Appendix 3 Summary materials prepared for the roundtable meeting

Part A

Principles articulated by the Independent Legal Arbiters: The Hon Keith Mason AC QC The Hon J C Campbell QC

October 2020

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Foreword

On Wednesday 16 September 2020 the Legislative Council resolved that I convene a roundtable meeting before the end of the 2020 sitting calendar focussed on the substance of privilege claims. The roundtable meeting is to include key office holders and party leaders together with representatives of the crossbench, together with the independent legal arbiter, the Hon. Keith Mason AC QC, representatives of the Department of Premier and Cabinet, the Clerk of the Parliaments and officers of the Legislative Council.

This document, which is a compendium of the principles articulated by the independent legal arbiter, the Hon. Keith Mason AC QC, together with those articulated by the Hon. Joseph Campbell QC, has two purposes.

Firstly, it has been prepared as an aid to assist members and other participants to prepare for the roundtable.

Secondly, and following (and no doubt informed by discussion at) the roundtable, it is envisaged that this document will be tabled in the Legislative Council and made publicly available in order to assist government agencies in formulating privilege claims and members of the Legislative Council and future independent legal arbiters in considering those claims.

In circulating this document I note that, with the exception of a brief debate in the Legislative Council following the tabling of the Hon. Keith Mason's first report in 2014, each subsequent report has been accepted and implemented by the Legislative Council without demur. This is indicative of broad acceptance by the Legislative Council of the principles articulated by the independent legal arbiter and summarised in this document.

Finally, although this document deals with the reports of the Hon. Keith Mason AC QC and the Hon. Joseph Campbell QC, and they have adopted different administrative procedures and slightly different approaches to legal reasoning from earlier independent legal arbiters, the reports of earlier arbiters, particularly the late Sir Laurence Street, remain pertinent and relevant. Further information about the reports of earlier arbiters may be found in the submissions attached to the Hon. Keith Mason's 2014 report on the disputed claim of privilege concerning the WestConnex Business Case.

Thanks are due to Ms Jenelle Moore and Ms Beverly Duffy for the preparation of this document.

Hon. John Ajaka MLC
President

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The role of the House; the Arbiter; and the Executive

In the **WestConnex** report, Mr Mason set out his foundational understanding of the respective roles of the House, the Arbiter and the Executive: the House has the final prerogative in all matters pertaining to access and publication of documents returned under SO 52; the Arbiter's role is to report on the validity of claims of privilege pressed; the burden of demonstrating the validity of a claim of privilege rests with the agency asserting the claim; and the Arbiter may determine that the validity of a claim has changed over time as circumstances have changed:

> Some propositions are clear, in my view. First, Standing Order 52 is not the source of the House's power to compel production of State papers, nor do its terms limit the power of the House to regulate or modify the circumstances under which members or the public may access documents after they are required to be tabled. Secondly, the Arbiter evaluates and reports independently of the House and is in no sense the delegate of Parliament or the House. Thirdly, the Arbiter's role is to report the outcome of his or her "evaluation" as to the "validity" of any (still) disputed claim of privilege that is (still) pressed, taking account of the contents of the documents and any submissions duly received. Fourthly, it is then up to the House to decide what steps to take it not being bound to accept the report of the Arbiter (which is not to say that the House has the liberty to disregard privilege, only that it must decide what to do). Fifthly, the burden of demonstrating that particular (documented) information is privileged lies upon the body asserting the privilege, this being of the essence of an immunity or privilege. Sixthly, information may conceivably attract privilege at one point of time but not at another.[1]

However, in relation to Mr Mason's sixth point above – that information may conceivably attract privilege at one point of time but not another – it should be noted that Mr Campbell has recently articulated a different view as to his role in assessing claims made following the passage of time.[2]

The Arbiter is appointed for the explicit purpose of determining whether documents should remain privileged from publication, not from production

Mr Mason reaffirmed the court's finding in the *Egan* cases that the Arbiter is appointed for the explicit purpose of determining whether documents should remain privileged from *publication*, not from *production*:

> If, in the present situation one asked: "Privileged from what?" the answer must be: "From dissemination to the general public either through unconditional release, or through disclosure of their particular contents". Speaking hypothetically, the impact of such dissemination or disclosure potentially cuts both ways. From Government's perspective, there is risk of harm if confidential information gets into "the wrong hands" (in the sense of hands other than those chosen by Government or the hands of members of the House). From the House's perspective, there is the desirability of stimulating further information gathering and

[1] WestConnex Business Case, dated 8 August 2014, p 5.

[2] Contamination at power station associated sites, 18 September 2020 , p 3. Mr Campbell stated that on his reading of SO 52, his report should relate to the validity of the claim of privilege as it was made. If events have moved on since the documents were produced and the claim made, his report should not take any such movement into account. In taking this approach, Mr Campbell appears to vary from the approach taken by both Mr Mason and former Arbiters, particularly Sir Laurence Street.

of debate proceeding without the restrictions consequent upon complying with Standing Order 52 (5) (b) (ii).[3]

More recently, the Arbiter has further articulated his view on the meaning of 'privilege' in a memo to the Clerk, stating that:

> ... "privilege" means that it's not in the public interest for the document or the portion of it proposed for redaction to be made available other than to members of the Legislative Council or to be published or copied without an order of the House.[4]

The memorandum is attached at Appendix 1.

The constitutional role of the House

The focus should always be on the needs of the House in performing its constitutional functions

A concept fundamental to the operation of the orders for papers process is that of the Arbiter in supporting, advising and facilitating the constitutional role of the House. While the courts are confined by reference to the grounds of privilege developed at common law in determining an objection to *produce* documents, the Arbiter is not – firstly, because his or her role is to determine privilege from publication, not production; and secondly because the House's authority to call for papers, use them and publish them stems from its constitutional functions, recognised in the *Egan* cases. In **WestConnex**, Mr Mason cites with approval a submission put forward by the Crown Solicitor's Office that encapsulates this view:

> The Crown Solicitor's Office on behalf of DPC submits that, in addressing any privilege issues touching State papers required to be returned, (a) the Arbiter is not necessarily confined by reference to the grounds of privilege developed at common law to determine an objection to production of documents to a court; and (b) it should be kept in mind that the House's authority to call for papers and its authority to access them, use them, and allow their publication all stem from the constitutional functions recognised in Egan v Willis. I agree. And I also accept that the Arbiter should assume that any dissemination of the papers under the authority of the House will only be for the purpose of exercising the House's constitutional functions.[5]

Later in that report, he articulates this principle thus: 'the focus should always be upon the needs of the House in performing its constitutional functions':

> It should be noted that I am not suggesting that there is a relevant interest in 'the public' gaining access to compulsorily tabled documents. *The focus should always be upon the needs of the House in performing its constitutional functions.* [emphasis added] With some snippets of confidential information the House' s needs will be met if only members are free to access them while remaining under the constraints imposed by Standing Order 52 (5) (b). . .. With most information, however, the House's needs may indicate that it should be free to

[3] WestConnex Business Case, dated 8 August 2014, pp 8-9. Also referenced in Register of Buildings Containing Potentially Combustible Cladding, Greyhound Welfare – Further Order.

[4] Memorandum to the Clerk of the Parliaments from the Hon Keith Mason, AC, QC, 24 September 2020, p 1

[5] WestConnex Business Case, dated 8 August 2014, p 6.

