 In the broad scope of circumstances to which the section might apply, there is no reason in the language of s 8(1)(b) or otherwise for construing the reference to "partial conduct" as confined to treatment which is different from the treatment of other persons or things in "relevantly identical" circumstances. Making such a comparison is but one way to assess whether a person has been preferred or advantaged.

274 This ground of review is rejected.

Ground of review 11

275 This ground is as follows:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding that the duty in s 11(2) of the ICAC Act to report to the Commission any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct does not need to be confined to a 'matter' involving some specified subject matter, and may involve a generalised suspicion divorced from any particular subject matter (R [13.11]-[13.21])…

276 Section 11(2) of the Act imposes a duty to report to the Commission "any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct". The applicant submits that the "matter" to be reported must be a "specified subject matter". It is said that the identification of such a subject matter is necessary to permit a sensible consideration of whether there were "reasonable grounds" for a suspicion of corrupt or possibly corrupt conduct. Section 11(2) is said to require the reporting of something which is "articulated sufficiently to permit it sensibly to be regarded as possibly… corrupt".

277 This argument was made to the Commission. The Commission said in response, and by reference to the guidelines issued under s 11(3), that in its view the reporting provision may be engaged by a broad range of conduct, including where "a person [does] not even have information which identifies the individual" or where a "reporting minister … merely [has] 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" ([13.17]).

278 The Commission also rejected the applicant's contention that Counsel Assisting had "failed adequately to identify the 'matter' said to have been reportable". It continued (at [13.20]):

> … 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.

279 This ground of review ultimately raises a question as to the construction of s 11(2). That question is whether, for there to be a "matter that [a] person suspects on reasonable grounds concerns or may concern corrupt conduct", the matter must involve some "specified subject". The materiality of that question in turn depends on whether the Commission's findings involved "matters" which were not confined to a "specified subject matter". For the reasons which follow, that proposition is not established, making it unnecessary to address further any debate about the scope of the word "matter" in s 11.

280 The Commission's findings of breach of s 11 are at [13.367]-[13.368]. The subject matters of those findings are referred to by the labels "Badgerys Creek land deal", "Country Garden and Mr Hawatt", and "Mr Demian". The findings address the applicant's state of mind as at September 2017 (in relation to the "Badgerys Creek land deal") and after 13 July 2018 (in relation to each of the three matters).

281 The significance of those dates is as follows. In August and early September 2017, there was a series of intercepted telephone calls between the applicant and Mr Maguire concerning the "Badgerys Creek land deal". On 5 July 2018, the applicant and Mr Maguire had a conversation about his appearing 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, the applicant called on Mr Maguire to resign, believing that he "had been caught up with some people who… likely had… done some wrong" ([13.142]).

The "Mr Demian" subject matter

282 Mr Hawatt had been a councillor at Canterbury City Council until its amalgamation with Bankstown Council in May 2016 ([2.3]). Country Garden Australia Pty Ltd (Country Garden) was an Australian-based property developer ultimately owned by Chinese interests and held through a Hong Kong listed company. Mr Maguire and Mr Hawatt "worked" together with Country Garden to identify and introduce to Country Garden potential development sites. Mr Demian was a property developer and the owner of

such a site, described by the Commission as a "major project with a potential gross realisation of $2.5 Billion" in Camellia ([13.42]). As such, he was seeking a purchaser or joint venturer for that project.

283 At [13.42]-[13.43], the Commission found in relation to Mr Demian:

> The section concerning Charbel Demian in chapter [8] 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.
>
> 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.

284 There followed further communications in December 2016 and thereafter ([8.43]-[8.57]). Mr Maguire's evidence was that he was hoping to receive a financial benefit for assisting Mr Demian ([8.58]). However, Mr Maguire left it to Mr Hawatt to negotiate the commission that "they" would receive from Mr Demian ([8.58]).

The "Country Garden and Mr Hawatt" subject matter

285 In their 5 July 2018 conversation, Mr Maguire said to the applicant that he had been summonsed to the Commission because he had "introduced that idiot Hawatt to Country Garden", and that "Hawatt… pressured perhaps the general manager [of the Council] and others about planning to get planning approved so he could sell it to Country Garden" ([13.147]). The Commission also held that during this conversation Mr Maguire told the applicant that "he had made representations on behalf of property developers and assisted them by referring properties as potential investments to Country Garden", and that he had "also acknowledged that an 'incentive payment' for his introduction and assistance was within his contemplation" ([13.188]).

