

Privileges Committee

The 2009 Mt Penny return to order

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Terms of reference

1. That this House notes the findings and recommendations of the Privileges Committee in Report No. 68 entitled 'Possible non-compliance with the 2009 Mt Penny order for papers', dated 30 April 2013.
2. That the Privileges Committee inquire into and report on the failure to provide documents in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process, including documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the House on 14 March 2013, and in particular:
 - (a) the reasons for and circumstances leading to the failure to provide documents in the return,
 - (b) whether other documents held by offices identified in the resolution passed by the House on 12 November 2009 and captured by the terms of the resolution were not provided in the return,
 - (c) any deficiencies in processes or policies of a minister, ministerial office, department or other agency regarding the identification of documents captured by orders for the production of documents under standing order 52, or the inclusion of documents in a return,
 - (d) the identity of the person or persons whose actions resulted in the failure to provide documents in the return,
 - (e) any further action the House should take in relation to this matter, including:
 - (i) whether a person or persons should be adjudged guilty of contempt,
 - (ii) the scope of sanctions that may be imposed,
 - (iii) any possible further involvement by the Independent Commission Against Corruption,
 - (f) guidelines and policies for the process by which ministers, ministerial offices, departments and agencies respond to orders for the production of documents under standing order 52, in light of current guidelines and policies, and
 - (g) any other related matter.
3. That in order to ensure procedural fairness, natural justice and the protection of witnesses before the Committee, the Committee shall observe the procedures laid down in the standing orders and the practices and procedures of the House, and may adopt and report to the House any additional procedures as the Committee sees fit.
4. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser or advisers.

5. That notwithstanding anything to the contrary in the resolution establishing the Committee, for the purposes of this inquiry:
 - (a) the Committee consist of eight members, and
 - (b) the additional member be Mr Buckingham.

These terms of reference were referred to the Committee by the House on Tuesday, 7 May 2013.

Committee membership

The Hon Trevor Khan MLC	The Nationals	Chair
The Hon Amanda Fazio MLC	Australian Labor Party	Deputy Chair
The Hon Jeremy Buckingham ¹	The Greens	
The Hon David Clarke MLC ²	Liberal Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
The Hon Jenny Gardiner MLC	The Nationals	
The Hon Matthew Mason-Cox MLC	Liberal Party	
Revd the Hon Fred Nile MLC	Christian Democratic Party (Fred Nile Group)	

¹ The Hon Jeremy Buckingham was appointed to the Committee for the purposes of this inquiry.

² The Hon David Clarke replaced the Hon John Ajaka as a member of the Committee on 7 August 2013; *Minutes*, Legislative Council, 20 August 2013, p 1899.

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Chair's foreword

Former British Prime Minister Margaret Thatcher's press secretary, Sir Bernard Ingram once observed:

Many journalists have fallen for the conspiracy theory of government. I do assure you that they would produce more accurate work if they adhered to the cock-up theory.³

This inquiry concerned the failure of the executive government to provide a full return to order to the House in 2009 in response to the November 2009 Mt Penny order for papers. The procedural and political significance of this failure was immense, and led to speculation that there was a deliberate attempt by the former Minister for Mineral Resources and Minister for Primary Industries, Mr Ian Macdonald, or his staff to suppress or destroy documents provided to the Legislative Council in the return to order.

This speculation was understandable. In July 2013, the ICAC released its report on the outcomes of Operation Jasper entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*. Among other matters, the ICAC found that Mr Macdonald engaged in corrupt conduct in the creation of the Mt Penny tenement and the re-opening of the expression of interest process for the Mt Penny exploration licence. Clearly, Mr Macdonald had an interest in the documents made public as part of the Mt Penny return to order.

While the evidence of Mr Macdonald to the Committee on this matter was neither reliable nor persuasive, there is no evidence before the Committee that Mr Macdonald sought to interfere with documents provided to the House in the 2009 Mt Penny return to order. In the circumstances, he had no opportunity to do so. Rather, the failure of the executive to comply fully with the 2009 Mt Penny order for papers is attributable almost exclusively to administrative failings within the former Department of Industry and Investment.

On behalf of the Committee, I would like to thank all the individuals and organisations who made a submission to this inquiry or appeared as a witness. The Committee notes that all witnesses attended and gave evidence before the Committee voluntarily. For many of them, it was clearly a stressful experience.

On behalf of the Committee, I also wish to thank the Commissioner of the ICAC for his further assistance during the conduct of this inquiry, and the Director General and staff of the Department of Trade and Investment for their responsiveness to the inquiry.

Finally, I wish to thank my fellow members of the Committee for their collaborative approach to this difficult but very important matter.

The Hon Trevor Khan MLC

Chair

³ Cited in Charles Pigden, 'Popper revisited, or What is Wrong with Conspiracy Theories?' (1995) 25 *Philosophy of the Social Sciences*, in David Coady (ed), *Conspiracy Theories: The Philosophical Debate*, (Ashgate Pub Co, 2006), p 17.

Executive summary

In November 2009, the House ordered the production of State papers in relation to the 2009 Mt Penny mining exploration licence and tender process. A return to order was received from the Government later that month. However, in late 2012, following the publication of certain documents by the Independent Commission Against Corruption (ICAC) as part of Operation Jasper, concerns were raised whether the 2009 Mt Penny order for papers had been fully complied with. The House referred the matter to the Privileges Committee in March 2013.

The Committee reported in April 2013 (see Report No. 68 of the Privileges Committee). The Committee found that certain documents identified by the ICAC in a ‘document comparison matrix’ provided to the President should, *prima facie*, have been provided in the 2009 Mt Penny return to order.

This was a significant finding. Since the last of the *Egan* decisions in 1999 concerning the power of the Legislative Council to order the production of State papers, the House has made more than 300 such orders. This was the first time that the House had before it conclusive evidence that an order of the House for the production of State papers had not been fully complied with, as is required at law.

The failure to fully comply with the 2009 Mt Penny order for papers also had profound political implications. The documents that were identified by the ICAC in its ‘document comparison matrix’ revealed, amongst other things, the steps taken by the former Minister for Mineral Resources and Minister for Primary Industries, Mr Ian Macdonald, to create the Mt Penny tenement and to re-open the expression of interest process for the Mt Penny exploration licence. It is a matter of public record that these actions were subsequently the basis of findings of corrupt conduct against Mr Macdonald by the ICAC in its report on Operation Jasper.

On receipt of the Committee’s previous report, the House referred to the Committee terms of reference for a new inquiry into this matter. The terms of reference required the Committee to examine, amongst other things, the reasons for and circumstances leading to the failure to provide documents in the return, the identity of the person or persons whose actions resulted in the failure to provide documents in the return, and the operation of the process for ordering the production of State papers under standing order 52.

In undertaking this inquiry, the Committee took evidence from a range of parties, including former Ministers Ian Macdonald and Peter Primrose, their former office staff, the Clerk of the Parliaments and Clerk of the Legislative Council, the Director General and General Counsel of the Department of Premier and Cabinet, the Director General of the Department of Trade and Investment and key officers of the former Department of Industry and Investment who were primarily responsible for responding to the order for papers in 2009.

The key finding of the Committee is that no evidence was placed before it that the former Minister for Mineral Resources and Minister for Primary Industries, Mr Ian Macdonald, sought to interfere with the response to the 2009 Mt Penny order for papers. While the Committee did not find the evidence of Mr Macdonald reliable or persuasive, the evidence of other more reliable witnesses is that Mr Macdonald did not play a role in responding to the order for papers. Mr Macdonald’s resignation from office on 15 November 2009, just three days after the 2009 Mt Penny order for papers was made, effectively militated against him seeking to influence the documents provided in the return to order by his office or the Department of Industry and Investment.

The Committee also finds no fault in the conduct of Minister Primrose or his Acting Chief of Staff in responding to the order for papers. They responded appropriately and fully in the circumstances.

Rather, the Committee finds that the failure of the executive to comply fully with the 2009 Mt Penny order for papers is to be attributed almost exclusively to administrative failings within the former Department of Industry and Investment. The Department lacked appropriate processes and protocols for managing orders for papers and a number of staff of the Department made critical administrative errors in responding to the order for papers. The Committee highlights in particular the extremely tight timeframe in which the return to order was prepared due to an administrative error in the office of the Director General, and the failure, once the matter was progressed, to direct the order for papers to the Executive Director of the area primarily responsible for the majority of documents relevant to Mt Penny. The Committee notes that ultimately, these failures were the responsibility of the Director General of the Department, who failed both personally and as Director General to respond adequately to the order for papers.

There is no evidence available to the Committee, however, that any officer from the Department of Industry and Investment deliberately took any action or made any decision in order to restrict the documents provided to the House in 2009. Accordingly, the Committee does not believe that any further steps should be taken in relation to the individuals involved.

The Committee does, however, support in this report a number of proposals to improve the processes for the production of State papers to the Legislative Council. The Committee makes a number of recommendations that are applicable to members of the Legislative Council in drafting orders for the production of State papers, to the Department of Premier and Cabinet in coordinating the response to such orders, and to individual government departments and agencies in the provision of State papers.

Summary of findings and recommendations

- Finding 1** 17
The Committee finds that had the House received a full return to order in 2009 in response to the Mt Penny order for papers, it is likely that the information revealed would have materially contributed to establishing the truth surrounding the issue of the Mt Penny exploration licence. As a result, the matter may have been referred by the House to the ICAC immediately. As events transpired, ICAC did not commence Operation Jasper until February 2011, following receipt of an allegation from a private individual.
- Finding 2** 34
The Committee finds that the evidence of Mr Macdonald was unreliable. The Committee did not rely on the evidence of Mr Macdonald unless supported by the evidence of reliable witnesses or other independent evidence.
- Finding 3** 35
The Committee finds that no evidence was placed before it that Mr Macdonald sought to interfere with the response to the 2009 Mt Penny order for papers. Mr Macdonald's resignation from office on 15 November 2009, three days after the 2009 Mt Penny order for papers was made, effectively militated against him seeking to influence the documents provided in the return to order by his office or the Department of Industry and Investment.
- Finding 4** 37
The Committee finds no fault in the conduct of officers of DPC in responding to the order for papers.
- Finding 5** 37
The Committee finds that the evidence of Minister Primrose and his Acting Chief of Staff was credible and reliable.
- Finding 6** 37
The Committee finds no fault in the conduct of Minister Primrose or his Acting Chief of Staff in responding to the order for papers. They responded appropriately and fully in the circumstances.
- Finding 7** 65
The Committee finds that the failure of the Department of Industry and Investment to have a clearly established and widely available policy for responding to orders for papers materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.
- Finding 8** 66
The Committee finds that the failure by the Director, Executive Support to provide the Manager of Corporate Projects within the Department of Industry and Investment with notification of the Mt Penny order for papers until 19 November 2009 materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.
- Finding 9** 67
The Committee finds that the failure of the Deputy Director General, Minerals and Energy within the Department of Industry and Investment to take responsibility for the preparation of

the return of his Division materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

- Finding 10** **67**
 The Committee finds that the failure of the Manager of Corporate Projects within the Department of Industry and Investment to provide the Executive Director, Mineral Resources with notification of the Mt Penny order for papers materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.
- Finding 11** **68**
 The Committee finds that the failure of the Director General of the Department of Industry and Investment, to make any, let alone any proper, inquiry as to the circumstances surrounding the preparation of the 2009 Mt Penny return to order, or to review the contents of the return, was a serious omission which materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.
- Finding 12** **69**
 The Committee finds that there is no credible basis for any assertion that there was confusion within the Department of Industry and Investment as to whether emails were caught within the terms of the 2009 Mt Penny order for papers.
- Finding 13** **70**
 The Committee finds that on the evidence available to it, no officer of the former Department of Industry and Investment deliberately took any action or made any decision to restrict the documents provided by the Department in response to the 2009 Mt Penny order for papers.
- Recommendation 1** **93**
 That the Clerk publish a summary of observations and guidance provided by the Independent Arbiter concerning claims of privilege over documents in a return to order.
- Recommendation 2** **96**
 That members of the Legislative Council and the Clerk, in drafting orders for papers, adopt 21 days as the default period for returning documents to an order of the House, while allowing that there will be circumstances in which a much tighter timeframe is appropriate.
- Recommendation 3** **96**
 That members of the Legislative Council and the Clerk, in drafting orders for papers, redraft the standard wording currently used in the final paragraph of orders for papers to clarify that it only captures any legal or other advice which goes to the scope of the order.
- Recommendation 4** **98**
 That the Department of Premier and Cabinet, in consultation with the Clerk, create a new whole-of-government policy for dealing with orders for papers under standing order 52, incorporating the current guidance provided to each agency on the passing of an order for papers, but also including guidance on the following matters:
- (a) the date on which an order for papers 'speaks', being the date of the passing of the order for papers by the House;

- (b) the meaning of terms used in orders for papers, where they can be usefully defined and provided that they in no way limit the power of the Legislative Council to order the production of State papers, as agreed between the Department and the Clerk;
- (c) the appropriate circumstances in which a supplementary return can be provided;
- (d) any revised return to order certification processes proposed to be implemented by DPC; and
- (e) any revised processes for the keeping of records by agencies of the searches they perform in responding to an order for papers.

Chapter 1 Introduction

This chapter discusses the establishment and conduct of the inquiry.

The previous inquiry of the Committee

- 1.1 On 30 April 2013, the Chair of the Privileges Committee tabled in the Legislative Council the previous report of this Committee, Report No. 68, entitled ‘Possible non-compliance with the 2009 Mt Penny order for papers’.⁴
- 1.2 The report examined 139⁵ documents identified and made public by the Independent Commission Against Corruption as part of Operation Jasper,⁶ but not provided to the House in 2009 in response to an order for papers concerning the Mt Penny mining exploration licence and tender process. The focus of the report was on documents identified by the ICAC and listed in a ‘document comparison matrix’ as being documents possibly relevant to the 2009 Mt Penny order for papers, but not provided in the 2009 return to order. The Committee’s finding was as follows:
- The Committee finds that at least 124, if not all, of the documents identified by the ICAC in the ‘document comparison matrix’ as not having been provided to the House in 2009 related to the 2008/2009 EOI process, and that accordingly, they should, *prima facie*, have been provided in the 2009 Mt Penny return to order.
- 1.3 The Committee recommended that the House adopt new terms of reference referring a further inquiry to the Privileges Committee to consider the matters raised in its report. To this end, the Committee suggested draft terms of reference for the consideration of the House.
- 1.4 The full report of the Committee, which included a detailed background to the 2009 order for papers and the Mt Penny matter, is available on the Committee’s website. The background information included a summary of the 2008/2009 expression of interest (EOI) process for the exploration of 11 medium and small coal exploration areas in New South Wales, including the Mt Penny expression of interest area in the Bylong Valley.⁷

⁴ Privileges Committee, NSW Legislative Council, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013).

⁵ Or 140 documents. See footnote 55 of Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013).

⁶ Operation Jasper was an investigation by the ICAC into the circumstances surrounding a decision by the Hon Ian Macdonald to open the Mt Penny area in the Bylong Valley for coal exploration, including whether the decision was influenced by Mr Edward Obeid.

⁷ See Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), pp 1-2.

Establishment of this inquiry

- 1.5 On 2 May 2013, following the tabling of the Committee's previous report described above, the Leader of the House, the Hon Duncan Gay, gave notice of a motion to refer a further inquiry into this matter to the Privileges Committee. The notice given by Mr Gay adopted the terms of reference suggested by the Privileges Committee in its previous report, with the substitution of the Hon Jeremy Buckingham for Mr Shoebridge as a member of the Committee for the purposes of the inquiry.
- 1.6 Mr Gay moved the motion on 7 May 2013. It was adopted unanimously by the House without debate.⁸
- 1.7 The terms of reference required the Committee to inquire into and report on the failure to provide documents in the 2009 Mt Penny return to order, including documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the House on 14 March 2013. The full terms of reference are published at pages iv - v. The terms of reference did not set a reporting date. For the purposes of this inquiry only, the terms of reference appointed Mr Buckingham as an additional member of the Committee.⁹

Conduct of the inquiry

Advice from the ICAC

- 1.8 The Committee held its first meeting on 7 May 2013 to discuss the conduct of the inquiry. At that meeting, the Committee resolved to write to the Commissioner of the ICAC seeking advice as to how the ICAC obtained the documents provided in the 'document comparison matrix' and which agency or agencies the documents came from.
- 1.9 On 21 May 2013, the Commissioner of the ICAC responded to the letter from the Chair by providing the information requested along with an accompanying table outlining the author, addressee, date and document type of each document. This information was provided in accordance with secrecy provisions set out in section 111(4)(c) of the *Independent Commission Against Corruption Act 1988*.
- 1.10 On 28 May 2013, the Committee resolved to again write to the Commissioner thanking him for the information provided, indicating that the information was being kept confidential to members of the Committee, but that the Committee intended to use the correspondence and accompanying table to inform questions to witnesses at inquiry hearings without disclosing the document itself.

⁸ *Minutes*, Legislative Council, 7 May 2013, pp 1675-1676.

⁹ Another change of membership occurred on 7 August 2013, when the Hon David Clarke replaced the Hon John Ajaka as a member of the Committee on the advice of the Leader of the Government, following Mr Ajaka's appointment as a minister. See *Minutes*, Legislative Council, 20 August 2013, p 1899.

- 1.11 On 29 May 2013 the Commissioner of the ICAC responded stating that the Commission had no objection to the Privileges Committee using the information for this purpose and provided a Direction in relation to the use of the information contained in the document to ensure there was no inadvertent breach of section 111(4) of the *Independent Commission Against Corruption Act 1988*.
- 1.12 The Committee notes that the information provided by the Commissioner did inform some of the Committee's questions to witnesses as part of this inquiry, but the confidential ICAC document itself has not been published by the Committee except to the extent references are made to it in this report.

Submissions

- 1.13 At meetings held on 7 and 9 May 2013 the Committee resolved to write to a number of individuals, the majority of whom had been connected to the original Mt Penny return to order, to invite them to make a written submission to the inquiry.
- 1.14 In response, the Committee received 12 submissions and 2 supplementary submissions, including submissions from:
- Mr Ian Macdonald, the former Minister for Mineral Resources and Minister for Primary Industries
 - The Hon Peter Primrose, in his capacity as the former Minister for Mineral Resources
 - The Hon Nathan Rees, in his capacity as the former Premier of New South Wales
 - NSW Trade and Investment (of which the former Department of Industry and Investment is now a part), including a supplementary submission
 - The Department of Premier and Cabinet (DPC), including a supplementary submission, and
 - The Clerk of the Parliaments and Clerk of the Legislative Council, responding to the supplementary submission of DPC.
- 1.15 A full list of submissions can be found in Appendix 1.

The 'Maddocks Report'

- 1.16 The supplementary submission from NSW Trade and Investment included a copy of the so-called 'Maddocks Report', prepared by Maddocks Lawyers after the Director General Mark Paterson had consulted the Committee about conducting such an inquiry. Maddocks Lawyers were engaged by the Department to undertake an independent review of the response of the former Department of Industry and Investment to the 2009 Mt Penny Order for Papers. The report is discussed in detail in Chapter 4.

Hearings

- 1.17 The Committee held five public and *in camera* hearings at Parliament House throughout the course of this inquiry:

- On 11 June 2013, the Committee held a hearing entirely *in camera*. Subsequently, the Committee published a redacted version of the evidence of the Hon Peter Primrose, appearing in his capacity as the former Minister for Mineral Resources, and his former Acting Chief of Staff, together with a redacted version of the evidence of Mr Mark Paterson, Director General of NSW Trade and Investment. The evidence of a further witness remained confidential.¹⁰
- On 24 June 2013, the Committee held a public hearing at which it took evidence from Mr Chris Eccles, Director General of the Department of Premier and Cabinet (DPC), and Mr Paul Miller, General Counsel, DPC. Subsequently, the Committee also took evidence from Mr Jamie Gibson, former Deputy Chief of Staff to Mr Ian Macdonald, the former Minister for Primary Industries, and *in camera* evidence from Ms Leigh Sanderson, former General Counsel in DPC. Ms Sanderson's evidence was subsequently published in full by the Committee.
- On 23 July 2013, the Committee held a public hearing at which it took evidence from Mr Ian Macdonald, former Minister for Mineral Resources and former Minister for Primary Industries.
- On 26 August 2013, the Committee held a public hearing at which it took evidence from Mr David Blunt, the Clerk of the Parliaments and Clerk of the Legislative Council, and again from Mr Mark Paterson. The Committee also took *in camera* evidence from four current or former officers of The Department of Industry and Investment: Mr Mark Duffy, former Deputy Director General, Resources and Energy; Mr Brad Mullard, Executive Director, Mineral Resources; Ms Patricia Madden, Manager Operations, Office of Coal Seam Gas; and Mr Ron Taylor, Manager Governance and Information Requests, NSW Trade & Investment. This *in camera* evidence was later made public by the Committee, although the evidence of Mr Duffy was partially redacted.
- On 16 September, 2013, the Committee held a further *in camera* hearing at which it took evidence from three further officers with NSW Trade and Investment: Dr Richard Sheldrake, Deputy Director General; Mr William Hughes, the current Acting Director, Mineral Operations; and Mr Phil Anquetil, the current Executive Director, Business Services. Once again, this *in camera* evidence was later made public.

1.18 In resolving to take some evidence *in camera*, the Committee was guided by various considerations, including the relatively junior level of some witnesses, the stress of appearing before the Committee given the potential of the Committee to make findings of contempt of Parliament, and avoiding the glare of media attention.

1.19 In choosing not to publish the evidence of some witnesses, either in whole or in part, the Committee agreed with every request made by a witness for their evidence to be kept confidential. The Committee also of its own initiative, in consultation with witnesses, did not publish information of a personal nature, including the present employment details of certain witnesses, or information on junior staff who were not involved in the Mt Penny process and did not appear as witnesses. In one instance, the Committee also held back the publication of evidence to protect the reputation of a witness until this report could also be published. In all instances, the Committee sought and received the agreement of witnesses before deciding to

¹⁰ See the further comment later in this chapter under 'Unintended disclosure of the evidence of a witness'.

publish evidence taken *in camera*. Ultimately, however, the decision was a matter for the Committee.

- 1.20 A list of witnesses is provided in Appendix 2. The transcripts of the hearings are available on the Committee's website.

Additional material

- 1.21 In addition to submissions and evidence, the Committee also received a range of additional material during the inquiry.
- 1.22 The Committee received responses to questions on notice from the following: DPC, Ms Leigh Sanderson, NSW Trade and Investment, The Clerk of the Parliaments, Mr Duffy and Mr Taylor.
- 1.23 In addition, NSW Trade & Investment provided a range of additional material to the Committee on request, including various documents compiled by Maddocks Lawyers in preparing the 'Maddocks Report', the full range of notices to produce documents issued by ICAC to the Department, and the Department's policy for responding to orders for papers under standing order 52 entitled 'Standing order 52 – responses', dated June 2013. The Department also identified to the Committee a further 190 documents possibly relevant to the order for papers but not included in the original 2009 return to order or the ICAC's 'document comparison matrix'.
- 1.24 The Committee was also informed during its inquiry by a number of other documents publicly available, most notably a Clayton Utz report entitled 'Review of the Mount Penny Exploration Licence Allocation Process: Preliminary Report', dated November 2011. This report was commissioned by the former Department of Trade and Investment, Regional Infrastructure and Services (now NSW Trade & Investment). The Committee also notes an article written by Tracy Ong and Angus Grigg and published in the *Australian Financial Review* on 28 October 2013 entitled 'Labor powerbroker hits a rich seam'.
- 1.25 Finally, the Committee notes the publication by the ICAC on 31 July 2013 of its report on the outcomes of Operation Jasper entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*. As the Committee indicated in its previous Report No 68 of April 2013, Operation Jasper was the investigation which revealed that a large number of documents had not been provided to the Council in response to the 2009 Mt Penny order for papers. In its report of 31 July 2013, the ICAC found that Mr Macdonald engaged in corrupt conduct in the creation of the Mt Penny tenement and the re-opening of the expression of interest process in the tenement to other parties.

The changing name of the responsible department

- 1.26 For clarity, the Committee notes at the outset changes to the name of the department primarily involved in the Mt Penny matter.

- 1.27** At the time of the creation of the Mt Penny tenement in 2008, the responsible department was the Department of Primary Industries (DPI). The key division responsible for Mt Penny within the Department was the Mineral Resources Division.
- 1.28** In mid-2009, the Government announced a restructure of the NSW Government departments and agencies under which the existing 160 odd departments and agencies were grouped into 13 'super-departments'. Under this restructure, DPI became part of the new Department of Industry and Investment (also referred to as Industry and Investment NSW). At the time of the Mt Penny order for papers in November 2009, the Department of Industry and Investment was the responsible agency. Responsibility for the Mt Penny matter rested with the Mineral Resources Development Division within Minerals and Energy.
- 1.29** Subsequently, in April 2011, the Department of Industry and Investment was in turn combined with elements of a number of other agencies to form the new Department of Trade and Investment (also referred to as Trade and Investment NSW). Somewhat confusingly, the Department of Primary Industries was 'recreated' as a department within the Trade and Investment cluster. However, responsibility for the Mt Penny matter continued to rest with the Mineral Resources Division within Resources and Energy.

Procedural matters

Unauthorised disclosure of the confidential deliberations of the Committee

- 1.30** During the inquiry, on a number of occasions, issues arose in relation to the possible unauthorised disclosure of the deliberations of the Committee. Notably, in the lead up to the appearance of Mr Ian Macdonald before the Committee on 23 July 2013, there were several media reports of the internal deliberations of the Committee.
- 1.31** The Committee did not choose to investigate these apparently unauthorised disclosures, on the basis that they did not amount to a substantial interference with the conduct of the inquiry and the operation of the Committee. However, as the Privileges Committee is itself responsible for investigating unauthorised disclosures on behalf of the House, the Committee places on record its extreme regret and displeasure that its own internal deliberations were potentially disclosed and made public.

Unintended disclosure of the evidence of a witness

- 1.32** The Committee notes that prior to the Committee's hearing on 23 June 2013, a redacted version of the *in camera* evidence of a witness was incorrectly made public on the Committee's website for a period of approximately 24 hours. This was the result of an administrative error by the Committee secretariat when moving a document within the Committee's website. Although the error was subsequently revealed in the media, the Committee resolved nevertheless to keep the transcript confidential, in view of the limited public access of the website document during the short time it was available.
- 1.33** The Committee apologised to the witness, and would like to acknowledge the generous acceptance by the witness of that apology.

Procedural fairness

- 1.34** The Committee notes that the Committee's terms of reference provided that in order to ensure procedural fairness, natural justice and the protection of witnesses before the Committee, the Committee shall observe the procedures laid down in the standing orders and the practices and procedures of the House, and may adopt and report to the House any additional procedures as the Committee sees fit.
- 1.35** The Committee was particularly mindful of the need to ensure procedural fairness and the protection of witnesses throughout this inquiry. The Committee notes that it received advice on this matter from Mr John Evans, the former Clerk of the Parliaments and Clerk of the Legislative Council, during its previous inquiry.¹¹
- 1.36** Throughout the inquiry, the Committee followed the practices laid out in *New South Wales Legislative Council Practice* and the standing orders in relation to the taking of evidence. In the circumstances, the Committee did not feel the need to adopt any additional procedures as provided for in the terms of reference. However, the Committee did adopt a flexible approach to questioning of witnesses, allowing both members and witnesses to pursue a line of questioning and argument.
- 1.37** The Committee also notes that the terms of reference enabled the Committee to utilise the services of an appropriately qualified adviser or advisers. In the event, the Committee did not feel the need to engage an adviser.

Structure of this report

- 1.38** This report is in five chapters. The following four chapters are structured as follows:
- Chapter 2 provides background information to the inquiry: a summary of the order for papers process generally, a summary of the 2009 Mt Penny order for papers, an examination of the documents in the 'document comparison matrix, and a short examination of the significance of the failure to comply fully with the Mt Penny order for papers.
 - Chapter 3 examines why documents provided to or generated by Minister Macdonald's office were not included in the 2009 Mt Penny return to order. It also examines the response of Minister Primrose's Office to the order for papers.
 - Chapter 4 examines why documents in the possession of the Department of Industry and Investment were not included in the 2009 Mt Penny return to order.
 - Chapter 5 examines the operation of the order for papers process and standing order 52 generally, with particular reference to suggestions for change to the process made by DPC and the response of the Clerk of the Parliaments.

¹¹ See Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), p 6.

Chapter 2 **Background to the inquiry**

This chapter provides background information to the inquiry. It summarises the order for papers process generally and the processes involved in the 2009 Mt Penny order for papers, including changes to the ministry at the time of the order for papers. It also examines the documents provided by the ICAC in the ‘document comparison matrix’, including their source and nature. It concludes with a short examination of the significance of the failure to fully comply with the 2009 Mt Penny order for papers.

The order for papers process

- 2.1 Orders for the production of State papers are one of the principal means by which the executive is held accountable to the Legislature and the people of New South Wales.
- 2.2 The power of the House to order the production of State papers is a common law power based on the principle of reasonable necessity – that is, the House has such powers as are ‘reasonably necessary’ for the House to carry out its legislative and scrutiny functions. Unlike some other Australian jurisdictions, the power to order the production of papers has not been conferred on the Houses by statute or by reference to the powers of the House of Commons.
- 2.3 The executive government is obliged to comply with orders for the production of papers in full. The only area of ambiguity concerns ‘cabinet documents’.¹²
- 2.4 Standing order 52 regulates the Council’s common law power to order the production of State papers. The full terms of the standing order are provided at Appendix 3.

Departmental procedures

- 2.5 Under standing order 52, orders for papers are initiated by resolution of the House. On a resolution for the production of papers being agreed to, the terms are communicated by the Clerk to the Director General of the Department of Premier and Cabinet (DPC).
- 2.6 DPC subsequently coordinates the retrieval of the documents requested from the departments, agencies or ministerial offices named in the resolution. The process is initiated by the Deputy Director General, General Counsel, DPC, writing to the relevant heads of departments, agencies and ministerial offices named in the order, indicating the terms of the resolution of the House, providing an extract of the relevant Minutes of Proceedings of the Legislative Council, and providing the due date for the return. DPC also attaches detailed guidance in relation to the response. The full text of the DPC guidance made available in 2009 in relation to the Mt Penny order for papers is available at Appendix 4. A summary of the guidance is provided below:

¹² Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), pp 7 – 10. This matter is discussed further in Chapter 5.

- *Provision of papers:* DPC indicates that all papers which fall within the terms of the resolution, other than ‘cabinet documents’, must be produced in full, even if they contain irrelevant information. Only photocopies are to be provided, and it may be appropriate to mask some material where a claim for privilege is made. ‘Cabinet documents’ must not be produced.
- *Non-privileged papers:* DPC indicates that SO52(3) requires the creation of an index of all documents returned in the order. DPC encloses an example of the standard format for the index and provides a detailed explanation of the information and terminology to be used in the return.
- *Claims of privilege:* DPC indicates that a separate index of documents over which privilege is claimed must be prepared, and provides an example of the standard format to be used when making claims for privilege. DPC highlights the importance of setting out the claim clearly; if a privilege claim is subsequently challenged, the question is referred to an independent legal arbiter, and there is no subsequent opportunity to provide further submissions in support of a claim.
- *Delivery and identification:* DPC indicates that all papers are to be delivered in standard archive file record boxes with the corresponding parts of the index affixed to the top of each box. Agencies are to place privileged and non-privileged documents in separate boxes.
- *Certification by CEO:* DPC indicates that papers should be accompanied by a letter signed by the head of department/agency stating, ‘I certify to the best of my knowledge all documents held by the [Department] and covered by the terms of the resolution have been provided.’
- *Cabinet documents:* DPC reiterates that ‘cabinet documents’ should not be produced or referred to in responding to the resolutions. All agencies are obliged to protect the confidentiality of ‘cabinet documents’, as per Premier’s Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions*.
- *Estimated cost of compliance:* DPC indicates that the agency is to provide details of the costs incurred by the agency in complying with the resolution to the Cabinet Standing Committee on Public Administration.

2.7 For clarity, the Committee notes that documents provided in a return to order by a department are provided directly to DPC. They are not forwarded through the relevant ministerial office.

2.8 The Committee understands that the above process has remained largely unchanged between 2009 at the time of the Mt Penny order for papers and now.¹³

2.9 Once the offices, departments and agencies named in the order have produced the papers captured by the order to DPC, DPC lodges the return with the Clerk of the Parliaments. The

¹³ Correspondence from Director General, Department of Premier and Cabinet to the Clerk of the Parliaments dated 18 January 2013, cited in Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), pp 61-62. These sentiments were confirmed in evidence given before the Committee by Mr Chris Eccles, Director General, and Mr Paul Miller, General Counsel, Department of Premier and Cabinet, 24 June 2013, p 19.

return is either immediately tabled in the House or, if the House is not sitting, received by the Clerk out of session.

2.10 While DPC is responsible for coordinating returns to order, the Department has previously stated that:

- In accordance with the principles of responsible government and ministerial responsibility to Parliament, responsibility for producing the documents to the House rests formally with the ministers who represent the government in the Legislative Council.
- DPC does not independently review the documents produced to the Legislative Council. Instead, each agency is responsible for ensuring that the documents it is producing are fully responsive to the order, including a separate index of those documents.
- Although not required by SO 52, DPC also requests the head of each agency to provide letters of certification that, to the best of his or her knowledge, all documents held by that agency and covered by the terms of the order have been produced. These letters of certification are typically included in the return to order provided to the House. This certification does not extend to ‘cabinet documents’.¹⁴

The 2009 Mt Penny order for papers process

2.11 On 10 November 2009, the Hon Duncan Gay gave notice of motion for an order for the production of papers in relation to the Mt Penny mining exploration licence and tender process.

2.12 On 12 November 2009, the Legislative Council agreed to the motion. The order stated:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.¹⁵

2.13 On the same day, the Clerk of the Parliaments sent a letter to the Director General of DPC advising the terms of the resolution agreed to by the House. The letter was copied to the Hon John Hatzistergos MLC in his capacity as Leader of the Government in the Legislative Council.

¹⁴ Correspondence from Director General, Department of Premier and Cabinet to the Clerk of the Parliaments dated 18 January 2013, cited in Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), pp 61-62.

¹⁵ *Minutes*, Legislative Council, 12 November 2009, p 1517.

