

Special Report 2023/02: Investigation into the time taken by the ICAC to furnish its Operation Keppel Report to Parliament

Inspector of the Independent Commission
Against Corruption

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The Hon. Ben Franklin, MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Greg Piper, MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President and Mr Speaker

In accordance with section 77A of the *Independent Commission Against Corruption Act 1988* (ICAC Act), I furnish to each of you for presentation to the Parliament my *Special Report 2023/02: Investigation into the time taken by the ICAC to furnish its Operation Keppel Report to Parliament*.

Pursuant to section 78(1A) of the ICAC Act, I recommend that the Report be made public forthwith.

Sincerely

A handwritten signature in black ink, appearing to read "Gail Furness".

Gail Furness SC
Inspector of the Independent Commission Against Corruption

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1 Introduction

Between 2017 and 2020, the Independent Commission Against Corruption (the ICAC or the Commission) investigated the conduct of Daryl Maguire MP (Mr Maguire) in an investigation called Operation Keppel. The Commission held its First Public Inquiry in Operation Keppel between 21 September and 16 October 2020.

After the First Public Inquiry, the Commission extended the scope of Operation Keppel to investigate the conduct of the then Premier, the Hon Gladys Berejiklian MP (Ms Berejiklian).

The Commission's submissions timetable for the First Public Inquiry was placed on hold pending its completion of those investigations.

On 30 September 2021, the Commission determined to conduct a further public inquiry to investigate Ms Berejiklian's conduct (the Second Public Inquiry).

My predecessor Mr Bruce McClintock SC received several complaints about the decision of the Commission to hold the Second Public Inquiry. He concluded in a Special Report to Parliament, that the Commission had a proper basis for determining to conduct a public inquiry regarding the conduct of Ms Berejiklian (Special report 2022/01).¹ I am also of that opinion.

The Second Public Inquiry began on 18 October 2021 and concluded on 1 November 2021. The submissions process concluded on 9 May 2022 with one discrete issue being the subject of brief submissions in October 2022. Assistant Commissioner the Hon Ruth McColl AO SC (Assistant Commissioner or Ms McColl) presided over each Public Inquiry and was assisted by the same two counsel assisting.

The Commission furnished its report *Investigation into the conduct of the then Member of Parliament for Wagga Wagga and then Premier and others (Operation Keppel)* (the Report) to Parliament on 29 June 2023. The media was present when the Report was furnished to the Speaker and the President.

There had been much media interest earlier about when the Report would be published and that became intense when it was furnished. There was significant and obvious public interest in the Public Inquiries and the Report as the then Premier featured in both, but more so in the Second Public Inquiry. There was a deal of public discussion and commentary on the time taken to furnish the Report to Parliament.

I received a number of complaints prior to the furnishing of the Report and following its publication complaining of what they called the 'delay' in reporting.

Following the publication of the Report, I decided to conduct an investigation under s 57C(a) of the *Independent Commission Against Corruption Act 1988* (ICAC Act) into the time taken by the ICAC to furnish the Report to Parliament, in particular having regard to the Commission's work after the Second Public Inquiry.

The public interest in this issue is well founded, as the timely publication of decisions is essential to public confidence in judicial and administrative decision making.

As was said by the then Chief Justice Gleeson in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (NAIS) '[u]n due delay in decision making, whether by the courts or administrative bodies is always to be deplored.'² In the same decision, Kirby J stated 'undue delay may undermine

¹ <https://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/Special-Report-s-77A-ICAC-Act-regarding-the-Decision-to-Hold-a-Further-Public-Inquiry-in-Operation-Keppel-2022-01.pdf>

² (2005) 223 ALR 171 at [5].

acceptance by the parties and the community that the decision maker has given consideration to all the evidence and has remembered the detail'.³

2 My investigation

2.1 Terms of reference

I determined the following terms of reference for my investigation

- whether the time taken between 30 September 2021 and 29 June 2023 (the time period) amounts to maladministration (s 57B(1)(c)) and s 57B(4)(b) of the Act)
- assessing the effectiveness and appropriateness of the Commission's procedures relating to the propriety of its activities having regard to the time taken (s 57B(1)(d))
- the Commission's involvement with the media being present when the Operation Keppel Report was furnished.

Section 57B is as follows

(1) The principal functions of the Inspector are —

(a) to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State, and

(b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and

(c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and

(d) to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

(2) The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.

(3) The Inspector is not subject to the Commission in any respect.