286 On 13 July 2018, Mr Maguire gave evidence in the Operation Dasha public inquiry. The Commission summarised that afternoon's evidence at [13.218]:

> … [Mr Maguire] 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…

The “Badgerys Creek land deal” subject matter

287 In April 2017, Mr Maguire met Ms Waterhouse and became aware that her family owned land on the western boundary of the Badgerys Creek airport site ([8.81], [8.82]).

288 In early September 2017, Mr Maguire told the applicant that he was interested in a land deal at Badgerys Creek, which “would give him enough money to pay off his debts in the order of $1.5 million” ([13.83]). There were discussions about that land deal between the applicant and Mr Maguire on 5, 6 and 7 September 2017 ([13.79]-[13.94]). At the time of these discussions, Badgerys Creek and the Western Sydney Airport was a “critical, and ongoing, economic development for the NSW Government” ([13.86]). In one of those discussions, Mr Maguire said that “we’ve done our deal so hopefully that’s about half of all that gone now”, to which the applicant responded “That’s good… I don’t need to know about that bit” ([13.87]).

289 In October 2017, Mr Maguire told the applicant that Ms Waterhouse had property at Badgerys Creek and that he had been involved in trying to resolve road access issues for her with the RMS ([8.212], [13.122]). On 18 October 2017, Mr Maguire took Ms Waterhouse to Ms Berejiklian’s office and asked her staff to solve Ms Waterhouse’s “big problem”, which was a need for road access to her Badgerys Creek property ([13.121]-[13.125]).

Conclusion as to ground of review 11

290 The applicant submits that it is “pivotal to the application of s 11(2) that there be sufficient specificity in a putative ‘matter’ as to permit sensible consideration of whether there were ‘reasonable grounds’ for a suspicion of corrupt or possibly corrupt conduct”. Each of the matters which are the subject of the Commission’s s 11 findings is identified by reference to the conduct or subject matter, timing and persons involved, and on its face permits a sensible consideration of whether there were grounds for suspicion of corrupt or possibly corrupt conduct. These reasons outline each of these matters in order to test whether that is so, and do not seek to describe all the circumstances which were subject to evidence taken into account by the Commission. This being the position, and irrespective of the scope of a “matter” which can be the subject of s 11(2), there was no material error on the part of the Commission.

291 Ground of review 11 should be rejected.

Ground of review 12

292 Ground of review 12 is:

> Further or in the alternative to ground 1, the Commission, having found that:
>
> a. ‘the obstacles to a prosecution [of Ms Berejiklian] 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’ (R [13.416]), and
>
> b. ‘there is insufficient admissible 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’ (R

[13.417]),

reached an illogical or irrational result in finding that it was satisfied to the requisite standard that any breach of s 11(2) of the ICAC Act by Ms Berejiklian was 'dishonest' and 'partial' within the meaning of s 8(1)(b) of the ICAC Act (R [13.387]-[13.388])…

293 By this ground it is contended that the Commission's finding that the applicant's failure to discharge her obligations under s 11(2) of the Act constituted "serious corrupt conduct" is "internally inconsistent" with its subsequent decision in all the circumstances not to make a statement that consideration be given to obtaining the advice of the Director of Public Prosecutions (DPP) with respect to the prosecution of the applicant for misconduct in public office ([13.416]-[13.418]).

294 As noted at [50] above, s 74A of the Act concerns the content of reports made by the Commission to Parliament. Subsection 74A(2) is:

74A Content of reports to Parliament

…

(2) The report must include, in respect of each "affected" person, a statement as to whether or not in all the circumstances the Commission is of the opinion that consideration should be given to the following—

(a) obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of the person for a specified criminal offence,

(b) the taking of action against the person for a specified disciplinary offence,

(c) the taking of action against the person as 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.

295 The Commission decided not to recommend to the obtaining of advice from the DPP at [13.407]-[13.418]. Its reasons included the following:

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.

…

13.413. 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.