- 2.14** On 13 November 2009, the then Deputy Director General, General Counsel in DPC, Ms Leigh Sanderson, wrote to the following representatives of the offices and agencies named in the resolution, informing them of the order, as per the terms of the standard process outlined above, and asking that they deliver their agency's return to the Legal Branch of DPC:
- The Chief of Staff of the Premier's Office
 - The Chief of Staff of the Treasurer's Office
 - The Chief of Staff of the Minister for Mineral Resources and Minister for Primary Industries, Mr Ian Macdonald
 - The Secretary of the NSW Treasury
 - The Director General of Department of Industry and Investment
 - The Heads of all divisions and branches of DPC.¹⁶
- 2.15** Copies of these letters were included in the return to order provided to the Legislative Council by DPC.
- 2.16** On Sunday 15 November 2009, three days after the order was made, Mr Macdonald resigned from the ministry, following announcements made by the Premier Nathan Rees at the ALP conference on the previous day.¹⁷ In evidence, Mr Macdonald indicated that he resigned at approximately 11 am that Sunday in response to a specific direction from Premier Rees to do so.¹⁸ Mr Macdonald also informed the Committee that in the lead up to the conference, he anticipated that he would be asked to resign, and that Mr Rees wanted him out of the ministry and the Parliament.¹⁹ On Tuesday 17 November 2009, the Governor accepted Mr Macdonald's resignation and a new minister, the Hon Peter Primrose, was appointed to the portfolio of mineral resources.²⁰
- 2.17** On 20 November 2009, the Deputy Director General of DPC sent a memorandum to the Chiefs of Staff of the new Minister for Mineral Resources and the new Minister for Primary Industries in the same terms as those previously sent to the Chief of Staff of the former minister. A copy of this memorandum was included in the return to order provided by DPC.
- 2.18** Between 20 and 26 November 2009, DPC received returns from the heads of divisions and branches of DPC, the Office of the Premier, the Office of the Treasurer, the Office of the new Minister for Primary Industries, the Office of the new Minister for Mineral Resources, NSW Treasury and the Department of Industry and Investment. All returns were

¹⁶ Submission 8, Department of Premier and Cabinet, Attachment 1, pp 1, 3.

¹⁷ Submission 1, Mr Ian Macdonald, p 1. See also Andrew Clennell, 'Rees finally seizes control', *Sydney Morning Herald*, 16 November 2009, p 1.

¹⁸ Evidence, Mr Ian Macdonald, Former Minister for Mineral Resources and Minister for Primary Industries, 23 July 2013, pp 14, 27.

¹⁹ Evidence, Mr Macdonald, 23 July 2013, pp 13-15, 22.

²⁰ *Minutes*, Legislative Council, 24 November 2009, pp 1533-1534.

accompanied by written certification that all documents held and covered by the terms of the order had been provided.²¹

- 2.19** On 26 November 2009, the consolidated return was delivered to the Clerk of the Parliaments by DPC. The return comprised one box of privileged documents and one box of non-privileged documents. The return was tabled in the House the same day.
- 2.20** In its initial submission to the Committee, DPC stated that, with the exception of the change to ministerial portfolio responsibilities which occurred shortly after the order was made, the response by DPC to the 2009 Mt Penny order for papers followed the usual process.²²

The documents in the ‘document comparison matrix’

- 2.21** As indicated in Chapter 1, the previous report of this Committee entitled ‘Possible non-compliance with the 2009 Mt Penny order for papers’²³ examined 139 (or 140)²⁴ documents identified and made public by the Independent Commission Against Corruption (ICAC) as part of Operation Jasper, but not provided to the House in 2009 in response to the Mt Penny order for papers. The documents were identified by the ICAC and listed in a ‘document comparison matrix’. The Committee’s finding was as follows:

The Committee finds that at least 124, if not all, of the documents identified by the ICAC in the ‘document comparison matrix’ as not having been provided to the House in 2009 related to the 2008/2009 EOI process, and that accordingly, they should, *prima facie*, have been provided in the 2009 Mt Penny return to order.

- 2.22** The ‘document comparison matrix’ is reproduced at Appendix 5.

The source of the documents

- 2.23** The documents in the ‘document comparison matrix’ were obtained by the ICAC during Operation Jasper. Operation Jasper was an investigation by the ICAC into the circumstances surrounding a decision by the then Minister for Mineral Resources and Minister for Primary Industries, Mr Ian Macdonald, to open the Mt Penny area in the Bylong Valley for coal exploration, including whether the decision was influenced by Mr Edward Obeid.
- 2.24** During the course of Operation Jasper, the ICAC obtained many thousands of pages of documents, financial records and computer databases. They were obtained from a range of sources through the issue of 191 notices under section 22 of the *Independent Commission Against*

²¹ Submission 8, Department of Premier and Cabinet, Attachment 1, pp 2-3. In the case of the returns provided by the heads of branches and divisions of DPC, the officers concerned confirmed that they held no documents required to be produced under the order, except those created as a result of the order itself. These were included in the return.

²² Submission 8, Department of Premier and Cabinet, p 2.

²³ Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013).

²⁴ See footnote 55 of Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013).

Corruption Act 1988,²⁵ interviewing and obtaining statements from 56 witnesses, conducting 95 compulsory examinations, executing seven search warrants, and obtaining two warrants under the *Surveillance Devices Act 2007* and four warrants under the *Telecommunications (Interception and Access) Act 1979*.²⁶

- 2.25** The Committee also understands that between January 2012 and May 2013, the former Department of Industry and Investment received 17 section 22 Notices from the ICAC that apparently related to Mt Penny. In addition, the Department also received 5 informal requests for information from the ICAC.²⁷
- 2.26** The documents provided to the ICAC and listed within the ‘document comparison matrix’ were sourced from either:
- The electronic email accounts of nominated individual officers from the Department of Industry and Investment
 - The electronic (archived) email accounts of individual ministerial officers – these accounts are managed and held by the Department of Premier and Cabinet
 - Hard copies of documents provided by either the Department of Industry and Investment, individual departmental officers or other individuals or organisations associated with the EOI process.
- 2.27** The Committee is unaware of the number of documents that were provided to the ICAC by the Department of Industry and Investment.

The nature of the documents

- 2.28** The ‘document comparison matrix’ contains 139 line entries under the category ‘relevant documents from ICAC EOI Brief not in Call for Papers’. These 139 document line entries comprise 106 email messages and 33 hard copy documents. The 33 hard copy documents comprise 10 ministerial briefings, 20 letters, 1 submission, 1 evaluation document and 1 instrument of delegation.
- 2.29** However, it cannot be inferred from this that there were 139 discrete documents that were not provided in the 2009 Mt Penny return to order.
- 2.30** As noted in the Committee’s previous report,²⁸ some of the documents identified in the matrix are drafts, working versions or otherwise repetitive versions of later documents, at least some of which were provided in the return to order.

²⁵ Section 22 of the ICAC Act provides that for the purposes of an investigation, the Commission may, by notice in writing served on a person, require the person to attend at a time and place and provide the documents specified in the notice.

²⁶ ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*, (2013), p 14.

²⁷ Answers to questions on notice, NSW Trade and Investment, 21 June 2013, Question 16.

²⁸ Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013).

- 2.31** Similarly, with respect to the 106 emails, there are a number of cases where the one email is forwarded from one individual to another, often with no additional or significant comment within the email text. An example is a request for information from Minister Macdonald's Office which was transmitted through various sections of the Department and then returned through the hierarchy with the information attached. Almost a quarter of the 106 emails in the matrix fall within this description.
- 2.32** However, while there is a level of duplication in the emails, the Committee notes that in some instances, the text of the emails contained quite significant information. Examples include:
- Email from Jamie Gibson, Deputy Chief of Staff to Graham Hawkes, DPI asking for a Mt Penny brief that he can provide to the 'boss' (J-9 43-44)
 - Email from Alan Coutts, Deputy Director General, DPI to Graham Hawkes, DPI which includes the question 'What do you mean by Mt Penny – it is not an area we recognize by that name as a potential allocation area' (J-9 73-74)
 - Email from Craig Munnings to Jamie Gibson, referring to Alan Coutts' unpreparedness to open the original expression of interest to further interested parties (J-12 428).
- 2.33** In terms of sender and recipient, the 106 emails can be categorised as follows:
- Five emails (one of which was also copied to a departmental officer) from ministerial officer to ministerial officer²⁹
 - Nine emails from ministerial officers to Department of Primary Industries (departmental) officers
 - 17 emails from departmental officers to ministerial officers
 - Four emails from departmental officers to the EOI probity auditor
 - Five emails from departmental officers to mining company representatives
 - Three emails from mining company representatives to departmental officers
 - 63 emails from departmental officers to departmental officers.
- 2.34** As highlighted above, officers from the Department of Primary Industries sent, received or were copied into 102 of the 106 emails.
- 2.35** It is important to note that many of the 106 emails included attachments – either text documents or image files. The emails contain 20 text documents and seven map images not listed elsewhere in the matrix (that is, separate from the 33 hard copy documents identified above). Some of these attached documents are quite significant, such as the document entitled 'Ministerial Briefing Mt Penny – Bylong Valley (J-9 45-49) and the document entitled 'Potential Coal Tender Areas' (J-9 85-90).³⁰

²⁹ These documents are marked in the 'document comparison matrix' as follows: J-9 Pp 62 – 64, J-9 Pp 158, J-9 Pp 164 – 168, J-12 Pp 297 – 307, and J-12 Pp 428. This last document was copied to a DPI officer.

³⁰ The significance of this document was noted by the ICAC. See ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*, pp 61-62.

2.36 Therefore, in addition to the 106 emails, there are 60 documents in total within the matrix that should have been returned in response to the 2009 order for papers.³¹ The Department of Primary Industries created, received or sent all of these documents.

Further documents provided by the Department of Trade and Investment

2.37 During the inquiry, the Department of Trade and Investment, at the request of the Committee, undertook a full review of all files held by the Department relating to the 2009 Mt Penny order for papers. The purpose of this review was to identify any additional documents not included in the original 2009 Mt Penny return to order or ICAC's 'document comparison matrix'. A broad interpretation of the terms of the order was taken by the Department.

2.38 As a result, the Department provided the Committee with a further 190 documents. The Committee notes that the majority of these documents were internal departmental emails relating primarily to the EOI process for the exploration of the 11 medium and small coal exploration areas, including the Mt Penny expression of interest area. However, the documents also included a number of emails and advices in relation to inquiries into Mt Penny by Tracy Ong and Angus Grigg on behalf of the *Australian Financial Review*. Also included was briefing material provided by the Department to the Minister to assist him in responding to potential questions in the Legislative Council.

Committee comment

2.39 The Mt Penny order for papers was passed by the House at a time of significant interest in the Mt Penny matter. On 28 October 2009, an article written by Tracy Ong and Angus Grigg entitled 'Labor powerbroker hits a rich seam' was published in the *Australian Financial Review*. It alleged that the family of Mr Edward Obeid stood to make a windfall profit from the purchase of Cherrydale Park outside Bylong.³² In addition, at the same time as the order for papers was before the House, Ms Lee Rhiannon was asking questions in the House of Minister Macdonald in relation to his role and that of Mr Obeid in the Mt Penny process.³³

2.40 However, on its receipt on 26 November 2009, the Mt Penny return to order did not show any particular evidence of malfeasance, and no further action was taken by the House at the time.

2.41 By contrast, the documents subsequently made public by the ICAC and provided to the Committee in the 'document comparison matrix' revealed the following information in relation to the Mt Penny tenement:

- The initiative for the creation of the Mt Penny tenement came from Minister Macdonald's Office, not the Department of Primary Industries.

³¹ Comprising the 33 hard copy documents identified by the ICAC, together with the 20 documents and 7 maps attached to emails.

³² Evidence, Mr Macdonald, 23 July 2013, p 6. See also pp 13, 15.

³³ *Hansard*, Legislative Council, 10 November 2009, p 19134 (Lee Rhiannon); 12 November 2009, pp 19468-19469 (Lee Rhiannon).

- The area that became the Mt Penny tenement was originally part of the North Bylong area.
- The Department was not ready to release the North Bylong area to tender for exploration.
- The creation of the Mt Penny exploration tenement was dealt with urgently at the request of the Minister's office.
- The NSW Minerals Council opposed restricting the EOI process for the Western Coalfield to small and medium mining companies and wrote to the Minister urging the Government to reconsider its policy position.
- The EOI process was re-opened after it closed, and several companies, including Cascade Coal, that were not originally invited to tender for the 11 small and medium coal allocation areas were allowed to do so.
- In September 2008 a number of companies, including Cascade Coal, wrote to the Department expressing interest in developing coal areas in NSW.
- The successful tenderer for the Mt Penny exploration licence had not been part of the original process.
- The Minister delegated the function of giving consent to apply for exploration licences, assessment leases and mining leases to the Director General of the Department.³⁴

2.42 The further 190 documents subsequently identified by the Department of Trade and Investment further evinced the apparent interest and involvement of Minister Macdonald's office in the EOI process and its outcome, the ongoing interest of journalists of the *Australian Financial Review* in the Mt Penny exploration licence, and the extensive briefing notes that were provided to Minister Macdonald by the Department to assist him to respond to these matters should they be raised in the House. While the Committee notes that not all of the 190 further documents identified by Trade and Investment were directly relevant to the Mt Penny order for papers, a significant number of them certainly were. The Committee finds it concerning that after the Mt Penny order for papers, the ICAC inquiries, the Clayton Utz review, the previous inquiry of this Committee and the Maddocks Review in relation to this matter, a further 190 additional documents were able to be produced to the Committee late in the inquiry.

2.43 The significance of the documents provided by the ICAC in the 'document comparison matrix', and indeed some of the further documents provided by the Department, cannot be overstated. While some of the information revealed by those documents was available from the 2009 return to order, it was by no means all available. This point was underscored by the Chair during the public hearing on 11 June 2013:

It is more than that. It is documents that it is becoming pretty plain were profoundly important to demonstrating malfeasance in regard to the issue of exploration licences. It is a matter of profound importance to members of the previous Government and I would think to the current Government with regard to that. This is not a mere technical matter of missing documents.³⁵

³⁴ Answers to Questions on Notice, NSW Trade and Investment, 13 September 2013, pp 1-2.

³⁵ Evidence, Committee Chair, 11 June 2013, p 28.

- 2.44 In the Committee's opinion, given the interest in the Mt Penny matter in both the House and the media in 2009, had a full return to order been received in 2009, the information revealed would have created significant controversy. It is possible that the matter would have been referred by the House to the ICAC immediately. As events transpired, ICAC did not commence Operation Jasper until February 2011, following receipt of an allegation from a private individual.³⁶ Mr Macdonald's later return to the ministry would have been rendered far less likely, if not impossible.

Finding 1

The Committee finds that had the House received a full return to order in 2009 in response to the Mt Penny order for papers, it is likely that the information revealed would have materially contributed to establishing the truth surrounding the issue of the Mt Penny exploration licence. As a result, the matter may have been referred by the House to the ICAC immediately. As events transpired, ICAC did not commence Operation Jasper until February 2011, following receipt of an allegation from a private individual.

- 2.45 The significance of the failure to fully comply with the 2009 order for papers was subsequently underscored by the release of the ICAC's report on its Operation Jasper investigation.³⁷ The ICAC report made a number of corrupt conduct findings against former Minister Macdonald, which included finding that the former Minister acted contrary to his public duty as a Minister of the Crown by arranging for the creation of the Mount Penny mining tenement and by deciding to reopen the EOI process for exploration licences.³⁸
- 2.46 In making these findings the ICAC relied in part on, and in some cases attached much importance to, information contained within documents that should have been, but were not, included in the 2009 return to order.³⁹

³⁶ ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*, p 12.

³⁷ ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*.

³⁸ ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*, p 11.

³⁹ For significance placed upon documents by the ICAC, see ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others*, pp 40-44, 61-62 and 98-99.

Chapter 3 Documents held in the offices of Ministers Macdonald and Primrose

As indicated in the previous chapter, the documents identified by ICAC in the ‘document comparison matrix’ included five emails between officers within Minister Macdonald’s office and a significant number of emails and briefing notes between Minister Macdonald’s office and the then Department of Primary Industries.

This chapter examines why many documents provided to or generated by Minister Macdonald’s office were not included in the 2009 Mt Penny return to order. The failure of the Minister’s office to produce documents was the source of speculation that there had been a deliberate attempt by Minister Macdonald, or his staff, to suppress or destroy documents.

The chapter also examines the response of Minister Primrose’s office to the order for papers. Because of Minister Primrose’s appointment as Minister for Mineral Resources on 17 November 2009 prior to the receipt by the House of the return to order, it was necessary to examine if his response, and that of his office, had been appropriate.

Changes in the ministry at the time of the 2009 Mt Penny order for papers

- 3.1 The 2009 Mt Penny order for papers called for the production of documents held by the Minister for Mineral Resources and Minister for Primary Industries and other specified officers and agencies within 14 days. Mr Macdonald was the Minister for Mineral Resources and Minister for Primary Industries at the time the order was agreed to by the House on Thursday 12 November 2009.
- 3.2 On Sunday 15 November 2009, three days after the order was made, Mr Macdonald resigned from the ministry after the then Premier, the Hon Nathan Rees, asked for his resignation.⁴⁰ On 17 November 2009 the Governor accepted Mr Macdonald’s resignation and a new minister, the Hon Peter Primrose, was appointed to the portfolio of mineral resources.⁴¹
- 3.3 On 26 November 2009 the House received a return to its order, nine days after Mr Macdonald had left the ministry. The return included a response from the office of Minister Primrose but no response from the office of Minister Macdonald. The response from Mr Primrose’s office included only one document, being the email request to his office for a return.
- 3.4 On 4 December 2009 the Governor accepted the resignation of the Hon Nathan Rees as Premier which entailed the resignations of all other ministers including Mr Primrose as minister for mineral resources. On the same day the Hon Kristina Keneally was appointed Premier.⁴²

⁴⁰ Submission 1, Mr Macdonald, p 1.

⁴¹ *Minutes*, Legislative Council, 24 November 2009, pp 1533-1534. See the discussion in Chapter 2 for more details.

⁴² *Minutes*, Legislative Council, 23 February 2010, p 1639.

- 3.5 On 8 December 2009 Mr Macdonald was reappointed to the ministry as Minister for State and Regional Development, Minister for Mineral and Forest Resources, and Minister for the Central Coast. On the same day Mr Primrose was appointed Minister for Small Business, Volunteering and Youth, and Minister Assisting the Premier on Veterans' Affairs.⁴³
- 3.6 Mr Macdonald continued to hold the mineral resources portfolio until he resigned from the ministry on 5 June 2010. He ceased to be a member of the Legislative Council on 7 June 2010.⁴⁴

The character and credibility of Mr Macdonald as a witness

- 3.7 On 23 July 2013 the Committee held a public hearing at which it took evidence from Mr Ian Macdonald, former Minister for Mineral Resources and former Minister for Primary Industries, in relation to the 2009 Mt Penny return to order.
- 3.8 However, prior to his appearance before the Committee, Mr Macdonald had given extensive evidence at the ICAC as part of Operations Jasper, Acacia and Jarilo. Operation Jasper was an investigation by the ICAC into the circumstances surrounding the decision by Mr Macdonald to open the Mt Penny area in the Bylong Valley for coal exploration, including whether the decision was influenced by Mr Obeid. Operation Acacia was an investigation, among other issues, of the circumstances surrounding the allocation of an exploration licence to Doyles Creek Mining Pty Ltd in and around Doyles Creek, which is a tributary of the Hunter River. Operation Jarilo was an investigation into allegations that Mr Macdonald, while NSW Minister for Energy, exercised his influence as a minister to set up meetings between senior public servants and a Sydney businessman, Mr Ronald Medich, in exchange for the provision of sexual services and hotel accommodation.
- 3.9 In the case of each investigation, adverse findings were made against Mr Macdonald.
- 3.10 With respect to Operation Jasper, the ICAC found that Mr Macdonald engaged in corrupt conduct by acting contrary to his public duty as a Minister of the Crown by:
- arranging for the creation of the Mt Penny tenement in order to benefit members of the Obeid family
 - providing members of the Obeid family with confidential information regarding Mt Penny
 - deciding to re-open the EOI process for exploration licences in order to favour a businessman, Mr Travers Duncan
 - providing Mr Duncan with confidential information related to the EOI process.
- 3.11 With respect to Operation Acacia, the ICAC found that Mr Macdonald engaged in corrupt conduct by acting contrary to his public duty as a Minister of the Crown by granting consent to apply for an exploration licence and subsequently granting the exploration licence to the company Doyles Creek Mining, substantially for the purpose of benefitting a businessman and associate, Mr John Maitland.

⁴³ *Minutes*, Legislative Council, 23 February 2010, p 1639.

⁴⁴ *Minutes*, Legislative Council, 8 June 2010, p 1889.

3.12 With respect to Operation Jarilo, the ICAC found that Mr Macdonald engaged in corrupt conduct by exercising his influence as a Minister to cause a senior public servant to attend a meeting at which Mr Ron Medich could promote his business interests, and by soliciting and receiving from Mr Medich and another the sexual services of a woman as a reward for arranging the meeting.

3.13 The Committee also notes the findings of the Commissioner of the ICAC in relation to the credibility of Mr Macdonald as a witness:

The Commission accepts Counsel Assisting's submission that Mr Macdonald did not give his evidence truthfully and cannot be accepted as a credible witness.

Generally, Mr Macdonald attempted to avoid answering difficult questions. He did this by not answering the question, by giving long, discursive and irrelevant answers, by being argumentative and by saying that he could not remember, even when the issue concerned was so strikingly important that he could be expected to remember. From time to time, he gave evidence that was inconsistent with earlier evidence. Some of his evidence was inherently improbable. At times, he also appeared to be making up evidence as he went along.

..

It is sufficient to state that Mr Macdonald concluded his testimony with the Commission being left with the impression that little he said could be believed.⁴⁵

3.14 The Committee also notes that on 24 June 2013, it took evidence from Mr Jamie Gibson, former Deputy Chief of Staff to Mr Ian Macdonald. By contrast to the evidence of Mr Macdonald, the Committee notes that the Commissioner of ICAC was complimentary of the evidence of Mr Gibson during the ICAC processes, noting that he appeared to be a reasonable person who was doing his best to tell the truth and give accurate evidence, and that his evidence was supported by the evidence of others.⁴⁶

3.15 The Committee comments on the reliability of the evidence given by Mr Macdonald and Mr Gibson during the Committee's inquiry in its conclusion to this chapter.

Did Mr Macdonald interfere with the return to order while he was a minister?

3.16 During this inquiry, the Committee sought to ascertain whether in the period during which Mr Macdonald remained in office after the Mt Penny order for papers was made he had had any role or involvement in responding to the order or sought to influence processes in his Department in any way. In doing so, the Committee was particularly mindful of the proceedings then underway in the ICAC in relation to the creation of the Mt Penny tenement and the re-opening of the expression of interest process for the Mt Penny exploration licence.

3.17 In his evidence to the Committee, Mr Macdonald submitted that he had no discussions with any minister, ministerial officer or departmental official relating to the House's order of 12

⁴⁵ ICAC, *Investigation into the Conduct of Ian Macdonald, John Maitland and others*, p 18.

⁴⁶ ICAC, *Investigation into the Conduct of Ian Macdonald, John Maitland and others*, p 18.

November 2009 either at the time or subsequently.⁴⁷ He also stated that he had never had a role in determining the documents to be included in returns to orders for papers,⁴⁸ that he never looked at what was provided in returns to orders, and that he would not have checked the return to the Mt Penny order.⁴⁹ He further stated that he had presumed his chief of staff would have been responsible for preparing returns from his office and that his department together with DPC would have been in charge of the process generally.⁵⁰

3.18 Mr Macdonald also specifically denied that he had destroyed any documents within the terms of the House's order⁵¹ or had instructed his staff to ensure that documents or emails not provided in response to the order were destroyed.⁵² In support of these assertions Mr Macdonald pointed out that electronic documents in ministerial offices cannot be destroyed as they are recorded on the computer system maintained by the Premier's Department.⁵³

3.19 Mr Macdonald further observed that he had not opposed the Mt Penny order when it had gone through the House although he had successfully opposed orders for papers in the House in the past⁵⁴ and stated that he had not been concerned when the order was agreed to as the core decisions relating to the licence applications had been made by the department and not by him.⁵⁵

3.20 Mr Macdonald's evidence in relation to these issues was corroborated by that of his Deputy Chief of Staff, Mr Jamie Gibson. Mr Gibson told the Committee that Mr Macdonald had not given him any instructions about destroying documents or emails.⁵⁶ As far as Mr Gibson recalled, Minister Macdonald had had no role in relation to the matter other than being told that the order had been passed:

To be honest, in terms of his role in this, as far as I remember I am sure I told him that the order had been passed. I think that is probably the only role he had.⁵⁷

3.21 Importantly, three officers from Mr Macdonald's department also confirmed in evidence to the Committee that there had been no interference from the minister's office in relation to the preparation of the return to the order.⁵⁸

⁴⁷ Submission 1, Mr Macdonald, p 1.

⁴⁸ Evidence, Mr Macdonald, 23 July 2013, p 4.

⁴⁹ Evidence, Mr Macdonald, 23 July 2013 p 35.

⁵⁰ Evidence, Mr Macdonald, 23 July 2013, pp 6-7.

⁵¹ Evidence, Mr Macdonald, 23 July 2013, p 29.

⁵² Evidence, Mr Macdonald, 23 July 2013, p 33.

⁵³ Evidence, Mr Macdonald, 23 July 2013, p 33.

⁵⁴ Evidence, Mr Macdonald, 23 July 2013, pp 3, 5.

⁵⁵ Evidence, Mr Macdonald, 23 July 2013 p 3.

⁵⁶ Evidence, Mr Jamie Gibson, Former Deputy Chief of Staff to Minister Macdonald, 24 June 2013, p 43.

⁵⁷ Evidence, Mr Gibson, 24 June 2013, p 35. See also p 34.

⁵⁸ See chapter 4 under the heading 'Was there any outside interference in the return to order?'

The coverage of the Mt Penny matter by the *Australian Financial Review*

- 3.22** As indicated in Chapter 2, on 28 October 2009, an article written by Tracy Ong and Angus Grigg entitled ‘Labor powerbroker hits a rich seam’ was published in the *Australian Financial Review*. It alleged that the family of Mr Edward Obeid stood to make a windfall profit from the purchase of Cherrydale Park outside Bylong.
- 3.23** Documents provided to the Committee by the Department of Trade and Investment as part of the further 190 documents provided by the Department reveal that the Department went to significant efforts to collate responses to questions raised by Tracy Ong and Angus Grigg. They also reveal that further material was prepared by the Department around 8-9 November 2009 for a follow-up article in the *Australian Financial Review*. This coincided with notice of the 2009 Mt Penny order for papers being given in the House by the Hon Duncan Gay on 10 November 2009. To the best of the Committee’s knowledge, this further article was never published.
- 3.24** In response to questioning by the Committee, Mr Macdonald acknowledged that he had been aware of an article published in the *Australian Financial Review* on 28 October 2009.⁵⁹ However, Mr Macdonald maintained that he had not been concerned about the content of the article as he had not had a role in the core decision-making process concerning the Mt Penny licence application.⁶⁰
- 3.25** Mr Gibson also stated that Mr Macdonald had not seemed concerned by the article which appeared in the *Australian Financial Review* on 28 October 2009. Mr Macdonald had told him the licence process had been overseen by a probity assessor, that it was a delegated authority to the department, and that ‘if it was looked at effectively there would be nothing in it’.⁶¹ While a House briefing note on the issue was in fact prepared by the Department on the matter, Mr Gibson did not believe any further action was taken.⁶²
- 3.26** The Committee notes, however, that the Minister’s Office was clearly particularly interested in the Department’s response to the follow-up *Australian Financial Review* article foreshadowed for early November 2009. An email from Jenny Ward, Public Affairs Officer with Industry and Investment dated 10 November 2010 and listed as of high importance stated:

Have had a call from the Financial Review wanting more information on the awarding of the exploration licence to Cascade Coal. Minister Macdonald wants to look at our suggested response before it goes to the newspaper this afternoon.

The requirements of *General Retention and Disposal Authority – Records of a Minister’s Office (GDA 13)*

- 3.27** Mr Macdonald’s resignation from the ministry on 15 November 2009 triggered requirements for the disposal of records in his ministerial office in accordance with procedures established by the State Records Authority.

⁵⁹ Evidence, Mr Macdonald, 23 July 2013, p 6. See also pp 13, 15.

⁶⁰ Evidence, Mr Macdonald, 23 July 2013, p 6.

⁶¹ Evidence, Mr Gibson, 24 June 2013, p 41.

⁶² Evidence, Mr Gibson, 24 June 2013, p 30.

3.28 The State Records Authority has issued an instrument under the *State Records Act 1988* in relation to the retention and disposal of records in ministers' offices: *General Retention and Disposal Authority – Records of a Minister's Office* (GDA 13).⁶³ The authority sets out the disposal protocol applicable to records relating to a minister's portfolio responsibilities and gives guidance on the disposal of other classes of records in ministers' offices.

3.29 Part 2.3 of GDA 13 sets out the procedures for disposing of a minister's records where the minister leaves office. In summary the key procedures are:

- Cabinet documents are to be returned to the Cabinet Office (now DPC).
- Departmental or agency documents relating to a Minister's portfolio responsibilities are to be returned or provided to the responsible department or agency.
- Records of the minister's portfolio responsibilities which are required to be kept as State archives are to be transferred to the State Records Authority.
- Records of the minister's portfolio responsibilities which are not required to be kept as State archives are to be destroyed when no longer required for administrative purposes.

3.30 GDA 13 applies equally to electronic records, including email, as it does to other records. In that regard the authority provides:

The retention and disposal authority applies equally to electronic records, including email, wordprocessed documents and database records. Electronic records relating to a Minister's portfolio responsibilities should be captured into official filing systems (either paper-based or electronic). Electronic records should also be protected and readily accessible for as long as they are required for administrative purposes.⁶⁴

3.31 In evidence to the Committee, Mr Paul Miller, General Counsel, DPC, advised that most of the documents in an outgoing minister's office will be department-related and will need to be returned to the relevant department in accordance with GDA 13:

The primary direction [of GDA 13] is that an outgoing Minister should return any departmental-related documents, which will be the bulk of what a Minister is dealing with in their official ministerial capacity, to the department.⁶⁵

3.32 Mr Miller also confirmed that electronic documents in the outgoing minister's office are captured by GDA 13 and should be returned to the relevant department, transferred to the State Records Authority, or, if inconsequential, destroyed:

The disposal authority provides that where an electronic document is a State record it needs to be kept as a State record. The outgoing Minister's responsibility and their office's responsibility is to print those electronic records and either return them to the department where they are relevant to the department or deposit them with the State Records Authority. The authority provides that ephemeral records— inconsequential sort of traffic—can be deleted.⁶⁶

⁶³ State Records Authority of NSW, *General Retention and Disposal Authority: Records of a Minister's Office* (GDA 13), approved 23 December 2002.

⁶⁴ State Records Authority of NSW, *GDA 13*, p 11.

⁶⁵ Evidence, Mr Paul Miller, General Counsel, Department of Premier and Cabinet, 24 June 2013, p 4.

⁶⁶ Evidence, Mr Miller, 24 June 2013, p 4.

- 3.33** In the case of an email between the minister's office and the minister's department, Mr Miller advised that the department is primarily responsible for ensuring the document is dealt with in accordance with State records policy but that the minister's office should provide a hard copy to the relevant location in accordance with GDA 13.⁶⁷

The management of documents in Minister Macdonald's office after he resigned

- 3.34** Following Mr Macdonald's resignation from the ministry the staff of his office began the process of packing up the office. This process required consideration of a wide range of issues including staffing issues and ensuring that the proper procedures for shutting down the office were followed.⁶⁸ There were quite a few logistical issues to be dealt with in a short space of time.⁶⁹ As stated by Mr Gibson:

... it is quite a big job. The Minister had resigned at lunchtime that day so effectively he is out of the Cabinet and all the processes and authorities that he has stops, so we needed to make arrangements.⁷⁰

- 3.35** The Sunday Mr Macdonald resigned Mr Gibson went in to the ministerial office to talk to staff and begin the pack up process.⁷¹ The next day a representative from DPC came and spoke to staff of the ministerial office as to 'severance packages and ... cleaning the office up and getting out of the office'.⁷²

- 3.36** As part of the process of shutting down the ministerial office steps were taken to dispose of records in the office in line with the procedures in GDA 13 previously discussed. In that regard Mr Gibson told the Committee that:

All the privilege documents, cabinet documents and so on were returned to the Department of Premier and Cabinet as required. Any other departmental briefings that fell within the State Records Act were returned to the department or the relevant government agencies. Any older briefing notes, draft information and files that some advisers kept were disposed of in security bins.⁷³

- 3.37** Mr Gibson also stated that the email system in the ministerial office was shut down by DPC but that staff in the office were aware that the system was to remain in stasis as a public record:

In terms of email accounts and things like that specifically, the shutdown and closure was managed by the Department of Premier and Cabinet. Staff were advised that if they had any personal information or anything else they wanted to take with them

⁶⁷ Evidence, Mr Miller, 24 June 2013, p 9.

⁶⁸ Evidence, Mr Gibson, 24 June 2013, p 34.

⁶⁹ Evidence, Mr Gibson, 24 June 2013, p 42.

⁷⁰ Evidence, Mr Gibson, 24 June 2013, p 43.

⁷¹ Evidence, Mr Gibson, 24 June 2013, p 42.

⁷² Evidence, Mr Gibson, 24 June 2013, p 43.

⁷³ Evidence, Mr Gibson, 24 June 2013, p 35.

they could do so. But essentially the email system would be shut off and it would be kept in stasis as a public record should it be needed in the future.⁷⁴

- 3.38** The General Counsel, DPC at the time of the House's order, Ms Leigh Sanderson, told the Committee that she would not have expected Mr Macdonald to have held any relevant documents at the time he left the ministry given the responsibilities of outgoing ministers to transfer the records of their office to other locations:

Reverend the Hon. FRED NILE: Were you concerned that no return was provided by Minister Macdonald's office before he left office? If so, what did you do?

Ms SANDERSON: I do not recall noticing that there was no return and I certainly do not recall being concerned about there being no return. I would not have expected the former Minister, as he then was, to have had any documents to return at the time the returns were due but I do not recall.

Reverend the Hon. FRED NILE: Because of the short period of time.

Ms SANDERSON: At that stage he was not a Minister, so any documents that he had had should already have been distributed to other places and if he still had State papers at the date those returns were due that would have caused me more concern had I realised that was the case than him effectively not having any State papers.⁷⁵

- 3.39** In that regard Ms Sanderson noted the obligations of outgoing ministers to distribute records of their office to the relevant department, the Cabinet secretariat or the State Records Authority:

... it is necessary to look at the obligations to return departmental papers to the department, return Cabinet documents to the Cabinet secretariat and any other State papers that do not fall within either of those categories should be sent to State records. So in that sense nothing should cease to be available because all State papers need to be distributed by the outgoing Minister's office to a suitable recipient.⁷⁶

- 3.40** Ms Sanderson also pointed out that, to the extent Mr Macdonald had at some stage held documents which were also held by the Department of Industry and Investment, the Department would have been responsible for ensuring that the documents were captured on the relevant files:

... to the extent that the documents that were at some stage within his office were also held by the department, I would have considered, had I thought about it at the time, that he had effectively returned or provided those documents to the department because particularly with emails if departmental officers are either the authors or recipients of emails then they have that document and I would expect that it is their responsibility to put it on the relevant file.⁷⁷

⁷⁴ Evidence, Mr Gibson, 24 June 2013, p 35.

⁷⁵ Evidence, Ms Leigh Sanderson, Former General Counsel, Department of Premier and Cabinet, 24 June 2013, pp 48-49.

⁷⁶ Evidence, Ms Sanderson, 24 June 2013, p 50.

⁷⁷ Evidence, Ms Sanderson, 24 June 2013, p 49.