(4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is —

(a) contrary to law, or

(b) unreasonable, unjust, oppressive or improperly discriminatory, or

(c) based wholly or partly on improper motives.

(5) Without affecting the power of the Inspector to make a report under Part 8, the Inspector may, at any time —

(a) make a recommendation or report concerning any matter relating to the functions of the Inspector under this section that the Inspector considers may effectively be dealt with by recommendation or report under this section, and

³ Ibid at [86].

(b) provide the report or recommendation (or any relevant part of it) to the Commission, an officer of the Commission, a person who made a complaint or any other affected person.

As can be seen, maladministration includes delay in the conduct of investigations as well as action or inaction of a serious nature that is, among other things, unreasonable.

I have not inquired into the conduct of the investigations or the Public Inquiries. Suffice to say that they were detailed and lengthy investigations. It is to the commendation of those assisting the Commission that the oral evidence in the Public Inquiries was taken in a relatively short time.

2.2 Information sought

I sought various information and documents from the Commission during the course of my investigation. My requests were

- for a detailed timeline of Operation Keppel with specific reference to the Second Public Inquiry and with reasons for the time taken between each event
- for information concerning the appointment and various re-appointments of Ms McColl
- about resourcing
- the timing of counsel assistings' submissions and those in reply
- for relevant meeting papers and minutes
- for policy and procedure documents and
- for details of the Commission's involvement with the media being present when the Report was furnished.

I had access to all submissions made to the Commission. I note those submissions have not been made public except to the extent they have been cited in the Report.

On 17 July 2023 I directed under s 111(4)(c) of the ICAC Act that an officer of the Commission divulge to Ms McColl, the information acquired by Ms McColl by reason of, or in the course of, the exercise of Ms McColl's functions under the Act in relation to Operation Keppel.

I directed that that information be divulged to Ms McColl forthwith.

I certified that it is in the public interest that that information be divulged to assist me in carrying out an investigation under s 57C of the Act.

I then asked Ms McColl to answer questions about matters that were within her knowledge.

2.3 Draft Report

I provided a draft of my report to Ms McColl and the Commission and invited submissions.

Ms McColl made no submissions and I have taken into account the brief submissions made by the Commission in this report.

3 Timeline

The following timeline is adapted from the information provided by the Commission. It sets out key events relevant to timeframes. In the next sections of this report, I deal with those key events.

Table 1: Timeline

Date	Event
26 June 2020	Chief Commissioner Hall wrote to the Premier seeking the appointment of the Hon Ruth McColl AO SC as a part-time Assistant Commissioner for the period 31 July 2020 to 28 February 2021 (on the basis the public inquiry was anticipated to commence on 31 August 2020).
15 July 2020	Appointment of the Hon Ruth McColl AO SC as part-time Assistant Commissioner until 28 February 2021.
21 September 2020	Operation Keppel First Public Inquiry commenced.
16 October 2020	Operation Keppel First Public Inquiry concluded. The inquiry was held over 19 days and evidence was taken from 26 witnesses.
17 December 2020	Decision to broaden the scope of Operation Keppel.
17 December 2020	Chief Commissioner Hall wrote to the Special Minister of State seeking an extension of the Assistant Commissioner's appointment to 30 June 2021.
17 February 2021	The Assistant Commissioner was appointed until 30 June 2021.
13 May 2021	Chief Commissioner Hall wrote to the Special Minister of State seeking an extension of the Assistant Commissioner's appointment to 31 December 2021.
26 May 2021	The Assistant Commissioner's appointment as a part-time Assistant Commissioner was extended to 31 December 2021.
30 September 2021	Decision made to hold the Second Public Inquiry in Operation Keppel.
18 October 2021	Operation Keppel Second Public Inquiry commenced.
1 November 2021	Operation Keppel Second Public Inquiry concluded. The inquiry was held over 11 days and evidence was taken from 14 witnesses.
2 November 2021	Submissions timetable was set with submissions by counsel assisting to be finalised on 20 December 2021 and submissions in reply due on 14 February 2022.
8 November 2021	Chief Commissioner Hall wrote to the Special Minister of State seeking an extension of the Assistant Commissioner's appointment to 30 June 2022.
15 December 2021	The Assistant Commissioner's appointment as a part-time Assistant Commissioner was extended to 30 June 2022.
17 December 2021	Revised submissions timetable was set: submissions by counsel assisting to be provided to relevant persons by 15 February 2022 with submissions in reply due by 28 March 2022. At a later date, an extension was granted to some parties until 9 May 2022 for submissions in reply.