296 The applicant does not contend that the Commission's finding as to "serious corrupt conduct" was illogical or irrational by reference to that ultimate finding or the reasons supporting it. Had she done so, it would have been necessary to show that the conclusion was one which no logical or rational decision-maker could have arrived at on the available evidence. As Crennan and Bell JJ said in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [130]-[131]:

> … an allegation of illogicality or irrationality … is nevertheless an allegation of the same order as a complaint that a decision is 'clearly unjust' or 'arbitrary' or 'capricious' or 'unreasonable' in the sense that the state of satisfaction mandated by the statute imports a requirement that the opinion as to the state of satisfaction must be one that could be formed by a reasonable person…
>
> … The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

297 Instead, the applicant contends that the finding that she engaged in "serious corrupt conduct" in failing to discharge her s 11 duty ([13.406]) is inconsistent with the Commission's subsequently formed opinion that consideration should not be given to obtaining advice with respect to prosecution of the applicant for the offence of misconduct in public office.

298 The proposition that such an inconsistency renders that finding illogical or irrational does not follow. First, it assumes that any illogicality or irrationality which might explain the asserted inconsistency is only in relation to the finding of "serious corrupt conduct", and not in relation to the Commission's declining to make a s 74A(2) statement.

299 Secondly, the proposition assumes that, where the factual circumstances justify a "serious corrupt conduct" finding in relation to conduct in breach of s 11, those same factual circumstances must also justify an opinion that consideration be given to

prosecuting for the offence of wilful misconduct.

300 More fundamentally, there is no necessary inconsistency between the two conclusions for reasons which are identified by the Commission's observations at [13.416]-[13.417], which accepted the applicant's "overall submission" before it on the s 74A(2) question. Whereas the Commission was not bound by the rules of evidence (s 17 of the Act), those strict rules would apply to the prosecution of any criminal charge. In addition, the evidence given by the applicant before the Commission would not be admissible in any criminal proceeding. Moreover, the standard of proof applied by the Commission was the balance of probabilities informed by the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, whereas the standard to be applied in any criminal proceeding is satisfaction beyond reasonable doubt. Finally, as the applicant argued before the Commission ([13.414], [13.416]), the offence of misconduct in public offence requires proof of elements not essential to the matters which constitute "serious corrupt conduct".

301 Ground of review 12 fails.

Ground of review 13

302 Ground 13 is as follows:

> Further or in the alternative to ground 1, the Commission made a material error of law in finding that for a finding of 'dishonest' exercise of official functions for the purposes of s 8(1)(b) of the ICAC Act, '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' (R [13.371])…

303 This ground also addresses the Commission's finding of "serious corrupt conduct" with respect to the applicant's failure to discharge her obligations under s 11. The Commission held that failure constituted a "dishonest" exercise of her official functions for the purposes of s 8(1)(b) ([13.387]). It *also* held, however, that breach of duty was "partial" because the applicant preferred Mr Maguire's interests in having his conduct concealed in order to protect him from further investigation by the Commission ([13.388]).

304 Success on this "dishonesty" ground of review would not affect the Commission's separate finding that the same conduct amounted to "partial" conduct. It follows that the error of law contended for by this ground could not itself result in the quashing of the Commission's findings of serious corrupt conduct based on breaches of s 11.

305 The applicant argues that, on its proper construction, "dishonest" conduct in s 8(1)(b) *includes* a subjective element requiring that the person appreciated or realised that his or her conduct was dishonest according to the standards of ordinary people.

306 That argument proceeds as follows. Section 8(1)(b) was in the Act when enacted in 1988, and has not been amended. The word "dishonest" in that provision was and remains undefined. The authorities as to the meaning of "dishonest" relied on by the Commission reflect a "modern" interpretation of "dishonest", whereas the "prevailing understanding" at the time the Act was passed was that the test for dishonesty included whether the person also must have realised the conduct was dishonest by the

standards of ordinary people (see *R v Ghosh* [1982] QB 1053 at 1064; *R v Love* (1989) 17 NSWLR 608 at 614; and *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7 at [9]-[14] (Toohey and Gaudron JJ)).

307 There is no reason for construing "dishonest" in the Act other than in its ordinary sense, which is "dishonest according to ordinary notions" rather than "dishonest in some special sense" (*Peters* at [15], [18] (Toohey and Gaudron JJ)). That is a question of fact such that in a criminal trial it is for the jury to determine whether the conduct of the accused was dishonest according to the standards of ordinary, decent people (*Peters* at [18] (Toohey and Gaudron JJ), [86] (McHugh J, Gummow J agreeing)).