- 3.41** In his evidence, Mr Gibson also stated that to his recollection, following Mr Macdonald's resignation, no preparations were commenced in the ministerial office for the provision of a return to DPC as responsibility for responding to the order of the House would have been ceded to the incoming minister:

Reverend the Hon. FRED NILE: Were the preparations for a return to the House of the order commenced between 13 November 2009, when the Department of Premier and Cabinet sought a return from your office, and 17 November 2009 when Mr Macdonald ceased to be the Minister? If so, what were those preparations?

Mr GIBSON: Not to my recollection, and it would be my thinking at the time that because that was an order for the mining Minister, as Mr Macdonald had resigned that would cede to the next Minister and that with DPC's legal adviser and that Minister they would have access to all of the documents on our system that they would need to access. So no, none specifically from Mr Macdonald's office.⁷⁸

- 3.42** Further, Mr Gibson maintained that he had not deleted, destroyed or disposed of records that could have been caught by the House's order.⁷⁹ While he had deleted personal emails from the office system after Mr Macdonald had resigned and in doing so may have deleted emails relating to his professional role, these would have been 'low level information type emails' and not anything that would have jeopardised the call for papers.⁸⁰

- 3.43** Mr Gibson also stated that he had no recollection of contacting departmental staff about the House's order but that if he had contacted the department about the issue it would have been to discuss how the return should be coordinated.⁸¹

- 3.44** When asked if he had any explanation as to why emails of which he was the sender or recipient had not been included in the return to the House, Mr Gibson referred to the timing of Mr Macdonald's resignation shortly after the order by the House, the need to follow the established procedures in packing up the ministerial office, and his belief DPC would have been able to search ministerial records after Minister Macdonald had left:

I think it is more a case of unfortunate timing than deliberate action. I preface that by saying that we can now retrospectively look at all the allegations that are on the table. However, you must remember that when we were packing up the office in 2009 none of these issues now raised publicly was in the arena. These documents were just like every other public record we had. We followed the appropriate process for packing up a ministerial office. Having done it twice, I know that it is a pretty stressful situation.

You have to look after staff and deal with a range of issues in closing it down properly and doing an appropriate handover to the incoming Minister so that the Government can continue on. It was always my understanding that the Department of Premier and Cabinet would have access to our records well beyond us leaving the ministry and that they would be able to search through the documents for the call for papers in our absence. ... I think it was unfortunate timing in that we were dismissed as the call

⁷⁸ Evidence, Mr Gibson, 24 June 2013, p 44.

⁷⁹ Evidence, Mr Gibson, 24 June 2013, p 33.

⁸⁰ Evidence, Mr Gibson, 24 June 2013, pp 38-39.

⁸¹ Evidence, Mr Gibson, 24 June 2013, p 33.

went through and there was a lag or some access issues in the preparation of the return.⁸²

The DPC ‘backup’ of the office of Minister Macdonald’s electronic records

- 3.45** As discussed in Chapter 2, the ‘document comparison matrix’ includes emails from Mr Macdonald’s ministerial office which ICAC obtained from electronic records held by DPC.
- 3.46** In its supplementary submission to this inquiry, DPC confirmed that the Ministerial and Parliamentary Services IT branch of DPC, MAPS IT, provides specialist technology support to ministers and ministerial staff including the provision of email accounts and network drives. The staff of MAPS IT therefore have the ability to access those accounts and drives for the purpose of providing information technology (IT) support.⁸³
- 3.47** However, DPC advised that it does not consider the electronic records of ministerial offices as maintained by MAPS IT are necessarily encompassed by the terms of orders for papers by the House:

DPC does not consider that an order under Standing Order 52 would, in so far as it is directed to DPC, ordinarily be interpreted as covering any ‘documents’ on this Ministerial office network that are only accessible by DPC (MAPS IT) in this way.^[19] It would evidently be undesirable if DPC were routinely required to search such records for these purposes.⁸⁴

- 3.48** In support of that view DPC pointed out that under clause 7 of schedule 2 of the *Members of Parliament Staff Act 2013* records of political office holders including ministers or their staff which are stored by DPC in connection with the provision of IT services are taken to be in the possession or under the control of the office holder and not that of DPC (clause 7(1)). It also provides that any request or requirement to produce such a record is to be made direct to the office holder or their staff (clause 7(2)). DPC considers that clause 7 ‘reflects the existing practice’.⁸⁵
- 3.49** Clause 7 of schedule 2 is set out in full below:

7 Records of political office holders

- (1) Any record of information created or received by a political office holder or the staff of a political office holder that is stored by a person employed in the Department of Premier and Cabinet in connection with the provision of information technology services for the office holder or his or her staff is, for all purposes while the political office holder is holding that office, taken to be in the possession or under the control of the political office holder and not in the possession or under the control of the Department of Premier and Cabinet.

⁸² Evidence, Mr Gibson, 24 June 2013, p 34.

⁸³ Submission 8a, Department of Premier and Cabinet, p 18.

⁸⁴ Submission 8a, Department of Premier and Cabinet, pp 17-18.

⁸⁵ Submission 8a, Department of Premier and Cabinet, p 18.

- (2) Accordingly, any request or requirement to produce any such record of information is to be made or directed to the political office holder concerned or his or her staff.
- (3) This clause extends to records of information in existence before the commencement of this clause.

3.50 In evidence to the Committee, Mr Miller confirmed that DPC does not search ministers' email accounts in response to orders by the House, and gave reasons in support of that position:

... although in a technical and practical sense we do have access to the electronic documents, we do not search Ministers' email accounts and I would suggest that it is probably not a good idea to be suggesting that a department should, given what might be on those emails. Those emails might deal with parliamentary matters, personal matters, party political matters which are also dealt with under the disposal authority....⁸⁶

3.51 In relation to former ministers, Mr Miller advised that DPC retains 'backups' of electronic records⁸⁷ which are kept for IT purposes rather than as a permanent record of the emails.⁸⁸ He also advised that DPC would not routinely search backup electronic material relating to former Ministers' offices on a call for papers directed to DPC.⁸⁹ By analogy he pointed out that under the *Government Information (Public Access) Act 2009*, electronic backups of material need not be searched unless there is reason to believe a State record was deleted or destroyed in contravention of the State Records Act 1998.⁹⁰

3.52 Mr Miller advised however that DPC does comply with compulsory notices from ICAC for the production of electronic material held by DPC as the IT service provider for ministerial offices. He specified that such notices generally require the provision of entire email boxes rather than records on particular subjects (as is the case with orders by the House):

We can from [time] to time receive compulsory notices to produce documents from ICAC, including notices requiring the production of electronic material that the department may hold in its capacity as an IT service provider for ministerial offices. When the ICAC does that it generally asks for the particular email boxes; it does not necessarily tell us what the subject matter is or it does not ask us to look for particular emails. It will just say, "We want the email boxes of these individuals." We comply with that order by going to the relevant branch of the department that provides the IT support asking them to burn the inbox or sent items or whatever onto a CD. I don't look at them; I just produce them to the ICAC either under a letter from myself or from the director general.⁹¹

3.53 In its recent investigation in relation to Mt Penny, ICAC obtained records of emails in Minister Macdonald's office from DPC under notices issued pursuant to section 22 of the

⁸⁶ Evidence, Mr Miller, 24 June 2013, p 5.

⁸⁷ Evidence, Mr Miller, 24 June 2013, p 3.

⁸⁸ Evidence, Mr Miller, 24 June 2013, p 7.

⁸⁹ Evidence, Mr Miller, 24 June 2013, pp 7, 26.

⁹⁰ Evidence, Mr Miller, 24 June 2013, p 7.

⁹¹ Evidence, Mr Miller, 24 June 2013, p 3.

*Independent Commission Against Corruption Act 1988.*⁹² With respect to those records Mr Miller told the Committee that following the passage of time DPC would have had access to electronic material from which ICAC could have restored the emails rather than to the emails themselves:

What would exist after the passage of time is what are known as backup tapes. So they may or may not be—in fact, they would not be after that period of time—the actual emails that you and I could sort of access. They would be forms of electronic material that could potentially be restored into emails. When we produce documents to the ICAC, where they ask for these sorts of backup tapes, we generally—in fact, we don't with the ICAC seek to restore the backups ourselves. We provide them with the backup and they do whatever restoration, or provide the sort of forensic and IT expertise that is needed to recreate an email from that material.⁹³

- 3.54** Mr Miller went on to state that if the House were to make an order for papers regarding something that occurred under a previous minister and direct that order to DPC, DPC would not undertake the same searches as it did to respond to ICAC's notices unless the order specifically required that:

The Hon. JOHN AJAKA: If today the Legislative Council was to forward a Standing Order 52 in relation to something that occurred with the previous Government, a previous Minister, was to send it to Premier and Cabinet, would you undertake those same inquiries as you did for ICAC in trying to obtain from that depository the necessary information?

Mr MILLER: It would depend on the terms of the order but generally speaking no, unless the order specifically requested us to. If, for example, an order were made now that sought all documents, all correspondence from former Premier Keneally, for example, we would search for documents held within DPC full stop. We would not try to restore the Premier's old office in an electronic sense in order to search for those, no. And it would not be practical for us to do so.⁹⁴

The documents available to Mr Primrose on his appointment as the Minister

- 3.55** The evidence before the Committee showed that when Mr Primrose replaced Mr Macdonald as minister for mineral resources on 17 November 2009, his office did not have access to any of the documents in the office of the former minister, Mr Macdonald.
- 3.56** Mr Primrose told the Committee that all the briefing papers *et cetera* his office received came through his Department⁹⁵ and that he did not know 'what files, briefings, folders, *et cetera*, were made available to the department from the former minister'.⁹⁶

⁹² Correspondence from the Commissioner of the ICAC to the Chair of the Committee, 21 May 2013.

⁹³ Evidence, Mr Miller, 24 June 2013, p 3.

⁹⁴ Evidence, Mr Miller, 24 June 2013, p 7.

⁹⁵ Evidence, the Hon Peter Primrose MLC, Member of the NSW Legislative Council and former Minister for Mineral Resources, 11 June 2013, p 2.

⁹⁶ Evidence, the Hon Peter Primrose, 11 June 2013, p 3.

- 3.57** The Acting Chief of Staff to Minister Primrose stated that Minister Primrose's office was not given access to the physical or electronic records of former Minister Macdonald's office.⁹⁷ In particular, Minister Primrose's office had no access to the computer network of former Minister Macdonald.⁹⁸
- 3.58** The Acting Chief of Staff also pointed out that under *General Retention and Disposal Authority – Records of a Minister's Office (GDA 13)* there is no provision for transfer of records to an incoming minister regardless of political party affiliation.⁹⁹ Accordingly, when Mr Primrose took over from Mr Macdonald no records relating to the former minister's office were available to the new ministerial office.¹⁰⁰
- 3.59** The Committee was also told that the office of Minister Primrose was located in a different location from the offices of the former Minister Macdonald in both Governor Macquarie Tower and the Parliament,¹⁰¹ the office had a new complement of staff except for an administrative officer retained from the former minister's office,¹⁰² and corporate knowledge of documentation from the former minister's office was not retained.¹⁰³
- 3.60** Mr Paul Miller, General Counsel, DPC, confirmed that, where a new minister is appointed, he or she does not receive the documents of the former minister. Documents from the former minister will have been returned to Cabinet or the minister's department when the outgoing minister leaves office. Documents of the former minister may then be submitted to the new minister through briefings from the department:

The Hon. JEREMY BUCKINGHAM: When a new Minister is appointed how does he or she retrieve the documentation of the former Minister?

Mr MILLER: The answer is that they do not retrieve it. The former Minister's documents, including briefs that are halfway through, will have gone back to the department. Cabinet documents will have gone back to the Department of Premier and Cabinet. They are then resubmitted essentially fresh for the new Minister. So the brief becomes a brief to the new Minister; it is not a retrieval of a previous brief.

If I can explain it this way. On a smaller scale it is like a change of government where upon a change of government you do not have the former ministry providing documents for the new ministry. You have the departments providing an incoming government brief to the new Ministers. It is the same sort of process on a much smaller scale.¹⁰⁴

- 3.61** Mr Miller also confirmed that a new minister cannot retrieve documents of the former minister deposited with the State Records Authority or electronic documents from the DPC MAPS IT system:

⁹⁷ Submission 9, Name suppressed, p 4.

⁹⁸ Evidence, Name suppressed, 11 June 2013, p 5.

⁹⁹ Submission 9, Name suppressed, p 4.

¹⁰⁰ Submission 9, Name suppressed, p 4.

¹⁰¹ Submission 9, Name suppressed, p 4.

¹⁰² Evidence, the Hon Peter Primrose, 11 June 2013, p 2.

¹⁰³ Submission 9, Name suppressed, p 4.

¹⁰⁴ Evidence, Mr Miller, 24 June 2013, pp 23-24.

The Hon. JEREMY BUCKINGHAM: Those documents would only come from the department; there would be no retrieval from State Records? They could not restore or retrieve documents from the MAP system out of State Records?

Mr MILLER: No, the premise would be that if the Minister needs the documents to perform his or her ministerial functions they will have gone to the department to be resubmitted to the new Minister.¹⁰⁵

The response of Minister Primrose's office to the order for papers

- 3.62** When Mr Primrose replaced Mr Macdonald as the minister for mineral resources, Ms Sanderson on behalf of DPC wrote to Minister Primrose's Chief of Staff seeking a return to the order of the House. The request was in the same terms as previously sent to the office of former Minister Macdonald.¹⁰⁶
- 3.63** The Acting Chief of Staff to Minister Primrose provided a return to DPC on 23 November 2009, six days after Mr Primrose's appointment as the minister.¹⁰⁷ The return contained one document covered by the terms of the order of the House, the memorandum from DPC to Minister Primrose's Chief of Staff seeking a return, together with a schedule of documents showing that as the only document produced.¹⁰⁸
- 3.64** In evidence to the Committee Mr Primrose stated that he became aware of the Mt Penny order for papers when advised of the order by his chief of staff. After becoming aware of the order he briefly discussed with his chief of staff the process that the latter would undertake.¹⁰⁹
- 3.65** The Acting Chief of Staff to Minister Primrose stated that he had sought advice from Ms Sanderson as to the procedure to be followed to comply with the order of the House.¹¹⁰ While he could not recall exactly the nature of the advice provided¹¹¹ he believed it was to 'determine whether the office of the Minister for Mineral Resources and Minister for Regulatory Affairs [that is, Minister Primrose] had documents relating to the call for papers'.¹¹² In her evidence, Ms Sanderson indicated that she could not recall giving this advice, but that she gave such advice on many occasions to ministerial chiefs of staff.¹¹³
- 3.66** After receiving advice from Ms Sanderson, the Acting Chief of Staff conducted a search of the documents in Minister Primrose's office. The documents in the office were small in number at that stage. He found nothing in the office except the letter from Ms Sanderson asking for a return to order from Minister Primrose's Office.¹¹⁴

¹⁰⁵ Evidence, Mr Miller, 24 June 2013, p 24.

¹⁰⁶ Submission 8, Department of Premier and Cabinet, Attachment 1, p 2.

¹⁰⁷ Submission 4, the Hon Peter Primrose MLC, p 1; Submission 9, confidential, p 2.

¹⁰⁸ Submission 8, Department of Premier and Cabinet, Attachment 1, p 2.

¹⁰⁹ Evidence, the Hon Peter Primrose, 11 June 2013, p 2.

¹¹⁰ Evidence, Name suppressed, Former Acting Chief of Staff to Minister Primrose, 11 June 2013, pp 6, 8, 12.

¹¹¹ Evidence, Name suppressed, 11 June 2013, p 12.

¹¹² Evidence, Name suppressed, 11 June 2013, p 6.

¹¹³ Evidence, Ms Sanderson, 24 June 2013, p 48.

¹¹⁴ Evidence, Name suppressed, 11 June 2013, p 3.

3.67 In other evidence to the Committee, Ms Sanderson questioned whether it had in fact been necessary for Mr Primrose to have provided a return to the House's order at all as he was not the responsible minister at the time the order was made.¹¹⁵ In that regard, Ms Sanderson noted the threshold question as to the time at which an order for papers 'speaks', which may be the time at which the order is made, the time the return is lodged, or both.¹¹⁶

The provision of a supplementary return on Mr Macdonald's return to office?

3.68 Following Mr Macdonald's reappointment as minister for mineral resources on 8 December 2009, there was the opportunity for the provision of a further return to the House providing documents which had been held by Mr Macdonald's ministerial office at the time of the House's order but were not lodged with the initial return.

3.69 The Deputy Chief of Staff to Minister Macdonald, Mr Gibson, told the Committee that after Mr Macdonald was reappointed as the minister, access to emails and electronic documents in the ministerial office were restored within a matter of days.¹¹⁷ When the electronic records were restored they were largely the way they had been left when Minister Macdonald left office.¹¹⁸

3.70 Mr Gibson also conceded that if a supplementary return had been prepared it would have likely picked up emails in Minister Macdonald's office which had been omitted from the original return:

CHAIR: But if he had done a supplementary return it would have shown from those earlier emails, would it not, that he had been the initiator of the Mount Penny exploration licence?

Mr GIBSON: Yes, it would have. I suspect, and I say this, we would have picked up some of those documents that we did not because I would have been searching my own email rather than the Department of Premier and Cabinet or whoever did it.¹¹⁹

3.71 However, Mr Gibson stated that he had given no thought to providing a supplementary return as he had understood that the House's order had been complied with by the incoming minister.¹²⁰ He had also understood that if there had been any deficiencies with the return submitted to the House DPC would have advised the minister's office.¹²¹

3.72 In his evidence Mr Macdonald asserted he was not aware of the supplementary return procedure and that his attention had not been drawn to the procedure:

CHAIR: There is the capacity, is there not—and I invite you to consider this—when documents are found not to have been produced to do a supplementary return?

¹¹⁵ Evidence, Ms Sanderson, 24 June 2013, p 57.

¹¹⁶ Evidence, Ms Sanderson, 24 June 2013, pp 50, 57.

¹¹⁷ Evidence, Mr Gibson, 24 June 2013, pp 33-34.

¹¹⁸ Evidence, Mr Gibson, 24 June 2013, p 33.

¹¹⁹ Evidence, Mr Gibson, 24 June 2013, p 40.

¹²⁰ Evidence, Mr Gibson, 24 June 2013, p 40.

¹²¹ Evidence, Mr Gibson, 24 June 2013, p 41.

Mr MACDONALD: I do not know. There may be, but I do not know. No-one raised it with me.¹²²

- 3.73 Mr Primrose told the Committee that had he been in a similar position he would have looked at putting in a supplementary return.¹²³

The first time a change of minister had occurred while an order was outstanding

- 3.74 The evidence received by the Committee suggested that the 2009 Mt Penny order for papers was the first occasion on which there has been a change of minister between the making of an order for papers by the House and the submission of the return.

- 3.75 Ms Sanderson, General Counsel at DPC at the time, advised that she did not recall any other occasion when there had been a relevant change in portfolio between the passage of an order for papers by the House and the return of papers to the House. However, there had been resolutions where the documents sought were historical in the sense that they predated the current minister's appointment.¹²⁴

- 3.76 The current General Counsel, Mr Miller, was asked during his evidence who is responsible for ensuring that the documents of an outgoing minister are captured in response to a call for papers where there has been a change of minister. Mr Miller replied that the 2009 instance was the first occasion of which he was aware in which there had been a change of minister after an order for papers had been made and that he was not certain what advice he would give if the issue arose again today:

The Hon. JOHN AJAKA: ... We are trying to understand who has the responsibility to absolutely ensure that when a Minister is decommissioned someone gains immediate access to all relevant material to ensure that it does not simply, and whether deliberately or accidentally, disappear into a system.

Mr MILLER: That is a difficult question. The 2009 order was the only occasion that I am aware of where there was this change of Minister during the course of when an order was made and when an order was produced. If that issue arose now and I were to be called upon to provide advice on how to deal with it, I am actually not sure what advice I would give. The difficulty is as you say. The new Minister is not in a position practically to produce those documents.¹²⁵

- 3.77 Mr Miller went on to point out that following a change of minister the former minister may hold relevant documents but is no longer the minister. Further, DPC would have access to the former minister's electronic records but does not search those records in response to orders for papers by the House. Given such complexities Mr Miller concluded that he would be likely to seek advice from the Crown Solicitor or Solicitor General if the issue were to arise again.¹²⁶

¹²² Evidence, Mr Macdonald, 23 July 2013, p 34.

¹²³ Evidence, the Hon Peter Primrose, 11 June 2012, p 13.

¹²⁴ Evidence, Ms Sanderson, 24 June 2013, p 54.

¹²⁵ Evidence, Mr Miller, 24 June 2013, p 5.

¹²⁶ Evidence, Mr Miller, 24 June 2013, p 5.

Committee comment

- 3.78** In July 2013, ICAC released its report on the outcomes of Operation Jasper entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*. Amongst other matters, ICAC found that Mr Macdonald engaged in corrupt conduct in the creation of the Mt Penny tenement and the re-opening of the EOI process in the tenement to other parties.
- 3.79** During the inquiry, the Committee examined closely whether Mr Macdonald sought in any way to influence the Mt Penny return to order. The failure of the Minister's office to produce documents was the source of speculation that there had been a deliberate attempt by Minister Macdonald, or his staff, to suppress or destroy documents.
- 3.80** From the outset, the Committee notes the observations made by the Commissioner of the ICAC in relation to the credibility of Mr Macdonald as a witness. The Committee believes that many of the observations made by the Commissioner are equally applicable to the evidence given by Mr Macdonald before this inquiry. The Committee found that the evidence of Mr Macdonald could not be accepted as reliable unless it was supported by the evidence of other more credible witnesses, or by other independent evidence.
- 3.81** By contrast, the Committee found Mr Gibson, Mr Macdonald's former Deputy Chief of Staff, to be a reliable witness. His evidence was credible and reliable and of great assistance to the Committee. The Committee believes that where Mr Gibson's evidence supported that of Mr Macdonald, Mr Macdonald's evidence could then be accepted.
- 3.82** The Committee makes the following finding.

Finding 2

The Committee finds that the evidence of Mr Macdonald was unreliable. The Committee did not rely on the evidence of Mr Macdonald unless supported by the evidence of reliable witnesses or other independent evidence.

- 3.83** On the question of whether Mr Macdonald interfered with the return to order whilst he was a minister, Mr Macdonald sought to convey the impression in his evidence to the Committee that there had been no need for him to be concerned about the creation of the Mt Penny tenement and EOI process as the core decisions in relation to the process had been undertaken by his Department and not by him. Mr Macdonald also argued that he had not been opposed to the Mt Penny order when it had gone through the House.
- 3.84** The Committee finds the evidence of Mr Macdonald on this point inherently unbelievable. The Committee cannot ignore the findings of the ICAC that Mr Macdonald engaged in corrupt conduct. In the Committee's opinion, there is ample reason to conclude that Mr Macdonald would have been keenly interested in the passing by the House of the Mt Penny order for papers. In this regard, the Committee notes the existence of a draft speech, prepared by the Department of Industry and Investment for Minister Macdonald, opposing the order for papers. This speech was provided in the return to order received by the House in 2009.

- 3.85** However, the Committee acknowledges the evidence of Mr Gibson that Mr Macdonald did not give him any instructions about destroying documents or emails in relation to the Mt Penny return to order, and that Mr Macdonald played no role in relation to the matter. This evidence was corroborated by officers from the Department of Industry and Investment.
- 3.86** The Committee also notes that Mr Macdonald resigned from the ministry only three days after the order was made. In the Committee's opinion, this would have effectively militated against attempts by him to influence the documents provided in the return, whether from his ministerial office or the Department of Industry and Investment, prior to the submission of the return to the House on 26 November 2009.
- 3.87** Based on this evidence, the Committee makes the following finding.

Finding 3

The Committee finds that no evidence was placed before it that Mr Macdonald sought to interfere with the response to the 2009 Mt Penny order for papers. Mr Macdonald's resignation from office on 15 November 2009, three days after the 2009 Mt Penny order for papers was made, effectively militated against him seeking to influence the documents provided in the return to order by his office or the Department of Industry and Investment.

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- 3.88** The Committee notes that if it were to accept the proposition that Mr Macdonald or members of his ministerial staff deliberately withheld or destroyed documents in order to suppress information, it would have been necessary not just to withhold or destroy documents in the Minister's office, but also the counterpart documents (particularly emails) held within the Department. There is simply no evidence that such a course of action was followed. Indeed, the fact that ICAC, through notices issued pursuant to section 22 of the *Independent Commission Against Corruption Act 1988*, was able to discover the documents it provided in the 'document comparison matrix' indicates that documents were not destroyed.
- 3.89** The Committee wishes to make it clear, however, that the finding the Committee makes above is specific to this matter only. The Committee in no way questions the broader findings of the ICAC in its report on Operation Jasper that Mr Macdonald engaged in corrupt conduct.
- 3.90** The Committee also notes the coverage of the Mt Penny matter by the *Australian Financial Review*. In his evidence to the Committee, Mr Macdonald indicated that he was not at all concerned about the article which appeared in the *Australian Financial Review* on 28 October 2009.
- 3.91** Again the Committee finds the evidence of Mr Macdonald on this point inherently unbelievable. In the Committee's opinion, there is ample reason to conclude that the disclosure in the *Australian Financial Review* article would have caused Mr Macdonald to be concerned that his role in the creation of the Mt Penny tenement and the re-opening of the EOI process to other parties would be exposed. Further documents provided by the Department of Trade and Investment as part of the 190 documents identified as possibly relevant to the Mt Penny order for papers would seem to confirm this.
- 3.92** Mr Macdonald's departure from the ministry triggered requirements for the disposal of his ministerial records under procedures established by the State Records Authority set out in

General Retention and Disposal Authority – Records of a Minister’s Office (GDA 13). Under GDA 13, where a minister leaves office records in the minister’s office relating to the minister’s portfolio responsibilities are to be provided to the minister’s department or other relevant agency or transferred to the State Records Authority depending on the nature of the documents concerned.

- 3.93** Accordingly, when Mr Macdonald left the ministry the agency responsible for coordinating returns to order, the Department of Premier and Cabinet (DPC), expected that documents which had been held by Mr Macdonald’s office would have been dispersed to the appropriate locations, including the Department of Industry and Investment in accordance with GDA 13. Consequently DPC took no steps to pursue the provision of a return from Mr Macdonald’s office. In those circumstances no return from Mr Macdonald’s office was ultimately included in the return provided to the House on 26 November 2009.
- 3.94** As discussed in Chapter 2, most of the documents held in Minister Macdonald’s office identified in the ‘document comparison matrix’ were also held by the Department of Industry and Investment. However, the matrix also includes a small number of emails between staff in Mr Macdonald’s office which were not copied to the Department at the time they were generated.¹²⁷ The Committee understands from material provided by the ICAC that these emails were obtained by ICAC from electronic records maintained by DPC rather than from the former minister’s department. The Committee is not able to tell whether these documents were ever provided to the Department when Mr Macdonald resigned as would have been required by GDA 13. If they were, they were not produced by the Department in the return to order.
- 3.95** The Committee wishes to be clear on this point. On the resignation of Minister Macdonald, it was the responsibility of his office to provide relevant documents, including emails, relating to the minister’s portfolio responsibilities to the Department of Industry and Investment. In turn, in the Committee’s opinion, it was the responsibility of the Department, in responding to the order for papers, to produce those documents that had been held by the office of Minister Macdonald as at 12 November 2009, the date of passing of the order.
- 3.96** In his evidence, Mr Gibson indicated his belief that DPC would have been able to search ministerial records after Minister Macdonald had left office. It is correct that DPC maintains the electronic environment of ministers’ offices, and that that environment can subsequently be recreated and searched, and indeed has been searched in response to section 22 notices from the ICAC. However, the evidence from DPC during the inquiry was that this electronic environment is not searched by DPC in response to orders for papers. The Committee accepts the reasons for this provided by DPC.
- 3.97** That said, the Committee acknowledges that the circumstances of the 2009 Mt Penny order for papers were singular. The Committee understands this was the first time on which there had been a change of minister between the making of an order for papers by the House and the submission of the return. The officers in Minister Macdonald’s office undoubtedly had a difficult task to clear the office. Mr Macdonald had been a minister for a very long time and his office would have accumulated a great number of documents including electronic documents which all needed to be dealt with in accordance with the appropriate procedures.

¹²⁷ See Chapter 2 under the heading ‘The nature of the documents’.

3.98 The Committee accepts that officers of DPC responded appropriately to the order for papers.

Finding 4

The Committee finds no fault in the conduct of officers of DPC in responding to the order for papers.

3.99 In relation to the response of Minister Primrose's office to the order for papers, the Committee notes evidence during the inquiry that the office of Minister Primrose did not have access to any of the documents in the former Minister Macdonald's office and was not in a position to provide any documents in the return to order, other than the memorandum from DPC to Minister Primrose's Chief of Staff seeking a return. Where a minister leaves office there is no provision for a handover from the outgoing minister to the incoming minister and any material from the outgoing minister's office which the incoming minister receives is provided through the minister's department.

3.100 The Committee found the evidence of Minister Primrose and his Acting Chief of Staff in their appearance before the Committee to be credible and reliable.

Finding 5

The Committee finds that the evidence of Minister Primrose and his Acting Chief of Staff was credible and reliable.

3.101 The Committee also finds no fault in the conduct of Minister Primrose or his Acting Chief of Staff in responding to the order for papers. They responded appropriately and fully in the circumstances.

Finding 6

The Committee finds no fault in the conduct of Minister Primrose or his Acting Chief of Staff in responding to the order for papers. They responded appropriately and fully in the circumstances.

3.102 The question was also raised during evidence as to whether Mr Primrose should have even been asked to provide a return to the Mt Penny order for papers, given that he was not the minister at the time the order was made. As discussed later in this report (Chapter 5) the Committee takes the view that an order for papers 'speaks' at the time it is agreed to by the House rather than at the time the return is lodged. On that view there was no obligation for Mr Primrose's office even to have provided a return.

3.103 Should circumstances arise again where there is a change of minister between the making of an order for papers by the House and the submission of the return, the Committee is of the view that the most appropriate course of action for the House to take would be the passing of a fresh call for papers, directed to the new Minister, thus avoiding any question of ambiguity.

- 3.104** Finally, the Committee notes that there was scope for the provision of a supplementary return by Minister Macdonald's office after Mr Macdonald was reappointed to the mineral resources portfolio in December 2009. Such a return may have picked up emails in Minister Macdonald's office which had been omitted from the original return. However, the Committee understands that the office relied on the return already provided, and the fact that there was no further communication on the matter from DPC.
- 3.105** While the Committee does not discount the appropriateness of supplementary returns in certain circumstances, the Committee understands that had GDA 13 been fully complied with in the first instance, and had all relevant documents been identified and provided by the Department of Industry and Investment in its return to order, there would have been no need for a supplementary return.
- 3.106** The Committee examines the adequacy of the response of the Department of Industry and Investment to the order for papers in the next chapter.

Chapter 4 Documents held by the Department of Industry and Investment

As indicated in Chapter 2, of the documents identified by ICAC in the ‘document comparison matrix’, all but four were created by or received by officers of the Department of Primary Industries which later became part of the Department of Industry and Investment, and should have been provided by the Department in the 2009 Mt Penny return to order.

This chapter examines the reasons for the failure of the Department to provide the documents subsequently identified by the ICAC.

The Maddocks Report

Background to the Report

- 4.1** At the commencement of the inquiry the Committee came to the view that it would likely need to take evidence from the departmental officers who were involved in providing the Mt Penny return to order in 2009. The relevant individuals could be identified by reference to the documents in both the Mt Penny return to order and the ‘document comparison matrix’. The Committee resolved to write to these individuals advising them of the inquiry and inviting them to make a submission.
- 4.2** In response, the Director General of the Department of Trade and Investment, Mr Mark Paterson, proposed in the initial submission of the Department that the Department commission a legal firm to undertake an independent inquiry within the Department to identify what occurred in 2009.¹²⁸
- 4.3** Mr Paterson was subsequently invited to appear before the Committee to put forward his proposal, which he did on 11 June 2013. In evidence, Mr Paterson advised that should the Committee consent to the proposal for an independent review, the review would be conducted by the legal firm Maddocks Lawyers.¹²⁹ Mr Paterson further advised that he envisaged the report would take only a few weeks to prepare.¹³⁰
- 4.4** The Committee did not object to the commissioning of the independent review.
- 4.5** On 30 July 2013, the Department provided the Committee with a copy of the report from Maddocks Lawyers as a supplementary submission to the inquiry. The Committee later resolved on 26 August 2013 to publish the report. A copy of the report with annexures is at Appendix 6.

¹²⁸ Submission 6, NSW Trade and Investment, p 1.

¹²⁹ Evidence, Mr Mark Paterson, Director General, NSW Trade and Investment, 11 June 2013, p 33.

¹³⁰ Evidence, Mr Paterson, 11 June 2013, p 26.

The Report's terms of reference and methodology

4.6 The terms of reference given to Maddocks Lawyers for undertaking their review were to:

- document the policies and procedures that applied to the 2009 Mt Penny order for papers
- investigate and document the actions taken by the Department in response to the Order
- in relation to the documents that were not produced, examine and report on where and how these were held.¹³¹

4.7 In undertaking the review, Maddocks interviewed 15 current or former departmental staff either in person or by telephone and email.¹³² In addition, Maddocks caused searches to be undertaken of the Department's IT records.¹³³

The Report's summary of the process followed in responding to the order

4.8 Annexure B of the Maddocks Report is a pictorial chronology of the actions taken by the Department of Industry and Investment in responding to the order for papers. The chronology was mainly generated by reference to emails that recorded actions taken by various departmental officers. The chronology also includes probable actions or discussions that took place, based on interviews given by departmental officers.

4.9 However, the report notes that it was impossible to determine definitively what actions were taken by the Department in responding to the order, including the searches performed (including both search terms used and which records were searched) and whether a search was made of TRIM.¹³⁴

The Report's summary of the documents not produced in 2009

4.10 With respect to the documents that were not produced in November 2009 in response to the Mt Penny order for papers, the Maddocks Report classified the 139 line entries in the 'document comparison matrix' as 106 emails and 33 documents.¹³⁵ As discussed in Chapter 2, many of the emails in the document comparison matrix also included electronic documents as attachments which are not listed elsewhere in the matrix.

4.11 With respect to the 33 documents, the Report noted that 22 of those documents existed on TRIM and that only one of the documents was accessed during the period in 2009 when the

¹³¹ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), p 3.

¹³² Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), pp 3-4.

¹³³ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), pp 4-5.

¹³⁴ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), pp 6-7.

¹³⁵ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), pp 6-7.

Department was responding to the order for papers. The Report could not determine where or how the 11 documents not registered on TRIM were held within the Department. The Report noted that none of the 106 emails was registered on TRIM.¹³⁶

The Report's findings

4.12 The key finding of the Maddock Report was at paragraph 6.1. It was as follows:

Based on the methodology set out in section 2 above, we have found no evidence of impropriety or the intentional withholding of documents by Departmental staff.

4.13 Paragraph 6.2 of the Report then went on to provide a number of administrative reasons for the incomplete response to the 2009 Mt Penny order for papers. Paragraph 6.2 can be reviewed in full in Appendix 6. For reasons of brevity it is not repeated here. The individual reasons advanced by Maddocks in paragraph 6.2 are discussed in context below.