Date	Event
15 February 2022	Counsel assistings' submissions comprising 532 pages were provided to relevant persons.
27 April 2022	Additional submissions were provided by the Commission to a selected party on discrete issues.
4 May 2022	Response from the selected party was received.
9 May 2022	Last submissions in response to counsel assistings' submissions were received.
24 May 2022	Chief Commissioner Hall wrote to the Premier seeking an extension of the Assistant Commissioner's appointment to 31 October 2022.
8 June 2022	The Assistant Commissioner's appointment as a part-time Assistant Commissioner was extended to 31 October 2022.
6 October 2022	Additional submissions were provided by the Commission in relation to a discrete issue to one party.
18 October 2022	Submissions in response to the 6 October 2022 submissions were received.
31 October 2022	Appointment of the Assistant Commissioner concluded and Ms McColl was engaged under s 104B of the ICAC Act on a part-time basis as a consultant.
8 February 2023	<p>Draft Report was provided by Ms McColl to the Commission's Review Panel – Volume 1 comprising 362 pages and Volume 2 comprising 327 pages.</p> <p>The Review Panel consists of:</p> <ul style="list-style-type: none"> • Chief Commissioner Hatzistergos • Commissioner Murrell • Commissioner Lakatos • Chief Executive Officer • Solicitor to the Commission • Executive Director, Corruption Prevention Division • Executive Director, Investigation Division.
22 February 2023	Review Panel met to discuss Volume 2 of the draft report.
23 February 2023	Review Panel's comments in relation to Volume 2 of the draft report were provided to Ms McColl in tabulated form.
3 March 2023	Review Panel met to discuss Volume 1 of draft report.
8 March 2023	Meeting held with Ms McColl and the Chief Commissioner to discuss the Review Panel's primary concerns, suggestions and recommendations in relation to Volume 2 and how she proposes to address these.
14 March 2023	Draft Corruption Prevention chapter of 25 pages was provided to the Review Panel.
17 March 2023	Review Panel's comments in relation to Volume 1 of the draft report were provided to Ms McColl in tabulated form.

Date	Event
22 March 2023	<p>Ms McColl provided tabulated responses addressing Review Panel's comments in relation to Volume 2 of the draft report.</p> <p>Case Lawyer created a new marked-up draft (Post Review Draft) showing changes made by Ms McColl following the Review Panel process and identifying any issues not addressed.</p>
24 March 2023	<p>Ms McColl provided tabulated responses addressing Review Panel comments in relation to Volume 1 of the draft report.</p> <p>Case Lawyer created a new marked-up draft (Post Review Draft) showing changes made by Ms McColl following the Review Panel process and identifying any issues not addressed.</p>
5 April 2023	Case Lawyer provided Volume 2 of the Post Review Draft report to Solicitor to the Commission to check all changes and that all issues raised by the Review Panel were appropriately addressed.
6 April 2023	Ms McColl's involvement in the preparation of the Operation Keppel report ceased.
12 April 2023	Solicitor to the Commission's review of Volume 2 of the Post Review Draft report was completed and sent to the Commission's Manager Communications and Media for the editing process to commence.
12 April 2023	Chief Commissioner approved the revised Corruption Prevention chapter to be provided to the Commission's Manager Communications and Media for the editing process to commence after it had been reviewed by the Review Panel and Ms McColl.
19 April 2023	Case Lawyer provided Volume 1 of the Post Review Draft report to Solicitor to the Commission to check all changes and that all issues raised by the Review Panel were appropriately addressed.
21 April 2023	Solicitor to the Commission's review of Volume 1 of the Post Review Draft report was completed and sent to the Commission's Manager Communications and Media for the editing process to commence.
17 May 2023	Volume 1 first edit was reviewed by the case lawyer.
22 May 2023	Volume 1 was sent to layout (multiple edits reviewed before Layout).
30 May 2023	Volume 2 first edit was reviewed by the case lawyer (multiple edits reviewed before Layout).
6 June 2023	Volume 2 was sent to Layout.
16 June 2023	Volume 1 was proof checked by the case lawyer (multiple edits reviewed before Layout).
21 June 2023	Media release was made concerning the furnishing date.
23 June 2023	Volume 2 was proof checked by case lawyer.
26 June 2023	Complete report was finalised for printing.
29 June 2023	Report was furnished. Volume 1 was 318 pages and Volume 2 358 pages.