308 The Commission's finding of "dishonesty" was made on the basis that, for the purposes of s 8(1)(b), for conduct to be "dishonest", it was necessary that the public official's conduct answered that description according to the standards of ordinary, decent people ([13.371], citing *Peters* at [18]). It was uncontroversial that by those standards it was not necessary that the person accused of dishonesty appreciate his or her act or omission to be dishonest according to the standards of ordinary people ([13.371], citing *Farah Constructions Pty Limited v Say-Dee Pty Limited* (2007) 230 CLR 89; [2007] HCA 22 at [173], which in turn cites *Macleod v The Queen* (2003) 214 CLR 230; [2003] HCA 24 at [36]-[37]). The Commission did not err in proceeding on that basis.

309 Accordingly, this ground of review fails.

Conclusion

310 In the result, each ground of review has been rejected. Ms Berejiklian's application to quash the Commission's findings of "serious corrupt conduct" or to have those findings declared as made without or in excess of jurisdiction should be dismissed, with costs.

311 **WARD P:** I have had the opportunity to consider the reasons of the majority (Bell CJ and Meagher JA) in draft. As their Honours have made clear, the proceedings before this Court (being an application for judicial review) do not permit a "merits" review of the findings of the respondent (the Commission). Rather, what is contended is that the Commission's findings that the applicant had engaged in serious corrupt conduct were affected by jurisdictional error and errors of law on the face of the record. The applicant seeks an order quashing those findings or declaring that they were affected by jurisdictional error or otherwise not made in accordance with law.

312 For the reasons that follow I have reached a different view as to Ground 1 from that reached by the majority.

313 The background to the matter has been comprehensively set out in the majority judgment as have the relevant statutory provisions.

314 As to Ground 1, I did not understand Senior Counsel for the applicant to be abandoning the written submissions provided before the hearing. Rather, I understood the oral submissions to be emphasising a particular aspect of the applicant's argument that the report entitled "Investigation into the conduct of the then member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel)" (Report) was

delivered in excess of jurisdiction. However, nothing ultimately turns on whether the applicant's oral submissions were so confined given the conclusion I have reached as to the aspect that was emphasised in the applicant's oral submissions on the lack of authority of the Hon Ruth McColl AO SC (once her appointment as Assistant Commissioner had expired and she was simply a consultant appointed pursuant to s 104B of the *Independent Commission Against Corruption Act 1988* (NSW) (the Act) to provide services, information or advice to the Commission) to make witness credibility assessments which could then be 'adopted' by the Commission as the basis for the adverse findings it made against the applicant.

315 The constitution of the Commission has been explained in the majority judgment. Relevantly, as their Honours have noted, the Act refers variously to the "making" of a report (s 74(8)), the preparation of a report (see s 74(2)-(4)), and the furnishing of a report (see s 74(7)). The function of making a report under the Act is one that cannot be delegated (s 107(4)), other than to an Assistant Commissioner if the Chief Commissioner is of the opinion that there would or might be a conflict of interest or it would be in the interests of justice to do so (s 107(6)).

316 The applicant has submitted that the notion of "making a report" under s 74 encompasses the functions of both preparing and furnishing a report, referring to the extrinsic materials for the original Independent Commission Against Corruption Bill 1988 (No 2) (NSW); in particular, the reference in the Explanatory Note to cl 76 (which in terms framed the preparation of a report and furnishing of that report as a requirement to "make" reports). The applicant does not submit that "making" a report encompasses all administrative aspects of the preparation of the report along the way.

317 The applicant argues that the restriction on delegation of the function of making a report (as noted above) reflects a choice by Parliament to limit the pivotal functions of preparing and furnishing reports under the Act to Commissioners or, in some circumstances, Assistant Commissioners. The applicant submits that, by specifically providing that a function of making a report may be delegated "to an Assistant

Commissioner only”, Parliament manifested its intention that this was the only means of making a valid report (referring in this context to *Project Blue Sky Inc v The Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [91]-[93]).