> disseminate the information publicly unless there is a clear overriding need for the confidentiality urged by the Executive.[6]

In doing so, it is not within the purview of the Arbiter to anticipate the manner in which the House intends to use the information – the Arbiter will only have reference to whether documents claimed to be privileged should be published:

> ... I do not accept ... that the House must identify and the Arbiter discern the House's particular reasons for wanting to disseminate documents beyond members lest any objection to the Executive's claim of privilege be imperilled.[7]

Mr Mason came to the same conclusion when the Crown Solicitor's Office suggested that the Arbiter's role extend to an extensive three-part assessment:

> In its submissions on behalf of DPC, the Crown Solicitor's Office has suggested that, when determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the Arbiter to understand:
> i) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published;
> ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of the function; and
> iii) how publication of the documents is reasonably necessary for the House to fulfil that function.

Mr Mason rejected this representation of his role, stating categorically that he was' not persuaded that my task extends to items (ii) and (iii)...' He described this approach as 'latitudinal.' [8]

The Arbiter referenced these key observations in reports on the **Crown Casino VIP Gaming Management Agreement**, **Register of Buildings Containing Potentially Combustible Cladding** and **Greyhound Welfare – Further Order**.

Legal professional privilege

The common law 'dominant purpose' test applies to claims of legal professional privilege

Mr Mason's understanding of the common law test of legal professional privilege is that it attaches to documents that are:

- prepared with the **dominant** purpose of obtaining confidential **legal advice**, or
- prepared with reference to **litigation** that is in the **contemplation** of the client.[9]

With regards to the first criteria, it must be shown that the dominant purpose of a document was to obtain legal advice. Advice about a policy or decision of the executive does not come under this head

[6] WestConnex Business Case, dated 8 August 2014, p 9. Also referenced in Crown Casino VIP Gaming Management Agreement, Register of Buildings Containing Potentially Combustible Cladding, Greyhound Welfare – Further Order.
[7] WestConnex Business Case, dated 8 August 2014, p 6.
[8] WestConnex Business Case, dated 8 August 2014, p 9.
[9] Report on Landcom Bullying Allegations 2019: Part 1, Treasury return of papers, p 6

of privilege. With regards to the second criteria, Mr Mason suggested that there must be a real prospect of litigation in the contemplation of the client, as distinct from a mere possibility, although the possibility has to be 'more likely than not.' He cited Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority [2002] VSCA 59, (2002) 4 VR 322 at [19] in support of this position. [10]

And just because litigation may occur at some point, does not mean that the claim will be upheld. In relation to the claim of legal privilege over a copy of the 'Werman' report (a report on an investigation into the Chair of Landcom) Mr Mason said:

> Later events may cast 'evidentiary' light on the question of privilege, but are not determinative ... the basis of the claim of privilege does not change its complexion simply because litigation by a former employee may have actually commenced **after** the Werman investigation or because defamation proceedings by someone still connected with Landcom may have been **later** threatened arising out of things said by witnesses during the investigation. [11]

In his report on **Sydney Stadiums**, Mr Mason rejected claims over several documents on the grounds that they would not attract legal professional privilege at common law: 'They contain no more than communications discussing the instructions for advice. Other documents do not reveal the substance of confidential legal advice....'[12] He did however uphold privilege in relation to two documents that could be described as 'embodying legal advice' because they related to 'fairly imminent matters that concern the impact of redevelopment on third parties and discuss legal strategies for addressing them in the near future'.[13]

In **Landcom (Part 1**) Mr Mason rejected a claim of legal professional privilege over the Werman report as it would appear the claim did not meet the 'dominant purpose' test required to attract the privilege:

> The focus of the entire investigation appears to be allegations of breaches of the Landcom code of conduct, something admittedly capable of grounding a claim in damages by an employee, but not necessarily so. The letter ... that forms Annexure 4 to the Report describes the trigger for the original investigation in broad terms without suggesting the existence or imminence of any litigation by the complainant.[14]

In adjudicating an analogous dispute in relation to a report into **TAFE underpayments** (the WorkDynamic report), Mr Mason observed that the TAFE report appeared to be an even 'weaker candidate' for legal professional privilege, noting that at least the Werman report had the potential of becoming the subject of a tort claim. He also noted with regards to the TAFE report that:

> A resolve to consider the taking of disciplinary steps or rectification of administrative short fallings will seldom be close enough to litigation so as to bring it within contemplation to the relevant standard. [15]

In his report on **Greyhound Welfare**, while upholding privilege over several documents, Mr Mason dismissed claims over certain other documents because they did not meet the basis for a claim of legal

[10] Landcom Bullying Allegations 2019: Part 1, Treasury return of papers, p 6
[11] Landcom Bullying Allegations 2019: Part 1, p 7 [emphasis in the original]
[12] Sydney Stadiums, p 7
[13] Sydney Stadiums, p 9
[14] Landcom Bullying Allegations 2019: Part 1, Treasury return of papers, p 7
[15] TAFE underpayments, p 2

professional privilege: '... some of the documents examined appear to be no more than communications of information or instructions to lawyers, or reporting of information by lawyers.'[16]

In **Contamination at power station associated sites**, Mr Campbell upheld the claims over most of the documents over which a claim of legal privilege was made, including correspondence providing or relating to the provision of advice, or a brief from which the substance of legal advice given could be ascertained. However he did not uphold the claims made over emails and correspondence that did not disclose the substance of advice or from which the substance of advice provided could not be inferred. In doing so, the Arbiter outlined the principles he took to be applicable to evaluating the claim. For Mr Campbell, this test at common law is:

> ... that there has been a confidential communication, between a client and the legal advisor, made for the dominant purpose of the client obtaining or the advisor giving legal advice or assistance, or with reference to litigation (including dispute resolution procedures such as arbitration or mediation) that is actually taking place or is in the contemplation of the client.[17]

The Executive bears the onus of demonstrating privilege

In several reports, Mr Mason suggests that the Executive needs to make clear its grounds for claiming privilege: 'I have placed the onus of persuasion on those arguing for privileged status.'[18] He also advised that a 'formulaic attempted invocation of legal professional privilege' will not be accepted as an adequate basis for a claim.[19]

In his adjudication of **TAFE Underpayments**, Mr Mason rejected a claim of legal professional privilege in relation to an investigation report into wage theft (the Workdynamic report) because 'no specific or contextual information to support the claim was offered.' He reiterated that the onus rests with the Executive to show that the investigative exercise was embarked upon for the dominant purpose of obtaining confidential legal advice or with reference to litigation that is in the contemplation of the client.[20]

Even if a document does meet the common law test for legal professional privilege, it may not necessarily be privileged from publication by the House

In **WestConnex**, Mr Mason noted that if a court establishes that legal professional privilege pertains to a particular document, there is no balancing of other interests and the relevant documents are not disclosed:

> ... the law has already struck the balance. If a proper claim has been made and it is not waived by the client, the privilege (or immunity) exists, as a rule of substantive law, yielding only to clearly expressed legislation to the contrary: see *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9]-[11]. [21]

Whereas in the parliamentary context, the application of this privilege is different. Citing the Court of Appeal in *Chadwick,* which ruled that legal professional privilege is not a ground for refusing to

[16] Greyhound Welfare, p 12
[17] Contamination at power station associated sites, p 5
[18] Sydney Stadiums, p 2
[19] TAFE underpayments, p 1
[20] TAFE underpayments, p 1
[21] WestConnex Business Case, p 7

produce documents to the Legislative Council, Mr Mason said that in the absence of case law directly on point, the case was instructive as to how an Arbiter might assess the validity or otherwise of privilege claims:

> ... Egan and Chadwick throw very helpful light on the reasons why the House has a legitimate need for access to a wide range of information; and why "traditional" applications of common law rules of privilege in the areas of public interest immunity and legal professional privilege do not justify refusing a call for paper. In my view these principles also inform (but do not control) the Arbiter's task. [22]

He further explains in the **WestConnex** report that:

> ... It is at least conceivable that some adjustment of these rules may be called for *in law* in a context where the House is reviewing the conduct of the Executive. For example, the House may be concerned to explore whether a government whose conduct it is scrutinising has sought and followed legal advice in a particular matter. Recognising that legal professional privilege is a right personal to the client, capable of waiver, there may conceivably be circumstances in which the House has a constitutionally-derived legal right to more unrestricted access than the strict application of the common law rules of legal professional privilege may suggest.[23]

It therefore follows that even if a document does attract a claim of legal professional privilege, it may not necessarily be privileged from publication by the House.