4 The time taken to report to Parliament

4.1 The appointments

Each of Ms McColl's appointments was made on a part time basis. It is clear from the timeline that each extension to her appointment as Assistant Commissioner was required to accommodate the investigation and the submissions process. Ms McColl's appointment as a consultant on 31 October 2022 was necessary to complete the report, noting that the final submission as to a discrete issue, about which I say more later, was provided on 18 October 2022.

4.2 Submissions timetable

The timeline sets out the initial date for the service of counsel assistings' submissions and the revised date. The initial submissions timetable was, in my view, tight having regard to the extensive evidence, its complexity and the importance of any findings or recommendations. It is not surprising that an extension was sought, first by counsel assisting and then by other parties, consequent on that extension.

The decision to extend the timetable for the service of counsel assistings' submissions was the subject of discussion between several including the then Chief Commissioner and Ms McColl.

I am satisfied that serious consideration was given by all to the consequences of such an extension. Ultimately, the reasons for granting the extension included

- the length of the investigation
- the transcripts generated
- the documents considered
- difficult factual and legal questions raised
- pre-existing commitments of counsel assisting
- the importance of formulating proposed serious corrupt conduct findings
- the need for Ms McColl to make comments on the draft submissions and
- the Christmas period.

I am of the view that the decision of the then Chief Commissioner to extend the timetable was reasonable in all the circumstances. It meant, of course, that six months or so would elapse from the completion of the Second Public Inquiry before all substantive submissions were received.

4.3 Submissions served on 6 October 2022

A discrete issue arose after all submissions had been received, necessitating the Commission making further submissions concerning Mr Maguire. Those brief submissions were served on 6 October 2022 and submissions in reply were made on behalf of Mr Maguire on 18 October 2022.

4.4 Preparing the Report

At all times, Ms McColl had responsibility for preparing the Report. Ms McColl was effectively working full time on preparing it after the conclusion of the hearing, subject to leave and other commitments.

Ms McColl received assistance from various quarters within the Commission during that time including IT, one or more Principal Lawyers and Senior Lawyers, a Senior Investigator and a Corruption Prevention Officer.

Other than a request for a Principal Lawyer, which was met, Ms McColl told me that she did not ask for additional resources 'because I understood that what was made available accorded with the Commission's practice'.

The Commission said had Ms McColl sought further resources; those resources would have been provided.

In their responses to my requests for information, both Ms McColl and the Commission noted that the Commission did not have the resources of a Royal Commission. That is undoubtedly the case. In my experience, Royal Commissions are generally well-funded, they are not faced with competing priorities outside their terms of reference and do not manage a permanent agency and all the work that entails.

I do not doubt that Ms McColl and all the Commission officers engaged in assisting draft the Report worked hard, with attention to the task and in good faith. There is no evidence that anyone acted capriciously or irrationally. Various contributors from time-to-time were on leave, unwell or worked lesser hours for personal reasons, as is to be expected in a long investigation in an ongoing agency.

4.5 The Review Panel

In December 2022, some of the Commissioners began reviewing some chapters of the draft Report. On 8 February 2023, Ms McColl provided a full copy of the draft Report.

From 8 February until 6 April 2023 (58 days, almost 2 months), the Review Panel, which comprised the Commissioners and other executive staff set out in the timeline, provided comments to Ms McColl on the draft Report. Ms McColl responded in writing to those comments. The draft Report was provided to the Review Panel in three parts. What was to become Volume 1 was 362 pages, Volume 2, 327 pages and the corruption prevention chapter 25 pages. The Review Panel comments on Volume 1 were 25 pages and Volume 2 were 74 pages.

The Chief Commissioner advised me that he considered the time taken for the Review to be 'entirely reasonable'.

I note that each of those involved in the Review Panel held senior roles in the Commission. They would have had significant responsibilities for the ongoing work of the Commission including some of the other Public Inquiries which commenced under the previous Commissioners.

In my view, it was a lengthy review process. However, given the size of the two volumes, the public interest and the complexity of the two Public Inquiries, I am satisfied that it was not unreasonable.

Even so, given the Commission's public expression that it will report 80% of its longer public inquiries in six months, if this period of review becomes common, rather than the exception, it will be almost impossible to meet that target. I say more about this issue in relation to the procedures of the Commission.

4.6 The editing, proofing process

From 5 April to 29 June 2023 (85 days, about three months) further reviewing, editing, proofing and ultimately printing happened until the Report was furnished on 29 June 2023.