Key departmental witnesses

4.14 Following the receipt of the Maddocks Report, the Committee took evidence from a number of key current and former departmental officers. The hearings took place on 26 August 2013 and 16 September 2013. The two hearings were both held *in camera*. However in both cases, the Committee later resolved, with the concurrence of the witnesses, to publish the transcript of their evidence, in some cases with relatively minor redactions. Each of the seven witnesses who appeared before the Committee had also been interviewed as part of the Maddocks review.

4.15 The Committee heard evidence from the following witnesses.

Dr Richard Sheldrake. At the time of the 2009 Mt Penny order for papers, Dr Sheldrake was the Director General of the Department of Industry and Investment.¹³⁷ It was to Dr Sheldrake that DPC referred the 2009 Mt Penny order for papers, and as Department head it was Dr Sheldrake who was ultimately responsible for certifying that all relevant documents held by Industry and Investment were provided in the return to order. In 2009, Dr Sheldrake was based in departmental offices in Sydney.

Mr Phil Anquetil. In 2009 Mr Anquetil was the Director, Executive Support in the Office of Dr Sheldrake in Sydney. As an extension to that role, Mr Anquetil also provided some policy and administrative support to the Minister's Office.¹³⁸

¹³⁶ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), p 7.

¹³⁷ At the time of giving evidence before the Committee, Dr Sheldrake was the Director General, Department of Primary Industries within NSW Trade and Investment. On 17 September 2013, the Minister for Primary Industries announced the retirement of Dr Sheldrake. His last day as Director General was 27 September 2013.

¹³⁸ Evidence, Mr Phil Anquetil, Executive Director, Business Services, NSW Trade and Investment, 16 September 2013, p 21.

Mr Mark Duffy. In 2009 Mr Duffy was the Deputy Director General, Resources and Energy within the Department of Industry and Investment.¹³⁹ Mr Duffy became part of the Department in July 2009 at the time of the formation of the Department of Industry and Investment, having been transferred from the previous Department of Water and Energy. Mr Duffy was not part of the Department at the time of the creation of the Mt Penny tenement or the finalisation of the EOI process for the Mt Penny exploration licence.¹⁴⁰ However, at the time of the order he was the head of the Resources and Energy division within Industry and Investment that held the overwhelming majority of the documents covered by the terms of the order for papers. Mr Duffy was also based in departmental offices in Sydney.

Mr Brad Mullard. In 2009, Mr Mullard was the Executive Director, Mineral Resources within the Resources and Energy division in Industry and Investment. Mr Mullard is a long-term employee of the Department. He and the section he headed were responsible for the creation of the Mt Penny tenement. At the time of the call for documents, Mr Mullard reported to Mr Duffy. Mr Mullard was based in departmental offices in Maitland.

Ms Patricia Madden. In 2009, Ms Madden was the Manager, Operations, Coal and Petroleum Development in Industry and Investment. Ms Madden worked directly for Mr Mullard, and was also based in departmental offices in Maitland.

Mr William Hughes. In 2009, Mr Hughes was a principal adviser and for a period the A/Director, Industry Coordination in Industry and Investment. Development Coordination was part of the Mineral Resources section, and Mr Hughes worked to Mr Mullard, however it was the only part of that section based in departmental offices in Sydney. The Industry Coordination unit was responsible for the EOI process for the Mt Penny exploration licence.¹⁴¹

Mr Ron Taylor. In 2009, Mr Taylor was the Manager, Corporate Projects in Industry and Investment. Mr Taylor's role included the coordination of departmental responses to formal requests for information, including orders for papers. Mr Taylor was based in departmental offices in Cronulla, but was able to work from departmental offices in Sydney if required. Mr Taylor was the officer given the responsibility for coordinating and collating the Mt Penny return to order on behalf of the Department, including preparing the covering letter, index of documents and claim for privilege.¹⁴² He reported to Mr Anquetil.¹⁴³

4.16 The Committee also notes that it twice took evidence from Mr Mark Paterson, the Director General of the Department of Trade and Investment. Mr Paterson was not part of Industry and Investment at the time of the 2009 Mt Penny order for papers.

¹³⁹ At the time of giving evidence, Mr Duffy was not employed in the public sector.

¹⁴⁰ Evidence, Mr Duffy, Former Deputy Director General, Minerals and Energy, Industry and Investment NSW, 26 August 2013, p 23.

¹⁴¹ Evidence, Mr William Hughes, Acting Director, Mineral Operations, NSW Trade and Investment, 16 September 2013, pp 14-15.

¹⁴² Evidence, Mr Ron Taylor, Manager Governance and Information Requests, NSW Trade and Investment, 26 August 2013, p 69.

¹⁴³ Evidence, Dr Sheldrake, Deputy Director General, NSW Trade and Investment, 16 September 2013, p 12.

Witnesses' recollection of the events of 2009

- 4.17** The Maddocks Report noted that the staff members interviewed as part of the review 'uniformly had very limited memory of their involvement in responding to the order in 2009'. Maddocks noted that the events are now some four years ago, and many staff have subsequently been involved in producing documents to the ICAC pursuant to its inquiries.¹⁴⁴
- 4.18** Similarly, witnesses giving evidence before the Committee in general terms had only limited recollection of their actions in responding to the call for papers. A number of witnesses emphasised to the Committee that their focus at the time was on the change of ministers. For example, Ms Madden advised the Committee:

I do not recall there being any other discussion [about the Mt Penny order for papers]. Like I said, that week I was flat out. The last thing I would have been doing was worrying about an SO 52 when I had a new Minister. I had 30 House folder notes to do in less than 24 hours and speeches for a Minister to open a new thing at university. He was also supposed to be visiting Maitland on the Friday morning. I set up a visit program. That got cancelled at 4.00 pm on Thursday afternoon. I am sorry, but the SO 52 was right off my agenda at that point. I had not been asked for it. I had no time to chase anything up other than what was on my desk at that moment.¹⁴⁵

- 4.19** Similarly in evidence, Mr Mark Duffy, the former Deputy Director General, Minerals and Resources, indicated:

Mr DUFFY: Firstly, at 2.4, the report says, 'The events the subject of the review occurred in November 2009, some four years ago.' It goes on to say, 'The department staff was interviewed; uniformly had very limited memory of their involvement in responding to the order. In fact, none of those staff members could actually recall their involvement in that process.'

CHAIR: I have that underlined.

...

Mr DUFFY: Well, from my point of view, given the swirl of the events of the time and given that in retrospect this is a major issue, but if there is another freedom of information [FOI] – you have got to understand how much information and how many issues bombard a department or an agency on a daily basis. In retrospect there is no doubt there is a major issue for you because it is an affront to your processes in that you have asked for material and it has not appeared here, and I understand that. You had an Independent Commission Against Corruption [ICAC] with findings of corruption, so in retrospect this is a major issue. But at the time it is possible to see a department in transition, a Minister falling over – I think the Government collapsed a week or so later – and the place was under enormous stress and pressure; no doubt about it.

From my point of view it was the worst period of government I have ever seen since I have been involved in New South Wales, since 1985-undoubtedly the worst period of

¹⁴⁴ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), p 4 at paragraph 2.4.

¹⁴⁵ Ms Patricia Madden, Manager Operations, Office of Coal Seam Gas, NSW Trade and Investment, 26 August 2013, p 65.

government I have ever seen. It was extremely difficult for bureaucrats to cope with the uncertainty and the chopping and changing. We had one Minister for 18 days. Try gearing up to get a Minister up to speed in 18 days and then he is gone and then we have a new Premier. I have never seen anything like it.¹⁴⁶

The reasons for the failure to comply with the order

4.20 As indicated previously, paragraph 6.2 of the Maddocks Report sets out a number of administrative reasons for the incomplete production of documents in November 2009. The Committee reviews those and other reasons below. The Committee's conclusions are at the end of this Chapter.

The lack of a clear policy for responding to orders for papers

4.21 At paragraph 6.2.1, the Maddocks Report observed:

there was no written policy or guideline which clearly articulated how Departmental staff were to respond to orders for the production of documents pursuant to Standing Order 52, including the procedures by which relevant documents were to be identified.

4.22 This was reiterated in evidence by Mr Taylor, the Manager, Corporate Projects within Industry and Investment at the time of the 2009 Mt Penny return to order, and the officer charged with the responsibility of coordinating the response on behalf of the Department.¹⁴⁷

4.23 However, in his subsequent submission to the inquiry, Mr Taylor provided the Committee with a copy of a draft Standing Order 52 policy which he indicated was from 2006.¹⁴⁸ This draft policy is reproduced at Appendix 7. The Committee notes the following policy and procedures set out in the policy:

POLICY

- 4.1 The Principal Manager, Corporate Projects [Mr Taylor] will liaise with Premiers Department and Deputy Directors General/Executive Directors regarding actions required under Standing Order No 52.
- 4.2 Deputy Directors General/Executive Directors are responsible for ensuring all relevant documents are identified, copied and referred to the Principal Manager, Corporate Projects within the specified timeframe. This will include an indexed list and, where appropriate, recommendations concerning claims for privilege.
- 4.3 The Principal Manager, Corporate Projects will be responsible for ensuring copies of relevant documents and the NSW DPI response is available for endorsement by the Director General and subsequent referral to Premiers Department.

¹⁴⁶ Evidence, Mr Duffy, 26 August 2013, pp 31-32.

¹⁴⁷ Evidence, Mr Taylor, 26 August 2013, p 71.

¹⁴⁸ Submission 12, Mr Taylor, p 1.

PROCEDURES

Upon notification by Premiers Department of an Order for the production of documents under Standing Order 52, the Principal Manager, Corporate Projects [Mr Taylor] will advise the Director, Sydney Office [Mr Anquetil] and seek confirmation of the Deputy Director General/Executive Director responsible for providing the documents sought.

The Principal Manager, Corporate Projects will then consult with the relevant Deputy Director General/Executive Director and advise the timeframe to provide the necessary documentation.

The Principal Manager, Corporate Projects will prepare the NSW DPI response based upon the documentation and advice provided. This will be referred to the Director, Sydney Office for endorsement and issued to Premiers Department by the Director General [Dr Sheldrake].

- 4.24** In his submission, Mr Taylor stated that the policy is a reasonable reflection of his understanding of the process to be followed at the time of the Mt Penny order for papers.
- 4.25** The Committee notes that the policy provided by Mr Taylor, as reproduced in Appendix 7, was undated, so it is difficult to ascertain its currency or application. The Committee notes the contrary evidence of Dr Sheldrake that:

...there was no process in place within the department and within the Department of Premier and Cabinet at the time, around the preparation of material for Standing Order 52. ... In relation to this we would have been better served if we had a process and procedure in place in 2009.¹⁴⁹

The tight timeframe for responding to the order

- 4.26** At paragraph 6.2.5, the Maddocks Report observed:

the timeframe for responding to the Order was very tight. The fax was sent by DPC to the DG on Friday, 13 November 2009 and specified Friday, 20 November 2009 as the deadline for providing comments.

- 4.27** The 2009 Mt Penny order for papers adopted by the Legislative Council on 12 November 2009 called for documents relating to Mount Penny to be laid upon the table of the House within 14 days: that is by 26 November 2009. However, as indicated by Maddocks above, the Department of Industry and Investment was requested by DPC to provide all relevant documents in its possession and control within a seven-day time period between 13 and 20 November 2009. A copy of the formal request for documents from Ms Leigh Sanderson, General Counsel, DPC to Dr Richard Sheldrake, Director General of the Department, is at Appendix 4. Annexure B of the Maddocks Report, the pictorial chronology of the actions taken by the Department in responding to the order for papers, indicates that the correspondence arrived at the Office of Dr Sheldrake by fax at 1.03 pm on Friday, 13 November 2009.

¹⁴⁹ Evidence, Dr Sheldrake, 16 September 2013, p 10.

- 4.28** Falling within the seven day period that the Department had to respond to the order for papers was the resignation of the Hon Ian Macdonald as the Minister for Mineral Resources and Minister for Primary Industries and the appointment of the Hon Peter Primrose as Minister for Mineral Resources and the Hon Tony Kelly as Minister for Primary Industries.
- 4.29** At his first appearance before the Committee, Mr Paterson stated that the seven days allowed to the Department to produce documents was relatively short, particularly when compared to the time later allowed by the ICAC to the Department to provide the documents in relation to the ICAC's investigations.¹⁵⁰
- 4.30** In the event, the Department did not provide its response to the order for papers until Monday, 23 November 2013. The response was late by one business day.
- 4.31** The Committee discusses in the following Chapter whether 14 days is sufficient time to allow an effective response to an order for papers of the nature of the 2009 Mt Penny order.

The six day delay in taking action

- 4.32** Also at paragraph 6.2.5, the Maddocks Report observed:
- [Mr Taylor] was not notified that he was to co-ordinate the response to the Order until Thursday, 19 November 2009. [T]o the extent that there was an informal policy on responding to Standing Orders and other requests for information, it was simply to comply on time. The focus was on providing a response on time rather than on ensuring that the production was complete.
- 4.33** As indicated above, Dr Sheldrake's Office received notification of the order for papers from DPC on Friday, 13 November 2009 with a request that the Department provide relevant documents by Friday, 20 November 2009.
- 4.34** However, the order for papers was not definitely communicated to Mr Taylor as the officer responsible for coordinating the response on behalf of the Department until Thursday, 19 November 2009, a delay of six days.
- 4.35** Annexure B of the Maddocks Report, the pictorial chronology of the actions taken by the Department, indicates that a support officer in the Director General's Office placed the order for papers notification on the department's TRIM system at 9.27am on Monday, 16 November 2009. However, Mr Taylor did not receive TRIM notification of the order until 9.02am on Thursday, 19 November 2009. He opened and reviewed the fax at 10.17am.¹⁵¹ Mr Taylor provided the Committee with a copy of this notification in his response to questions taken on notice from hearing on 26 August 2013.
- 4.36** Accordingly, Mr Taylor was given less than two days to coordinate and finalise a response to the order for papers on behalf of the Department.
- 4.37** As indicated, the Maddocks Report cited the short timeframe for responding to the order as one of the reasons for the incomplete production of documents. However, the report does

¹⁵⁰ Mr Paterson, Evidence, 11 June 2013, pp 16, 21, 24.

¹⁵¹ The times listed in the Maddocks Report pictorial chronology do not reflect daylight saving time.

not provide any insight into what was the cause of the delay of six days in providing the order to Mr Taylor. It only notes in Annexure B that Mr Phil Anquetil, Director, Executive Support in the Office of Dr Sheldrake was ‘provided with [a] copy of the fax setting out the order between 13/11/09 and 19/11/09’.

- 4.38** In his evidence to the Committee, Mr Anquetil could not explain the delay in receiving the order for papers and sending it to Mr Taylor.¹⁵² Mr Anquetil confirmed that it would either have been he or someone in his section at his direction that forwarded the notification of the order to Mr Taylor on 19 November 2009.¹⁵³
- 4.39** Mr Anquetil also conceded that he had placed Mr Taylor in a ‘very deep hole’ by assigning him the task to coordinate the response in less than two days.¹⁵⁴
- 4.40** In his evidence to the Committee, Dr Sheldrake also advised that he could not provide any explanation as to what was the cause of the delay, while noting that the delay no doubt had a bearing on the documents provided by the Department.¹⁵⁵
- 4.41** In his evidence, Mr Taylor indicated that he was not aware of any other order for papers where there had been such a significant delay in providing the terms of the order to him from the Director General’s Office.¹⁵⁶

The targeting and management of the initial request for documents

- 4.42** At paragraph 6.2.2 to 6.2.4, the Maddocks Report provided detailed commentary on the initial coordination of the response to the Mt Penny order for papers on 19 November 2009 and the roles performed by Mr Taylor and Mr Duffy:

it is clear from the interviews referred to in paragraph 2.1 that Departmental staff understood [Mr Taylor], as information officer, to be responsible for co-ordinating the response to the Order. There was some confusion, however, as to the extent of his role. [Mr Taylor] considered himself a mere conduit or facilitator of the response, whereas some others within the Department believed he was conducting searches and collating material.

it was unclear to [Mr Taylor] which people within the Department were to be sent a copy of the Order and how he was to determine which areas or people were relevant to the Order. There was no clear policy or guidelines setting out who was responsible for determining which people within the Department were to receive the Order. [Mr Anquetil] provided some guidance to [Mr Taylor] in this respect but this was *ad hoc* and informal.

[Mr Taylor] sent the Order by email directly to the Division Head, [Mr Duffy] (DDG for Energy and Minerals). However, it is not clear what action was taken by [Mr Duffy] in responding to the Order, apart from forwarding the email from [Mr Taylor]

¹⁵² Evidence, Mr Anquetil, 16 September 2013, p 21.

¹⁵³ Evidence, Mr Anquetil, 16 September 2013, p 28.

¹⁵⁴ Evidence, Mr Anquetil, 16 September 2013, p 28.

¹⁵⁵ Evidence, Dr Sheldrake, 16 September 2013, p 4.

¹⁵⁶ Evidence, Mr Taylor, 26 August 2013, p 84.

containing the Order to [Ms Smith] requesting her advice. [Ms Smith] does not recall the specific email but considers it likely that she would have orally given [Mr Duffy] general advice about responding to standing orders. This was because she had previously been in a legal role and dealt with standing orders regularly in the Energy division of the Department and [Mr Duffy] was aware of this. The general advice was based on [Ms Smith's] experience in responding to standing orders, rather than in accordance with some written or formal policy.

There is no evidence that [Mr Duffy] forwarded the email containing the Order to [Mr Mullard]. [Mr Mullard] was the Executive Director of Minerals. Given his role and the terms of the Order, many of the people interviewed at paragraph 2.1 were surprised that [Mr Mullard] was not involved in the Department's response to the Order (i.e. not copied in on the email from [Mr Taylor] on 19 November 2009 or was not forwarded the email by [Mr Duffy]).

[Mr Mullard] agreed that ideally the Order ought to have been brought to his attention. However, he noted that [Mr Duffy] worked in a different office (in Sydney) and may have taken comfort in the fact the Order had been copied to [Mr Hughes], who was also located in Sydney and was the Chair of the Mt Penny EOI evaluation panel.

- 4.43** Within the Department of Industry and Investment, it was the Minerals Resources section of the Energy and Resources division that was responsible for the creation of the Mt Penny tenement and the EOI process for the Mt Penny exploration licence. As such, it was this section that created and presumably held the vast majority of documents relevant to Mt Penny. The Mineral Resources section was primarily based in Maitland.
- 4.44** The executive director of Mineral Resources was Mr Brad Mullard. The Maddocks Report noted that of the 106 emails listed in the ICAC 'document comparison matrix', half were either sent by or to Mr Mullard.¹⁵⁷
- 4.45** However, as identified by Maddocks, Mr Mullard was *not* notified of the order for papers, either directly by Mr Taylor, or indirectly through Mr Duffy, and was therefore not requested to provide all relevant documents.
- 4.46** Annexure B of the Maddocks Report, the pictorial chronology of the actions taken by the Department, indicates that at 11.18am on 19 November 2009, Mr Taylor referred the order for papers to Mr Duffy by email. This was in accordance with the draft Standing Order 52 policy Mr Taylor cited to the Committee. The email was copied to Mr Anquetil, Mr Hughes and two other departmental officers,¹⁵⁸ but *not* to Mr Mullard. The email read in part:

Attached is advice from the Department of Premier and Cabinet regarding an order by the Legislative Council under Standing Order 52 for the production of documents concerning Exploration Licence 3771 (now EL 7406) –Mt Penny.

¹⁵⁷ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), p 7 and Annexure A.

¹⁵⁸ The other two individuals were Mr Tony Heffemand who worked in the Finance section and Ms Sara MacWilliam, Mr Duffy's executive assistant.

In responding to this Order, the Director General must certify that *all documents held by Industry & Investment NSW and covered by the terms of the resolution have been provided.* (original's emphasis)

It is therefore essential that all documents potentially within the scope of the resolution are identified and referred for assessment. This should include a schedule of the document title, author and date created.

...

As the Deputy Director General Minerals & Energy you are requested to make the necessary enquiries within your area of responsibility for any and all related documents. This will allow Industry and Investment NSW to demonstrate full compliance with the Orders.

...

DPC requires our response by the close of business Friday 20.11.09 – your assistance in meeting this timeframe is appreciated.

- 4.47 The evidence provided to the Committee during the inquiry is that Mr Duffy never provided a response to this email from Mr Taylor.¹⁵⁹ This point was also made by Maddocks, as cited above.
- 4.48 Nor did Mr Duffy forward the request to Mr Mullard. The Committee notes that in evidence, Dr Sheldrake commented that under normal circumstances Mr Duffy would have forwarded on the email to Mr Mullard, but that the circumstances were not normal due to the very tight time frame.¹⁶⁰
- 4.49 As the Committee understands it, Mr Duffy advanced a number of reasons for his lack of action in response to the email of Mr Taylor.
- 4.50 From the outset of his evidence to the Committee, Mr Duffy indicated that he was routinely bypassed within the Department regarding mineral resources issues.¹⁶¹ Mr Duffy argued that following his appointment to Resources and Energy in July 2009, Minister Macdonald and his office often bypassed him and went directly to Mr Mullard regarding mineral resources issues, and that the information he received mostly came from Mr Mullard:

I could not really put it any better myself – that was exactly the situation. He continued dealing directly with Mr Mullard and routinely excluded me from the information loop in relation to Mineral Resources. Needless to say, the arrangement bothered me greatly. Among other impacts, it left me highly exposed. I carried the title but was not being informed on day-to-day issues between the Minister, his office and the department.

... I spoke about it, particularly with Mr Mullard, on a number of occasions. He agreed that the arrangement was uncomfortable and unsatisfactory for him as well as for me. We resolved that the best way to manage the situation, at least in the interim,

¹⁵⁹ Evidence, Mr Taylor, 26 August 2013, p 75.

¹⁶⁰ Evidence, Dr Sheldrake, 16 September 2013, pp 3-4, 5.

¹⁶¹ Evidence, Mr Duffy, 26 August 2013, pp 23-25.

was for Mr Mullard to provide me with regular updates on these discussions and proposed agency responses. Obviously this was far from normal – let alone an ideal arrangement.¹⁶²

4.51 Mr Duffy gave further evidence that while in theory the matter was under his control, he was not involved in the creation of the Mt Penny mining exploration licence, and had never been briefed on the matter.¹⁶³

4.52 Accordingly, when he received Mr Taylor's email of 19 November 2009 in relation to the order for papers, Mr Duffy suggested to the Committee that he did not feel at all concerned about the tight time-frame for responding to the order.¹⁶⁴ He assumed Mr Mullard had already been notified and was working on the order, and that he had been copied in as a matter of courtesy.¹⁶⁵

I worked on the assumption, I worked on the primary assumption, given the information flows, that Brad overwhelmingly would have known, and that is my surprise. My surprise is that Brad Mullard was not the first person to receive the communication about the order 52.¹⁶⁶

4.53 Mr Duffy further emphasised that his assumption was that Mr Mullard 'would have been primarily emailed in', and that he was 'not in the loop, but Brad is'. '[T]hat is the way I understood the process to work; that is to say, I had nothing to offer'.¹⁶⁷ And again:

The way the process was [Mr Mullard], like everyone else, probably would have assumed that he should have been cc'd indirectly or directly got the copy of the email. He would not be looking to me to do that because our practice was that information was not regularly flowing through from me to him ...¹⁶⁸

4.54 In this regard, however, the Committee notes that while Mr Mullard did concede that he was effectively in control of the Mineral Resources section on a day-to-day basis, he also told the Committee that 'most items were going through Mark Duffy and he would refer them to me'.¹⁶⁹

4.55 Asked to comment on why he did not receive or seek a response from Mr Duffy, Mr Taylor responded:

He was quite often missing in action, in that you would not get a response from him. Responses would come back through his minions.¹⁷⁰

¹⁶² Evidence, Mr Duffy, 26 August 2013, pp 23-24.

¹⁶³ Evidence, Mr Duffy, 26 August 2013, p 26.

¹⁶⁴ Evidence, Mr Duffy, 26 August 2013, p 28.

¹⁶⁵ Evidence, Mr Duffy, 26 August 2013, p 28.

¹⁶⁶ Evidence, Mr Duffy, 26 August 2013, p 31.

¹⁶⁷ Evidence, Mr Duffy, 26 August 2013, p 31.

¹⁶⁸ Evidence, Mr Duffy, 26 August 2013, p 35.

¹⁶⁹ Evidence, Mr Brad Mullard, Executive Director, Mineral Resources, NSW Trade and Investment, 26 August 2013, p 46.

¹⁷⁰ Evidence, Mr Taylor, 26 August 2013, p 75.

4.56 Mr Duffy did forward Mr Taylor's email to Ms Karen Smith who at the time worked as corporate counsel in the Energy section. Mr Duffy told the Committee that while having no real recollection of the facts of the day he presumes that he had a conversation with Ms Smith on what he was required to do with the email from Mr Taylor:

... presumably we had a conversation that day along the lines of we are presuming that the head office, if you like, was running the process, that there is nothing in my email tray or TRIM relating to any documents that I had, which is not surprising given that I was not part of the department [at the time of Mt Penny EOI] and had no involvement in the process. I think that is what would have happened.¹⁷¹

4.57 The Committee notes, however, that this reconstruction of what possibly occurred is contradicted by the evidence given by Ms Smith to Maddocks. Ms Smith said that she had considerable experience with SO 52s and understood the process of having each relevant Department Head responsible for certifying that all relevant documents have been produced. Ms Smith said that her basic advice would have been to spell out to Mr Duffy what was in the email – namely that he was responsible for ensuring that all documents within his area of responsibility were provided.¹⁷²

4.58 The Committee also sought to establish why Mr Taylor did not copy Mr Mullard directly into his email of 19 November 2009, whereas he did copy in Mr Hughes. Mr Mullard was after all the 'go to man' on mineral resources issues. Again, those involved could not recall the actual events, but were able to suggest what most likely occurred.

4.59 Annexure B indicates that Mr Anquetil probably had a discussion with Mr Taylor in relation to the order on the morning of 19 November 2009. It is unfortunate that, as with all other attempts to determine what occurred in 2009, Mr Anquetil could not recollect the conversation he had with Mr Taylor when he would have discussed the task and advised Mr Taylor from whom within the Department relevant documents should be sought.¹⁷³

4.60 However, both Mr Taylor and Mr Anquetil agreed in evidence that upon receiving the TRIM notification to coordinate a response to the order for documents, Mr Taylor would have spoken over the telephone to Mr Anquetil to discuss to whom in the Department the request should be directed. Mr Anquetil advised the Committee that prudence and protocol would have led him to advise Mr Taylor to send the request to Mr Duffy:

The prudent call would have been for him to send it to the head of the division. That would have been the protocol. If he had asked me where to send a request for documents. I would have told him to send it to the deputy director of the Resources and Energy Division.¹⁷⁴

4.61 Mr Taylor similarly speculated:

My understanding would have been when I became aware of the order I would have rung Phil Anquetil who was the director of the Sydney Office and basically the chief

¹⁷¹ Evidence, Mr Duffy, 26 August 2013, p 30.

¹⁷² Ms Karen Smith, Interview with Maddocks Lawyers, File note, cited in Answers to questions on notice, Trade and Investment NSW, 28 August 2013.

¹⁷³ Evidence, Mr Anquetil, 16 September 2013, p 22.

¹⁷⁴ Evidence, Mr Anquetil, 16 September 2013, p 22.

of staff for the director general and said “We have this standing order,” I can only assume there was a direction “Send it out to Mark Duffy” – Will Hughes would have been the guy actually doing the Mount Penny stuff – “Send it to him so he can get started with it”. But it is really Duffy’s responsibility to make sure the process is followed.¹⁷⁵

4.62 Mr Taylor also suggested that it may have been the case that he had been aware that Mr Mullard was not available that day.¹⁷⁶

4.63 In evidence, Mr Mullard confirmed that he was not in his office on the day the request from Mr Taylor was sent out. He was in Canberra appearing at a Senate Committee hearing.¹⁷⁷ However, asked whether he was surprised that he had not been contacted by Mr Taylor in relation to documents captured by the order for papers, Mr Mullard indicated:

Yes, I am very surprised I was not referred to by someone. I would have thought I should have been. The only explanation I can think of is that they may have been aware that I was not in the Maitland Office at the time.¹⁷⁸

4.64 Mr Taylor conceded that in hindsight, Mr Mullard should have been copied into the email of 19 November 2013.¹⁷⁹

4.65 Another alternative explanation is that Mr Taylor and Mr Anquetil may have interpreted the scope of the order as applying solely to the EOI process for the Mt Penny exploration licence, which was primarily the responsibility of Mr Hughes. This is examined further below under the heading ‘The narrow interpretation of the scope of the order’.

4.66 In the event, the Committee notes that the majority of documents that were included in the 2009 Mt Penny call for documents were in fact provided by Mr Hughes. Mr Hughes was responsible for the EOI process, but not the original creation of the Mt Penny tenement. All of the documents in relation to the EOI process were securely stored in the Sydney office of the Department.¹⁸⁰ By contrast, Mr Mullard provided none, having not been in a position to do so. Nor did Dr Sheldrake,¹⁸¹ despite having been copied into a large number of emails in relation to creation of the Mt Penny tenement as revealed in the ‘document comparison matrix’.

4.67 The Committee notes the observation of Dr Sheldrake that if the Department had allowed itself more time to respond to the order for papers, then it is likely that the failure to seek documents from Mr Mullard would have been remedied.¹⁸²

¹⁷⁵ Evidence, Mr Taylor, 26 August 2013, p 70.

¹⁷⁶ Evidence, Mr Taylor, 26 August 2013, pp 76-77, 80.

¹⁷⁷ Evidence, Mr Mullard, 26 August 2013, pp 42, 45.

¹⁷⁸ Evidence, Mr Mullard, 26 August 2013, p 45.

¹⁷⁹ Evidence, Mr Taylor, 26 August 2013, p 81.

¹⁸⁰ Evidence, Mr Hughes, 16 September 2013, p 15.

¹⁸¹ Evidence, Mr Anquetil, 16 September 2013, pp 27 - 28.

¹⁸² Evidence, Dr Sheldrake, 16 September 2013, pp 3-4.

The management of the second opportunity to provide documents

- 4.68** Annexure B of the Maddocks Report indicates that there was a second and final brief opportunity for Mr Mullard and the Mineral Resources section based in Maitland to become aware of, and therefore possibly contribute towards, the return to order.
- 4.69** At 11.23 am on Monday 23 November 2009, Mr Taylor sent an email attaching what was referred to in the Maddocks Report at Annexure B as a ‘draft response to Order’. This email was sent to Mr Anquetil and copied to three other people, one of whom was Mr Mullard and another Mr Hughes. Mr Hughes did indeed provide a further document to Mr Taylor eight minutes later at 11.31am. Mr Duffy was not included in this email.
- 4.70** In evidence, Mr Taylor could not elucidate for the Committee the reasons why he included Mr Mullard in the email, and why he did not include Mr Duffy.¹⁸³
- 4.71** As it was, Mr Mullard did not review the email. He advised the Committee that he was not in the office at the time¹⁸⁴ and his office staff who checked his emails when he was out of the office did not notify him of the email. Mr Mullard said that he received hundreds of emails a week and as he was frequently out of the office he relied upon his staff to bring to his attention items that required action on his part.¹⁸⁵
- 4.72** The Committee was provided with a copy of the email by Mr Taylor.¹⁸⁶ The Committee notes that it had no subject heading and no content. It simply contained the text: ‘See attached file: Standing Order 52 EL 3722 23.11.09 response doc’ and included the attached file.
- 4.73** The Committee further notes that the attachment to the email was a draft letter from Dr Sheldrake to Ms Leigh Sanderson, General Counsel at DPC forwarding the response to the order for papers with an attached claim for privilege. It was not the index to the documents to be provided by the Department in response to the order for papers itself. Mr Taylor advised the Committee that he distributed this document to the people listed to ensure that they were satisfied with the claim for privilege.¹⁸⁷ Mr Taylor further advised that the actual index of documents was provided in a separate document.
- 4.74** At 12.44 pm, some 81 minutes after Mr Taylor’s initial email, Mr Anquetil forwarded the draft letter to be placed on official letterhead for signature of the Director General. Mr Taylor was not able to provide any further information to the Committee in relation to any further communications between himself and Mr Anquetil after the email of 11.23 am.¹⁸⁸

¹⁸³ Evidence, Mr Taylor, 26 August 2013, p 74.

¹⁸⁴ Evidence, Mr Mullard, 26 August 2013, p 43.

¹⁸⁵ Evidence, Mr Mullard, 26 August 2013, pp 52-53. See also the evidence of Ms Madden, 26 August 2013, pp 55 – 56.

¹⁸⁶ Answers to questions on notice, Mr Taylor, item 19.

¹⁸⁷ Submission 12, Mr Taylor, p 1.

¹⁸⁸ Evidence, Mr Taylor, 26 August 2013, pp 58-79.

The narrow interpretation of the scope of the order

4.75 As indicated previously in Chapter 2, the terms of the 2009 Mt Penny order for papers were as follows:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.¹⁸⁹

4.76 At paragraph 6.2.8, the Maddocks Report observed:

the terms of the Order are very broad requesting all documents “*in relation to Exploration Licence 3771 .. - Mt Penny, including any documents relating to the tender process ...*” From the interviews conducted in paragraph 2.1, one may infer that some Departmental staff tended to overlook the word “including” in interpreting the Order and focussed on tender documents only. We note the Privileges Committee’s interpretation of the Order in its report was that it called for the production of all documents that could be said in any way to bear upon or inform an understanding of the 2008/2009 “tender process”, that is, the 2008/2009 EOI process.

4.77 The reference by Maddocks to the Privileges Committee’s interpretation of the 2009 order is a reference to the following paragraph in the Committee’s previous report:

In its own approach to this matter, the Committee first considered the wording of the 2009 order for papers. Notices of motion for the production of papers in the Legislative Council are carefully worded to produce the documents sought. By the inclusion of the words ‘in relation to’ and ‘relating to’, the House deliberately sought the production of all documents that could be said in any way to bear upon or inform an understanding of any aspect of the 2008/2009 ‘tender process’. The Committee interpreted the ‘tender process’ as referring to the 2008/2009 EOI process, as did Mr Walker in his advice.¹⁹⁰

4.78 The Committee stands by this interpretation of the 2009 Mt Penny order for papers. While the order for papers included specific reference to ‘any document relating to the tender process’, the terms of the order were broader, and also required the production of documents ‘in relation to Exploration Licence 3771 (now Exploration Licence 7406).’ The Committee believes that this could reasonably be interpreted as all documents in relation to the creation of the Mt Penny tenement, which was created only a matter of months before the EOI process.

4.79 Nevertheless, on a simple inspection of the ‘document comparison matrix’, it is clearly the case that the documents that were provided by the Department of Industry and Investment in the 2009 Mt Penny return to order related primarily to the 2008/2009 EOI process and

¹⁸⁹ *Minutes*, Legislative Council, 12 November 2009, p 1517.

¹⁹⁰ Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), paragraph 4.12.

subsequent awarding of the exploration licence. As indicated, most of these documents were seemingly provided by Mr Hughes. Industry and Investment did not produce any documents relating to the creation of the Mt Penny tenement.