Mr Mason observed that one of the agencies making the claim of legal professional privilege in the **Sydney Stadiums** dispute accepted that "constitutional" principles inform questions as to the validity of disputed privilege claims, but nonetheless argued that the policy reasons supporting common law privileges should apply with similar force in relation to papers ordered under SO 52. Mr Mason found it difficult to see how the public policies underpinning legal professional privilege had significant application to the dispute before him:

> It might be otherwise if there was some ... allegedly tortious injury resulted from it **and** there was information that premature disclosure to the public might prejudice government ... It has certainly not been demonstrated to my satisfaction that rejecting the "validity" of these particular claims might inhibit candour between the government agencies and their lawyers ....In the public sector at least, one would expect all such communications to be candid. And one would not be shocked if Parliament wished to satisfy itself both as to the instructions given and the advice received concerning administrative action to be carried out at public expense. [24]

It would appear that such disputes largely revolve around the *emphasis* placed by each party on these different factors:

> Both "sides" in these matters urge differing conception of the gravitational pull of (a) "traditional" privilege principles operating in a non-parliamentary context; and (b) "traditional" models of unrestrained parliamentary access to information in its control.[25]

[22] Sydney Stadiums, p 3
[23] WestConnex Business Case, p 7
[24] Sydney Stadiums, p 9 emphasis in the original
[25] Sydney Stadiums, p 3

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While grateful for the guidance offered by the various submissions he had received in relation to his role, Mr Mason concluded that: 'None of these approaches offer a truly bright line or yardstick.' Nevertheless, what was clear from the practice of past Arbiters is that the Arbiter's role is to weigh up the relevant considerations in each case:

> As I read the various submissions and the practice of past Arbiters, no-one contends, (post-Chadwick) that claims invoking public interest immunity and legal professional privilege are to be rejected summarily by the independent Arbiter. Nor are they to be accepted summarily either.[26]

In his report on **TAFE underpayments**, Mr Mason noted that even if the WorkDynamic report *did* attract legal professional privilege, the now redacted report falls entirely within the principle stated in Egan v Chadwick (1999) 46 NSWLR 563 at (86) where Spigelman CJ, Meagher JA agreeing at (152], said:

> In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. [27]

In **Sydney Stadiums**, the Arbiter found that certain documents would attract legal privilege under the common law, but that 'the real question is whether this common law head of privilege is to be accepted as regards documents called by Parliament, or at least the documents tabled in the present matter.'[28] He cites argument from Mr Searle who submitted that disclosure beyond members should only be withheld if detrimental to the public interest. His response to Mr Searle's argument was:

> I do not read this as an argument that "public interest" in access to confidential legal advice would trump legal privilege in a "traditional" situation ... Rather it is an invitation to factor into my evaluation the range of "constitutional" principles touching on whether a privilege claim framed by reference to "public interest immunity".... etc should continue to be respected by the House ... Assuming that I have understood the submission correctly, I am prepared to approach this particular field of controversy in this manner.[29]

Mr Campbell's views on Legal Professional Privilege

In most respects, Mr Campbell's views regarding the law of legal professional privilege would seem to align with those of Mr Mason:

> The law of legal professional privilege cannot operate in the same way, concerning a call for papers made by the Council, as it operates concerning production of documents under compulsion in a court. It must be modified to take into account the constitutional principle of the accountability of the Executive to the Parliament.[30]

[26] Sydney Stadiums, p 3
[27] TAFE underpayments, p 2
[28] Sydney Stadiums, p 8
[29] Sydney Stadiums, p 8
[30] Contamination at power station associated sites , p 4

Similarly to Mr Mason, Mr Campbell also admits the applicability of the common law in relation to legal professional privilege to non-curial contexts, including in deciding a question or privilege under standing order 52.[31] It would also appear he shares Mr Mason's views regarding the applicability of the 'dominant purpose' test:

> The requirements of a claim of legal professional privilege under the common law are that there have been a confidential communication, between a client and the legal advisor, made for the dominant purpose of the client obtaining or the advisor giving legal advice or assistance, or with reference to litigation ... that is actually taking place or is in the contemplation of the client.[32]

Mr Campbell is also of the view that even if an Arbiter deems that a document meets the common law test, this does not prevent the House from deciding that the document should be disseminated, it is but one factor the House takes into account in making an 'informed and responsible decision' about whether to publish the document.[33]

However, it would appear that Mr Campbell's view in relation to one aspect of his role differs from that of past Arbiters, including Mr Mason. Mr Campbell's reading of SO 52 is that his report should relate to the validity of the claim of privilege as it was made. If events have moved on since the documents were produced and the claim made, his report should not take any such movement into account.[34]

Public interest immunity

This sections deals with claims of privacy/confidentiality/personal information and commercial-in-confidence. While these are not recognised heads of privilege, such claims are essentially a subset of a claim of public interest immunity and may be determined by reference to the public interest. On a small number of occasions, an agency has sought public interest immunity based on statutory secrecy, 'without prejudice privilege' and 'parliamentary privilege'. These claims are also discussed in this section.

The role of the Arbiter in determining public interest privilege claims reflects the constitutional role of the House [35]

In his report on the **WestConnex Business Case**, Mr Mason acknowledged that public interest privilege can be asserted in places other than courts:

> ... the law recognises privilege such as public interest immunity and legal professional privilege, as rights or immunities capable of being asserted outside curial contexts ... There is a right and there may be a duty to assert it [public interest immunity] and High Court authority supports its availability in extra-curial proceeding (Jacobsen v Rogers (1995) 182 CLR 572 at 588-9). When raised, a balancing of potential harms is required.[36]

[31] Contamination at power station associated sites , p 5
[32] Contamination at power station associated sites , p 5
[33] Contamination at power station associated sites, p 5
[34] Contamination of power station associated sites, 18 September 2020 , p 3.
[35] See also 'The Role of the Arbiter' on pp. 4-5
[36] Report on WestConnex, p 7; Contamination at power station associated sites, p 7

Mr Campbell also recognised authority for the application of public interest privilege in contexts other than court proceedings.[37] Both Arbiters contend that the adjudication of public interest privilege claims in a parliamentary setting is distinct from what occurs in a court. Mr Mason's views are summarised below, followed by those of Mr Campbell.