318 Ms McColl was appointed as an Assistant Commissioner under s 6A(1) of the Act on 15 July 2020 on which date the Chief Commissioner executed an instrument under s 107(1)-(2) of the Act delegating specified functions to Ms McColl. Those functions did not include the function of “making a report” (as the Commission accepted in submissions in this Court – see AT 51.41).

319 After a number of extensions, Ms McColl’s appointment as Assistant Commissioner expired. Ms McColl’s engagement as a consultant (after the expiry of her term as Assistant Commissioner) in late October 2022, as announced by the Commission on about 28 October 2022, was “for the purposes of her finalising the [Report], including participating in the review and editing processes of that [Report]”.

320 The Commission received the last of the written submissions in relation to the enquiry on 18 October 2022. There is no suggestion that prior to the expiry of her term as Assistant Commissioner Ms McColl had provided a draft Report to the Commission. Indeed, it is clear that, as at 11 January 2023, Ms McColl had not yet completed her draft of the Report. On that date, the Commission issued a media release stating that Ms McColl was working to complete a draft of the Report as soon as possible and that once the Report had been received it would need to be subjected to the Commission’s “review, editing and production processes”. The draft Report was not received until 8 February 2023; and was not finalised (through the process referred to at [59] of the majority judgment) until 26 June 2023 before being furnished to Parliament on 29 June 2023.

321 The significance of the above timeline of events is that whatever draft “findings” were recommended or included in the draft Report when it was submitted by Ms McColl on 8 February 2023, they must have been made by her at that time in her capacity as a consultant and not as Assistant Commissioner. This is of relevance because the applicant submits that, from 1 November 2022 onwards, the function of preparing a report required under s 74(3) could not be carried out by Ms McColl; that function could be delegated only to an Assistant Commissioner (assuming a perceived or potential conflict of interest subsisted or the interests of justice required).

322 The applicant submits that the media releases by the Commission referred to above provide a sound basis to conclude that Ms McColl was carrying out the function of preparing the Report after the expiration of her Commission on 31 October 2022. I agree. The applicant further submits that the Commission’s role was limited to reviewing and deciding whether or not to adopt Ms McColl’s draft Report. In this regard, the applicant points to the refusal of the Commission to provide disclosure of matters going to Ms McColl’s functions after 31 October 2022, of which the Commission has peculiar knowledge, as providing a ready basis for the drawing of a negative inference

against the Commission on this issue (referring to *Hartnett t/as Hartnett Lawyers v Bell as Executor of the Estate of the late Mabel Dawn Deakin-Bell* (2023) 112 NSWLR 463; [2023] NSWCA 244 at [153]-[154], and the cases there cited).

323 The applicant contends that, by continuing to prepare the (draft) Report after the expiration of her appointment as an Assistant Commissioner, Ms McColl exceeded the authority conferred upon her under the Act; and that this amounts to jurisdictional error (citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at [163], quoted with approval in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 at [66]), which affects the Report furnished to Parliament, having regard to the Commission's adoption of the Report prepared by Ms McColl outside the limits of her authority.

324 In oral submissions, Senior Counsel for the applicant made clear that there is no issue taken with the proposition that the Commission may enlist the assistance of persons in connection with the preparation and making of a report (see at AT 4.5-12) but the applicant's position, as I understand it, is that, insofar as the Commission 'adopted' the findings or opinions by Ms McColl as to witness credibility assessments, this amounted to jurisdictional error, as the making of such assessments by Ms McColl at the time that she was merely a consultant was beyond power.

325 In that regard, it is important to note that the Commission expressly noted that it had adopted assessments made by Ms McColl (see [2.37] of the Report, reproduced in the majority judgment at [63]) and that the Commission emphasised that assessments as to witness credibility and reliability were important factors for the Commission to consider in properly weighing the evidence and making findings of fact available on that evidence (see at [2.38] of the Report, also reproduced in the majority judgment).

326 The Commission, in its written submissions, contends that the applicant has not established that the Commission 'adopted' a report prepared (in the statutory sense) by Ms McColl or adopted any findings and opinions made by by Ms McColl. However, at least in relation to the assessment of witness credibility, that is squarely contradicted by the Report itself (and, in particular, the statement at [2.37] that has been reproduced in the majority judgment). While the Report does not record particular findings by Ms McColl contained in her draft Report, it cannot be gainsaid that the Commission did adopt Ms McColl's assessments. That is exactly what the Report says it did.