- 4.80** The evidence received by the Committee reinforces this view that the Department interpreted the order for papers as referring solely to the EOI process for the Mt Penny exploration licence, and not the creation of the Mt Penny tenement. When questioned by the Committee as to the possible reasons why he included Mr Hughes but not Mr Mullard in his original email of 19 November 2009, Mr Taylor suggested that it was a focus on the tender process that led him to include Mr Hughes:

In terms of the Mt Penny stuff, Bill Hughes did the Mount Penny tender so he would be the one getting together the information which, at the time, was sought. **Certainly my understanding was that the interest was in the tender for Mount Penny rather than the processes that preceded it.** Will did the Mount Penny tender process and evaluation. So we cc'd him into it so that he could start getting his bits and pieces together. (emphasis added)¹⁹¹

- 4.81** And also:

My understanding at the time, and things have obviously moved on since then, but the order was assumed to be about the tender process for Mount Penny. Will Hughes looked after the tender process for Mount Penny.¹⁹²

- 4.82** Similarly, Mr Mullard suggested in evidence:

They also would have been aware that the main person who was involved in the Mount Penny tender process was William Hughes. He chaired the committee. William Hughes was obviously one of the key players and it was referred to him as someone who they knew was involved very heavily in the Mount Penny tender.¹⁹³

- 4.83** Ms Madden also suggested:

From my perspective, I always thought the EOI process commenced when they put out the tender documents or the EOI documents. So typically I would have thought that was something that William Hughes would handle.¹⁹⁴

- 4.84** This narrow interpretation of the order may have been the principal reason why Mr Mullard and the Mineral Resources section at Maitland which created the Mt Penny tenement were not included in the email of 19 November 2009 and, as transpired, not given the opportunity to provide documents to the return to order.

The non-return of emails

- 4.85** At paragraph 6.2.6, the Maddocks Report observed:

¹⁹¹ Evidence, Mr Taylor, 26 August 2013, p 76.

¹⁹² Evidence, Mr Taylor, 26 August 2013, p 81.

¹⁹³ Evidence, Mr Mullard, 26 August 2013, p 45.

¹⁹⁴ Evidence, Ms Madden, 26 August 2013, p 57.

From our interviews referred to in paragraph 2.1, it appears that some Departmental staff may not have understood the Order to require the production of emails and therefore did not undertake searches of inboxes.

4.86 The Report goes on at paragraph 6.2.7 to discuss the nature of the 2009 Mt Penny order for papers, noting that it refers to ‘papers’ and ‘documents’, without specifically referring to emails. The Report suggests that this may have contributed to the way the order was interpreted, at least by some departmental staff.

4.87 For the avoidance of doubt, the Committee cites the definition of a ‘document’ in section 21 of the *Interpretation Act 1987*:

document means any record of information, and includes:

- (a) anything on which there is writing, or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or
- (d) a map, plan, drawing or photograph.

4.88 Emails clearly fall within the definition of a document for the purposes of section 21 of the *Interpretation Act 1987*.

4.89 Accordingly, emails should have been returned in 2009.

4.90 As indicated previously in Chapter 2, of the 139 line items listed in the ‘document comparison matrix’, 106 were emails, many of which had attached to them significant documents not listed elsewhere in the matrix.

4.91 The Committee notes, however, that in his evidence to the Committee on 26 August 2013, Mr Taylor suggested that it may have been the case that emails were not considered documents in 2009.¹⁹⁵ Mr Taylor also posited that only crucial emails would likely be included in returns to order or similar, but that ultimately his role was only to collate the documents provided to him.¹⁹⁶ The Committee notes that Mr Taylor’s evidence at this time was far from clear.

4.92 Following his appearance before the Committee, Mr Taylor provided a submission to the inquiry in which he sought to clarify the evidence he had given:

Emails are documents and should have been searched for, however, when giving evidence I was unsure if that was the view of all people doing such searches. I have since reviewed a Return to Order for 2006 and two others done immediately after the Mount Penny Return and note these include emails in the documents provided.¹⁹⁷

¹⁹⁵ Evidence, Mr Taylor, 26 August 2013, pp 70, 72.

¹⁹⁶ Evidence, Mr Taylor, 26 August 2013, pp 73-74.

¹⁹⁷ Submission 12, Mr Taylor, p 1.

4.93 The Committee notes that in evidence, Mr Taylor indicated that he was involved in the preparation of five returns to order prior to the Mt Penny return to order.¹⁹⁸ Emails were provided in four of the five returns,¹⁹⁹ the fifth being a nil return.²⁰⁰ However, on the four occasions on which emails were provided, there was only one instance in which the email went to the substance of the matter.²⁰¹ In the other three returns, the emails provided were produced in complying with the order for papers.

4.94 In evidence, some departmental staff typically involved in responding to orders for papers indicated that there was no dispute as to the status of emails. Mr Mullard categorically stated that it was widely understood in the Mineral Resources section that documents included emails.²⁰² Mr Duffy indicated his own understanding that emails should be returned.²⁰³ Similarly, Ms Madden stated:

I would search TRIM, emails and files – as broadly as possible.

...Hardcopy files. Sometimes you would go through hardcopy files because sometimes people send stuff in hardcopy that may or may not get onto TRIM depending on what it is – for instance, if they are large maps then they may be too large to scan. So you would do as large a search as possible.²⁰⁴

4.95 Regrettably, as indicated, neither Mr Mullard nor Ms Madden were in a position to contribute to the return to order.

4.96 By contrast, the evidence of Dr Sheldrake was:

I think in hindsight I think clearly we should have, as part of Standing Order 52, provided that material. But I think in 2009 the way the Standing Order 52 was worded, although at the beginning of the wording it does say “all documents”, the reference is very much around the provision of material associated with the Mount Penny expression of interest process. I do not think in 2009 I or the staff in the department who assisted in compiling the package thought of the need to search for emails. Now, I guess I will contrast that with the way the Independent Commission Against Corruption [ICAC]—

...

¹⁹⁸ They were: Taronga Zoo Asian Elephants (September 2006), Hunter Rail cars (November 2006), Boral Timber (November 2006), Powercoal cable snap (November 2006), Gretley mine disaster (November 2006). See Evidence, Mr Taylor, 26 August 2013, p 69. By contrast, however, the Committee notes that in its answers to questions on notice, the Department indicates that Mr Taylor’s only involvement in a previous response to an order for papers was in June 2009. See Answers to questions on notice, Trade and Investment NSW, 21 June 2013, p 5.

¹⁹⁹ Taronga Zoo Asian Elephants (September 2006), Boral Timber (November 2006), Powercoal cable snap (November 2006), Gretley mine disaster (November 2006).

²⁰⁰ Hunter Rail cars (November 2006).

²⁰¹ Taronga Zoo Asian Elephants (September 2006).

²⁰² Evidence, Mr Mullard, 26 August 2013, p 47.

²⁰³ Evidence, Mr Duffy, 26 August 2013, p 29.

²⁰⁴ Evidence, Ms Madden, 26 August 2013, pp 57-58.

I think that the investigation that the Independent Commission Against Corruption has conducted shows that some of those emails have a link and a relevance to the matters that came out in Jasper.²⁰⁵

4.97 In the event, the Committee notes that only two emails substantively relating to Mt Penny (as opposed to emails related to complying with the order) were provided in the 2009 Mt Penny return to order.

4.98 As noted previously, Mr Hughes seemingly forwarded the majority of the documents that were provided by the Department in 2009. However, Mr Hughes did not include any emails in the documents that he did provide. There are approximately 20 emails listed in the ‘document comparison matrix’ of which Mr Hughes was either the sender or the recipient.

4.99 Mr Hughes told the Committee that at the time of the order for papers he ‘had had very little experience with what were freedom of information requests or any other calls at that time’.²⁰⁶ Mr Hughes said that with the one-day turnaround, ‘[I]t was a scramble to get documents together in that time period’.²⁰⁷ Mr Hughes suggested that at the time he most likely focussed on providing the documents which he knew needed to be provided:

I probably had very little guidance as to what to look for. Being part of the evaluation committee, I knew that we had all the tender documents in a compactus – and the panel report, the letters signed off by the Director General and things like that. My thought process was probably to get those documents.²⁰⁸

4.100 Finally, on a different matter, the Committee notes that there was a stated approach by Mr Taylor and perhaps others at the time of the Mt Penny order for papers of limiting the number of emails sent in relation to the preparation of the return to order, as it was recognised that each such email would subsequently need to be produced itself in the return to order.²⁰⁹ The Committee examines this issue further in Chapter 5.

The lack of a verification process

4.101 At paragraph 6.2.12, the Maddocks Report observed:

there was no verification process. By that we mean that no one within the Department was clearly responsible for overseeing compliance with the Order and there was no critical questioning or analysis to ensure that production was complete. There was no review by the Division Head or any other appropriate director of the search records and documents and no certification that appropriate searches had been undertaken and all relevant documents provided.

²⁰⁵ Evidence, Dr Sheldrake, 16 September 2013, p 7.

²⁰⁶ Evidence, Mr Hughes, 16 September 2013, p 18.

²⁰⁷ Evidence, Mr Hughes, 16 September 2013, p 16.

²⁰⁸ Evidence, Mr Hughes, 16 September 2013, p 17.

²⁰⁹ Maddocks Lawyers, *Independent review of response to Mt Penny call for papers under Standing Order 52: Final Report*, (July 2013), p 6 at paragraph 4.3. Evidence, Mr Taylor, 26 August 2013, pp 72-73. Evidence, Mr Mullard, 26 August 2013, p 51.

- 4.102** As already identified by Maddocks and the Committee, Mr Duffy, the Deputy Director General, Resources and Energy, played no role in the order for papers, and did not verify the return to order. Rather, the final negotiations seem to have been between Mr Taylor and Mr Anquetil.
- 4.103** As indicated previously, Mr Taylor provided Mr Anquetil with a draft letter from Dr Sheldrake to Ms Leigh Sanderson, General Counsel at DPC forwarding the response to the order for papers on 23 November 2009. When questioned by the Committee as to why he prepared a draft response for Dr Sheldrake's signature without first receiving certification from Mr Duffy on behalf of the Resources and Energy Division, Mr Taylor suggested that there was an overriding obligation to provide a response within the tight time frame. Mr Taylor also stated that it was often the case that Mr Duffy would not provide a response to such requests and that one would have to rely on a response from another officer from Resources and Energy.²¹⁰
- 4.104** As also indicated previously, Mr Anquetil in turn placed Mr Taylor's draft letter on official letterhead for signature of the Director General. However, Annexure B of the Maddocks Report, the pictorial chronology of the actions taken by the Department, does not indicate when Mr Taylor provided Mr Anquetil with a copy of the index of documents in the return to order, or the actual documents themselves.²¹¹
- 4.105** In his evidence to the Committee, Mr Anquetil indicated that he sighted the index of documents. However, he argued that it was not his role to examine the index to ensure that all relevant documents had been provided, and that this responsibility rested with Mr Duffy.²¹² It is also not clear whether Mr Anquetil ever provided the index of documents to Dr Sheldrake.²¹³

The certification by the Director General

- 4.106** At paragraph 6.2.12, the Maddocks Report observed:

the DG did not consider it his role or responsibility to review the documents produced and personally verify that the correct searches had been conducted and the production was complete. Given his position, it is unsurprising that the DG signed off on the response to the Order without reviewing the documents and instead relied upon a proper search and collation process having been undertaken. But where the process undertaken was defective, it necessarily impinges upon the veracity of the DG's certification.

- 4.107** On 23 November 2009, Dr Sheldrake, the Director General of the Department of Industry and Investment, signed the covering letter addressed to Ms Leigh Sanderson at DPC certifying

²¹⁰ Evidence, Mr Taylor, 26 August 2013, p 75.

²¹¹ In his response to questions taken on notice during his appearance before the Committee, Mr Taylor provided a copy of an email he sent to Mr Anquetil which has an index of documents attached. The date of the email is Wednesday 25 November 2009, after the return to order was provided by the Department. As this response was received after the final hearing, the Committee did not have the opportunity to confirm whether this was the first time the index of documents was provided to the Director General's Office.

²¹² Evidence, Mr Anquetil, 16 September 2013, pp 23-24.

²¹³ Evidence, Mr Anquetil, 16 September 2013, pp 24-25.

that to the best of his knowledge ‘all documents held by I&I NSW and covered by the terms of the resolution had been provided.’ A copy of this letter is at Appendix 8.

- 4.108** In evidence, Dr Sheldrake indicated that he would have signed the letter without necessarily reviewing the documents to be provided by the Department.²¹⁴ In signing the letter and giving his certification, Dr Sheldrake said that he would have relied upon his confidence in the people who had assisted in compiling the material.²¹⁵ He did not personally review the documents,²¹⁶ and did not see it as his role to review the documents.
- 4.109** The Committee wishes to highlight this point. A large number of emails provided by the ICAC in the ‘document comparison matrix’ were emails sent or received personally by Dr Sheldrake. They related to the creation of the Mt Penny tenement. The evidence of Dr Sheldrake, however, was that he did not check to ensure these documents were included in the return to order:

CHAIR: Can I put this to you: When you come to certify one of these things, one of the things that you personally would be concerned to do is to comply with it in terms of documents that you have either received or documents that you have initiated, would you not?

Dr SHELDRAKE: In signing the letter that I signed indicating that the material had been provided, I accepted that I had confidence in people who had assisted in compiling that material. So I did not go through the material that was provided and look to see if it coincided with meetings that I had, or it aligned with my diary, or there were emails present.

CHAIR: You see, not only was there an obligation on, for instance, whether it be Mr Duffy or other people in the department to produce documents, but some of these documents were actually your documents, were they not? They were emails initiated by you or documents received; that is, they were actually, could I suggest, in your possession.²¹⁷

- 4.110** Dr Sheldrake also speculated that he would have discussed the matter with Mr Anquetil,²¹⁸ he had no recollection of such a discussion in 2009.²¹⁹ However, he did indicate that at the time he had not been aware that Mr Mullard had not been involved in the process:²²⁰

Brad Mullard was responsible for mineral resources. He would have been the person who I would have thought would prepare material in response to a standing order 52 in relation to this matter.²²¹

- 4.111** In all probability, Dr Sheldrake was also unaware that Mr Duffy had not provided a response.

²¹⁴ Evidence, Dr Sheldrake, 16 September 2013, p 7.

²¹⁵ Evidence, Dr Sheldrake, 16 September 2013, pp 4, 6.

²¹⁶ Evidence, Dr Sheldrake, 16 September 2013, pp 7-8.

²¹⁷ Evidence, Dr Sheldrake, 16 September 2013, pp 6-7.

²¹⁸ Evidence, Dr Sheldrake, 16 September 2013, p 6.

²¹⁹ Evidence, Dr Sheldrake, 16 September 2013, p 12.

²²⁰ Evidence, Dr Sheldrake, 16 September 2013, p 3.

²²¹ Evidence, Dr Sheldrake, 16 September 2013, p 4.

- 4.112 The Committee notes that the position of a Director General is akin to that of a director of a public company. In the recent decision of *Australian Securities and Investments Commission v Healey*,²²² dealing with the responsibility of directors for the financial statements of the company, Justice Middleton in the Federal Court found:

Directors are entitled to delegate to others the preparation of books and accounts and the carrying on of the day-to-day affairs of the company. What each director is expected to do is to take a diligent and intelligent interest in the information available to him or her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her.

- 4.113 The Committee will make further comment on this issue later in this chapter.

Other matters

- 4.114 At paragraph 6.2.9, the Maddocks Report also provided other possible, more general explanations for the incomplete production of documents in November 2009:

although documents appear to have been provided from the TRIM system and some searches of that system may have been conducted (there is no evidence to the effect), the TRIM system is not infallible. It relies upon Departmental staff registering documents on TRIM. At the time of the Order in 2009, the use of TRIM by Departmental staff was variable and certainly not universal. This is established by the fact that only 22 of the missing 139 documents appear to be registered on TRIM.

according to many of the people we interviewed at paragraph 2.1, the Mineral Resources division of the Department was under-resourced and had been stripped of senior management. The lack of adequate resourcing may have made locating documents and undertaking thorough searches more difficult. That is, already busy people were asked to identify relevant documents.

the Department had offices in Sydney, Orange and Maitland. This meant that staff were not all situated in one place and could not communicate as easily with one another. In these circumstances, the production of documents is more difficult and the process is more susceptible to failures. Accordingly, there was even more need for clear guidelines as to who was responsible for each part of the production process.

- 4.115 The Committee addresses these matters in its comment at the end of this Chapter.

Was there any outside interference in the return to order?

- 4.116 Throughout the inquiry hearings the Committee took the opportunity to ask departmental officers if they had been subject to any type of explicit or implied pressure to withhold documents from the Department's return to order. All witnesses were adamant that there had been no such interference.

²²² Federal Court of Australia, *Australian Securities and Investments Commission v Healey* [2011] FCA 717.

- 4.117** In giving evidence before the Committee, Dr Sheldrake said that he had no memory of having any discussion with the Minister's Office about the Mt Penny order for papers.²²³ Mr Anquetil said that in all his time at the Department there had never been any interference by a Minister or a Minister's office regarding the Department's response to a Standing Order 52, freedom of information (FOI) or Government Information Public Access (GIPA) request.²²⁴
- 4.118** By contrast, in evidence, Mr Taylor said that he could recall at least one occasion when the view of the Minister's office regarding the release of information had been made known to him:
- On one occasion, and it was probably prior to this, it was very strongly put to me that the Minister's office did not want some documents released, and my response was that you need to get somebody else to do the FOI determination because I think it should be released.²²⁵
- 4.119** However, Mr Taylor told the Committee that he could categorically state that neither Mr Macdonald nor anyone purporting to represent Mr Macdonald made contact with him in order to provide advice or guidance about the types of documents to be incorporated into the 2009 Mt Penny return to order.²²⁶

The Clayton Utz Report

- 4.120** In 2011, the Minister for Resources and Energy, the Hon Chris Hartcher, requested that an independent review be undertaken into the allocation process for both the Doyles Creek and Mt Penny exploration licences. The request was directed to Mr Duffy.²²⁷
- 4.121** The Minister subsequently approved the engagement of Clayton Utz to undertake the review. The scope of the review, as subsequently articulated by Clayton Utz in its report, was as follows:
- We have been engaged by the Department to investigate the efficacy and decision making in respect of the allocation of the Mount Penny exploration and development area. Specifically, we have been asked to undertake an initial review of the documentation pertaining to the tendering and granting of the Mount Penny EL with a view to making a recommendation to the NSW Government on what steps, if any, should be taken next.²²⁸
- 4.122** In conducting its review, Clayton Utz was provided with 491 pages of documents, including documents on the EOI process, Cascade Coal, and Monaro Mining NL.²²⁹

²²³ Evidence, Dr Sheldrake, 16 September 2013, p 7.

²²⁴ Evidence, Mr Anquetil, 16 September 2013, p 30.

²²⁵ Evidence, Mr Taylor, 26 August 2013, p 79.

²²⁶ Evidence, Mr Taylor, 26 August 2013, p 79.

²²⁷ Answers to questions on notice, Trade and Investment NSW, 21 June 2013, p 1.

²²⁸ Clayton Utz, *Review of Mount Penny Exploration Licence Allocation Process: Preliminary Report*, (November 2011), p 1.

²²⁹ Answers to questions on notice, Trade and Investment NSW, 21 June 2013, p 2.

- 4.123** The Preliminary Report²³⁰ of Clayton Utz was provided on 4 November 2011 and is available on the website of Trade and Investment NSW. The executive summary states:

On the basis of the documentation available to us, we have not identified any potential issues with the Expression of Interest process and allocation of Exploration Licence No. 7406 (Mount Penny EL) to Cascade Coal that might suggest that public trust was breached in any way.

On the information available to us there is insufficient evidence to conclude that Eddie Obeid, the former Minister for Mineral Resources, had inside knowledge that the Department of Primary Industries (Department) intended to grant an exploration licence over the Mount Penny area prior to his family's purchase of Cherrydale Park. However, there are a number of further areas of factual inquiry which could be undertaken to more conclusively determine this issue.

We recommend that, given the limited information presently available, the Department, in consultation with Clayton Utz and counsel, should in the first instance investigate those avenues of inquiry that do not require coercive powers or significant expense, to determine whether a broader and more costly investigation is justified. If a Special Commission of Inquiry is established into the circumstances surrounding the allocation of Exploration Licence No. 7270 at Doyles Creek by the Department, then the most cost effective and efficient way to conduct further investigations into Mount Penny would probably be to include those issues in the terms of reference of the Special Commission of Inquiry.²³¹

- 4.124** The Committee notes that Clayton Utz did not raise any specific issues that 'might suggest that public trust was breached in any way', however its report did recommend further investigation. A range of further avenues of investigation were suggested by Clayton Utz at part 5 of their report.
- 4.125** The Department did not subsequently undertake any further investigations as suggested by Clayton Utz.²³² It was not until August 2012 that the ICAC announced that it was undertaking Operation Jasper, investigating the circumstances surrounding the Mt Penny exploration licence.

The new policy adopted by Trade and Investment for responding to order for papers

- 4.126** In its answers to questions on notice, the Department of Trade and Investment provided the Committee with a copy of a new policy (policy number TI-G-147) adopted by the Department for responding to orders for papers under standing order 52. The new policy and covering message from the Director General is at Appendix 9.

²³⁰ The Committee understands that there was no final report. See Answers to questions on notice, Trade and Investment NSW, 21 June 2013, p 2.

²³¹ Clayton Utz, *Review of Mount Penny Exploration Licence Allocation Process: Preliminary Report*, (4 November 2011), p 1.

²³² Answers to questions on notice, Trade and Investment NSW, 21 June 2013, Answer 23.

- 4.127** In evidence to the Committee on 26 August 2013, Mr Paterson advised the Committee that all staff within the Department of Trade and Investment had been advised of the new policy.²³³ He also indicated that the policy was developed in consultation with DPC.²³⁴
- 4.128** The Committee notes that the policy includes a number of elements:
- On receipt of an order for papers, the Manager of Governance and Information Requests (MGIR) is to email the order to all Division Heads. The policy specifically provides ‘If any recipient is aware of an area that may hold relevant information that has not been included in this initial request for documents, the MGIR is to be advised immediately’.
 - Division Heads are responsible for ensuring a thorough search is undertaken within their area, and advising MGIR of areas outside their portfolio which may hold relevant information.
 - Officers must undertake a thorough search of records, including TRIM, physical file holdings, individual and branch computer drives, electronic or pocket diaries and notebooks, and, notably in the context of this inquiry, emails.
 - Officers conducting a search for documents are required to record in writing the search that they undertook by completing a ‘Branch Search Record form’, which is Attachment A to the policy.
 - Division Heads must certify that appropriate searches have been conducted and all relevant information has been provided using Attachment B to the policy.
 - Records are to be kept of who was involved in the search for documents, the search parameters or criteria and what records were searched.
 - The MGIR prepares a draft response to the order for papers based on the documentation and advice provided by Division Heads.
 - The Deputy Director General, Strategy and Operations, reviews the proposed response, based upon the documentation and advice provided by Division Heads.
 - The Director General issues the response when satisfied it fully complies with the order for papers.
- 4.129** The Committee notes that it asked the Clerk to comment on the policy. In response, the Clerk observed that the document indicates a serious intent to ensure that all necessary searches are completed and recorded. However, the Clerk also noted that along with the adoption of a new policy, the Department would need to address a number of administrative issues. For example, the Department would need internal communication to be timely to ensure Division Heads and their staff have adequate time to respond to orders for papers. Equally, processes would need to be in place to inform Division Heads not initially required to do a search for documents of the order for papers, to enable them to nominate additional documents that may nonetheless be available from their Division.²³⁵

²³³ Evidence, Mr Paterson, 26 August 2013, p 9.

²³⁴ Evidence, Mr Paterson, 26 August 2013, p 15.

²³⁵ Answers to questions on notice, Mr David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council, 4 October 2013, p 1.

Further investigations by the ICAC

- 4.130** The Committee notes that on 23 October 2013, prior to the tabling of this report, the ICAC announced the conduct of three further investigations (Operations Cyrus, Cabot and Meeka) into allegations concerning Mr Edward Obeid.
- 4.131** Of note, Operation Cabot concerned allegations that, between 2007 and 2008, Mr Obeid misused his position as a member of Parliament to influence public officials to exercise their official functions with respect to the review and grant of water licences at Cherrydale Park at Mt Penny, without disclosing that he, his family or a related entity had an interest in the licences. It is also alleged that during the same period, certain public officials improperly exercised their official functions with respect to the review and grant of the water licences at Cherrydale Park.
- 4.132** The Committee notes that Mr Duffy, in his capacity as the Director General of the Department of Water and Energy prior to 2009, was specifically named in connection with Operation Cabot during initial proceedings before the ICAC on 18 October 2013.
- 4.133** During his appearance before the Committee, the Committee Chair specifically questioned Mr Duffy in relation to meetings he held with Mr Obeid in 2007 and 2008. In his response, Mr Duffy indicated that he believed the meetings were in relation to electricity privatisation.²³⁶ The Committee did not pursue this line of questioning further.

Committee comment

- 4.134** The Committee believes that, while there is no evidence of impropriety, there were a number of interrelated factors that together contributed, some more significantly than others, to what was an administrative failure of the former Department of Industry and Investment to fully comply with the 2009 Mt Penny order for papers.
- 4.135** First, there was no clearly established and recognised policy across the Department for responding to orders for papers under standing order 52. While Mr Taylor, Manager, Corporate Projects, the individual responsible for coordinating the 2009 Mt Penny return to order, cited a draft policy to the Committee, its status and distribution is unclear. The failure of the Department to have a clearly established and widely available policy in place in 2009 materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

Finding 7

The Committee finds that the failure of the Department of Industry and Investment to have a clearly established and widely available policy for responding to orders for papers materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

²³⁶ Evidence, Mr Duffy, 26 August 2013, pp 26-27.

- 4.136** Second, from receipt of the Mt Penny order for papers in the office of Dr Sheldrake, the Director General of the Department on the afternoon of Friday, 13 November 2013, the Department had only seven days to respond to the order. During that period, Minister Macdonald resigned and a new minister was appointed.
- 4.137** While the seven days available may have been enough in normal circumstances for the preparation of a full return to order, the time available was effectively reduced to just one day through an administrative failure in Dr Sheldrake's Office that did not see the order for papers provided to the responsible officer, Mr Taylor, until the morning of Thursday, 19 November 2013. In the Committee's opinion, Mr Anquetil, Director, Executive Support in Dr Sheldrake's Office, must take responsibility for this failure. The failure to provide Mr Taylor with notification of the order for papers until 19 November 2013 meant that a full response to the order was rendered almost impossible.
- 4.138** It is the view of the Committee that the time frame of just over one-day within which officers were requested to provide relevant documents was the most significant factor contributing to the incomplete production of documents in response to the 2009 Mt Penny order for papers. There were a number of other contributing factors, but some of these could have been remedied had there been time for reflection and review, while other factors were simply exacerbated by the haste with which departmental officers were forced to respond.

Finding 8

The Committee finds that the failure by the Director, Executive Support to provide the Manager of Corporate Projects within the Department of Industry and Investment with notification of the Mt Penny order for papers until 19 November 2009 materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

- 4.139** Third, on receipt of the order for papers on 19 November 2013, Mr Taylor emailed the order to Mr Duffy, the Deputy Director General, Minerals and Energy with a request to provide the necessary documents. Mr Duffy did not respond to this request. Nor did he forward it to Mr Mullard, the Executive Director, Mineral Resources, who was the 'go to man' on mineral resources issues. In his evidence, Mr Duffy indicated that he assumed that Mr Mullard had already been notified and was working on the order, that he was routinely by-passed in such matters, and that he was being informed only as a matter of courtesy.
- 4.140** While understanding that he was in a difficult position, in the Committee's opinion, Mr Duffy should have confirmed, rather than assumed, that the order for documents was being dealt with by all the relevant officers within his area of responsibility, notably Mr Mullard. He should also have taken greater responsibility for the preparation of the return from the Mineral and Energy Division.

Finding 9

The Committee finds that the failure of the Deputy Director General, Minerals and Energy within the Department of Industry and Investment to take responsibility for the preparation of the return of his Division materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

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- 4.141** The Committee notes that the performance of Mr Duffy in the exercise of his official functions in his previous role with the former Department of Water and Energy is currently being investigated by the ICAC as part of Operation Cabot.
- 4.142** Fourth, on forwarding the order for papers to Mr Duffy on 19 November 2013, Mr Taylor copied four other officers into the email, including Mr Hughes, but excluding Mr Mullard. During evidence Mr Taylor speculated as to the possible reasons why he did not copy Mr Mullard into his email, including that he may have been so advised by Mr Anquetil, that he may have been aware that Mr Mullard was out of the office that day, or that he thought the scope of the order for papers primarily related to the EOI process for the Mt Penny exploration licence rather than the creation of the Mt Penny tenement. The Committee leans towards this last explanation.
- 4.143** Whatever the reason, Mr Taylor's decision not to copy in Mr Mullard was highly unfortunate in the circumstances, and had significant implications for the scope of documents provided in the return to order. In the end, the majority of documents provided in response to the order for papers appear to have been provided by Mr Hughes in relation to the EOI process. Mr Mullard was not in a position to provide any.
- 4.144** Along with the one-day timeframe for the return, the Committee highlights this administrative failure as another key reason for the Department's failure to comply fully with the Mt Penny order for papers. Quite simply, the order was not referred to Mr Mullard, the Executive Director of the Minerals Resources section, which was the section primarily responsible for matters relating to Mt Penny and, as such, held the majority of documents relevant to Mt Penny.

Finding 10

The Committee finds that the failure of the Manager of Corporate Projects within the Department of Industry and Investment to provide the Executive Director, Mineral Resources with notification of the Mt Penny order for papers materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

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- 4.145** Fifth, on 23 November 2013, Mr Taylor distributed a further email providing a draft letter from Dr Sheldrake to Ms Leigh Sanderson, General Counsel at DPC forwarding the Department's response to the order for papers. On this occasion, Mr Mullard was copied in to the email, in theory giving him a last-minute opportunity to contribute to the return to order. In the event, however, the email from Mr Taylor was very unhelpfully identified, and Mr Mullard was out of the office at the time. It is understandable that staff in Mr Mullard's office

did not recognise the significance of the email, and the opportunity to correct the return to order, such as it was, was lost. The response was put on the Director General's letterhead.

- 4.146** Sixth, Departmental officers seemingly interpreted the order for papers as referring solely to the EOI process for the Mt Penny exploration licence, and not the creation of the Mt Penny tenement. As indicated above, the Committee feels that this may have been the real reason Mr Taylor did not copy his initial email of 19 November 2009 to Mr Mullard.
- 4.147** Seventh, there was no verification process from Mr Duffy or another appropriate senior officer from the Resources and Energy division of the documents provided in the return to order. This was a significant failure in the Department's response to the order for papers.
- 4.148** Eighth, Dr Sheldrake, the Director General of the Department, did not consider it his role or responsibility to review the documents produced by the Department in response to the order for papers. This is despite his certification that to the best of his knowledge 'all documents held by I&I NSW and covered by the terms of the resolution had been provided,' and despite the fact that General Counsel at DPC relied on the certification as proof to be provided to the Legislative Council that all reasonable searches for documents had been undertaken, and all documents collated and produced.
- 4.149** It would seem, on the evidence available, that Dr Sheldrake simply relied upon the apparent integrity and competence of his staff, and nothing more. There is no evidence before the Committee that Dr Sheldrake examined or even saw the index of document provided in the return. There is no evidence that he asked any questions of either Mr Anquetil or Mr Taylor. In short, there is no evidence of any, let alone any proper, inquiry.
- 4.150** In accordance with the recent decision in *Australian Securities and Investments Commission v Healey*,²³⁷ the Committee believes that Dr Sheldrake owed a duty of care both to the Government of the day and the Legislative Council to ensure that proper processes were in place in his Department to ensure order for papers were fully complied with, and to ensure that a full search for documents within his Department had been undertaken in this particular instance. The fact that emails personally sent and received by him were not included in the return demonstrates a complete failure of systems and personnel within the Department, and a complete failure, in the words of Justice Middleton in *ASIC v Healey*, to 'apply an enquiring mind to the responsibilities placed upon him'. The lack of any formal procedures and guidelines for dealing with orders for papers made Dr Sheldrake's assertion that he relied upon the people who had assisted in compiling the material wholly inadequate.

Finding 11

The Committee finds that the failure of the Director General of the Department of Industry and Investment, to make any, let alone any proper, inquiry as to the circumstances surrounding the preparation of the 2009 Mt Penny return to order, or to review the contents of the return, was a serious omission which materially contributed to the Department's failure to respond adequately to the 2009 Mt Penny order for papers.

²³⁷ Federal Court of Australia, *Australian Securities and Investments Commission v Healey* [2011] FCA 717.

- 4.151** Other factors were also advanced in the Maddocks Report and in evidence as contributing to the failure of the Department of Industry and Investment to comply fully with the 2009 Mt Penny order for papers. Of note, the Maddocks Report and the evidence of Mr Taylor and Dr Sheldrake posited that there was some confusion over whether emails should be included in the return to order. As noted earlier, in a subsequent submission to the inquiry, Mr Taylor later conceded that his evidence on this point was incorrect. The concession of Mr Taylor on this issue is to his credit. Emails clearly constitute ‘documents’ for the purposes of section 21 of the *Interpretations Act 1987*.
- 4.152** The Committee concludes, on the weight of the evidence of a number of other witnesses, that there was no doubt within the Department, at the time of the Mt Penny order for papers, as to whether emails were documents and should be included in the return to the order. Both the Maddocks Report and Dr Sheldrake are wrong on this point. In particular, the Committee does not accept Dr Sheldrake’s assertion that ‘I do not think in 2009 I or the staff in the department who assisted in compiling the package thought of the need to search for emails.’ This suggestion is against the weight of the evidence and is therefore not credible.
- 4.153** The Committee is particularly concerned that a senior public servant, such as Dr Sheldrake, could maintain the view that emails might not be considered documents in these circumstances. The Committee finds it difficult to afford much credence to Dr Sheldrake’s evidence on this issue. It may have been advanced as an excuse to partially explain his, and his Department’s, failure to adequately respond to the order for papers.
- 4.154** The Committee concludes that the failure to include emails in the Mt Penny return to order arose from the inadequacy of the inquiries made within the Department, due in large part to the delay in commencing the search for documents.

Finding 12

The Committee finds that there is no credible basis for any assertion that there was confusion within the Department of Industry and Investment as to whether emails were caught within the terms of the 2009 Mt Penny order for papers.

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- 4.155** The Maddocks report also cited other factors that contributed to the failure to comply fully with the order for papers: the inconsistent use of the TRIM system, resource constraints and the distribution of Departmental officers across different locations. The Committee does not dismiss these matters, but regards them as incidental to the processes described above.
- 4.156** The Committee is, however, satisfied that on the evidence available to it, no officer from the Department deliberately took any action or made any decision to restrict the documents provided by the Department in response to the 2009 Mt Penny order for papers.

Finding 13

The Committee finds that on the evidence available to it, no officer of the former Department of Industry and Investment deliberately took any action or made any decision to restrict the documents provided by the Department in response to the 2009 Mt Penny order for papers.