Mr Mason's understanding of the Arbiter's role in determining public interest claims is informed by Egan v Willis: 'As explained in Egan v Willis, the House's right to call for papers stems from its role as a legislator and body scrutinising the activities of Government ... the House's needs for access to documents is quite different to a court's needs.' [38]

In the court context, the public interest is focussed on the proper functioning of the *executive* arm of government and the *public service*. Whereas, in the parliamentary context, the House has a 'countervailing' public interest in performing its *constitutiona*l roles.[39] Mr Mason explored this theme in his report on **Landcom (Part 1):**

> ... the pattern of practice involving Executive claims of public interest immunity shows that independent Arbiters and the House have for many years accepted that some adjustment needs to be made for principles relating to public interest immunity as expounded by courts in the context of litigation or royal commissions when they fall to be applied to a House of Parliament exercising its constitutional roles as explained in Egan v Willis (1998) ...'[40]

While wider public interests associated with public interest immunity should be acknowledged (such as the executive's interests to secure information from third parties under assurances of confidentiality), Mr Mason suggests that as long as overriding harm is not done to the 'proper functioning of the executive arm of government and of the public service', the focus should always be on the needs of the House in performing its constitutional functions: 'Whether any document attracts the privilege can only be evaluated after weighing the legitimate governmental interests against the legitimate competing interest of the House.' [41]

Mr Campbell expressed a similar view in his report on **Contamination at power station associated sites**:

> ...the situation in which the validity of a claim of privilege is made concerning documents produced to the Council is one in which there may be some harm to one aspect of the public interest arising from the document being available to members without the restrictions of clause 5 (b) [of SO52] – it is just that that possible harm to the public interest is not shown to outweigh the public importance of the document being available for use without restriction.[42]

[37] Contamination at power station associated sites, p 7
[38] WestConnex Business Case, pp 6-7
[39] WestConnex, Business Case, p 10 emphasis added
[40] Landcom Bullying Allegations (Part 1) p 4
[41] WestConnex Business Case, dated 8 August 2014, p 11
[42] Contamination at power ptation associated sites, p 10

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Mr Campbell's view on Public Interest Immunity

In his report on **Contamination at power station associated sites**, Mr Campbell outlined his 'general considerations' concerning public interest immunity, including his reflections on the similarities and differences between the role of the ILA (Independent Legal Arbiter) and a judge in court context. In court, for instance, a judge can raise questions or seek information about a privilege claim, whereas in the Council, the documents have already been ordered; in a court, a public interest claim is supported by an affidavit which sets out relevant facts to assist the judge to assess a claim, but no 'precisely comparable procedure exists' for the Arbiter. Nor can the Arbiter apply an oath to maximise the likelihood of the claim being made on truthful grounds.[43] These and other factors discussed by Mr Campbell, taken together, create challenges for an ILA:

> In many situations where an ILA is asked to express an opinion concerning public interest immunity privilege these considerations create significant practical difficulties in being able to form a positive conclusion that the harm that is likely to arise from disclosure of the document in question outweighs the benefit this is likely to result from disclosure of the document.[44]

Mr Campbell identified several factors that would appear to address some of the challenges in determining public interest claims in a parliamentary context. First, some weight, he suggested, should be accorded to the fact that the Council has ordered the documents in the first place: 'It cannot be assumed that the Council would exercise its powers to require the production of documents irresponsibly'.[45] Second, he acknowledged that debate in parliament is a critical aspect of a representative democracy and access to documents to allow that is fundamental. And third, unlike a judge, the House makes the ultimate decision regarding the ultimate status of the document. '...the report of the ILA decides nothing – it expresses an opinion, which the House is free to accept, accept in part, or reject totally.' Given the challenges inherent in the role, Mr Campbell urges the parties to disputes to assist the weighing of public interest considerations to 'descend into as much detail' as to why privilege should be claimed or denied.[46]

Mr Campbell noted the fundamental challenge faced by an Arbiter in determining public interest privilege claims in a parliamentary context, as articulated by Priestly JA in *Egan v Chadwick*:

> It is more difficult to understand how interests can be weighed against one another when the contestants are the New South Wales Executive and the Upper House of the New South Wales Parliament; they may be opposed in a political sense but they are not opposed either in a legal sense or one analogous to that applicable in all the cases where public interest immunity has been held to exist.'[47]

Notwithstanding the difficulties, Mr Campbell does not consider his to be an impossible task: 'I would not accept that the weighing task is an inherently impossible one, just that it is a difficult one.' [48]

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[43] Contamination at power station associated sites, p 7
[44] Contamination at power station associated sites, p 8
[45] This view perhaps aligns with the 'latitudinal' approach discussed by Mr Mason in his reports, see p 6.
[46] Contamination at power station associated sites, p 9
[47] Contamination at power station associated sites, p 8
[48] Contamination at power station associated sites, p 8

Close attention will always be given to matters of public safety

In his report on **Register of Buildings Containing Potentially Combustible Cladding**, Mr Mason emphasised that in his and other Arbiters' assessments of the public interest, close attention would always be given to matters of public safety, noting that the relevance of public safety concerns in relation to disputed privilege claims have been considered in previous Arbiter reports including *Circular Quay Pylons* and *Greyhound Welfare.* While the claim in relation to the cladding report was pressed on four grounds, Mr Mason only upheld the claim in relation to the first ground, which was that disclosure would endanger public safety: 'The letter from the Commissioner of Police when read with the recent evidence of Mr Hudson to a Committee of the House paints a scenario that deserves to be taken into account no matter how limited the risk may be.'[49]

Privilege will more likely be upheld if they relate to certain categories of people

While Mr Campbell contends that every claim of public interest privilege must be judged on its own circumstances, there are some matters for which there is a higher likelihood that a claim will be upheld: 'These include matters relating to defence secrets, matters of diplomacy, police informers, whistle-blower's, adoption, wardship or ill-treatment of children'. [50]

Agencies need to demonstrate a compelling case of prospective harm in claims for public interest privilege

In his report on **the Crown Casino VIP Gaming Management Agreement,** Mr Mason said that given the relevant parties to the gaming Agreement would, or should, have been aware that an Agreement of this type would attract parliamentary oversight as to whether or not the agreement was in the interests of good government in New South Wales, it was all the more important that those seeking privilege on the basis of public interest immunity should focus on documenting the risk of harm posed by disclosure:

> I am not saying that a claim of public interest immunity would necessary fail in these circumstances. But a compelling case of prospective harm would need to be demonstrated before it succeeded .... In any public interest calculus one needs to address and weigh the reasons said to indicate a risk of harm to the public interest before addressing and weighing the factors supporting openness.[51]

Commercial in confidence

Commercial in confidence is not a head of privilege; such claims will be determined by reference to the public interest.[52]

According to Mr Mason, "Commercial in confidence" and "privacy" are loose and often conclusive expressions. They are not in themselves recognised heads of privacy (even for courts).' [53] When public interest immunity is raised, a balancing of potential harms is required. [54]

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[49] Register of Buildings Containing Potentially Combustible Cladding, p 3
[50] Contamination at power station associated sites, p 10
[51] Crown Casino VIP Gaming Management Agreement, pp 6-7
[52] WestConnex Business Case, p 10
[53] WestConnex Business Case, p 10
[54] WestConnex Business Case, p 7

In adjudicating claims of commercial in confidence in his interim report on **Insurance and Care NSW and the State Insurance Regulatory Authority**, Mr Mason said:

> Several documents are said to be privileged under the rubric of "commercial in confidence" but on the *acceptable conceptual basis* that it would be against the *public interest* for them to be disclosed more widely than to members of the House in accordance with the Standing Order.[55]