The Chief Commissioner told me that *'the time taken for the editing and other pre-production processes does not include that this report was prepared using a template different to the standard template used for Commission reports, which lengthened the time taken to prepare it for publication. It is also relevant to note that the editing and other pre-production processes involved the need for*

considerable attention to detail of a lengthy report, including as to content, style, grammar and physical layout.'

The Chief Commissioner advised me that he regarded this time for review, editing, layout and proofreading as 'unexceptional' given the length and complexity of the Report. He noted that these processes were given priority over other work.

I have no independent knowledge of the period of time that is usual for this process and accordingly, cannot comment on it. However, I repeat that given the Commission's public expression that it will report 80% of its longer public inquiries in six months, if this period is usual, it will be impossible to meet that target. I say more about this issue in relation to the procedures of the Commission.

4.7 New Commissioners and ongoing Public Inquiries

Of relevance to the time taken, the terms of the previous Chief Commissioner and Commissioners expired in August 2022 and a new Chief Commissioner and Commissioners were appointed in August and September 2022. This had consequences, including dealing with matters outstanding from the previous Commissioners. The current Chief Commissioner told me

...when I commenced my term as Chief Commissioner on 7 August 2022, there were five outstanding reports (Skyline, Paragon, Keppel, Tolosa and Galley) after the departure of the previous Commissioners. A priority for the current Commissioners was to ensure these reports were furnished to NSW Parliament and made public as soon as possible. However, due to the number of investigations and their stage of progression there were limited resources available for work on the preparation of the reports. On most occasions, only one lawyer was assigned to prepare a report for complex and lengthy investigations. In my view, this presented a significant vulnerability for the Commission, particularly in relation to compliance with timeframes.

4.8 Budget

The adequacy of funding had been a long-standing issue between the Commission and the Government. The current Chief Commissioner told me

... consequent to 2015-2016 budget the Commission suffered a significant reduction in its financial allocation with staffing across the agency reduced and no corresponding reduction in workload. In the 2022-23 budget the Commission obtained further funding. Together with other steps taken moving forward, the Commission has been able to provide at least two lawyers to assist in report preparation with the aim of producing the reports in a timelier manner.

5 Did the time taken to report to Parliament amount to maladministration under s 57B of the ICAC Act?

5.1 The ICAC's Benchmarks

On 9 June 2022, the Parliamentary Joint Committee on the ICAC (the PJC) initiated an inquiry into the *Review of aspects of the Independent Commission Against Corruption Act 1988* (the PJC inquiry). The terms of reference included the time standards in place for the ICAC to finalise reports and the relevant practices in other jurisdictions.

The Commission made a submission to the PJC Inquiry, dated 22 July 2022, which included advice as to the current key performance indicators (KPIs) it has adopted

Given the additional funding provided to the ICAC for 2022-23 and the consequent increase in available human resources for the drafting of investigation reports, the ICAC considers it is appropriate, in light of the above figures, to revise its KPI for report completion times to provide that 80% of reports be furnished to the Presiding Officers within 80 days of completion of the public inquiry where the duration of the public inquiry evidence was five or less days and 180 days otherwise. This will provide the necessary flexibility for dealing with contingencies that can arise from time to time that affect report delivery.

The Commission considers that a public inquiry is complete at the end of the submissions process.

As part of my investigation, the current Chief Commissioner told me

It should be stated that this period (set out in the PJC Report) is inclusive of the review, editing, layout and proof-reading processes. In effect, this remains a tight timeframe particularly with longer public inquiries, large volumes of exhibits and complex legal and factual argument. Nonetheless it is a timeline that the Commission will work towards meeting with the resources available to it.

Ms McColl told me that she was not aware of the Commission's submissions to the PJC as to timeframes until after her involvement in Operation Keppel ceased.

5.2 Parliamentary Joint Committee's Report

In December 2022 the PJC tabled its report 6/57 'Review of aspects of the ICAC Act 1988' (the PJC Report).

It noted

In the 2022-23 Budget, the ICAC received additional funding, which may improve the ICAC's performance against its own KPIs. The Committee has therefore recommended that the ICAC provide an update in its next annual report on whether the increased funding in the 2022-23 budget has shortened the time in which investigations are undertaken and reports finalised.

...

The Committee acknowledges that more complex investigations may require different time standards to those required for straightforward investigations and considers that the ICAC is best placed to develop an appropriately flexible set of standards that are fit for purpose.

...