- 4.157** That said, as previously indicated in Chapter 2, the Committee notes that the documents not provided, mainly relating to the creation of the Mt Penny tenement, were extremely significant in demonstrating malfeasance in regard to the Mt Penny exploration licence and ultimately corrupt conduct on the part of Minister Macdonald. It is unfortunate that this outcome provides fertile ground for suspicions of impropriety within the Department.
- 4.158** Equally, the failure of the Department to conduct further investigations into the Mt Penny exploration licence following the receipt of the Clayton Utz report of November 2011 is highly regrettable in light of subsequent events. The Committee expresses its concern that the Department, having been asked by Minister Hartcher to undertake a review, failed to brief Clayton Utz with all relevant and available documents. The failure of the Department in this respect meant that the manipulation of the tender process was not uncovered until the involvement of the ICAC some twelve months later.
- 4.159** Finally, the Committee notes the new policy adopted by Trade and Investment for responding to orders for papers. Many of the elements of the policy directly respond to issues raised during this inquiry, including a clear delineation of the separate roles of the Manager of Governance and Information Requests and of Division Heads, clear parameters for what records should be searched, and clear sign-off procedures by officers involved in compiling a return. Had this policy been in place in 2009, it seems likely that the issues raised in this chapter would not have arisen, subject to a suitable timeframe being adopted for the return to order.

Chapter 5 The order for papers process and standing order 52

This chapter examines suggestions for change to the order for papers process and standing order 52 (SO 52)²³⁸ made by the Department of Premier and Cabinet (DPC), and the response to those suggestions from the Clerk of the Parliaments. In considering these issues raised by DPC and the Clerk, the chapter also draws on commentary on the operation of the order for papers process raised with the Committee throughout the inquiry.

Background to the recommendations made by DPC

- 5.1 On 24 June 2013, the Director General of DPC, Mr Chris Eccles, and the General Counsel of DPC, Mr Paul Miller, gave evidence before the Committee. Their attendance and evidence reflected DPC's central role in coordinating the Government's response to orders for papers.
- 5.2 During the hearing on 24 June 2013, the Committee invited Mr Eccles and Mr Miller to consider any further submission DPC might wish to make in relation to the operation of the order for papers process and standing order 52.²³⁹
- 5.3 On 19 July 2013, DPC made a supplementary submission to the Committee which suggested changes to the SO 52 process 'both from the Council's perspective in making orders and from the perspective of the executive in responding to those orders'.²⁴⁰ The submission contained 20 recommendations²⁴¹ in total, together with other general comments.
- 5.4 On 23 August 2013, the Clerk of the Parliaments and Clerk of the Legislative Council, Mr David Blunt, made a submission to the Committee which responded to the 20 recommendations made by DPC. Mr Blunt subsequently gave evidence before the Committee on 26 August 2013.
- 5.5 The Committee examines the issues raised by DPC and the Clerk below. It should be noted that the comments and recommendations made by DPC and the Clerk are generally only paraphrased below, however the submissions of both are available on the Committee's website.

²³⁸ SO 52 is reproduced at Appendix 3.

²³⁹ Evidence, the Hon John Ajaka, 24 June 2013, p 23.

²⁴⁰ Submission 8a, Department of Premier and Cabinet, covering letter.

²⁴¹ The Committee notes that they were characterised as 'suggestions' by DPC.

Changes to the order for papers process recommended by DPC

A requirement to satisfy the necessity for an order for papers

- 5.6** In its supplementary written submission, DPC stated its general support for the Legislative Council's power to order the production of state papers, noting that it is 'an essential element of our parliamentary democracy'. However, DPC also observed that where the power is used as a 'fishing expedition' or for partisan political reasons, there is a risk that agencies will come to view it more as a cost and a burden with no clear connection to their own public interest objectives.²⁴²
- 5.7** DPC subsequently made two recommendations that go to the necessity for an order for papers:
- Consideration could be given to requiring a member moving a motion for an order for papers to satisfy the Council that the order is genuinely necessary for the scrutiny function of the Legislative Council. For example, the order might relate to a current committee inquiry or a bill that is currently before the House (DPC Recommendation 1).
 - Where State papers are ordered for a particular purpose, such as a committee inquiry, then they should be made available exclusively for that purpose, similar to documents produced for the purpose of court proceedings (DPC Recommendation 2).²⁴³
- 5.8** In response to DPC Recommendation 1, the Clerk observed that the power of the Legislative Council to order State papers is recognised at law as reasonably necessary in order for the House to fulfill its roles in the system of responsible government. As such, it is for the House to decide on a case-by-case basis whether an order is necessary.²⁴⁴ The Clerk reiterated this in evidence:
- An order for papers is only agreed to by the House when the member who has given the notice of motion and who is proposing the order is able to convince the majority of members to support the resolution. In my submission, there is already plenty of scope for members who have any concerns about the proposed order to raise those matters in debate and, if necessary, address them through the moving of amendments to such an order.²⁴⁵
- 5.9** In opposing DPC Recommendation 1, the Clerk acknowledged that the Council's use of the power to order papers can impose a considerable financial cost on the government departments and agencies called on to collate the returns to order, arising in part from the demands the returns place on the time of public servants. The Clerk also acknowledged that, in past years, certain orders for papers agreed to by the Council had been particularly broad in scope, even ill-defined, thus resulting in large volumes of documents being returned. However, it was the Clerk's contention that most often members seek the return of specific

²⁴² Submission 8a, Department of Premier and Cabinet, pp 7-8.

²⁴³ Submission 8a, Department of Premier and Cabinet, p 8.

²⁴⁴ Submission 11, Clerk of the Parliaments, p 7.

²⁴⁵ Evidence, Mr David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council, 26 August 2013, p 5.

documents and target orders for papers in such a way as to limit the burden that the process places on government agencies, and to ensure that the documents required are returned.²⁴⁶

5.10 The Clerk also acknowledged that, in the past, members might have resorted to an order for papers where they had been frustrated in their attempts to gain access to information about government decisions and actions through other means such as freedom of information requests and questions to ministers. However, the Clerk equally cited examples where the House's use of the SO 52 process to access government information had had an impact on government policy, had informed or been the impetus for a committee inquiry, or had been of great assistance in a member's pursuit of an issue of maladministration or misconduct.²⁴⁷

5.11 Accordingly, the Clerk strongly opposed any proposal to restrict or place limits on the exercise of the power of the House to order papers.

5.12 The Clerk also strongly opposed DPC Recommendation 2 that papers returned to an order for papers for a particular purpose should be available exclusively for that purpose. The Clerk observed in his submission:

Suggestions 1 and 2 appear to be based on the assumption that the purposes to which documents returned under SO 52 are used can be easily compartmentalised and limited, for example, to a committee inquiry. According to the *Egan* cases, the power exists to enable the House to undertake and fulfil its role in the system of responsible government, including in the 'superintendence of the executive'. As these are complex and somewhat imprecise concepts it would be inappropriate to seek to limit the use of returned papers to only some limited purposes.²⁴⁸

5.13 The Clerk reiterated this observation in his evidence to the Committee on 26 August 2013.²⁴⁹

The targeting and clarity of orders for papers agreed to by the House

5.14 In its supplementary written submission, DPC made a number of suggestions regarding the drafting of motions for orders for papers to be considered by the House:

- Orders should be targeted to the State papers that the Council actually needs to perform its functions in the particular case. Although there may be an understandable tendency on the part of members of the Council to 'cast the net' broadly, it is important that orders not be unnecessarily burdensome and they should not seek documents that are not required.²⁵⁰
- In drafting an order, the Council could also specifically consider what documents it does *not* need. Applications made under the *Government Information (Public Access) Act 2009* (GIPA Act)²⁵¹ often expressly state that they do not require the production of certain

²⁴⁶ Submission 11, Clerk of the Parliaments, p 8. See also Evidence, Mr Blunt, 26 August 2013, p 3.

²⁴⁷ Submission 11, Clerk of the Parliaments, p 8.

²⁴⁸ Submission 11, Clerk of the Parliaments, p 8.

²⁴⁹ Evidence, Mr Blunt, 26 August 2013, p 6.

²⁵⁰ Submission 8a, Department of Premier and Cabinet, p 11.

²⁵¹ The GIPA Act replaced the former *Freedom of Information Act 1989* in 2009.

categories of documents, for example, drafts of documents, intra-departmental emails, and correspondence from the general public.²⁵²

5.15 DPC also made the following observations in relation to the clarity of orders:

- Orders passed by the Council under SO 52 can lack the precision of other legal instruments such as subpoenas and orders for discovery. They can be ‘ambiguous’, ‘internally inconsistent’ and ‘oppressively broad in scope’. In spite of this, the executive is simply required to comply, with no opportunity to challenge or clarify the terms of an order once it has been made, and without the input of the office or agency to which it refers.²⁵³
- There is nothing to prevent either a member, before drafting or moving a motion for an order, or the Council, before debating the motion, consulting with the agencies which will have to comply with the motion.²⁵⁴

5.16 To this end, DPC made several recommendations regarding the targeting and clarity of orders for the production of papers:

- The scope of orders should be drafted carefully to identify the documents actually needed for the Legislative Council’s functions, to exclude more clearly any documents that are not required, and to avoid ‘broad fishing expeditions’ (DPC Recommendation 9).
- ‘Greater care’ could be given in the drafting of orders to clarify the particular documents that are sought (DPC Recommendation 10).
- Consideration could be given to consulting with executive agencies named in an order, either separately or through DPC, on the drafting of the order before it is moved and debated (DPC Recommendation 11). This would provide the Council with the opportunity to consider more directly the likely impact of the order in terms of the extent of documents that it is likely to receive, what confidentiality or other public interest concerns might be raised, and how an order in those terms is likely to be interpreted and applied by the executive.²⁵⁵

5.17 In response to DPC Recommendations 9 and 10, the Clerk acknowledged that there had in the past been examples of extremely broad orders that had imposed a significant and perhaps unreasonable burden on the Executive Government, particularly in the years immediately following the *Egan* decisions. However, he argued that in recent times, in the vast majority of cases, members do seek his assistance in drafting motions for orders for papers so that the terms of the order capture only the documents they desire, while minimising the burden on government agencies.²⁵⁶

²⁵² Submission 8a, Department of Premier and Cabinet, p 12.

²⁵³ Submission 8a, Department of Premier and Cabinet, p 12. See also Evidence, Ms Sanderson, 24 June 2013, p 52.

²⁵⁴ Submission 8a, Department of Premier and Cabinet, p 12.

²⁵⁵ Submission 8a, Department of Premier and Cabinet, pp 12-13.

²⁵⁶ Submission 11, Clerk of the Parliaments, p 13.

- 5.18** He continued that when members have a good knowledge of the specific documents they require, the orders are usually well targeted and specific. An order is less precise generally only in cases where the member has been unable to ascertain through other means where the documents are held or the format in which the information required is held. Consequently, some orders are necessarily broader in scope.²⁵⁷
- 5.19** In relation to DPC Recommendation 11, the Clerk argued that the most appropriate forum for negotiating and amending the terms of an order for papers is during debate in the House. While orders for papers are a procedural process, they are also by nature political. Thus members would likely be reluctant to discuss their political strategy with a government agency. Indeed to do so would place the officials in government agencies in a very political position. Notices remain on the Notice Paper for considerable lengths of time and it is understood that, in at least some cases, motions have been drafted or amended by members following negotiation with the Government. Members can argue for and against the necessity of an order, or correct or reject the terms during consideration in the House.²⁵⁸

Claims of privilege and the arbitration process

- 5.20** Under SO 52, where a document in a return to order is considered by the executive to be privileged, the return must state the date of creation of the document, a description of the document, the author and the reasons for the claim of privilege. Documents subject to a claim of privilege are made available to members of the Legislative Council only.
- 5.21** Standing order 52 also provides a mechanism for members to dispute the validity of a claim of privilege. Upon receipt of such a dispute the Clerk is authorised to release the documents to an independent legal arbiter (being a Queen's Counsel, Senior Counsel or retired Supreme Court Judge) for evaluation and report. The House then uses the report of the arbiter to inform any subsequent decision to publish the disputed documents. The validity of a claim of privilege has been disputed on 38 occasions since 1999.²⁵⁹
- 5.22** In its supplementary submission, DPC made the following statement in relation to claims of privilege over returns to orders:
- The power of the Council under Standing Order 52 to override public interest privileges is extraordinary. The process lacks many of the safeguards, consultation processes, and independent oversight mechanisms of other compulsory production processes, such as subpoenas or GIPA applications.²⁶⁰
- 5.23** DPC went on to make several criticisms of the process for dealing with claims of privilege made by the executive:

²⁵⁷ Submission 11, Clerk of the Parliaments, p 13.

²⁵⁸ Submission 11, Clerk of the Parliaments, pp 13-14; Evidence, Mr Blunt, 26 August 2013, p 5.

²⁵⁹ Submission 11, Clerk of the Parliaments, p 2. References to trends and statistics regarding orders for papers in the Legislative Council are generally reported from 1999, being the year in which the decision of the NSW Court of Appeal in *Egan v Chadwick* was handed down, following which the Government conceded the requirement to provide a return to orders for papers made by the Council.

²⁶⁰ Submission 8a, Department of Premier and Cabinet, p 8.

- Under the current process, agencies have only ‘one shot’ to make a submission regarding a claim of privilege over a document at the time at which it is initially returned to the House. No further opportunity is provided to the agency to make further submissions or respond to contrary arguments if the claim of privilege is subsequently disputed. In effect, agencies are put to the work of preparing comprehensive submissions in support of privilege claims that might never be challenged. If they do not, they risk a decision being made against the claim not because it is deficient but rather because they have not explained with sufficient detail or clarity the basis for it in their original return. Should the independent legal arbiter determine that privileged documents should be released, that decision is not subject to review or appeal by the executive.
- Unlike other processes such as those under the GIPA Act and court-ordered production, no provision exists for third parties, for example third parties wishing to claim privacy or commercial confidentiality, to be given notice of the order for papers and to be given an opportunity to make submissions as to whether they object to documents being released.²⁶¹

5.24 DPC accordingly made three recommendations regarding documents over which a claim of privilege is made by the executive, and the mechanism by which the documents are assessed by the arbiter:

- Consideration could be given to allowing the executive to return initially an index of papers subject to a claim of privilege, identifying the grounds on which privilege is claimed, rather than the documents themselves. The Council could then, having regard to that index, pass a further resolution seeking the production of any of the documents named. Documents produced would be subject to the arbitration mechanism provided for by SO 52 if the validity of the claim of privilege was disputed (DPC Recommendation 3).
- The office or agency that has made the claim of privilege could be given an opportunity to make submissions directly to the arbiter in relation to a contested claim of privilege (DPC Recommendation 4).
- Any third party whose personal or business affairs are affected by a contested privilege claim could be given an opportunity to make their views known to the arbiter (DPC Recommendation 5).²⁶²

5.25 Separately, DPC also made a fourth recommendation (DPC Recommendation 13) that provision be made in SO 52 for privilege claims to be made on the basis of any ground that would constitute an ‘overriding public interest against disclosure’ under the GIPA Act.²⁶³ DPC further submitted that:

.. at present, privilege claims are considered solely in accordance with the common law relating to legal professional privilege and public interest immunity. If our suggestion at (13) above is adopted, it will be much easier for agencies to identify and articulate

²⁶¹ Submission 8a, Department of Premier and Cabinet, pp 8-9.

²⁶² Submission 8a, Department of Premier and Cabinet, p 9.

²⁶³ Submission 8a, Department of Premier and Cabinet, p 14.

privilege claims, utilising their existing understanding and the much clearer statutory guidance under the GIPA Act.²⁶⁴

5.26 In Chapter 4, the Committee noted the new policy (policy number TI-G-147) adopted by the Department of Trade and Investment in June this year for responding to orders for papers under standing order 52. The policy is reproduced at Appendix 9. The Committee notes that it specifically provides that ‘The Government Information (Public Access) Act 2009 (GIPA Act) is informative when determining public interest immunity considerations which potentially warrant a claim of privilege.’ The policy goes on to cite claims of privilege under the GIPA Act.

5.27 In response, the Clerk disputed the statement by DPC that the power of the House to override public interest immunity is ‘extraordinary’:

This statement suggests the Legislative Council has somehow ascribed to itself some sort of unreasonably wide power. ... The power to require the production of documents including those subject to a claim of public interest immunity was determined by the NSW Court of Appeal, again based on the common law principle of reasonable necessity.

Whilst it is acknowledged that this power is significant, its existence is a matter of law. Any suggestion that the power should be constrained by new administrative procedures is rigorously opposed.²⁶⁵

5.28 The Clerk responded to the four recommendations of DPC as follows:

- The Clerk opposed DPC Recommendation 3, which proposed that only an index of privileged documents should initially be provided to the Council. The Clerk submitted that the power exists to order the production of State papers, including those upon which a claim of privilege can be made. The standing orders should not be used to restrict that power. The implementation of DPC Recommendation 3 would result in a significant restriction on the use of the power of the House to order the production of State papers.
- The Clerk neither opposed nor supported DPC Recommendation 4, which suggested that the executive should be given the opportunity to make submissions directly to the arbiter in relation to contested claims. The Clerk noted that the arbiter has on several occasions requested the assistance of agencies in the examination of documents that are the subject of a disputed claim of privilege due either to the inadequacy of the index or the written claim of privilege. In one instance, this extended to the arbiter inviting the assistance of solicitors, engineers and a project manager to clarify claims of privilege on particular documents. While the Clerk conceded that DPC is correct in observing that an agency has ‘one shot’ as far as the initial claim of privilege is concerned, the arbiter determines whether further information is subsequently required, as is appropriate given the expertise of those who exercise this function.
- The Clerk suggested that further consideration be given to DPC Recommendation 5, which was that a third party whose personal or business affairs are affected by a contested privilege claim be given an opportunity to make their views known to the

²⁶⁴ Submission 8a, Department of Premier and Cabinet, p 15.

²⁶⁵ Submission 11, Clerk of the Parliaments, p 4.

arbiter. While the Clerk acknowledged the potential for significant or even adverse impact on third parties by the disclosure of government information, he argued that it is nevertheless up to the House to make that determination.²⁶⁶

- The Clerk argued that the change of procedure such as that proposed in DPC Recommendation 13 is not necessary. Recommendation 13 was that provision be made in SO 52 for privilege claims to be made on the basis of any ground that would constitute an ‘overriding public interest against disclosure’ under the GIPA Act. The Clerk argued that the appropriate test is that established in *Egan v Chadwick*,²⁶⁷ not that in the GIPA Act. Moreover, since *Egan v Chadwick*, a body of precedent has developed in relation to the public interest test by the House.²⁶⁸

5.29 The Committee also notes that the Clerk made some general observations in his submission on claims of privilege and the arbiter process. The Clerk noted that while the role of the arbiter is central to the process of determining the validity of a disputed claim of privilege, the Council does not delegate its power to make a privileged document public. Upon receipt of the arbiter’s report, it is then the decision of the House whether to accept the arbiter’s advice in relation to the privilege to be afforded to the particular State papers. A further motion, on notice, must be agreed to by the House for any documents subject to a claim of privilege to be made public.²⁶⁹

5.30 That said, the Clerk did concede that in 2005, there were three occasions on which the House had resolved that, if it was not sitting when the report of an arbiter was lodged with the Clerk, the report and any documents considered by the arbiter to be not privileged were authorised to be published by the Clerk out of session. The House did so because the report of the arbiter would be delivered during the summer adjournment of the House, and it was deemed vital that any documents deemed suitable for publication be released as soon as possible.²⁷⁰

‘Cabinet documents’

5.31 In its supplementary written submission, DPC observed that a majority of the Court of Appeal in *Egan v Chadwick*²⁷¹ held that the Legislative Council does not have the power to require the production of ‘cabinet documents’. The confidentiality of cabinet information is a necessary component of responsible government and, in particular, the convention of collective ministerial responsibility.²⁷²

5.32 However, DPC also noted that the precise scope of the protection for cabinet documents is not entirely clear.²⁷³ The Parliament has, however, adopted a definition of ‘cabinet documents’ in clause 2 of Schedule 1 of the GIPA Act.²⁷⁴

²⁶⁶ Submission 11, Clerk of the Parliaments, p 10.

²⁶⁷ *Egan v Chadwick* (1999) 46 NSWLR.

²⁶⁸ Submission 11, Clerk of the Parliaments, pp 10-11.

²⁶⁹ Submission 11, Clerk of the Parliaments, p 2.

²⁷⁰ See Submission 11, Clerk of the Parliaments, p 4. See also Evidence, Mr Blunt, 26 August 2013, p 3.

²⁷¹ *Egan v Chadwick and others* (1999) 46 NSWLR.

²⁷² Submission 8a, Department of Premier and Cabinet, p 11.

²⁷³ Submission 8a, Department of Premier and Cabinet, p 11.

- 5.33** Accordingly, DPC recommended that standing order 52 be amended to note expressly that ‘cabinet documents’ do not need to be produced in response to an order for papers, and that for this purpose ‘cabinet documents’ can be taken to include any document that contains ‘cabinet information’ as defined in clause 2 of Schedule 1 of the GIPA Act (DPC Recommendation 8).
- 5.34** The Committee notes that in evidence, Mr Miller indicated that DPC itself adopts the definition of cabinet documents in the GIPA Act when responding to orders for papers.²⁷⁵ It seems likely that other departments are using the same definition.²⁷⁶
- 5.35** In response, the Clerk noted that the power of the House to order the production of ‘cabinet documents’ is a matter of ongoing controversy:

In his judgment, Spigelman CJ held that it is not reasonably necessary for the proper exercise of the functions of the Council to call for documents the production of which would conflict with a key element in our system of responsible government: the doctrine of collective ministerial responsibility. However, while he concluded that the production of documents which recorded the ‘actual deliberations of Cabinet’ was inconsistent with collective ministerial responsibility, he specified that the production of documents ‘prepared outside Cabinet for submission to Cabinet may, or may not, depending on their content, manifest a similar inconsistency’. Meagher JA took a broader view that the immunity of Cabinet documents from production was ‘complete’.

In dissent, Priestley JA observed that a court has ‘the power to compel production to itself even of Cabinet documents, even though the power will in regard to certain Cabinet documents be used with the highest degree of circumspection’. From this, his Honour went on to say that ‘The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity.’²⁷⁷

- 5.36** The Clerk accordingly opposed DPC’s recommendation to define ‘cabinet documents’ in the standing orders according to the GIPA Act. He observed:
- the standing orders are not a source of power, but the rules through which the power to order the production of papers is exercised or applied. As the matter of the power of the Council to order the production of ‘cabinet documents’ is in contention it would be inappropriate to define a power, or the lack thereof, in the standing orders.²⁷⁸
 - the definition of ‘cabinet documents’ in the GIPA Act is much broader in scope than the position articulated by Spigelman CJ in *Egan v Chadwick* and would have a

²⁷⁴ DPC acknowledged that the definition of cabinet information for the purposes of the GIPA Act is in some respects both more strict (ie narrower) and less strict (ie broader) than what the majority of the Court of Appeal would have considered to be a Cabinet document in *Egan v Chadwick*. See Submission 8a, Department of Premier and Cabinet, p 11.

²⁷⁵ Evidence, Mr Miller, 24 June 2013, p 15.

²⁷⁶ Evidence, Mr Miller, 24 June 2013, p 21.

²⁷⁷ Submission 11, Clerk of the Parliaments, p11.

²⁷⁸ Submission 11, Clerk of the Parliaments, p 11.

deleterious impact on the capacity of the Council to hold the executive government to account through the orders for papers process.²⁷⁹

5.37 The Clerk concluded that the true scope of cabinet documents, with respect to orders for papers, remains to be settled at law, and no doubt a matter will eventually arise which will lead to a dispute with the executive government and result in clarification of the matter by the courts. In the interim, if a written test for a ‘cabinet document’ is required, the Clerk preferred the following definition offered by an independent legal arbiter in 2005:

- (vii) In assessing a claim for public interest immunity in relation to ‘Cabinet documents’, a distinction is to be drawn between:
 - (a) true Cabinet documents, that is, those documents which disclose the actual deliberations of Cabinet; and
 - (b) Cabinet documents, that is, reports or submissions prepared for the assistance of Cabinet.
- (viii) A claim for privilege for true Cabinet documents will always be upheld. That is because the public interest in maintaining the principle or doctrine of collective responsibility of Cabinet for its decisions outweighs any other public interest. It is at the core of the operation of government. It has thus been held that the Legislative Council does not have the power to require production of such documents.
- (ix) When privilege is claimed for other Cabinet documents, a judgment process is required to weigh the competing public interests.²⁸⁰

5.38 The Committee notes that in his response to questions on notice, the Clerk again raised the issue of ‘cabinet documents’ and the assumption that a broad range of cabinet documents are immune from seizure. The Clerk noted that this position is seemingly adopted by the Department of Trade and Investment in its new policy (policy number TI-G-147) for responding to orders for papers.²⁸¹

5.39 The Committee notes that it canvassed the definition of ‘cabinet documents’, and the respective approaches of Justices Spigelman, Meagher and Priestley in *Egan v Chadwick*, in detail in its previous report.²⁸²

The public release of Government information in returns to order

5.40 In its supplementary written submission, DPC observed that ‘a practice has developed by which the Department of the Legislative Council immediately makes publicly available, and in particular to the media, all documents that have been produced... under SO 52’, both where

²⁷⁹ Submission 11, Clerk of the Parliaments, p 12.

²⁸⁰ Submission 11, Clerk of the Parliaments, p12.

²⁸¹ Answers to questions on notice, Mr Blunt, 4 October 2013, p 2.

²⁸² Privileges Committee, *Possible non-compliance with the 2009 Mt Penny order for papers*, Report 68, (April 2013), pp 8-10.

they have not been subject to privilege and where the arbiter has recommended that privileged documents be released.

5.41 DPC submitted that the power of the House to order the production of State papers is to facilitate the performance by the Council of its functions. In many cases, the publication by the Council of returns to order in the course of exercising that power is appropriate and desirable.

5.42 However, DPC submitted that the publication of government information would not appear to be consistent with that power if it is used simply for the purpose of passing on documents to the media or third parties. Instead, the Parliament has passed the GIPA Act to facilitate access to government information by the media and others.²⁸³

5.43 Separately, DPC also submitted:

there is good argument that orders under SO 52 should only be considered if for some reason an application under the GIPA Act would not be appropriate or if one has been made but has not yet yielded a result that is satisfactory to the Council.²⁸⁴

5.44 In response, the Clerk noted that returns to orders are treated in the same manner as any other document tabled by the Clerk (or a President or a minister) in the House: they are publicly available documents, made available to members, the public and the media on request. Because of their volume, the content of returns to order are not routinely made available on the Council's website. Consequently, interested members of the public and the media must attend Parliament House in order to view the documents. As the documents cannot be removed from the Legislative Council, photocopying facilities are made available.²⁸⁵

5.45 The Committee also notes that the Clerk made some general observations separately in his submission on the difference between the responsibilities of the courts in deciding the release of privileged information and the role of Parliament. The Clerk cited Sir Laurence Street, who has acted as independent legal arbiter for the Council in past years:

...there is an important difference between the responsibility of a court ruling on such [privilege] claims and the function of Parliament. The Court's function is to administer justice and expound the law. Parliament is the guardian of the public interest with age old constitutional authority to call upon the Executive to give an account of its activities.

While Courts apply developed principles in ruling on claims of privilege, Parliament will evaluate the claim (usually by its Arbiter) to consider whether it is in the public interest to uphold it. This process involves balancing against each other two heads of public interest that are in tension. On the one hand, there is a public interest [in not invading lawyer client relationships] and a public interest [in protecting what might be called commercially sensitive material]. And, on the other hand, there is a contrary

²⁸³ Submission 8a, Department of Premier and Cabinet, p 9.

²⁸⁴ Submission 8a, Department of Premier and Cabinet, p 13.

²⁸⁵ Submission 11, Clerk of the Parliaments, p 3. The Clerk does however note that the receipt of returns to orders have recently been published on the Council's new Twitter account, @nsw_upperhouse. See also Evidence, Mr Blunt, 26 August 2013, p 6.

public interest in recognising the public's right to know and the need for transparency and accountability on the part of the Executive.²⁸⁶

The provision of an index to returns

5.46 In its supplementary written submission, DPC contested the power of the Legislative Council to order the production of an index of documents accompanying a return to order:

.. DPC does not accept that the Council has any power to direct the executive as to the particular manner in which it complies with such an order. For example, and notwithstanding the current text of Standing Order 52, it appears that the Legislative Council has no power to require the executive to produce an index of the documents produced.²⁸⁷

5.47 In support, DPC cited a paper by Professor Anne Twomey,²⁸⁸ and respectfully disagreed with a paper by the former Clerk of the Legislative Council.²⁸⁹ The Committee also notes the evidence of Mr Miller before the Committee on 24 June 2013, citing advice of the Crown Solicitor.²⁹⁰

5.48 DPC also noted, however, that the executive voluntarily complies with requests to provide an index, and will continue to do so.²⁹¹

5.49 In response, the Clerk argued that the Council does have the power to order the production of an index of documents provided in a return to order, on the basis that such a list is reasonably necessary for the effective functioning of the House. In addition, the Clerk cited:

- The executive's long-term provision of such documents dating back to 1856.
- The creation of documents by the Government in response to other orders of the House, such as under SO 106(2) and SO 233.
- The need for an index both when a return to order consists of a large volume of documents and when the Government wishes to claim privilege over specific documents.²⁹²

The timeframe for compliance with orders for papers

5.50 In its supplementary written submission, DPC observed that it has become usual practice for the Legislative Council to impose a 14-day timeframe for compliance with an order for papers.

²⁸⁶ Submission 11, Clerk of the Parliaments, pp 4-5.

²⁸⁷ Submission 8a, Department of Premier and Cabinet, p 14.

²⁸⁸ Anne Twomey, 'Executive Accountability to the Australian Senate and the New South Wales Legislative Council' (2007) 07/70 *Legal Studies Research Paper - University of Sydney Law School*, pp 2-3.

²⁸⁹ Lynn Lovelock, 'The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On' (2009) 24/2 *Australasian Parliamentary Review*, pp 217-218.

²⁹⁰ Evidence, Mr Miller, 24 June 2013, p 8.

²⁹¹ Submission 8a, Department of Premier and Cabinet, p 14.

²⁹² Submission 11, Clerk of the Parliaments, pp 5-6, 15.

This appears to be done without reference either to the urgency of the matter or to the size and scope of the order.

- 5.51** DPC argued that where an order merely seeks a particular document from a particular agency, a 14-day turnaround is feasible. However, where an order is expressed in broad terms by reference to general subject matters requiring searches through numerous agencies and parts of agencies, 14 days is unreasonable.
- 5.52** Accordingly, DPC recommended that consideration be given to prescribing 28 days as the default period within which documents must be returned. Where an order seeks to impose a shorter timeframe this would be justified when the motion for the order is moved and debated in the House (DPC Recommendation 14).²⁹³
- 5.53** The Committee notes that during this inquiry into the 2009 Mt Penny return to order, it was clear that the timeframe for compliance with the Council's order placed significant pressure on the former Department of Industry and Investment.
- 5.54** In response to this issue, the Clerk submitted that prescribing 28 days as the default period for returning documents to an order for papers was reasonable, recognising the administrative burden that an order for papers imposes on a department or agency and the issues raised with the Committee during the course of this inquiry.²⁹⁴
- 5.55** However, the Clerk also observed that it is up to each member preparing a notice for an order for papers to propose the timeframe he or she thinks reasonable, based on the scope of the order and the urgency of accessing the information, and that it is then up to the House to make the ultimate decision during subsequent debate on the motion. There may be circumstances in which a much tighter timeframe is required.²⁹⁵

The final paragraph in orders for papers

- 5.56** It is standard practice for orders for papers passed by the House to include within the terms of the order a final paragraph requiring the production of 'any document which records or refers to the production of documents as a result of this order of the House.'
- 5.57** In its supplementary submission, DPC argued that through the inclusion of this final paragraph, the Council has sought to impose a continuous obligation on the executive to produce documents as and when they are created. In short, new documents created during the preparation of a return to order have themselves to be copied and added to the index, which becomes a continually moving document.
- 5.58** DPC further stated that, although the executive has chosen to comply with the requests made in the paragraph, 'we do not accept that the Council has the power to make an order in those terms'.²⁹⁶

²⁹³ Submission 8a, Department of Premier and Cabinet, p 14. See also Evidence, Mr Miller, 24 June 2013, pp 7-8.

²⁹⁴ Evidence, Mr Blunt, 26 August 2013, p 4.

²⁹⁵ Submission 11, Clerk of the Parliaments, p 15.

²⁹⁶ Submission 8a, Department of Premier and Cabinet, p 10.

- 5.59** DPC also argued that the requirement under this final paragraph acts as a disincentive to the creation of records which might otherwise be useful if it becomes necessary in the future to understand and reconstruct search processes and methodologies performed by a department or agency.²⁹⁷
- 5.60** Accordingly, DPC submitted that consideration could be given to discontinuing the practice of always requesting the executive to produce ‘any document which records or refers to the production of documents as a result of this order of the House’ (DPC Recommendations 6 and 19).²⁹⁸
- 5.61** In response, the Clerk observed that the standard final paragraph was never intended to capture documents relating to the internal arrangements for the collation of a return. Rather, the paragraph was initially adopted to ensure that any legal or other advice which went to the scope of an order, or sought to clarify its terms, should be provided.²⁹⁹
- 5.62** To this end, the Clerk conceded that there may be merit in rewriting the standard wording currently used in the final paragraph of orders for papers.³⁰⁰

Adoption of a whole-of-government policy for responding to orders under SO 52

- 5.63** In its supplementary written submission, DPC observed that there is currently no single whole-of-government ‘policy’ dealing with the manner in which agencies are to respond to orders for papers. However, as noted previously in Chapter 2, DPC provides detailed guidance to each department or agency named in an order when it writes to the relevant head of the department or agency seeking the return of relevant documents in relation to the order. Indeed, DPC suggested that its correspondence has perhaps performed the function of a whole-of-government policy better than a separate policy might, given that it is physically provided to each agency on each occasion.
- 5.64** That said, DPC was open to revising the current guidance and creating a whole-of-government policy explaining the obligations and procedures to be followed by agencies in responding to orders for papers, depending on the outcomes of this inquiry (DPC Recommendation 15).³⁰¹
- 5.65** DPC further noted, however, that the adoption of a whole-of-government policy will not avoid the need for individual agencies to determine their own internal processes for dealing with an order, having regard to their own particular structures and governance arrangements.³⁰²
- 5.66** In his submission, the Clerk supported the creation of a whole-of-government policy, and indicated a willingness to assist DPC in developing such a policy.³⁰³

²⁹⁷ Submission 8a, Department of Premier and Cabinet, p 17.

²⁹⁸ Submission 8a, Department of Premier and Cabinet, pp 10, 17.

²⁹⁹ Submission 11, Clerk of the Parliaments, p 14.

³⁰⁰ Submission 11, Clerk of the Parliaments, p 14.

³⁰¹ Submission 8a, Department of Premier and Cabinet, pp 14-15.