Commercial harm to private interests does not in itself generate public interest immunity

In his report on **Budget Finances 2018-2019** Mr Mason did not uphold a claim of commercial in confidence privilege in relation to a document which included forecasted taxes on Gaming devices. He cited Egan v Chadwick (1999) 46 NSWLR 563 in support of his contention that ' ... commercial harm to private interests does not in itself generate public interest immunity, let alone immunity precluding unrestricted access by Members in the present context'.[56]

Privilege will more likely be upheld if dissemination compromises the financial interest of taxpayers

In **WestConnex** Mr Mason asserts that privilege claims may be upheld if disclosure compromises the financial interest of taxpayers.[57] Mr Campbell concurs with the view of his fellow Arbiter, in his report on **Contamination at power station associated sites.**[58]

The executive needs to make a compelling case for commercial interests to trump the need for effective parliamentary oversight

A claim of privilege over redacted parts of an Agreement between the Independent Liquor & Gaming Authority and Crown entities was the subject the report on **Crown Casino VIP Gaming Management Agreement.** Crown argued that the redacted parts contained commercial in confidence information that should attract public interest immunity. The Arbiter did not uphold the claim of privilege. Mr Mason argued that the provisions that were being proposed to remain privileged formed part of a contract negotiated by the Authority and approved by the minister under the relevant statutes and as such:

> These factors (and the terms themselves) demonstrate that the whole Agreement furthers statutory functions designed to protect the interests of the public of New South Wales. This does not in itself exclude public interest immunity attaching to part of the agreement, but it is not a propitious start for an argument favouring secrecy over disclosure'[59]

In **Sydney Stadiums** most of the still disputed documents fell under the 'overlapping rubrics' of public interest immunity and commercial in confidence. In relation to schedule 2 of a memorandum of understanding between the government and national rugby league entities, Mr Mason did not uphold privilege for several reasons, including because:

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[55] Insurance and Care NSW and the State Regulatory Authority, p 8 emphasis added
[56] Budget Finances 2018-2019, p 2
[57] WestConnex Business Case, p 11
[58] Contamination at power station associated sites, p 10
[59] Contamination at power station associated sites, p 3

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> The provenance and costing of the proposals are key elements for parliamentary oversight. The "commerciality" of the broad arrangements (to government at least) appears to me to be at the heart of the matters of interest to parliament.[60]

Privilege will be upheld in relation to sensitive commercial information if this does not impede effective parliamentary scrutiny

In his interim report on **Insurance and Care NSW and the State Insurance Regulatory Authority,** Mr Mason upheld (in principle) a commercial in confidence claim in relation to documents revealing icare's active investment strategies, accepting icare's argument that public dissemination would allow market participants to predict the trading and investment strategy for icare managed schemes. He also upheld privilege in relation to documents concerning ongoing commercial negotiations, on the basis that dissemination would undermine icare's negotiating position to the detriment of the public interest. In relation to documents containing technical specifications of icare's databases, platforms and servers he said: 'The sensitivity of this information is obvious and there is no indication that the House would be impeded in its functioning by maintaining the privilege in the relevant sense'.[61]

In **Byron Central hospital and Maitland Hospital** privilege was claimed in relation to an assessment of the viability for a private operator to offer certain medical facilities in the Byron area. This included commercial modelling data which, according to the government, could affect any future tender processes. The government also sought privilege on specific anticipated costs of the development of Byron Shire Hospital. Mr Mason upheld the privilege in relation to certain redacted portions of the documents, indicating that the exercise had been challenging:

> This has not been an easy matter. However, in my evaluation, there is a risk to the public interest in getting the best value should the projects be approved and go to tender. I am unpersuaded that the very specific information in the redacted portions of otherwise released documents needs to go into the public domain in order that effective parliamentary scrutiny and debate could occur.[62]

Privilege will be upheld in relation to sensitive commercial information if disclosure is not in the public interest

In **Contamination at power station associated sites**, Mr Campbell did not uphold privilege in relation to a category of documents which contain estimates of the potential state liability for remediation of contamination at individual power stations. Treasury claimed disclosure would be commercially harmful by prejudicing future negotiations and potentially harming the public interest. This information is already provided on an aggregated basis. The Arbiter addressed the public interest arguments presented by the member in his report:

> Any public interest in knowing the extent to which the State might be liable for cleaning up contamination at a particular site (rather than at all the sites collectively, as is disclosed in the budget papers) strikes me as slight.[63]

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[60] Sydney Stadiums p 5
[61] Insurance and Care NSW and the State Insurance Regulatory Authority, Interim report, p 9
[62] Byron Central hospital and Maitland Hospital, p 2.
[63] Contamination at power station associated sites, p 11

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Private, personal or identifying information

Personal information is not a recognised head of privilege, but both agencies and the House should take steps to prevent certain personal information entering the public domain, particularly that relating to private citizens

Since his first report, Mr Mason has maintained that personal or 'private' information is not a recognised head of privilege at law. However, it does not follow that personal information should immediately be published – instead, Mr Mason draws a distinction between the claim of privilege at law, and separately, any determination as to whether the personal information the subject of the claim should be in the public domain.[64]

Where the Arbiter has not upheld a claim of privilege over personal information, he has almost uniformly gone on to indicate support for – or in some cases explicitly recommend – the redaction of information that would reveal certain identifying information.

Personal and privacy claims are determined by reference to the public interest

Mr Mason states in **Westconnex** that the House and the Arbiter should determine the nature and extent of the redactions required by considering the countervailing interest favouring disclosure:

> If the House wants to limit any perceived risk stemming from unconditional publication of confidential but unprivileged documents it is of course free to do so. I reiterate that these considerations do not in themselves justify the overriding of a privilege recognised by law. But, as regards public interest immunity at least, they are aspects of the countervailing interest favouring disclosure that have to be weighed.[65]

This approach is consistent with that adopted by the Hon JC Campbell QC, who recently articulated the public interest considerations that apply to personal information as follows:

> The mere fact that information is personal is not enough, by itself, to give rise to any arguable claim of public interest privilege ... It is only that personal information which is known to have been disclosed in confidence, or that could reasonably be seen as information that the person to whom it related would not want to be generally available, that seems to me to be capable of giving rise to a claim of public interest privilege ...[66]

On occasion Mr Mason has indicated that the public interest in disclosure may have been sufficient to sway him in support of maintaining privilege over certain information. In **Sydney Stadiums**, he stated that he would have been prepared to report that certain information relating to stadium members were covered by a relevantly valid privilege. However, the member disputing the claim had agreed to the redaction of information of individual members of the public, obviating his assessment.[67] In **WestConnex**, Mr Mason was asked to consider a privilege claim made over a username and login. He reported that 'privilege should be recognised for the portion of the document disclosing this information but not to the document as a whole'.[68]

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[64] For example, see Mr Mason's comments articulating this principle in WestConnex Business Case, 8 August 2014, pp 5, 8; Register of Buildings Containing Potentially Combustible Cladding, 13 December 2019, pp 3 – 5.
[65] WestConnex Business Case, dated 8 August 2014, pp 8-9.
[66] Allegations concerning the Hon John Sidoti MP, 4 November 2019, p 17.
[67] Sydney Stadiums, 22 May 2018, p 10. This information extended to postal addresses, residential addresses, telephone numbers, email addresses, membership numbers, bank account or credit card numbers and Dropbox folder URLs.
[68] WestConnex Business Case, dated 8 August 2014, p 12.