327 The Commission argues that [2.37] should be understood, in context, as meaning that it took the benefit of Ms McColl's assessment of factors of the kind set out at [2.37] (such as the responsiveness of otherwise of answers and the like) to assist it in making (its own) findings, including as to credibility. Further, the Commission points to the fact that

[2.37] of the Report referred also to “independent or objective evidence against which the credibility of witnesses may be assessed” (referring by way of example of this to [13.181] of the Report).

328 The Commission also notes that, in relation to the assessment of the applicant’s credibility, reference was made in the Report to objective facts proved independently of her testimony and to the “overall probabilities” in assessing the credibility of her evidence (referring by way of example to [11.442], [13.189], [13.196]-[13.197], [13.204], [13.347] and [13.350]-[13.363] of the Report).

329 The Commission argues that the statements on its website (to which the applicant has pointed) indicate only (and unremarkably) that Ms McColl had involvement with drafting the Report and the processes of reviewing and editing the same (after her engagement as consultant) and do not demonstrate that the Report was made by Ms McColl and not the Commission. Nor, it says, can factual inferences be drawn against the Commission because it formed the view under s 111(4)(c) of the Act that it was not necessary in the public interest to disclose information (as to the exercise of Ms McColl’s functions as consultant) that cannot otherwise be disclosed. It is submitted that drawing an adverse inference against the Commission would undermine the purpose of s 111 of the Act.

330 The Commission maintains that it is inherently improbable and impractical to suggest that it is contrary to the Act for the Commission to enlist the assistance of others in the drafting of the Commission’s reports; and that it would be unworkable if the function of “making a report” were to be taken to include every step involved in the formulation of a report, including matters such as drafting parts of a report. The Commission emphasises that what cannot be delegated (except to an Assistant Commissioner in certain circumstances) is the “function” of making a report; and says that s 107(4)(b), construed in context, provides that it is the making of findings, opinions, recommendations and reasons that can be communicated to Parliament which must be exercised by a Commissioner.

331 The Commission argues that the words “making a report under this Act” in s 107(4)(b) are not synonymous with drafting a report (pointing to the use of “make” in various of the statutory provisions in contradistinction to other acts such as “providing” (s 57B(5)) and “submitting” (s 55)); and says that “making a report” is to be understood as the ultimate act, embodied in the final report, of discharging the function of making findings, opinions and recommendations (referring to ss 75, 77 and 77A). The Commission further says that the function of making a report under the Act is not a reference to the logistical exercise of drafting a report but, rather, to the concept embodied by such making of a report; the communication of the Commission’s findings, opinions, recommendations and reasons for Parliament’s consideration.

332 The Commission also argues that nothing turns on the question whether the “preparation” and “furnishing” of a report (as referred to in s 74) are, for the purposes of the Act, acts which are distinct from the “making” of the report itself, again pointing to

the ability of the Commission to enlist the assistance of officers as part of the preparation of its reports.

333 The Commission submits that the substantive requirement for making a report under the Act is that a Commissioner brings his or her own mind to the findings, opinions, recommendations and reasons in a report, and that the report comprises the Commissioner's own findings. The Commission says that it is not inconsistent with that responsibility for a Commissioner to have other officers (including a consultant) to assist with the drafting of a report.

334 As to this last proposition, as adverted to above, the applicant does not cavil with the submission that assistance may be provided in the preparation of a report. However, the above submission by the Commission does highlight the complaint here made. If (as the Report itself states) the Commission 'adopted' witness credibility assessments of Ms McColl, then on the face of the Report those assessments are not assessments of the Commission – they are assessments of someone to whom the function of making such assessments had not been delegated at the time the findings based on those assessments are made.

335 I accept that the task of the Chief Commissioner in making the final Report included the determination of the necessary findings, opinions and recommendations; and that (as the majority points out) in terms of the function, authority and power up to this time the Chief Commissioner was in a position to oversee the preparation of a draft of the Report. However, the evidence does not permit a conclusion as to what was done in that regard prior to submission of the draft Report; and the Commission's own statements in the media releases referred to above and the Report itself suggest that the function of preparing the draft Report was entrusted to Ms McColl and that it was only once that draft Report was received that the process of review by the review panel was to commence. In that regard, I accept that the Chief Commissioner (and the review panel of Commissioners) could draw on the evidence and submissions made to the Commission in the course of the enquiry; and could obtain assistance from services or advice provided by someone in the position of Ms McColl as officer of the Commission.