³⁰² Submission 8a, Department of Premier and Cabinet, p 15.

³⁰³ Submission 11, Clerk of the Parliaments, p 16.

Clarification of the date at which an order ‘speaks’

- 5.67 In its supplementary submission, DPC argued that there appears to be some confusion as to the date at which an order for papers ‘speaks’. DPC submitted that, technically, an order can and should only require the production of State papers in existence at the date the order was made.
- 5.68 Accordingly, DPC suggested that SO 52 should be amended to make clear that an order ‘speaks’ at the date the order was passed, and that only documents that were in existence at that date are required to be produced (DPC Recommendation 6).³⁰⁴
- 5.69 The Committee notes that this matter is tied up with the wording of the final paragraph of orders for papers, as discussed above, and whether departments and agencies are required to produce routine correspondence and other documentation regarding the collation of a return.
- 5.70 In response, the Clerk observed that the Legislative Council has agreed to hundreds of orders for papers within a stated number of days ‘of the date of passing of this resolution’. As such, there is no need to amend standing order 52, as the meaning of the date on which an order ‘speaks’ has been a matter of common ground between the Government and the Council for many years.

Alignment of the terminology of orders for papers with the GIPA Act

- 5.71 In its supplementary written submission, DPC made a case for the terms of SO 52 to be more generally aligned with the concepts and terminology used in the GIPA Act:
- Under the GIPA Act, it is clear that a minister (including his or her staff) constitutes an ‘agency’, and therefore that requests for documents from that minister means documents held by that minister and his or her office, but not documents held by the minister’s department.
 - The GIPA Act makes it clear that documents ‘held’ by an agency include those held by the State Records Authority on behalf of that agency, but not information already generally available to the public.
 - The GIPA Act makes provisions regarding defunct agencies and their successor agencies.
 - The GIPA Act clarifies that agencies are not required to search back-up electronic records unless they have reason to believe that a relevant record has been lost as a result of contravention of the *State Records Act 1998*.³⁰⁵
- 5.72 DPC concluded by recommending that consideration be given to whether greater clarity would be provided to the operation of orders for papers under SO 52 by adopting these and other concepts in the GIPA Act (DPC Recommendation 12).³⁰⁶

³⁰⁴ Submission 8a, Department of Premier and Cabinet, p 10.

³⁰⁵ Submission 8a, Department of Premier and Cabinet, p 13.

³⁰⁶ Submission 8a, Department of Premier and Cabinet, p 14.

- 5.73** In response, the Clerk submitted that there is now significant precedent for the use of standard wording in orders for papers, such as ‘possession, custody or control’, or ‘the Minister for..’, ‘or the Department of...’, and ‘as at the date of passing of this resolution’. As the Government has complied with numerous orders for papers containing these terms, it could be argued that the House is entitled to consider that their meaning has been settled and should not be open to question. However, he indicated a willingness to work with DPC to clarify the meaning of the standard wording and to develop guidelines to assist departments in understanding the scope of orders.³⁰⁷
- 5.74** He remained opposed, however, to alignment of the terms of SO 52 with the terms of the GIPA Act, on the basis that the terms of the GIPA Act may be changed in the future.
- 5.75** The Committee notes the evidence of DPC that the GIPA Act makes it clear that ‘held’ by an agency includes documents held by the State Records Authority on behalf of that agency. In this regard, the Committee notes some evidence of inconsistencies in approach across government agencies, with some agencies of the view that documents archived with the State Records Authority are not currently in the ‘possession’ of the agency, while others leave this determination to the staff collating the response to the order.³⁰⁸

Provision for the making of supplementary returns

- 5.76** In its supplementary written submission, DPC observed that, on occasion, additional documents have been identified by agencies shortly after a return has been produced. These documents have been produced by way of a supplementary return.
- 5.77** DPC suggested that it may be useful to amend SO 52 to clarify the power of the executive to make such supplementary returns. Were such provision to be made, the usual procedures regarding claims of privilege and arbitration would apply (DPC Recommendation 7).³⁰⁹
- 5.78** The Committee also notes the following evidence of Mr Miller:

I think it is not clear under Standing Order 52, or the terms of the resolution, whether such supplementary returns are indeed possible. We have done it as a matter of good faith, although the question has arisen where, for example, the order requires us to produce privileged documents. ... It is an important question for us as to whether there is actually a process for providing supplementary returns, if I can put it that way.³¹⁰

- 5.79** In evidence, Mr Miller also made it clear that supplementary returns are only provided where departments and agencies become aware of documents not provided in an original return. They are not used as a device for a time extension where departments and agencies have difficulty meeting the deadline for a return.³¹¹

³⁰⁷ Submission 11, Clerk of the Parliaments, p 14.

³⁰⁸ Answers to Questions on Notice, NSW Trade and Investment, 21 June 2013, Question No 21; Evidence, Mr Paul Miller, 24 June 2013, p 15.

³⁰⁹ Submission 8a, Department of Premier and Cabinet, pp 10-11.

³¹⁰ Evidence, Mr Miller, 24 June 2013, p 10.

³¹¹ Evidence, Mr Miller, 24 June 2013, p 10.

- 5.80** The former Premier, Mr Rees, also recommended that it be made explicit that good faith supplementary returns can be made, post the initial return date.³¹²
- 5.81** While the Clerk supported the ability of agencies to make supplementary returns, he did not support any amendment to the terms of SO 52. He argued that a substantial body of precedent already provides a clear process for the lodgement of additional documents in return to an order of the House:
- Since 1999, there have been more than 50 occasions on which the government has provided additional documents after a return has been provided to the House, possibly due to the scope of an order for papers, or the time frame for responding. Additional documents lodged with the Clerk are reported to the House and made available to members in the normal manner. Considering this significant body of precedent, it is not necessary to amend the standing orders.³¹³
- 5.82** In Chapter 3, the Committee noted that there was a clear opportunity for Minister Macdonald's Office, on Mr Macdonald's reappointment to the ministry, to provide a supplementary return to the 2009 Mt Penny order for papers. Had the office done so, it seems likely that at least some of the documents missing from the 2009 Mt Penny return to order would have been captured, particularly emails.

The certification processes

- 5.83** In its supplementary written submission, DPC noted that it requires agencies named in an order to provide a certification from the head of the agency that, to the best of his or her knowledge, all documents held by the agency and covered by the terms of the order have been produced.³¹⁴
- 5.84** However, DPC observed that it is not practical for a head of an agency to undertake personally a search for documents in response to an order for papers. Accordingly, the head of the agency reasonably needs to rely on the diligence and advice of other officers of the agency. In DPC, the Director General, in coordinating a return to order from DPC, also requires subordinate officers to provide him with a certification in respect of the particular branch or agency for which they are responsible. DPC submitted that 'pyramid' style certification process is best-practice.³¹⁵
- 5.85** Accordingly, DPC recommended that the proposed whole-of-government policy on order for papers should direct agencies responding to an order to require certifications from relevant officers at appropriate levels in the agency. The final certification should also be amended to be expressed as being 'to the best of the officer's knowledge after having undertaken or directed the undertaking of reasonable searches' (DPC Recommendation 18).³¹⁶

³¹² Submission 7, The Hon Nathan Rees MP, p 2.

³¹³ Submission 11, Clerk of the Parliaments, p 15.

³¹⁴ Submission 8a, Department of Premier and Cabinet, p 16.

³¹⁵ Submission 8a, Department of Premier and Cabinet, p 16. See also Evidence, Mr Miller, 24 June 2013, p 25.

³¹⁶ Submission 8a, Department of Premier and Cabinet, p 16.

- 5.86** In reply, the Clerk indicated that these are internal matters for DPC, but that the proposal seemed reasonable and was supported.³¹⁷
- 5.87** The Committee notes that the issue of certification was discussed in Chapter 4. In the words of the Chair, in the case of the 2009 Mt Penny return to order, the certification provided by Dr Sheldrake as the Director General of Industry and Investment ‘meant little or nothing’.³¹⁸
- 5.88** As an aside, the Committee also notes evidence that ministers are not in the habit of reviewing the contents of returns to orders lodged with the Legislative Council. During evidence before the Committee, Mr Miller stated:

From a legal perspective, given the responsibility falls on the Leader of the Government and the Ministers in the upper House, if those Ministers wanted to see those documents before we provided them to the Legislative Council they would have a right to do so. In my experience no Minister has ever asked to scrutinise those documents before they are produced.³¹⁹

Identification of search parameters

- 5.89** In its supplementary written submission, DPC noted that it does not require agencies to document as part of a return to order the particular methodology, the search parameters or criteria, or the particular search terms used in electronic searches for documents. Agencies can, of course, create this information if they wish. DPC attributed this in part to the inclusion of the final paragraph in orders for papers requiring, in the interpretation of DPC, the production of documents created in responding to the order.³²⁰
- 5.90** In response to this issue, DPC recommended again a discontinuation of the practice of asking agencies to produce all documents created in responding to an order, and a direction being given to agencies to create and keep records of their searches. This could include who was involved in searches, the search parameters and criteria, and what files were searched (DPC Recommendations 19 and 20).³²¹
- 5.91** The Committee notes that in two recent returns to order concerning Yaralla Estate, the Sydney Local Health District, a part of NSW Health, has taken the unusual step of outlining in their index of documents provided in the return, a description of the type of each document provided, where and from whom each document was obtained, and the nature of the search process undertaken.³²²
- 5.92** The Committee also notes the evidence from Chapter 4 that the new policy adopted by the Department of Trade and Investment for responding to orders for papers requires officers conducting a search for documents to record in writing the search that they undertook in a ‘Branch Search Record form’ which is attached to the policy. In turn, Division Heads must

³¹⁷ Submission 11, Clerk of the Parliaments, p 16.

³¹⁸ Evidence, Committee Chair, 16 August 2013, p 9.

³¹⁹ Evidence, Mr Miller, 24 June 2013, p 14.

³²⁰ Submission 8a, Department of Premier and Cabinet, p 16.

³²¹ Submission 8a, Department of Premier and Cabinet, p 17.

³²² Return to order – Yaralla Estate, 13 June 2013; Return to order – Yaralla Estate – Further Order.

certify that appropriate searches have been conducted and all relevant information has been provided using Attachment B to the policy.

Staff training

5.93 In its supplementary written submission, DPC argued that for most agency staff, complying with an order under SO 52 is a straight-forward exercise for which no special training should be required. According to DPC,

...in most agencies the unit responsible for collating the returns is also responsible for the agency's compliance with the GIPA Act and other compulsory document processes, and so can be expected to appreciate both the importance of compliance and the appropriate procedures to be followed.³²³

5.94 However, DPC also noted that, from time to time, agencies have sought assistance and guidance from DPC, particularly as to the types of privilege claims that can be made, and the appropriate way of documenting these in a return to order.³²⁴

5.95 In response, DPC noted that the Crown Solicitor regularly conducts training for agency officials on the GIPA Act. DPC proposed that they approach the Crown Solicitor with a view to developing and offering training to agency officials who are involved in responding to orders for papers under SO 52, particularly in relation to the making of claims of privilege (DPC Recommendations 16).³²⁵

5.96 DPC also noted that it already provides information seminars to ministerial officers regarding their responsibilities under GIPA and SO 52. Refresher training and training for new staff is scheduled for late 2013 and annually thereafter.³²⁶

5.97 In his submission, the Clerk supported the provision of training seminars for staff involved in responding to orders for papers under SO 52 and indicated that staff of the Department of the Legislative Council would be happy to assist in the provision of that training.³²⁷ The Clerk reiterated this offer in his evidence to the Committee on 26 August 2013.³²⁸

Records of former ministers

5.98 In its supplementary written submission, DPC noted that when a minister ceases to hold office, any records still held by the office are dealt with in accordance with *General Retention and Disposal Authority – Records of a Minister's Office* (GDA 13). It applies to electronic records as much as it does to other records.

5.99 The Committee notes that this issue was discussed at length in Chapter 3.

³²³ Submission 8a, Department of Premier and Cabinet, p 15.

³²⁴ Submission 8a, Department of Premier and Cabinet, p 15.

³²⁵ Submission 8a, Department of Premier and Cabinet, pp 15-16.

³²⁶ Submission 8a, Department of Premier and Cabinet, pp 15-16.

³²⁷ Submission 11, Clerk of the Parliaments, p 16.

³²⁸ Evidence, Mr Blunt, 26 August 2013, p 7.

- 5.100** However, the Committee also notes that reference was made during the inquiry to the possibility of mandatory handovers between outgoing and ingoing ministers and their staff, with a checklist that includes specifically any orders under SO52 or the GIPA Act currently in train at the time of handover.³²⁹
- 5.101** In response, DPC observed in its supplementary submission:
- DPC does not support this as a workable proposal and considers the current practice, whereby responsibility for briefing the incoming Minister is the responsibility of the relevant portfolio department(s), should remain. This does not, of course, mean that an outgoing Minister cannot, as a matter of collegiality, talk through with the new Minister the issues with which they might have dealt while in office.³³⁰
- 5.102** In relation to the records of a minister's office that may have been transferred to State Archives, DPC commented that the Legislative Council may consider directing an order to 'the State Records Authority (in so far as it holds any State archives deposited by the Hon [insert name])'.³³¹
- 5.103** In his written submission, the Clerk also canvassed that records of a former minister could be retrieved through the direction of an order to the State Records Authority in the rare instances where it is required.³³²

State papers held by independent agencies

- 5.104** In his submission to the Committee, the Clerk observed that, while the power of the House to order the production of documents in the custody and control of ministers is clearly established, the power of the House to order the production of documents not in the custody or control of a minister is less clear cut. Such documents include State papers held by agencies such as the Audit Office of New South Wales, which is not directly responsible to a minister.
- 5.105** In relation to papers held by government agencies not directly responsible to a minister, the Clerk cited the following guidance provided by Priestley JA in the Court of Appeal in 1996 in *Egan v Willis and Cabill*:

In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power, in my opinion, in the two parts ordinarily called parliament of the three part legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in

³²⁹ Submission 7, the Hon Nathan Rees, p 2.

³³⁰ Submission 8a, Department of Premier, p 19.

³³¹ Submission 8a, Department of Premier, p 19.

³³² Submission 11, Clerk of the Parliaments, p 17.

which existing laws are operating; possible changes to existing laws; and the possible making of new laws.³³³

5.106 The Clerk noted that, in 2005, the House did not receive a return from the Audit Office in response to an order for papers in relation to road tunnel filtration. He concluded that in the absence of any response from the Audit Office, it can only be assumed that this non-compliance with an order of the House was in effect an assertion that the House does not have the power to order the production of State papers from the Audit Office.³³⁴

5.107 The Clerk concluded by asserting that this position is inconsistent with the *Egan* judgements:

Although an agency such as the Audit Office is not directly responsible to a minister but to the Parliament, it nevertheless has possession of State papers which may be determined by the House to be reasonably necessary for the effective operation of the House. It is further argued that the Leader of the Government in the Legislative Council, as representative of the Premier, is ultimately responsible for the return of State papers ordered by the Legislative Council.³³⁵

5.108 The Committee notes that the guidance provided by Priestly JA above was cited with approval by the majority in the High Court in *Egan v Willis* in 1998.³³⁶ The majority also cited with approval the broad definition of State papers provided by Gleeson CJ in the Court of Appeal,³³⁷ and the judgement in *Lange v Australian Broadcasting Corporation*³³⁸ the previous year that:

Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.³³⁹

5.109 The Committee notes that this matter also arose in May 2011 when the House sought the production of documents in the possession, custody or control of SAS Trustee Corporation (among others) relating to the eligibility of John Flowers MP to be elected to and hold a seat in the Assembly. The material was not provided.

Committee comment

5.110 In its supplementary written submission, DPC, at the invitation of the Committee, made a number of recommendations and suggestions for change to the order for papers process and the operation of standing order 52.

³³³ *Egan v Willis and Cabill* (1996) 40 NSWLR 650 per Priestley JA at 692.

³³⁴ Submission 11, Clerk of the Parliaments, p 18.

³³⁵ Submission 11, Clerk of the Parliaments, p 18.

³³⁶ *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 454.

³³⁷ *Egan v Willis* (1998) 195 CLR 424 at 442.

³³⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³³⁹ *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 452.

- 5.111** In commenting on these recommendations and suggestions, the Committee wishes to highlight the opening comment of the Clerk in evidence on 26 August 2013. The Clerk noted that while he and DPC represent different arms of the Government, and as such do not always agree, the relationship between both agencies is one of due respect.³⁴⁰
- 5.112** The Committee endorses this sentiment. While the Committee does not agree with some of the recommendations made by DPC in this chapter, it recognises that they were made in good faith with a view to improving the order for papers process.

A requirement to satisfy the necessity for an order for papers

- 5.113** In its supplementary written submission, DPC supported the Legislative Council's exercise of its power to order the production of State papers, but raised concerns about the exercise of that power without a requirement to demonstrate a legitimate public interest in the order being made.
- 5.114** This proposition was strongly opposed by the Clerk, who noted that the power to order papers has been found by the High Court of Australia as 'reasonably necessary' in order for the Legislative Council to fulfil its constitutional role under the system of responsible government.
- 5.115** The Committee agrees that the power of the Legislative Council to order state papers is a significant one. It should be exercised mindfully, cautiously and with due consideration of the consequences that flow both in terms of the resources required and the publication of information pertaining to the governance of the State. However, its existence is also a matter of law, deemed 'reasonably necessary' for the effective functioning of the Council and its central role in maintaining scrutiny and accountability of the Executive. To that end, the Committee concurs with the Clerk's contention that it is for the Council to determine, on a case-by-case basis, whether an order is necessary.

The targeting and clarity of orders for papers agreed to by the House

- 5.116** DPC also made the case in its supplementary submission for better targeting of orders for papers and 'greater care' in their drafting. It suggested that orders for papers could indicate documents specifically *not* required, and noted the precision of some other legal instruments. In drafting an order for papers, members could also liaise with agencies named in the order, either separately or through DPC.
- 5.117** In response, the Clerk noted that where in the past, there had been a number of orders for papers that had placed a significant and perhaps unreasonable burden on the executive, in the vast majority of cases now, members seek assistance with the drafting of orders for papers to ensure they are properly targeted. Necessarily, however, some orders remain broader in scope. The appropriate forum for negotiating and amending the terms of an order for papers is during debate in the House.
- 5.118** The Committee also believes that there has been a significant effort made by both members and the Clerk in recent years to ensure that orders for papers are carefully targeted for the

³⁴⁰ Evidence, Mr Blunt, 26 August 2013, p 2.

purposes required. The Committee therefore does not recommend any formal change to the Council's general practice in drafting orders for papers.

Claims of privilege and the arbitration process

- 5.119** In its supplementary submission, DPC also put forward a number of proposals in relation to the management of claims of privilege over documents provided in a return to order. The Committee notes in particular the statement of DPC that the power of the Council to override public interest privilege is 'extraordinary' and lacks the safeguard of other processes. DPC went on to make four recommendations in regard to claims of privilege including, most controversially, that consideration could be given to allowing the executive initially to return an index of papers subject to a claim of privilege, identifying the grounds on which privilege is claimed, rather than the documents themselves (DPC Recommendation 3).
- 5.120** The Committee does not support this recommendation. It would fundamentally undermine the role of the Legislative Council. As the Clerk noted, the power to require the production of documents, including those subject to a claim of public interest immunity, was determined by the NSW Court of Appeal, based on the common law principle of reasonable necessity. While the power is significant, its existence is a matter of law. The implementation of DPC Recommendation 3 would result in a significant administrative restriction on the power of the House to order the production of State papers.
- 5.121** DPC also recommended applying the public interest test in the GIPA Act to claims of privilege over documents in a return to order. The Committee also does not support this. The appropriate test of public interest is that established in *Egan v Chadwick*, not that in the GIPA Act. Moreover, since *Egan v Chadwick*, a body of precedent has developed in relation to the public interest test by the House.
- 5.122** On this matter, however, the Committee notes the advice of the secretariat that in 2008, Sir Laurence Street, the Independent Arbiter at the time, approached the former Clerk noting that in a number of his reports, he had provided some general observations and guidance concerning claims of privilege, and suggesting that some of these observations could usefully be collated into a document made available to departments to assist them when claiming privilege in returns to order. The initiative was not progressed. The Committee believes that it should be.

Recommendation 1

That the Clerk publish a summary of observations and guidance provided by the Independent Arbiter concerning claims of privilege over documents in a return to order.

- 5.123** DPC also recommended allowing departments and third parties to make direct submissions to the arbiter on claims of privilege. The point was well made that agencies have only 'one shot' to make a submission regarding a claim of privilege over documents at the time at which they are returned to the House.
- 5.124** The Committee has some sympathy for this argument that departments, and in particular third parties, should be able to make direct submissions to the arbiter on claims of privilege, if and

when a claim of privilege is disputed. While the Clerk noted that the arbiter has on several occasions requested the assistance of agencies in the examination of documents the subject of a disputed claim of privilege, the Committee notes that this is not a compulsory requirement, and there is no obligation on the arbiter to do so.

- 5.125** The Committee also notes, however, that departments and agencies, if they wish to claim privilege, need to put in a full argument in support of that claim at the time the return to order is provided. Otherwise, members would not be in a position to assess the claim and to determine whether the claim should be disputed.
- 5.126** It is also the case that any determination of the arbiter as to the validity of a disputed claim of privilege is then put to the House for consideration and debate. The process requires a motion, on notice, first for the report of the arbiter to be made public and then, subsequently, a motion on notice for the publication of the relevant papers. This is very purposefully made a slow, considered and deliberate process. Opportunity is provided both to the Executive and to other third parties with an interest in the documents to make representations to members in the House or privately prior to any debate on a motion to publish the documents.
- 5.127** Accordingly, the Committee does not recommend any changes to the arbiter process under SO 52. On the whole, the Committee believes that the current mechanisms provided under the standing orders and the processes of the House strike a balance between providing adequate safeguards and opportunities for consultation, and ensuring the Council is not restricted in exercising its common law powers for the effective scrutiny of Government. However, the Committee would be willing to consider these matters further in the future.
- 5.128** On a separate, small but important matter, the Committee notes the evidence of the Clerk that on three occasions in 2005, the House effectively delegated the determination of a claim of privilege to the independent arbiter. The Committee was not aware of these circumstances prior to this inquiry. While the Committee accepts that the circumstances in those three instances were singular, the Committee cautions that decisions in relation to the privileged status of documents should always ultimately be made by the House, and should not be delegated to the arbiter.

‘Cabinet documents’

- 5.129** In its supplementary submission, DPC made recommendations for changes to the management of ‘cabinet documents’. DPC recommended that SO 52 be amended to note expressly that cabinet documents do not need to be produced in response to an order for papers, and that for this purpose, ‘cabinet documents’ can be taken to include any document that contains ‘cabinet information’ as defined in clause 2 of Schedule 1 of the GIPA Act.³⁴¹
- 5.130** Again, these suggestions were not supported by the Clerk, who argued that the definition of ‘cabinet documents’ in the GIPA Act is not consistent with that adopted in *Egan v Chadwick*, and opposed its incorporation into SO 52.
- 5.131** The Committee notes that as a result of the decision in *Egan v Chadwick*, the Legislative Council does not currently have the power to order the production of ‘cabinet documents’.

³⁴¹ The Committee also notes that it seems likely that the definition of ‘cabinet documents’ adopted in the GIPA Act is being used across the public service in responding to SO 52 requests.

However, the Committee does not necessarily accept that *Egan v Chadwick* is the final word on this matter, and that the Council does not have the power to order cabinet documents. The three Justices in *Egan v Chadwick*, Spigelman, Meagher and Priestly, took significantly different approaches to this issue. The Committee believes that the dissenting judgment of Justice Priestley is instructive.

- 5.132** In the meantime, the Committee also notes that the definition of what constitutes a ‘cabinet document’ is far from settled. The three justices in *Egan v Chadwick* offered widely varying definitions.

The public release of Government information in returns to order

- 5.133** In its supplementary submission, DPC raised concerns about the public release of Government information contained in returns to order to the media and other third parties. It argued that the purpose of the Legislative Council’s power to order papers is to facilitate the operation of the House itself, not the release of government information to the media and third parties. The GIPA Act is the appropriate mechanism for the public release of such information.
- 5.134** In response, the Clerk noted that returns to orders are treated in the same manner as any other documents tabled by the Clerk: they are made publicly available.
- 5.135** The Committee does not accept the argument made by DPC. In the normal course of events, all documents tabled in the Legislative Council by the Clerk and not deemed to be privileged are made public. They are made public on the basis that the people have a right to know the information that underlies public debate and informs Government decision-making. The Committee cites with approval the comments of the former Clerk on this matter.³⁴²
- 5.136** The Committee also acknowledges the reasoning of Sir Laurence Street, cited by the Clerk in his submission, that there is an important difference between the responsibilities of the courts in deciding the release of privileged information and the role of Parliament. The Parliament, when applying the public interest test to the publication of documents, applies very different principles to those applied by the courts.

The provision of an index to returns

- 5.137** In its supplementary submission, DPC contested the power of the Council to order the production of an index of documents accompanying a return to order.
- 5.138** The Committee rejects this position put forward by DPC. The Committee supports the interpretation of the Clerk that the power exists as a matter of reasonable necessity and as a matter of practice and precedent. It is also self-evidently in the interests of the Government to provide an index where the Government wishes to claim that a document is privileged. Without the provision of such a list, the Government cannot identify the document and provide a reason for the claim of privilege.

³⁴² See Lynn Lovelock, ‘The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On’ (2009) 24/2 *Australasian Parliamentary Review*, pp 215-216.

The timeframe for compliance with orders for papers

- 5.139** In its supplementary submission, DPC argued that the current usual practice of the Council of imposing a 14-day timeframe for compliance with an order for papers under SO 52 is unreasonable in certain circumstances.
- 5.140** The Committee endorses this position, and notes that in the case of the 2009 Mt Penny order for papers, the tight 14-day deadline for the return to order was one of the reasons for the failure of the then Department of Industry and Investment to comply fully with the order.
- 5.141** The Committee supports prescribing 21 days as the default period for orders for papers, while recognising that there may be circumstances in which a tighter timeframe is appropriate, for example where the documents sought are relevant to the consideration by the House of an urgent matter, or where the number of documents sought is small in number and does not require 21 days to be returned.

Recommendation 2

That members of the Legislative Council and the Clerk, in drafting orders for papers, adopt 21 days as the default period for returning documents to an order of the House, while allowing that there will be circumstances in which a much tighter timeframe is appropriate.

The final paragraph in orders for papers

- 5.142** It is standard practice for orders for papers passed by the House to include within the terms of the order a final paragraph requiring the production of ‘any document which records or refers to the production of documents as a result of this order of the House.’
- 5.143** The Committee supports the DPC recommendation that this paragraph should be redrafted to make clear its original intent, namely that any legal or other advice which goes to the scope of an order, or seeks to clarify its terms, should be provided. Its intent was not to require the production of routine correspondence and other documentation regarding the collation of a return. The Committee notes that this was an issue that arose during the collation of the 2009 Mt Penny return to order.
- 5.144** The Committee endorses DPC’s argument that such an interpretation may actually impede the creation of records which might otherwise be useful for reconstructing the search process undertaken. There was certainly evidence of this during this inquiry.

Recommendation 3

That members of the Legislative Council and the Clerk, in drafting orders for papers, redraft the standard wording currently used in the final paragraph of orders for papers to clarify that it only captures any legal or other advice which goes to the scope of the order.

Adoption of a whole-of-government policy for responding to orders for papers

- 5.145** In its supplementary written submission, DPC argued that there is currently no single whole-of-government ‘policy’ dealing with orders for papers under SO 52. Currently, DPC provides detailed guidance to an agency on each occasion it is named in an order. An example from the 2009 Mt Penny order for papers is cited at Appendix 4.
- 5.146** The Committee believes that the detailed guidance provided by DPC, as cited in Appendix 4, has performed its function well. However, the Committee is happy to support the development and adoption of a whole-of-government policy on this matter.
- 5.147** That said, the adoption of a whole-of-government policy would not avoid the need for each agency to determine its own internal processes for responding to orders for papers under SO 52. In Chapter 4, the Committee noted that one of the factors that led to the failure of the former Department of Industry and Investment to comply fully with the 2009 Mt Penny order for papers was the lack of a clear internal policy within the Department for dealing with the order. The development of such internal policies should be a priority for all agencies.

Other issues

- 5.148** There are a number of other issues on which the Committee can also agree, at least in part, with the DPC submission:
- The Committee agrees that an order for papers ‘speaks’ at the day of the passing of order for papers by the House, although the Committee does not believe that this understanding needs to be inserted into SO 52. The Committee believes that this matter would be better dealt with through the new whole-of-government policy.
 - The Committee also believes there may be merit in examination of closer alignment between the terminology used in orders for papers under SO 52 and the terminology used in the GIPA Act. Again, some definitions could be provided in the new whole-of-government policy on orders for papers. While the Committee notes that the processes under the GIPA Act and the order for papers process have been developed to address fundamentally different purposes, nevertheless terms and tests provided in the GIPA Act touch on issues arising during this inquiry. For example, the Act makes clear the scope of requests for information as they pertain to documents held by the State Records Authority; the distinction between documents held by ministers, their offices, and agencies; and the scope of searches as they apply to electronic backup documents. The Committee believes that these are matters that could usefully be clarified in the whole-of-government policy, provided that they in no way limit the power of the Legislative Council to order the production of State papers.
 - The Committee also supports the practice of agencies providing supplementary returns to orders when additional documents are identified subsequent to lodgment of the original return. However, the Committee endorses the position of the Clerk that there is already a significant body of precedent for this practice, and that there is no need for any amendment of the terms of SO 52 to make specific provision for supplementary returns. Again, the Committee believes that clarification of this matter could be usefully addressed in the proposed whole-of-government policy on orders for papers. It should be made clear, however, that the mechanism for a supplementary return should be utilised only where additional documents are identified after the initial return date, and

not as a mechanism for extending the timeframe in which the agency must produce the documents required.

- The Committee supports the concept of a ‘pyramid-style’ certification process for returns to orders. While this is largely a matter for DPC, the Committee believes that it could again be addressed through the whole-of-government policy on orders for papers.
- The Committee endorses the suggestion of DPC that agencies be required to create and keep records of their searches, including who was involved in the search and the search terms. Such a record would have been of particular assistance in relation to the 2009 Mt Penny return to order. The creation of such records in the future would facilitate examination of returns where issues arise as to whether all documents have been produced.

5.149 Based on these five matters discussed above, the Committee makes the following recommendation.

Recommendation 4

That the Department of Premier and Cabinet, in consultation with the Clerk, create a new whole-of-government policy for dealing with orders for papers under standing order 52, incorporating the current guidance provided to each agency on the passing of an order for papers, but also including guidance on the following matters:

- (a) the date on which an order for papers ‘speaks’, being the date of the passing of the order for papers by the House;
- (b) the meaning of terms used in orders for papers, where they can be usefully defined and provided that they in no way limit the power of the Legislative Council to order the production of State papers, as agreed between the Department and the Clerk;
- (c) the appropriate circumstances in which a supplementary return can be provided;
- (d) any revised return to order certification processes proposed to be implemented by DPC; and
- (e) any revised processes for the keeping of records by agencies of the searches they perform in responding to an order for papers.

5.150 The Committee also strongly supports the proposal by DPC for additional staff training, and the continuation of training for ministerial staff. The Clerk was also supportive of this proposal and offered the Department of the Legislative Council’s assistance in that regard.

5.151 In addition, the Committee endorses the observation of DPC that in instances where a former minister has left office, and records of the Minister may have been transferred to the State Records Authority, an order for papers can be addressed to the State Records Authority as necessary. The Committee agrees with the form of words proposed by DPC.

5.152 Finally, on a separate matter not raised by DPC, the Committee notes that the Clerk raised in his submission the issue of State papers held by independent agencies. The Clerk indicated that the powers of the Council in this regard are not clear cut. If anything, the Committee

believes that the Clerk understated the case on this matter. Again, the Committee would be willing to look further at this matter should it arise again.

- 5.153** In conclusion, the Committee believes that the order for papers process plays a legitimate and important function in assisting the Legislative Council to fulfill its legislative and oversight roles under the system of responsible government in New South Wales. While there is now a significant body of precedence in relation to the orders for papers process and the operation of standing order 52, the Committee believes that the recommendations in this Chapter will assist in further refining the order for papers process.

Appendix 1 List of submissions

No	Author
1	Mr Ian Macdonald
2	Mr Jason Stewart
3	Mr Michael Schur
4	The Hon Peter Primrose MLC
5	Ms Dianne Leeson
6	NSW Trade and Investment
6a	NSW Trade and Investment
7	The Hon Nathan Rees MP (partially confidential)
8	Department of Premier and Cabinet
8a	Department of Premier and Cabinet
9	Name suppressed
10	Mr John Lee
11	Clerk of the Parliaments
12	Mr Ron Taylor

Appendix 2 List of witnesses

Date	Name	Position and Organisation
Tuesday, 11 June 2013 Macquarie Room, Parliament House, Sydney	The Hon Peter Primrose MLC	Member of the NSW Legislative Council and former Minister for Mineral Resources
	(Name suppressed)	Former acting Chief of Staff to Minister Primrose
	(Name suppressed)	(Position withheld)
	Mr Mark Paterson	Director General, NSW Trade and Investment
Monday 24 June 2013 Macquarie Room, Parliament House, Sydney	Mr Chris Eccles	Director General, Department of Premier and Cabinet
	Mr Paul Miller	General Counsel, Department of Premier and Cabinet
	Mr Jamie Gibson	Former Deputy Chief of Staff to Minister Macdonald
	Ms Leigh Sanderson	Former General Counsel, Department of Premier and Cabinet
Tuesday, 23 July 2013 Macquarie Room, Parliament House, Sydney	Mr Ian Macdonald	Former Minister for Mineral Resources and Minister for Primary Industries
Monday, 26 August 2013 Macquarie Room, Parliament House, Sydney	Mr David Blunt	Clerk of the Parliaments and Clerk of the Legislative Council
	Mr Mark Paterson	Director General, NSW Trade and Investment
	Mr Mark Duffy	Former Deputy Director General, Minerals and Energy, Industry and Investment NSW
	Mr Brad Mullard	Executive Director, Mineral Resources, NSW Trade and Investment
	Ms Patricia Madden	Manager Operations, Office of Coal Seam Gas, NSW Trade and Investment
	Mr Ron Taylor	Manager Governance and Information Requests, NSW Trade and Investment

Monday, 16 September 2013
Macquarie Room, Parliament
House, Sydney

Dr Richard Sheldrake

Deputy Director General, NSW
Trade and Investment

Mr William Hughes

Acting Director, Mineral
Operations, NSW Trade and
Investment

Mr Phil Anquetil

Executive Director, Business
Services, NSW Trade and
Investment

Appendix 3 Standing order 52

Order for the production of documents

- (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
- (2) When returned, the documents will be laid on the table by the Clerk.
- (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.
- (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
 - (a) made available only to members of the House,
 - (b) not published or copied without an order of the House.
- (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Appendix 4 Correspondence from Ms Sanderson to Dr Sheldrake dated 13 November 2009 in relation to the Mt Penny order for papers



Premier
& Cabinet

URGENT

13 NOV 2009

Dr Richard Sheldrake
Director General
Department of Industry and Investment
161 Kite Street
ORANGE NSW 2800

COPY

Facsimile: (02) 6391 3336

BY FACSIMILE AND POST

Dear Dr Sheldrake

Standing Order 52 – Exploration Licence – Mt Penny

I write to inform you that on Thursday, 12 November 2009 the Legislative Council agreed to the following Resolution:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of the passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) – Mt Penny, including any documents relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Thursday 12 November 2009, entry 9, page 1516, is attached.