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The scope of redactions made must not impede the House in its ability to discuss the subject of the documents, but should not discourage members of the public from making representations to government

In **Sydney Stadiums**, Mr Mason clarified that information should be redacted in such a way so as not to impede the House in its ability to discuss the subject of the documents, while 'remov[ing] any discouragement stemming from privacy concerns that might inhibit members of the public from making representations to government'.[69]

In this regard, Mr Mason has sought to ensure in particular that redactions are guided by the nature or purpose of an individual's interaction with government. The redaction of names is sometimes acceptable. For example, in the report on **Insurance and Care NSW and the State Insurance Regulatory Authority**, the Arbiter agreed to redaction of the names of scheme claimants. Similarly, in **Contamination at power station associated sites**, numerous documents contained full names, contact details, direct telephone numbers and email addresses of various of the employees or other officers of private sector companies and of state departments or instrumentalities. While Mr Campbell observed that 'this is information of a type that does not attract any variety of recognised legal privilege', he acknowledged it was nonetheless information over which employees and officers would have a legitimate interest in preserving their privacy. He noted the public interest in the privacy of individuals not being unjustifiably invaded and recommended the information be redacted.[70]

However, in **Floodplain Harvesting** (Reports 1 and 2), Mr Mason went so far as to ensure that the redaction of email addresses *did not* preclude the identification of the individuals involved, as those individuals had engaged with government in the course of negotiating and lobbying for a particular outcome.[71] In this report he explained that citizens who deal with government must expect that those dealings could be the subject of scrutiny, particularly in circumstances where those citizens are advancing their own interests:

> Except for very unusual categories of information-providers such as whistleblowers and confidential police informants, citizens who deal with government must recognise that the activities of government are subject to Parliamentary scrutiny and that such scrutiny may entail examining exactly whom the government consulted. A fortiori, when those citizens are advancing their own interests, however legitimately.[72]

Similarly, in **Rules Based Environmental Water**, Mr Mason rejected a claim of 'privacy' on the basis that there was 'no sign that the constituents raising issues about water flows, licence trading etc were expecting anything beyond their concerns being fairly and effectively addressed by government'.[73]

In **Stronger Country Communities Applications**, Mr Mason stated that 'privacy' claims ostensibly on behalf of stakeholders whose situations or views are being considered in the framing of detailed executive action will almost never attract a relevant public interest privilege in the parliamentary context. Access to these names relates directly to the processes of government decision-making, the factors taken into account, and the persons whose interests were favoured or disfavoured by the Executive. The Arbiter pointed to his assessment in the **Floodplain Harvesting** report as an example

[69] Sydney Stadiums, 22 May 2018, p 10.
[70] Contamination at power station associated sites, 18 September 2020, pp 16-17.
[71] Floodplain Harvesting, 11 June 2020, p 3; Floodplain Harvesting Exemptions (No 2), 1 September 2020, p 1.
[72] Floodplain Harvesting, 11 June 2020, p 2.
[73] Rules Based Environmental Water, 1 September 2020, p 1.

of the application of this principle. However, he acknowledged that particular instances of truly personal information such as email addresses or phone numbers could be redacted.[74]

It is preferable that the redaction of personal information be negotiated and agreed between members and agencies, rather than at the direction of the Arbiter

Both Mr Mason and other Arbiters have encouraged negotiation between the member disputing the claim of privilege and the relevant agency with a view to agreeing on the nature and extent of any redactions that should be made, in favour of the Arbiter making that determination.[75] This avoids the time and cost incurred by the Arbiter making such assessment and works to ensure that the appropriate balance is struck between accessibility and confidentiality, to the satisfaction of the House and the relevant agencies.

This approach worked well in the **Insurance and Care NSW and the State Insurance Regulatory Authority** report. iCare drew on the approach taken by Mr Mason in WestConnex and Sydney Stadiums to argue in favour of the House accepting the redaction of personal information proposed by iCare. In doing so, icare noted that in these reports Mr Mason had argued that:

- the resolution of disputed claims of privilege relating to personal information generates a substantial waste of time and public money
- it is 'inconceivable' that there is any public interest in the dissemination of such personal information
- there is a real risk of harm stemming from the unrestricted disclosure of this information.[76]

Following consultation, the Arbiter and the member disputing the claim both supported the redaction of the information proposed.[77] Mr Mason has also recommended that the House adopt a sessional order to set out procedures for the redaction of personal information,[78] however the House has not opted to do so to date. If the House did adopt formal procedures to require redaction prior to documents being returned, and given that the scope of redactions agreed between members and agencies to date has varied with reference to the issues that pertain to the particular matter the subject of the dispute, the practical process by which redactions should be agreed and made (including the extent of redactions and the timeframe in which they should be made) and the consequent precise framing of the proposed sessional order,
would need to be the subject of further discussions between the Arbiter, the Clerk and DPC.

Redactions recommended in recent years have extended to: the identity of whistleblowers, informants, witnesses, people who would be at risk of harm if their details were published, or (in some cases) individuals the subject of certain investigatory processes;[79] usernames, logins and membership

[74] Stronger Country Communities Applications, dated 11 September 2020, pp 2-3.
[75] For example, see WestConnex, 8 August 2014; Greyhounds; Sydney Stadiums, 22 May 2018, pp 9-10; Rules Based Environmental Water, 1 September 2020, p 1; Insurance and Care NSW and the State Insurance Regulatory Authority, 22 September 2020.
[76] Insurance and Care NSW and the State Insurance Regulatory Authority, 22 September 2020, p 8 of attached iCare submission.
[77] Insurance and Care NSW and the State Insurance Regulatory Authority, 22 September 2020, p 1.
[78] Sydney Stadiums, 22 May 2018, p 11. See also Memorandum from Mr Mason to the Clerk dated 24 September 2020, attached at Appendix 1.
[79] For example, see reports on Actions of former WorkCover NSW employee; Greyhound Welfare – Further Order; Landcom Bullying Allegations 2019 – Part 1: Treasury return of papers; Landcom Bullying Allegations 2019 – Part 2: Landcom return of papers; Landcom Bullying Allegations 2019 – Part 3: Draft Werman Report; TAFE Underpayments.

numbers;[80] email addresses, phone numbers, postal addresses, telephone numbers;[81] bank account numbers or credit card numbers; [82] and signatures, names of insurance claimants, and conflict of interest forms containing personal information of third parties and employees below the executive level[83].

[80] For example, see reports on WestConnex Business Case; Sydney Stadiums.
[81] For example, see reports on Sydney Stadiums; Floodplain Harvesting; Insurance and Care NSW and the State Insurance Regulatory Authority.
[82] For example, see report on Sydney Stadiums.
[83] For example, see Insurance and Care NSW and the State Insurance Regulatory Authority.

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Parliamentary privilege

Parliamentary privilege exists to protect the parliament from obstruction or curtailment of its powers by the courts and other such bodies. The privilege does not exist to protect the Executive from scrutiny by the Parliament.

Claims of 'parliamentary privilege' from publication have been made by the Executive in returns to orders on a number of occasions. These claims have been surprising in some respects, as parliamentary privilege, at its essence, exists to protect the parliament from obstruction or curtailment of its powers by the courts and other such bodies. The privilege does not exist to protect the Executive from scrutiny by the Parliament.