336 However, the difficulty as I see it is that the stated (and on the face of it unqualified) "adoption" by the Commission of witness credibility assessments made by Ms McColl (as presumably were included in her draft Report) amounts to her assessments being the relevant findings at least on aspects of the evidence given in the public hearings. It may be that those assessments could be (and perhaps were) tested by reference to objective evidence or the like but the Report does not indicate that (or how) this was done; nor how it is that the "adopted" credit assessments were relied upon in the ultimate conclusion (as opposed to assessments drawn from other objective evidence).

337 The conclusion as to a witness' responsiveness in answering questions, for example, is in practice something most likely to be drawn from observation of the evidence being given rather than by reference, say, to a transcript of that evidence. Similarly,

conclusions as to whether a witness was "dissembling" (see [13.181]) must surely have been informed by observation of the witness giving evidence (something that only Ms McColl, not the Commissioners, was able to do).

338 There is nothing to indicate that the opinions expressed in the draft Report by Ms McColl, whatever they were, as to witnesses' credibility were simply treated by the Commission as submissions that the Commission tested against objective evidence; and observations in the Report suggesting that the applicant treated giving evidence as akin to being on the hustings reinforces, rather than dispels, the conclusion that they were not. The language of "adopt" in relation to the witness credibility assessments demonstrates that Ms McColl's assistance went beyond providing "services, information or advice" (as permitted by s 104B) and into the making of findings (which the Commission then chose to adopt) something that as a consultant Ms McColl did not have the power to do.

339 As the majority has noted at [83], s 104B does not limit the subject matter of the "service, information or advice" that a consultant appointed therein may provide. However, I do not accept that the assistance provided by Ms McColl (in conveying her assessments of witness credibility, which were "adopt[ed]" by the Commission) can accurately be described as no more than the provision of "services, information or advice". The communication of Ms McColl's findings as to witness credibility, in circumstances where those findings were explicitly adopted by the Commission, amounts in effect to a delegation of the Chief Commissioner's task of determining all necessary findings in the making of the Report. I do not agree that such a finding imposes any unwarranted limit on the Commission's ability to carry out its principal function and purpose; particularly where those responsibilities that may only be discharged by a Commissioner (or properly appointed Assistant Commissioner) are clearly defined in the Act.

340 I do not enter into the debate as to whether the non-disclosure by the Commission (when such information was sought by the applicant's legal representatives) as to the functions exercised by Ms McColl gives rise to any adverse inference. It is not necessary to do so in circumstances where the Commission has itself made clear (at [2.37]) that it adopted her witness credibility assessments. The Commission has thus as a practical matter delegated (impermissibly in my opinion) to a consultant the task of making credibility assessments of the witnesses (at least to the extent that this was based on the witnesses' evidence in the hearings before the consultant when she was Assistant Commissioner); an issue that the Commission correctly recognised was an important factor in the determination of its ultimate conclusions.

341 In those circumstances I respectfully cannot agree with the conclusion by the majority that the Commission in making its Report did not act beyond its authority or power. I consider that the Commission's own Report establishes that it did more than merely obtain services, information or advice from Ms McColl. It adopted Ms McColl's assessments. Indeed, the explanation in the Report as to the process by which

"suggestions" were made to Ms McColl during the review of the draft Report tends to support the conclusion that the Commission in effect delegated to Ms McColl responsibility for assessing witness credibility in that it inverts the process of the Commission making the Report. Ms McColl's provision of "services" to the Commission would well involve the making of suggestions to it; not the converse. In any event, having regard to the admitted adoption by the Commission of Ms McColl's assessments on what was recognised to be such an important issue, I would uphold Ground 1.

342 Senior Counsel for the Commission accepted that if Ground 1 were to be upheld then it would follow that the report was beyond power (AT 2.45-46). Therefore, I would find for the applicant and quash the findings of serious corrupt conduct.

343 As to the remaining grounds of review, I agree with the conclusions reached by the majority.

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Amendments

26 July 2024 - Typographical error in date at [61] amended

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Decision last updated: 26 July 2024