The ICAC proposed a further revision of KPIs as part of its submission to this inquiry, which may more accurately reflect the time taken to produce Reports with consideration of their current resourcing. The proposed KPIs would provide that 80 per cent of Reports are furnished within 80 days of completion of the public inquiry where the inquiry evidence was five days or less, and 180 days otherwise.

I agree with the PJC that it is a matter for the Commission to set its time standards.

On 27 June 2023 the Government accepted the PJC's recommendation to it on time standards

That the Government amend the Independent Commission Against Corruption Act 1988 to require the ICAC to develop and publish time standards for completing section 74 reports, and to report on its own performance against these standards.

...

On 3 August 2023, the Government introduced the ICAC and LECC Legislation Amendment Bill 2023 which, among other things, contains amendments to the ICAC Act that respond to the PJC's recommendations.

5.3 Other benchmarks

Several courts have time standards in place for the delivery of judgments. For example, the Federal, the Federal Circuit and Family Court of Australia and the NSW Land and Environment Court aim to deliver judgments within three months from the date the judgment was reserved. Of course, there are vast differences between the role and operation of courts and that of administrative bodies. Not the least is that agencies such as the Commission conduct investigations which can continue through the report writing process. In this regard, I note that in November 2022, during the course of preparing the draft Report, legal issues arose requiring attention.

Usually, the courts consider that the time taken to deliver judgment should be counted from when all submissions have been received and then the judgment reserved. While there are good reasons for this general rule in courts, it does not seem to me that it should be rigorously applied to administrative decision makers such as the Commission.

Overall, there are a number of points at which it can be calculated when the time taken begins in order to measure the Commission's compliance with its KPIs. The media reporting has emphasised the date on which the then Premier gave evidence in the Second Public Inquiry. Others would have the date start at the end of the public hearing. Lawyers (in the main) agree it should be at the end of the submissions process.

I also note that in some jurisdictions, page limits are set for some submissions.⁴

5.4 Conclusion on benchmarks

All submissions in reply excepting a discrete issue affecting Mr Maguire were with the Commission by 9 May 2022. That discrete issue, for which submissions in reply were received on 18 October 2022, did not pursue new lines of inquiry and I am satisfied that they did not materially affect the period of time in which the Report was finalised.

I consider 9 May 2022 as the date from which the time should be calculated. While not losing sight that a discrete matter could only be resolved after 18 October 2022, I consider it overly technical and lacking in common sense to determine the timeframe from that date. The date on which Ms

⁴ For example, see *Federal Court Rules 2011* (Cth) rr 35.19, 36.42; *Uniform Civil Procedure Rules 2005* (NSW) r 51.36; *High Court Rules 2004* (Cth) rr 44.02.1, 44.03.1, 44.04.1, 44.05.

Berejiklian gave evidence has no bearing on when the Second Public Inquiry completed, although I understand why some consider that date relevant.

I note that the Chief Commissioner agrees with me as to the start date for counting how long it took the Commission to report. Ms McColl accepts that 9 May 2022 is relevant as is 18 October 2022.

It follows that 417 days expired between the end of submissions and the furnishing of the Report. This clearly fell well outside the 180 days the Commission has determined appropriate, however, given the complexity of Operation Keppel, it can be readily seen to be an exception.

6 Systemic issue

In the PJC Report the Committee noted

1.5 *The Committee has been concerned about the issue of timeliness of ICAC Reports throughout its recent inquiries, including the Reputational impact on an individual being adversely named in the ICAC's investigations (Reputational impact inquiry) and its most recent annual review.*

...

1.15 *In evidence presented at the Committee's recent inquiries, including this inquiry, the Reputational impact inquiry, and the most recent annual review inquiry for 2020-21, the ICAC has been transparent about the fact that it is not meeting its own KPIs for the majority of investigations. In the last decade, Reports have been furnished within the specified KPIs for only 38 per cent of investigations.*

[footnotes omitted]

In my view it is essential that the Commission have closer regard to the various relevant processes it has in place to ensure that this systemic issue is resolved.

Reducing the time taken to report to Parliament must be a priority for the Commission.

7 Consideration

7.1 Principles

The starting point is the ICAC Act. Section 74 requires that reports in relation to matters in which the Commission has conducted a public inquiry shall be furnished as soon as possible after the Commission has concluded its involvement in the matter.

'As soon as possible' is not defined in the Act, but clearly denotes that there should be no undue delay.

There have been a number of decisions which deal with delay in the delivery of judgments by courts and decisions by administrative bodies.