In his report on **Sydney Stadiums**, Mr Mason noted that Venues NSW had claimed privilege over briefings supporting anticipated parliamentary questions to ministers on the basis that disclosure would be contrary to the public interest because 'it would potentially undermine the responsibility of the Minister to the House'. He summarily dismissed the claim: 'With respect, I fail to understand this and I do not accept it'. He pointed to similar findings he had made in the WestConnex report (below).[84]

Similarly, in the dispute relating to the **Stronger Communities Fund**, the Government claimed 'parliamentary privilege' on draft supplementary answers to questions prepared in the course of the Budget Estimates inquiry process. The Government asserted that the public interest in maintaining this privilege outweighed the public interest in making the information generally available for use in connection with debate in parliament. The Executive sought to rely on the decision of Austin J, In the matter of *Opel Networks Pty Ltd (in liq)* (2010) 77 NSWLR 126 at 134 [118] which upheld a claim of parliamentary privilege with respect to draft answers sought by a court-appointed liquidator. Pointing again to his decision in the WestConnex report (below), in which he observed that this decision stemmed from the relationship between the *court* and Parliament, and therefore provided no basis for the Executive to assert privilege against scrutiny by Parliament, the Arbiter swiftly concluded that the claim was 'without any legal merit'.[85]

The Arbiter pointed to both these reports for his reasoning in rejecting a claim based on parliamentary privilege in **Rules Based Environmental Water**.[86]

The GIPA Act does not provide a basis for claiming parliamentary privilege against scrutiny of the actions of the Executive by the House

In the **WestConnex** return, the Government used the provisions of the *Government Information (Public Access) Act 2009* (GIPA Act) to argue against the publication of House folder notes returned relating to the WestConnex Business Case. Lawyers for Roads and Maritime Services suggested that, while the GIPA Act does not apply directly, its principles inform the consideration of public interest immunity, and the GIPA Act conclusively presumes an overriding public interest against the disclosure of information to the public the disclosure of which would, but for any immunity of the Crown, infringe the privilege of Parliament.[87]

In response, Mr Mason noted that while there are decisions by the courts in Queensland and New South Wales upholding claims of 'parliamentary privilege' with respect to briefing notes,[88] these all

[84] Sydney Stadiums, 22 May 2018, p 10.
[85] The Stronger Communities Fund, 17 July 2020, p 1.
[86] Rules Based Environmental Water, 1 September 2020, p 2.
[87] WestConnex Business Case, 8 August 2014, p 14.
[88] Mr Mason specifically referenced *Rowley v O'Chee [2000] 1 Qld R 207, In the matter of Opel Networks Pty Ltd (in liq) (2010) 77 NSWLR, Tziolas v NSW Department of Education [2012] NSWADT 68.*

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stemmed from the relationship between *courts and tribunals* on the one hand and Parliament on the other, and they involved the application of Article 9 of the *Bill of Rights 1688*. Therefore, they have no bearing on the activities of Parliament itself or privileges that the *Executive* may assert against the House. Mr Mason concluded:

> The conclusive presumption in the GIPA Act does not bear directly on the present issue. This is for two reasons: first, because the GIPA Act deals with freedom of information applications made by members of the public against the Executive; and secondly, because Parliament's privileges could not, by definition, be infringed by something done under the authority of the House.[89]

Statutory secrecy and other non-disclosure provisions

Statutory secrecy provisions cannot operate to prevent the House from exercising its constitutional role unless they do so by express provision to that effect

A range of statutes in New South Wales make it an offence to disclose certain sensitive information. However, the general parliamentary view has long been that it is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters the law by express words. Therefore, unless expressly stated, statutory secrecy provisions do not impede the House from exercising its constitutional role.

In the **Crown Casino VIP Gaming Management Agreement** report, the Government, at the request of Crown Group, invoked s 17 of the *Gaming and Liquor Administration Act 2007*, which sets out certain secrecy provisions. The Act does not permit documents to be released to a court, but does permit release to the Minister, Crime Commission, ICAC and NSW Police. It similarly does not prevent information being released under GIPA, unless that information would disclose information concerning certain business affairs of an application for a casino licence.

Mr Mason determined that in light of the Council's constitutional role, which includes oversight of the Minister who is expressly mentioned in the Act, he:

> ... cannot conceive that the Council is disadvantaged in comparison to the bodies mentioned in s 17 [ICAC etc]. Nor is a Parliament a "court" within the scope of s 17(4). And Parliament certainly has not delegated to the Authority the function of certifying conclusively as to the public interest in the present context.
>
> In my opinion, statutory non-disclosure provisions will only affect the powers of the Council if they do so by express reference or necessary implication.[90]

The policies informing secrecy obligations may inform any consideration of a public interest immunity claim, even in the parliamentary context

In **Payroll Tax Compliance – Further Order**, the Arbiter observed that, while secrecy provisions in the *Taxation Administration Act 1996* did not provide immunity from the call for papers or provide a direct basis for upholding privilege, Revenue NSW had been correct in submitting that the policies informing secrecy obligations may inform any consideration of a public interest immunity claim, even in the

[89] WestConnex Business Case, 8 August 2014, p 14.
[90] Crown Casino VIP Gaming Management Agreement, 21 October 2014, pp 4-5.

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parliamentary context. However, in that case, considerations in favour of promoting oversight were deemed to carry more weight and the claim of privilege was not upheld.[91]

In the **Budget Finances 2018-2019** report, Mr Mason made the analogous point that both federal and state statutory 'prohibited information' provisions invoked in support of privilege, including those in the *Taxation Administration Act 1953* and the *Gaming Machines Act 2001*, did not purport to address aspects of the relationship between the Upper House and the Executive arm of government.[92]

Similarly, in the **Greyhound Welfare – Further order report**, Mr Mason did not uphold a claim of privilege made over draft extracts of a final report passing between Greyhound Racing NSW and the Special Commission of Inquiry into the Greyhound Racing Industry in NSW that were subject to a non-disclosure regime. He stated that something more than an agreement to maintain confidentiality is needed to generate a basis for privilege as nothing had been advanced or demonstrated to show that the public interest could be harmed in withholding privilege from the documents.[93]

In his report on **Floodplain Harvesting**, Mr Mason stated that 'invocation of private law confidentiality notions or rules drawn directly from the *Government Information (Public Access) Act 2009* or the *Privacy and Personal Information Protection Act 1998* almost never provides a legitimate ground of privilege in the present context beyond the preclusion of the public release of private email addresses and phone numbers'. Citizens who deal with government must recognise that the activities of government are subject to Parliamentary scrutiny and that such scrutiny may entail examining exactly whom the government consulted.[94]

In the report on documents relating to **Allegations concerning the Hon John Sidoti MP**, DPC had submitted that clause 11 of the *Ministerial Code of Conduct* contains a Note stating that GIPA (also at clause 11) provides there is conclusively presumed to be an overriding public interest against the disclosure of the Ministerial Register of Interests. DPC submitted that any finding that the documents were not privileged would be contrary to the intention of Parliament as evidenced by the statutory scheme established by the GIPA Act.

In response, Mr Campbell determined that the GIPA provision is not determinative of any public policy that is to be applied for the purpose of deciding a claim concerning documents produced to the Council – it must be read in the context of its Act. It directs the public interest test that operates in applications for access to information made under GIPA by members of the public.[95]

Without prejudice privilege

Members should address the policy and public interest reasons underlining 'without prejudice privilege' if this claim is made in a dispute

This common law category of privilege was raised in the **contamination at power station associated sites** dispute in relation to several documents. This privilege was claimed over several documents relating to a dispute between AGL and the government. The member disputing the claim did not address this specific claim in her dispute letter, and the Arbiter upheld the privilege in relation to all of the documents over which such a claim was made, stating that:

[91] Payroll Tax Compliance – Further Order, 9 September 2020, p 2.
[92] Budget Finances 2018-2019: Gaming machine profits, 19 July 2018, pp 2-4.
[93] Greyhound Welfare – Further order, 14 February 2017, pp 5-6.
[94] Floodplain Harvesting, 11 June 2020, p 2.
[95] Allegations concerning the Hon John Sidoti MP, 4 November 2019, p 19-20.

> In my view that submission does not take into account the public policy that underlies the common law's recognition of "without prejudice" privilege, or the public interest that is involved in seeking to promote settlement of disputes.[96]

General guidance for members and agencies

Members can assist the Arbiter by advising the purpose for which the documents in dispute will be used by the House in carrying out its constitutional roles

In formulating a dispute to a claim of privilege, a member should ensure that they address why the claims made over particular documents should not stand. However, the Arbiter has also suggested that, where possible, members can assist him in his role by also extending those submissions to address the purpose for which the member intends to use the documents to assist the House in the carrying out its constitutional roles. Mr Mason set out his position in **Register of Buildings Containing Potentially Combustible Cladding**:

> Over the past year or so some concerns have been raised in my mind that lead me to remind Members that, while I would never require those objecting to a claim of privilege to declare in advance their intentions with the disputed information, I will always be assisted by such explanation. I do not see my role as that of granting what in effect is a freedom of information request for the sole purpose of publishing information to the world. My focus is upon the needs of the House in its constitutional roles.[97]

Members and agencies can assist the Arbiter by ensuring that submissions made either for or against privilege address why it is, or is not, in the public interest to publish the documents

Similarly, both members and agencies can assist the Arbiter by ensuring that submissions made either for or against privilege address why it is, or is not, in the public interest to publish the documents. In his report on **Allegations concerning the Hon John Sidoti MP**, Mr Campbell made the following observation:

> It assists greatly in conducting the weighing task that is inevitably involved in a claim for public interest privilege if the officers of the Executive who make the claim of privilege descend into as much detail as possible concerning why it is not in the public interest for the disputed documents to be freed from the limitations of rule 5(b) [of SO 52], and if those members of the House who opposed the claim for privilege identify the public interest that would be served by rejecting the claim for privilege and thereby freeing the documents from the limitations of rule 5(b) [of SO 52].[98]

[96] Contamination at power station associated sites, p 13
[97] Register of Buildings Containing Potentially Combustible Cladding, dated 13 December 2019, p 5.
[98] Allegations concerning the Hon John Sidoti MP, dated 4 November 2019, p 15.

Appendix 1: Memorandum to the Clerk of the Parliaments from the Hon Keith Mason, AC, QC, 24 September 2020

Memorandum to the Clerk relating to Standing Order 52 re *Returns to Orders Roundtable*

24 September 2020

I refer to the resolution by the House on 16 September.

May I raise three issues for discussion, touching the scope of the Standing Order.

The definition of "privilege"

Examination of my reports as adopted by the House over the years will reveal that I proceed from the starting point that the Executive has answered the call for papers to the satisfaction of the House. Claims asserting privilege in that context by reference to "commercial in confidence", "public interest immunity" (in a curial context) or "legal professional privilege" (in a curial context) do not establish a basis for resisting the call for papers: see *Egan v Chadwick* (1999) 46 NSWLR 563. Once tabled, the documents are made available but only to Members of the Legislative Council and they are not to be published or copied without an order of the House (*Standing Order* 52 (5) (b)).

The task of the independent legal arbiter commences after a member "dispute[s] the validity of the claim of privilege in relation to a particular document or documents" and the President appoints the arbiter (*Standing Order* 52 (6) and (7)).

Much confusion exists about the scope of this term in the context of the Standing Order. The topic is discussed generally by me in several reports, most recently *Landcom Bullying Allegations 2019,* 13 September 2019, pp 3-4 and *Register of Buildings Containing Potentially Combustible Cladding,* 13 December 2019, pp 3-5. My understanding is that the House expects more from the arbiter than to consider whether:

- the Executive might have had a claim of privilege had *Chadwick* not been decided as it was decided; or
- the rules and policies underpinning specific categories of privilege at common law or recognised in the *Government Information (Public Access) Act 2009* are to be directly applied to classes of documents despite their tabling in response to a call for papers.

Many submissions prepared on behalf of agencies of the Executive, doubtless at vast expense, ignore these principles, perhaps out of ignorance, perhaps in the hope that an arbiter or the House will adopt a different approach in a particular matter. Perhaps the fault also lies in the lack of focus and guidance offered by the Standing Order itself.

I offer for the consideration of the Roundtable the proposal that the Standing Order be amended to clarify and confirm what "privilege" means in the presently critical context, ie an answered call for papers where the dispute triggered by the Member involves the continuing application of *Standing Order* 52 (5) (b) in its two arms. Might consideration be given to adding to the Standing Order:

> *(10) For the purposes of this Standing Order "privilege" means that it is not in the public interest for the document or the portions of it proposed for redaction to be made available other than to members of the Legislative Council or to be published or copied without an order of the House.*

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Genuinely private information

Sometimes general access to the identities of favoured constituents and their communications with the Executive is vital to parliamentary oversight: see *Floodplain Harvesting Exemptions,* 11 June 2020; *Stronger Country Communities Applications,* 11 September 2020.

But there are many times when such information is not required by the House, at least in the sense that it becomes publicly available after documents are tabled and accessible only to Members. Some general standing order or practice needs to be arrived at, hopefully of a nature that the time of all concerned is not wasted.

At present, disputes about categories of genuinely confidential information such as private phone numbers and email addresses, bank account details etc are negotiated and, if necessary addressed in a report in a general way. An ultimately agreed position is usually reached without the necessity of me reading and ruling upon masses of documents. Privacy issues like these do not invariably attract privilege but one infers that the disputing Member is happy to see them accommodated.

It may be better if the House addressed the matter through some standing order that could of course be overridden in appropriate cases.

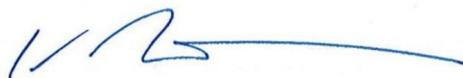
The broader "conciliation" role of the arbiter

An independent legal arbiter can do nothing to narrow the scope of a call for papers or to resolve disagreements about its compliance. That function is not conferred under the Standing Order.

But once seized of a matter, the arbiter may make enquiries of the "parties" through the Clerk or the officers. Sometimes these will be for assistance in locating key documents. In recent years, it has become my practice on occasions to ask the Executive arm if it wishes to press in full its claim of privilege in light of the Member's submission or some general suggestion on my part, usually by reference to an earlier adopted report. If time permits, this usually triggers a "waiver" of privilege over many documents and a recasting of the submissions tabled in support of the original claim. If time permits (and it often does not) I have endeavoured to allow the Member the opportunity to reconsider his or her position in light of the amended claim.

On rare occasions, the Member has been invited independently to consider modifying the extent of his or her dispute in light of some general principles. I do not see it to be part of my remit to probe the Member's objectives but sometimes wish that I could do so in order better to focus the Member's and my own deliberations.

Might there be a benefit in clarifying the nature and extent of the arbiter's "conciliation" role?



The Hon Keith Mason AC QC

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