The High Court was concerned with the question of whether delay between the hearing of a review of a refusal to grant a protection visa and the handing down of judgment resulted in a denial of procedural fairness in *NAIS*.⁵

⁵ (2005) 223 ALR 171.

The following observations were made by Gummow J in NAIS

Observations by LeBel J in the Supreme Court of Canada in Blencoe v British Columbia (Human Rights Commission) may usefully be repeated here. LeBel J observed that there are different kinds of delay and that not all administrative bodies are the same. Delay in deciding an individual case may relate to the special complexity of the subject-matter as well as to the inattention of the decision-maker. The former may encompass necessary delay. Further, the diversity of the powers, mandates and structures of administrative bodies makes it inappropriate to apply particular standards from one context to the other.

Among the sources of delay in administrative decision-making which have been identified in the United States are the presence of a large workload, the complexity of issues entrusted to administrative decision-makers, inadequate funding and staffing and legislatively required time-consuming procedures. It may be said to be a responsibility of the executive and legislative branches of government to the public at large to alleviate such sources of delay...

*[footnotes omitted]*⁶

*Viscariello v Legal Profession Conduct Commissioner*⁷ concerned the question of whether the Board and ultimately the Commissioner's delay in dealing with complaints was justified and not unlawful and in breach of a duty. The South Australian Supreme Court held that it is one to be answered having regard to all relevant factors including the institutional framework within which an investigation falls to be undertaken, the nature of the complaint, resources available and the consequences of the delay. The Court also referred to LeBel J in *Blencoe v British Columbia (Human Rights Commission)*⁸ (the authority to which Gummow J referred in NAIS)

LeBel J went on to state that differentiation between reasonable and unreasonable delay involved a balancing exercise undertaken conscious of the needs of administrative systems, likely already under strain, and the good faith efforts of the people involved. LeBel J also said that three factors generally loom large in the balancing exercise — length, cause and effects. He expanded on each:

- (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;*
- (2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as effectively as possible those resources it had available; and*
- (3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.*

*[footnotes and references omitted]*⁹

⁶ Ibid at [18-19].

⁷ [2019] SASC 111.

⁸ [2000] 2 SCR 307.

⁹ [2019] SASC 111 at [63].

7.2 Complexity

A key consideration is the complexity of the task. I am satisfied that drafting the Report was legally and factually complex for the following reasons.

First, the investigation was in two related parts and concerned the conduct of, among others, two Members of Parliament, one the then Premier. It began in 2017.

Secondly, two Public Inquiries were held, separated by just over 12 months. There were 30 days of hearings, and 37 witnesses were called. 8,630 pages of transcript were generated, and 708 exhibits tendered.

Thirdly, the 'procedural safeguards' in place were the opportunities given to the parties to respond to any potential adverse findings contended by counsel assisting. The submissions process which achieved this took six months, a period of time I have found was reasonable.

The submissions were long: there were almost 1000 pages; counsel assistings' submissions were 532 pages; 135 pages of written submissions in reply were made on behalf of Ms Berejiklian and 46 (plus attachments) on behalf of Mr Maguire. Five other affected persons made submissions and there were corruption prevention submissions. Those made on behalf of Ms Berejiklian were closely argued and concerned matters of public and parliamentary significance.

To illustrate this, in their introduction to their submissions, senior counsel for Ms Berejiklian stated (omitting references)

In engaging in its task, the Commission must discern and apply the correct legal meaning of concepts of importance to our system of parliamentary democracy and responsible government, and relevantly encapsulated in the ICAC Act and the NSW Ministerial Code of Conduct (Ministerial Code). The content of such concepts "falls to be determined against a background of general expectations, based upon custom, convention and practice". When tested against such measures, the instability and heterodoxy of Counsel assisting's analysis is readily apparent.

It was also readily apparent that the Report would need to respond in detail to these submissions.

I have concluded that the ultimate timetable for submissions was reasonable. Having regard to the submissions that were made, it was unlikely that the Report would be completed quickly, be short or shy away from complex legal issues.

I note that the content of the submissions is not publicly known as they were not and are still not publicly disclosed other than as revealed in the Report. Thus, the public commentary before the Report was published, and to a lesser extent, after the Report was furnished, did not have the benefit of this information.

Finally, the Report was in two volumes: 318 pages and 358 pages respectively. It contained findings of serious corrupt conduct by Mr Maguire and Ms Berejiklian, opinions in relation to three persons that consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to their prosecution and 18 corruption prevention recommendations.

7.3 Conduct of the Commission

The next consideration is the conduct of the Commission in carrying out its task. As I have found, the evidence is that all involved were, within available resources, attentive to the work, diligent and acted in good faith.

7.4 Resources

The third consideration is the use of available resources. While they were limited in the sense that the Commission had other work to do and there were budgetary issues, I am satisfied that the

Commission used the available resources effectively. I note that the Commission prioritised this Report over other reports it had responsibility for.

I agree with Gummow J that ‘*It may be said to be a responsibility of the executive and legislative branches of government to the public at large to alleviate such sources of delay.*’¹⁰

7.5 Impact

The final consideration is the impact of the delay.

The impact was enormous; on 1 October 2021 the Premier resigned because she could not predict how long it would take the Commission to complete the investigation. It transpired that it would be 1 year and 8 months before that occurred.

The reputation of many people continued to be affected over the months taken to complete the Report and furnish it to Parliament.

The welfare of witnesses awaiting the outcome of the Public Inquiries was no doubt impacted in various ways.

I note that the Commission did provide some public updates, in particular, that the Report would not be furnished before the 2023 NSW election.

8 Conclusion on the time taken to report to Parliament

Balancing the impact with the complexity, importance and resources available, I am satisfied that the time taken to Report to Parliament on Operation Keppel does not amount to maladministration because while the issue is serious, it was not *unreasonable, unjust, oppressive or improperly discriminatory*.

To adopt the language used in *NAIS*, this was necessary delay and was not undue delay.

Nevertheless, the Commission cannot expect to meet its KPIs if it continues to work in the same way. As recommended below, it has to reduce the length of submissions, rework its review process and find more efficient ways to technically produce a report at the editing and proofing stage. It has to constantly monitor its resources when completing a report and if they are inadequate to do so in a timely manner, actively seek more resources. The PJC and I should be informed if this occurs.

9 Procedures outlining responsibilities and timelines for submissions and reports

I asked the Commission for copies of its procedures that outline responsibilities for the preparation and serving of submissions of counsel assisting, the preparation of reports and any timeframes for the completion of relevant tasks.

It provided me with a Manual for Assistant Commissioners dated January 2015. It contains three paragraphs in relation to timeliness (5.1) and a section on the preparation of investigation reports.

¹⁰ *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 223 ALR 171 at [19].

The then goals for timeframes for public inquiries over six days were that the draft report be provided within 60 days of the last submission and published within 30 days thereafter (section 7).

Sections of the Operations Manual, which guide the work of other Commission officers, were provided. These include those on Investigation reports, Briefs and Corruption Prevention recommendations. Sections 4.1.4 and 4.1.6 set out the same timeframes as the Manual. No time frame is set for the Review Panel (4.1.7).

Work Instruction IM04-A was provided which concern the production and furnishing of s 74 reports, including the editing, layout, proofreading and printing processes. No time frames for that part of the process are set out.

Evidently, these procedures need revision, including clarification of how an Assistant Commissioner or consultant may access the Commission's resources and, should the need arise, request further resources.

10 The presence of the media at the furnishing of the Report

I am advised by the Commission and have seen supporting correspondence that the decision to permit the media to attend that event was not made by the Commission. Commission officers who attended Parliament consented to be filmed.

I am satisfied that there was no misconduct or maladministration in relation to the circumstances in which Commission officers attended Parliament House.

11 Recommendations

1. I recommend that the Commission review its procedures in relation to the preparation of reports following s 74 investigations and in doing so consider the following:
 - a. imposing a limit on the pages of submissions made by counsel assisting and those in reply
 - b. the composition of the Review Panel and the priority given by the Review Panel members over its usual duties when considering reports
 - c. exploring other means of achieving the efficient proof reading, layout and printing of reports
 - d. updating its procedures and manuals to reflect current KPIs, emphasising the need for timely provision of reports and clarifying how resources are allocated, and
 - e. whether the current KPIs are achievable or should be adjusted.
2. I recommend that the Commission advise the PJC and myself when it is of the view that its resources will adversely impact its capacity to report to Parliament in accordance with its KPIs.
3. Pursuant to section 78(1A) of the ICAC Act I recommend that this report be made public forthwith.

Inspector of the Independent Commission Against Corruption

GPO Box 5341
Sydney NSW 2001

T: 02 9228 3032

E: oiicac_executive@oiicac.nsw.gov.au

W: www.oiicac.nsw.gov.au/



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