The resolution requires the documents to be tabled within 14 days.

The following guidelines apply to your response to the Resolution.

1. Provision of Papers

All papers (other than Cabinet documents) which fall within the terms of the Resolution must be produced. Cabinet documents must **not** be produced (see section 6 below).

Papers which fall within the terms of the Resolution should be produced in full, even if they contain irrelevant information. That is, material should not be blacked out or otherwise masked when photocopying papers which fall within the terms of the Resolution.

It may, however, be appropriate to mask some material in documents if a claim for privilege is made (see section 3 below).

Please note that only photocopies of original papers and files are to be provided. All papers should be delivered by close of business on **Friday, 20 November 2009** to:

Mr Paul Miller
Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Please contact Mr George Makrides, Senior Project Officer, Legal Branch, on (02) 9228 5871 if you wish to discuss any aspect of this request.

2. Non-privileged papers

Standing Order 52(3) provides that, 'A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document'.

A document showing the standard format to be used when preparing an index under Standing Order 52 is enclosed at **Annexure A**. Please adhere to the standard format when preparing an index of documents.

Please note that the index should contain the following information:

<i>Document Number</i>	The document number should follow the format '(a)(i) 1', where '(a)' refers to the relevant paragraph of the Resolution, '(i)' refers to the relevant subparagraph of the Resolution, and '1' refers to the first document in the group of documents that fall within subparagraph (a)(i).
<i>Item</i>	The description of the relevant item as per the Resolution. For example, 'Documents relating to concept formulation and cost benefit analyses'.
<i>Document</i>	A short description of the relevant document. For example, 'Letter from X to Y'.
<i>Date of creation</i>	Where the exact date is unknown, insert an estimated date range if possible.
<i>Author</i>	The agency or organisation that created the document.
<i>Privilege Claim</i>	If the index relates to privileged documents, write 'Yes'. If the index relates to non-privileged documents, write 'No'.

3. Claims of Privilege

A document showing the standard format to be used when making claims for privilege is enclosed at **Annexure B**. Please adhere to the standard format, where appropriate, when making a claim for privilege.

If a privilege claim is subsequently challenged, the question of whether the document is privileged will be referred to a legal arbiter for a ruling.

It is important, therefore, that the basis of the claim is clearly set out in the response to the Resolution so that the arbiter can properly assess the validity of the claim. There will be no opportunity to provide further submissions in support of a claim of privilege if it is challenged.

Please note that a **separate index** is required for 'non-privileged' and 'privileged' documents as these types of documents are returned separately.

If a document contains only a minor amount of privileged material, it may be appropriate to produce two copies of the document: a full copy of the document as a 'privileged' document, and a copy of the document with the privileged material blacked out or otherwise masked as a 'non-privileged' document.

This approach may be appropriate where, for example, a document contains a relatively small amount of personal information which may be subject to a claim for privilege on the grounds of privacy, but which is not needed for the document to be understood. For example, letters to the Government on a particular issue could be produced on a 'non-privileged' basis with the names and addresses of the authors blacked out, with full copies provided on a 'privileged' basis.

4. Delivery and Identification

As time is critical, it would be appreciated if all papers could be delivered in file record boxes with the corresponding parts of the index affixed to the top of each box. For example, that part of the index which lists the documents contained in Box 1 should be attached to the top of Box 1.

Please place 'privileged' and 'non-privileged' documents in separate boxes.

The Legislative Council has also requested that agencies return documents in standard archive boxes (Type 1 boxes). Further information about this type of box may be obtained from State Records at <http://www.records.nsw.gov.au/grr/docs/storageboxes.doc>

5. Certification by CEO

Papers should be accompanied by a letter signed by you stating, "I certify to the best of my knowledge all documents held by the Department of Industry and Investment and covered by the terms of the resolution have been provided".

6. Cabinet Documents

Cabinet documents should not be produced or referred to in responding to the Resolution.

All agencies are obliged to protect the confidentiality of Cabinet documents (refer to Premier's Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions*).

7. Agency Contact

Could you please provide the contact details of the officer assigned to coordinate your agency's response to George Makrides as soon as possible.

8. Estimated Cost of Compliance

Consistent with the usual practice, it will be necessary for your agency to provide details of the costs incurred in complying with the resolution **under separate cover** for the Cabinet Standing Committee on Public Administration.

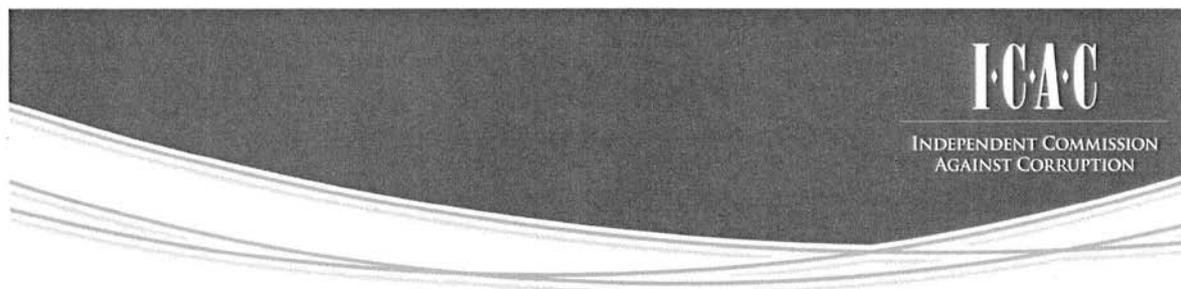
I seek your assistance in ensuring that your agency's documents are with the Legal Branch of the Department no later than by close of business on **Friday, 20 November 2009**.

Yours sincerely



Leigh Sanderson
Deputy Director General (General Counsel)

Appendix 5 The ICAC ‘document comparison matrix’



**E12/2241 : Document Comparison Matrix and copies of
relevant Documents that are not contained within Return to
Order**

CONFIDENTIAL

E12/2241 Document Comparison Matrix

Call for papers 12 November 2009 : All documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury in relation to Exploration Licence 3771 (now Exploration Licence 7406) - My Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
A40	Undated 2001 - The Western Coalfield Narrative : 2001 (GS2001/204)	No		
A39	Mt Penny Boreholes : Drilling and Geological Data	No		
			9/05/2008 12:00:59 email from Graham Hawkes to Jamie Gibson forwarding Mt Penny information provided by Larkings. Attaches Mt Penny Area Map 9 May 2008	J-9 Pp 41 - 42
			9/05/2008 12:06:09 email from Jamie Gibson to Graham Hawkes asking for Mt Penny brief that he can provide to "boss"	J-9 Pp 43 - 44
			9/05/2008 12:57:52 email Graham Hawkes to Jamie Gibson attaching "Mt Penny - Bylong Valley" briefing and Mt Penny Area Map 9 May 2008 for Minister	J-9 Pp 45 - 49
			14/05/2008 11:02 AM email from Jamie Gibson to Craig Munnings requesting more information on the Mt penny area of the Bylong Valley. Gibson asks if it is possible for DPI to open it's holdings for tender	J-9 Pp 62 - 64
			14/05/2008 13:39:36 email from Graham Hawkes to Brad Mullard re Gibson's inquiry and forwarding "Mt Penny - Bylong Valley" briefing and Mt Penny Area Map 9 May 2008	J-9 Pp 65 - 68
			14/05/2008 14:43:12 email from Graham Hawkes to Craig Munnings seeking more information about Mt Penny as per Gibson's request	J-9 Pp 69 - 72
			14/05/2008 15:51:27 email from Alan Coutts to Graham Hawkes re Mt Penny as a potential allocation area	J-9 Pp 73 - 74
			1/06/2008 00:28:18 email from Alan Coutts to Brad Mullard re Minister's request on future allocations	J-9 Pg 77
			2/06/2008 14:13:22 email from Shirley Hibbs to Brad Mullard containing 'Small Areas in the Western Coalfield.doc'	J-9 Pp 80 - 84
			2/06/2008 14:13:47 email from Shirley Hibbs to Brad Mullard containing 'Potential Coal Tender Areas.doc'	J-9 Pp 85 - 90
			2/06/2008 16:11:03 email from Leslie Wiles to Brad Mullard containing three maps - Benelabri, North Bylong and Ridglands.	J-9 Pp 91 - 94
			2/06/2008 16:54:08 email from Brad Mullard to Harriet Skinner with "Small Areas in the Western Coalfield.doc" attached	J-9 Pp 95 - 99
			3/06/2008 Ministerial briefing BN08/1229 prepared by Brad Mullard titled 'Potential Coal Allocation Areas in Western NSW' provided by L Wiles	J-9 Pp 100 - 108
			4/06/2008 10:01:58 email from Brad Mullard to Harriet Skinner containing 'EOI_Areas.doc'	J-9 Pp 109 - 115
			4/06/2008 12:37:24 email from Shirley Hibbs to Leslie Wiles containing 'Potential Coal Allocation Areas in Western NSW.doc'	J-9 Pp 117 - 126
			4/06/2008 16:26:35 email from Jamie Gibson to Brad Mullard re follow up meeting with GMT regarding drilling rig/crew purchase	J-9 Pp 127 - 128
			4/06/2008 17:06:32 email from Jamie Gibson to Brad Mullard re request for maps shown to Macdonald to be enlarged and sent up	J-9 Pp 129 - 130
			5/06/2008 07:19:00 email from Richard Sheldrake to Brad Mullard regarding extra resources required for drilling.	J-9 Pg 131

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			5/06/2008 09:59:29 email from Robert Larkings to Brad Mullard attaching "Drill Rig Indicative Cost summary.xls"	J-9 Pp 132 - 133
			5/06/2008 16:32:06 email from Jamie Gibson to Mullard and Munnings confirming receipt of the maps and requesting full list of resource deposits across NSW	J-9 Pp 134 - 135
			5/06/2008 16:41:36 email from Brad Mullard to Robert Larkings attaching "Copy of Drill Rig Indicative Cost summary.xls"	J-9 Pp 136 - 137
			5/06/2008 16:54:33 email to Brad Mullard from Julie Moloney attaching version of 'Potential Coal Allocation Areas in Western NSW' provided by Wiles	J-9 Pp 138 - 144
			5/06/2008 18:02:15 email from Jamie Gibson to Brad Mullard requesting the full list of resource deposits across NSW in one week	J-9 Pp 145 - 146
			5/06/2008 18:06:49 email from Robert Larkings to Brad Mullard, Harriet Skinner and Patricia Madden attaching 'MB Drill Rig Costs.doc'	J-9 Pp 147 - 151
			5/06/2008 18:38:10 email from Brad Mullard to Julie Moloney re full list of resource deposits across NSW	J-9 Pp 152 - 153
			5/06/2008 18:39:11 email from Brad Mullard to Julie Moloney re full list of resource deposits across NSW	J-9 Pp 154 - 156
			6/06/2008 15:04:08 email from Jamie Gibson to Craig Munnings requesting a copy of the latest Bylong Valley (Mt Penny) map.	J-9 Pg 158
			6/06/2008 15:25:20 email from Brad Mullard to Craig Munnings containing four maps - Benelabri, North Bylong, Ridglands and Western Allocation.	J-9 Pp 159 - 163
			6/06/2008 15:59:01 email from Craig Munnings to Jamie Gibson containing four maps - Benelabri, North Bylong, Ridglands and Western Allocation.	J-9 Pp 164 - 168
			16/06/2008 10:22:34 email from Patricia Madden to Brad Mullard containing 'Coal Exploration & tender areas.doc'	J-9 Pp 171 - 175
			16/06/2008 11:28:23 email from Brad Mullard to Richard Sheldrake, Jamie Gibson and Craig Munnings attaching "EOI Areas.doc"	J-9 Pp 176 - 182
			16/06/11:34:10 email from Julie Moloney to Brad Mullard containing 'West Allocation 16 June 2008.jpg'	J-9 Pp 183 - 184
			17/06/2008 9:22:11 email from Karen Inglis to Mullard containing a pdf and jpg version of 'Future Exploration Tender Areas'	J-9 Pp 188 - 189
			19/06/2008 13:07:03 email from Julie Moloney to Brad Mullard containing list of Western Coalfield companies document	J-9 Pp 193 - 193.1
			19/06/2008 13:46:24 email from Julie Moloney to Brad Mullard containing revised list of Western Coalfield companies document	J-9 Pp 194 - 195
			25/06/2008 10:24:34 email from Julie Moloney re Western Coalfield Areas	J-9 Pp 218 - 219
A1	26/06/2008 - Coal Exploration Licence Application / Renewal Identification Sheet : Fred Schiavo	No		J-9 Pg 216
			27/06/2008 14:32:43 email from Julie Moloney to Fred Schiavo and Melanie Brown regarding shapes files for 5 areas in Western Coalfield with potential EOI's	J-9 Pp 221 - 222
			2/07/2008 17:49:55 email to from Julie Moloney to Brad Mullard with list of companies to be invited	J-9 Pp 225 - 226
			4/07/2008 15:27:39 email from Allan Courts to Sheldrake re meeting with Minister on 7 July 2008	J-9 Pg 227
			7/07/2008 13:32:13 email from Julie Moloney to Kevin Ruming re Mt Penny	J-9 Pg 231
A2	7/07/2008 - Mt Penny ID Diagram : Fred Schiavo	No		J-9 Pg 217
			18/07/2008 15:44:16 email from Julie Moloney to Brad Mullard attaching 3 documents re briefing re potential EOI areas	J-9 Pp 237 - 241.1

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			23/07/2008 Ministerial briefing BN08/1589 'Coal Allocation Proposal' BN08/1589 prepared by Patricia Madden	J-9 Pp 254 - 264
			23/07/2008 11:04:15 email from Brad Mullard to Julie Moloney attaching draft of 'NSW Coal Allocation Strategy.doc'	J-9 Pp 265 - 272
			23/07/2008 11:17:58 email Brad Mullard to Julie Moloney with attachment 'Company EOI July 2008.doc'	J-9 Pp 273 - 274
			23/07/2008 11:33:05 email Brad Mullard to Patricia Madden email with attachment 'Company EOI July 2008''	J-9 Pp 275 - 276
			23/07/2008 11:35:48 Email Patricia Madden to Craig Munnings and Brad Mullard with attachment 'Company EOI July 2008''	J-9 Pp 277 - 278
			23/07/2008 12:05:08 email from Julie Moloney to Brad Mullard with track changes on 'NSW Coal Allocation Strategy.doc'	J-9 Pp 279 - 289
			30/07/2008 13:48:37 email from Shirley Hibbs (on behalf of Brad Mullard) to Jamie Gibson regarding his request for more information on the areas	J-12 Pp 294 - 296
			30/07/2008 14:35:32 email from Jamie Gibson to Craig Munnings re TRIM Briefing: BN08/1229 : Potential Coal Allocation Areas in Western NSW'	J-12 Pp 297 - 307
			30/07/2008 16:12:39 email from Patricia Madden to Craig Munnings	J-12 Pp 308 - 312
			31/07/2008 16:21:38 email from Patricia Madden to Jamie Gibson titled 'Coal Allocation Proposal' attaching 3 documents re coal tender areas	J-12 Pp 313 - 331
			3/09/2008 9:37:25 Email from Brad Mullard to Alan Coutts attaching 'Remnant Release Areas Inform Pack Text Fig 1 August 2008 2008.doc'	J-12 Pp 380 - 395
A3	August 2008 - Coal Release Areas : Gunnedah Coalfield; Hunter Coalfield and Western Coalfield - Expression of Interest Information	No		J-12 Pp 332 - 356
A4	9/09/2008 - Director General Briefing - Coal Allocation Proposal prepared by Patricia Madden, Manager Operations, Mineral Resources, Industry & Investment NSW	No		J-12 Pp 403 - 405
			12/09/2008 letter from Amerod (White Energy) to DPI re EOI	J-12 Pg 414
			17/09/2008 16:10:35 Email Jenny Ward to Lyndall Derrig regarding response to Newcastle Herald	J-12 Pp 415 - 418
			17/09/2008 16:33:16 email Tracey Godwin to Jenny Ward containing list of coal release areas	J-12 Pp 419 - 420
			18/09/2008 letter from White Energy re Expression of interest in NSW Coal Deposits	J-12 Pg 421
			18/09/2008 letter from Arthur Phillip re Arthur Phillip NSW Coal Program	J-12 Pg 422
			19/09/2008 letter from Griffin Coal re Expression of interest for the Gunnedah, Hunter and Western Coalfields	J-12 Pg 423 - 424
			19/09/2008 letter from Cascade Coal re interest in NSW Coal Deposits	J-12 Pg 425
			20/09/2008 letter from Redman Mining re Pursuit of NSW Coal Deposits	J-12 Pg 426
			25/09/2008 Letter from NSW Minerals Council to Macdonald	J-12 Pg 427
			1/10/2008 16:43:13 email Craig Munnings to Jamie Gibson and Graham Hawkes	J-12 Pg 428
			3/10/2008 letter from Julie Moloney to Richard Poole, Cascade Coal re letter 19/09/2008	J-50 2471
			3/10/2008 letter from Tiara Coal re Expression of Interest - Coal Release Areas August 2008	J-12 Pg 429
			3/10/2008 14:20:37 email Lindsay Karathanassis to Julie Moloney - expression of interest from Indian companies	J-12 Pg 430 - 431
			13/10/2008 Ministerial briefing note prepared by Patricia Madden titled 'Extension of Coal Allocation Areas Expression of Interest' - version 1	J-12 Pp 432 - 434

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOJ Brief not in Call for Papers	ICAC Exhibit / Page number
			13/10/2008 Ministerial briefing note prepared by Patricia Madden titled 'Extension of Coal Allocation Areas Expression of Interest' - version 2	J-12 Pp 435 - 437
A5	13/10/2008 - Mineral Briefing - Coal Allocation Areas Expressions of Interest prepared by Patricia Madden, Manager Operations, Mineral Resources, Industry & Investment NSW	No	13/10/2008 11:21:49 email Graham Hawkes to Craig Munnings with list of companies 28/10/2008 letter from Real Brand Holdings re EOJ 28/10/2008 MOC08/1547 Briefing and draft letters re NSW Minerals Council and Tiaro Coal 6/11/2008 11:24:44 email from Tracey Godwin to Tony Vankeulen et al re media enquiries for EOJ areas 1/11/2008 12:16:45 email Jamie Gibson to Alan Coutts re discussion this morning sending names of companies who have contacted DPI 12/11/2008 12:16:45 email from Jamie Gibson to Alan Coutts regarding list of companies 13/11/2008 1:42:20 email from Patricia Madden to Brad Mullard with list of companies 13/11/2008 16:07:38 email from Alan Coutts to Jamie Gibson containing list of companies	J-12 Pp 438 - 440 J-12 Pp 441 - 449 J-12 Pg 450 - 452 J-12 Pp 453 - 456 J-12 Pg 457 J-12 Pp 458 - 459 J-12 Pg 467 J-12 Pp 460 J-12 Pp 461 - 462
Nil	14/11/2008 - Email from Garth Holmes to Alan Coutts re "Coal Release Areas" EOJ Evaluation Process dated	No	14/11/2008 17:06:36 email to Zanella, Mullard and Hughes from Garth Holmes 20/11/2008 copy of signed letter from Brad Mullard to Kevin Fennell confirming his engagement	J-12 Pg 468 J-12 Pp 469 - 470 J-12 Pg 475
A7	20/11/2008 - Expression of Interest - Jain Group	Yes	21/11/2008 12:29:25 email from Garth Holmes to Brad Mullard attaching draft "Coal Release Areas ED letter to KFennell 21Nov2008.doc" 21/11/2008 copy of signed letter from Brad Mullard to Kevin Fennell regarding proposed re-opening of EOJ process	J-12 Pp 463 - 465 J-12 Pp 476 - 477 J-20 Pp 1196 - 1315
A8	21/11/2008 - Expression of Interest Monaro Mining	Yes	23/11/2008 18:23:47 email correspondence between Brad Mullard and Garth Holmes re Fennell letters 24/11/2008 letter to Kevin Fennell from Lindsay Gilligan 24/11/2008 14:51:12 email from Garth Holmes to Brad Mullard re Declaration of Expressions of Interest 24/11/2008 16:42:46 email Patricia Madden to Jamie Gibson 25/11/2008 Fax cover sheet and letter from Brad Mullard to Kevin Fennell replacing letter dated 21/11/08 re re-opening 25/11/2008 09:11:28 Email Sheldrake to Brad Mullard regarding letter to Kevin Fennell 25/11/2008 10:05:49 Email Jenny Ward to Julie Moloney and Brad Mullard regarding media enquiries on EOJ's 25/11/2008 11:44:26 email from Garth Holmes to Zanella, Mullard and Hughes re evaluation process 25/11/2008 14:54:43 Email Patricia Madden to Garth Holmes attaching Kevin Fennell letter	J-12 Pp 478 - 481 J-12 Pg 482 J-12 Pp 483 - 485 J-12 Pp 486 - 489 J-12 Pg 490 - 492 J-12 Pp 493 - 497 J-12 Pp 498 - 501 J-12 Pp 502 - 503 J-12 Pp 504 - 506 J-12 Pp 507 -509
			25/11/2008 15:16:02 Email Brad Mullard to Garth Holmes attaching Fennell letter 25/11/2008 15:32:55 Garth Holmes to Brad Mullard cc Patricia Madden attaching revised Fennell letter	J-12 Pp 510 - 513

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			25/11/2008 15:39:59 Email Madden to Holmes cc Mullard attaching revised Fennell letter	J-12 Pp 514 - 516
			25/11/2008 16:46:20 Email Garth Holmes to Patricia Madden cc Mullard	J-12 Pp 517 - 518
			26/11/2008 letter from Kevin Fennell to Garth Holmes re engagement	J-12 Pg 520
			26/11/2008 08:26:11 email from Brad Mullard to Richard Sheldrake advising of meeting with Fennell re change to EOI process	J-12 Pg 521
			26/11/2008 08:28:39 email from Brad Mullard to Jamie Gibson advising of meeting with Fennell re change to EOI process	J-12 Pg 522
			27/11/2008 17:18:15 email from Brad Mullard to Richard Sheldrake re outcome of meeting with Fennell	J-12 Pp 523 - 525
			27/11/2008 17:44:41 email from Brad Mullard to Jamie Gibson re meeting with Fennell	J-12 Pg 526
			28/11/2008 15:40:47 Email Patricia Madden to Julie Moloney attaching letter to Fennell	J-12 Pp 527 - 529
			28/11/2008 16:40:55 Email Garth Holmes to Brad Mullard cc Julie Moloney attaching Letter from Kevin Fennell 28/11/2008	J-12 Pp 530 - 533
			28/11/2008 Letter from Richard Poole, Cascade Coal to Julie Moloney, DPI re Expression of Interest in Specific NSW Coal Deposits	J-48 Pp 10 - 15
			3/12/2008 Unsigned ministerial brief reopening EOI	J-12 Pp 534 - 536
			5/12/2008 15:39:33 email from Brad Mullard to Richard Sheldrake containing documents re re-opening of EOI process	J-12 Pp 537 - 575
			5/12/2008 15:46:44 Email from Brad Mullard to Jamie Gibson re re-opening of EOI process (attachments same as email 5/12/2008 15:39:33)	J-12 Pp 577 - 578
			8/12/2008 12:47:28 email from Brad Mullard to Kevin Fennell re re-opening of EOI (attachments same as email 5/12/2008 15:39:33)	J-12 Pp 579 - 580
			10 December 2008 letter from Fennell to Mullard	J-12 Pg 581
			12/12/2008 12:07:00 email from Patricia Madden to Graham Hawkes, Brad Mullard et al attaching correspondence with draft briefing and information package re re-opening of EOI process (attachments same as email 5/12/2008 15:39:33)	J-12 Pp 582 - 584
			16 December 2008 14:46:02 Email Brad Mullard to Jamie Gibson re delegation of Ministerial functions	J-12 Pg 585
			18/12/2008 17:08:24 Email from David Agnew to Joy Agnew and Tracey Godwin re delegation of Ministerial functions	J-12 Pg 587
			22/12/2008 16:33:47 Email from Adrian Delany to Pam Joyce re ministerial delegation	J-12 Pp 588 - 594
			23/12/2008 Signed instrument of delegation	J-13 Pg 596
			23/12/2008 15:47:41 Email Graham Hawkes to Jamie Gibson re Ministerial delegation attaching relevant documents	J-13 Pp 597 - 601
			6/01/2009 14:05:00 Ministerial briefing V1 reopening EOI	J-13 Pp 628 -630
			6/01/2009 15:16:00 Ministerial briefing V2 reopening EOI with attachments	J-13 Pp 631 - 640
			8/01/2009 Signed ministerial briefing reopening EOI	J-13 Pp 641 - 649
A6	January 2009 Expression of Interest Package for Re-opening of Expressions of Interest as per email from William Hughes to Ron Taylor on 19/11/2009	No		J-13 Pp 602 - 627
			9/01/2009 Letter to Brad Mullard to Monaro Mining re reopening of EOI	J-13 Pp 650 - 651
			16/02/2009 Letter Lindsay Gilligan to Kevin Fennell re declaration process for new EOI applicants	J-13 Pg 652
			16/02/2009 Letter from John McGuigan, Cascade Coal to Brad Mullard, DPI regarding Expression of Interest Mt Penny	J-48 Pp 47 - 48

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
A9	16/02/2009 - Expression of Interest Cascade Coal	Yes		J-21 Pp 1603 - 1633
A10	February 2009 - Expression of Interest Breakspeare Coal Mines Ltd	Yes		
			16/02/2009 14:03:00 Email Julie Moloney to William Hughes re new EOI applicants	J-13 Pp 653 - 655
			16/02/2009 14:31:36 Email William Hughes to Brad Mullard et al re new EOIs received	J-13 Pp 656 - 658
			16/02/2009 14:36:00 Email William Hughes to Kevin Fennell re new EOI applicants	J-13 Pp 659 - 661
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Kevin Fennell	No		J-13 Pg 853
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by William Hughes	No		J-13 Pg 854
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Ado Zanella	No		J-13 Pg 855
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Julie Moloney	No		J-13 Pg 856
			29/04/2009 17:12:00 Email William Hughes to Kevin Fennell re evaluation panel	J-13 Pp 662
A11	1/05/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Brad Mullard	No		J-13 Pg 858
A11	7/05/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Richard Sheldrake	No		J-13 Pg 857
Nil	May 2009 - Exploration Licence Conditions 2009 pages 11 - 18	No		
			6/05/2009 Coal Release Areas : Evaluation of Expressions of Interest Prepared by William Hughes May 2009	J-13 Pp 663 - 686
			6/05/2009 Ministerial Submission Coal Release Exploration Areas Recommendations	J-13 Pp 687 - 734
A11	15/05/2009 - Letter from Kevin Fennell to William Hughes, Director, Development Coordination Mineral Resources with audit opinion			J-13 Pp 735 - 736
			21/05/2009 16:58:49 Email Damian Jeffree to Brad Mullard and William Hughes re 11 coal release areas	J-13 Pg 748
			26/05/2009 11:36:47 Email Selina Ranager to Lynnette Sisson and Shirley Hibbs re meeting with the Minister	
			The corresponding document in the Return to Orders appears to be an abridged version of this document.	J-13 Pp 756 - 757
A11	June 2009 - Evaluation of Expressions of Interest by Evaluation Team, Industry and Investment NSW	Yes		J-13 Pp 759 - 858
			1/06/2009 10:02:57 Email William Hughes to Brad Mullard attaching meeting notes Macdonald.pdf	
			1/06/2009 16:35:38 Email Mart Rampe to William Hughes cc Gardner Brook attaching Monaro letter 1Jun09	J-13 Pp 859 - 860
			2/06/2009 16:16:52 Email Mart Rampe to William Hughes attaching Monaro letter 2Jun09	J-13 Pp 861 - 864
A12	9/06/2009 - Letter from Loyal Coal Pty Ltd to William Hughes regarding EOI for Monaro Mining from Gardner Brook	No		J-13 Pp 867 - 870
			10/06/2009 10:30:15 Email William Hughes to Ado Zanella and Julie Moloney regarding reconvening re Monaro Mining	J-13 Pg 872
			10/06/2009 11:25:26 Email William Hughes to Ado Zanella and Julie Moloney reconvening re Monaro Mining	J-13 Pg 873
			10/06/2009 11:36:36 Email William Hughes to Mart Rampe re Loyal Coal	J-13 Pp 874 - 875
				J-13 Pp 876 - 877

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			10/06/2009 11:45:43 Email William Hughes to Kevin Fennell regarding reconvening re Monaro Mining	J-13 Pg 878
			10/06/2009 17:20:34 Email from Gardner Brook to William Hughes re Loyal Coal	J-13 Pp 879 -883
			10/06/2009 20:19:46 Email William Hughes to Gardner Brook re Loyal Coal	J-13 Pg 884 - 887
			15/06/2009 11:36:38 Email William Hughes to Julie Moloney cc Ado Zanella re regarding reconvening evaluation panel	J-13 Pp 889 - 891
			17/06/2009 16:55:58 Email William Hughes to Marte Rampe attaching Change name re Monaro, share certificates Voope	J-19 Pp 892 - 900
A13	18/06/2009 - EOI Recommendation - Approved by Director General I & I NSW 19/06/2009	Yes		J-19 Pp 903 - 907
A13	19/06/2009 - Letter from Kevin Fennell to William Hughes regarding Evaluation Panel deliberations about withdrawal of Monaro Mining NL	No		J-19 Pg 908
A14	19/06/2009 - Letter from Richard Sheldrake, DPI to John McGuigan, Cascade Coal Pty Ltd notifying they are the successful EOI applicant for Mt Penny	No		J-19 Pp 911 - 912
A15	19/06/2009 - Letter from Richard Sheldrake, DPI to Robert McLennan, Breakspeare Coal Mines Pty Ltd notifying they are were unsuccessful in their EOI application for Mt Penny	No		J-19 Pg 937
A15	19/06/2009 - Letter from Richard Sheldrake, DPI to Sumit Kumar Khetan, Jain Group notifying they are were unsuccessful in their EOI application for Mt Penny	No	19/06/2009 15:40:17 Email William Hughes to Jenny Ward re EOI process and recommendations	J-19 Pg 935
A16	8/07/2009 - Letter from David Agnew, DPI to John McGuigan, Cascade Coal Pty Ltd regarding exploration licence conditions	No	19/06/2009 16:05:32 Email William Hughes to Gardner Brook re Monaro Mining EOI	J-19 Pp 958 - 962 J-19 Pp 963 - 965
A17	10/08/2009 - Letter from David Agnew, DPI to John McGuigan, Cascade Coal Pty Ltd regarding consent to make application for Mt Penny EL	No	20/07/2009 Signed DPI submission re consent to apply prepared by William Hughes, signed by Richard Sheldrake	J-48 Pg 256 J-19 Pg 966
A18	23/08/2009 - Document from Cascade Coal Pty Ltd listing Mt Penny ELA 3771 Coordinates	No		J-19 Pp 973 - 974
A19	24/08/2009 - Arthur Phillip Funding Underwriting Agreement	No		J-48 Pp 267 - 280
A20	25/08/2009 - Nomination Letter plus supporting information - ELA 3771 - Cascade Coal Pty Ltd	Yes		J-48 Pg 281
A21	25/08/2009 - Receipt / Tax Invoice from DPI for \$1 million payment - contribution to Coal Development Fund from Cascade Coal Pty Ltd	No		
A22	25/08/2009 - Receipt / Tax Invoice from DPI for \$10,000.00 payment - Reassessment Fee (Mt Penny) from Cascade Coal Pty Ltd	No		
A23	25/08/2009 - Receipt / Tax Invoice from DPI for \$50,820.00 payment - ELA Application Fee (Mt Penny) from Cascade Coal Pty Ltd	No		
A24	28/08/2009 - Letter from Director General DPI to James McGuigan, Cascade Coal Pty Ltd acknowledging receipt of application for Mt Penny EL	No		
A25	2/09/2009 - Exploration Licence Applications Newspaper Guidelines by Gary Walker	No		
A25	2/09/2009 - Example of coal and mineral advertisement diagrams prepared by Gary Walker	No		
A25	2/09/2009 - ELA 3771 Diagram X prepared by Gary Walker	No		

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
A26	2/09/2009 - Coal Exploration Licence Application Identification Sheet prepared by Gary Walker	No		
A27	8/09/2009 - Diagram of Exploration Licence No ELA 3771 held by Mt Penny Coal Pty Ltd prepared by Gary Walker	No		
A28	11/09/2009 - Memorandum re ELA 3771 Cascade Coal Pty Ltd to Peter Johannessen, Titles from Sarah Jardine, Coal Advice	No		
A29	26/09/2009 - Email from Jeannine Biviano, DPI to Conan Yuen, Treasury re Financial Review Article	Yes		
A30	30/09/2009 - Email between David Agnew and David Holmes re EOI conditions	No		
A31	6/10/2009 - Exploration Licence Conditions 2009 prepared by Peta Johannessen - May 2009 version	No		
A32	6/10/2009 - ELA 3771 Exploration Licence Document for EL 7406 for Mt Penny Coal Pty Ltd dated 21 October 2009 (unsigned)	No		
A33	8/10/2009 - Letter from Peta Johannessen, DPI to James McGuigan, Cascade Coal Pty Ltd re intention to Grant Exploration Licence Application No 3771	No		J-48 Pp 282 - 291
A34	14/10/2009 - Parliamentary House Folder Note - Mt Penny prepared by William Hughes	No		
A35	21/10/2009 - Recommendation to Grant ELA 3771 to Mt Penny Coal Pty Ltd nominated by Cascade Coal Pty Ltd prepared by Peta Johannessen	No		
A36	21/10/2009 - Executed Exploration Licence for EL No 7406 to Mt Penny	No		J-19 Pp 971 - 1001
A37	27/10/2009 - Letter to James McGuigan, Mt Penny Coal Pty Ltd from DPI - Grant of EL 7406	No		J-48 Pg 292
A38	11/11/2009 - Response to Notice of Motion regarding the request for granting of exploration licences for 11 areas including Mt Penny approved by Brad Mullard	No		
B1	12/11/2009 - Letter to John Lee, Director General, Dept Premier and Cabinet from Lynn Lovelock, Clerk of the Parliament re Order for Papers - Exploration Licence - Mt Penny	No		
B1	13/11/2009 - Letter to Dr Richard Sheldrake from Leigh Sanderson - Deputy Director General (General Counsel) re Standing order 52 - Exploration - Mt Penny	No		
B2	19/11/2009 11:18AM - Email from Ron Taylor, Manager Corporate Projects, Industry & Investment NSW to Mark Duffy re Standing Order 52 - Exploration Licence - Mt Penny noting the Director General must certify that all documents held by Industry and Investment NSW and covered by the terms of the resolution have now been provided	No		
B3	19/11/2009 11:45AM - Email from David Agnew, Industry & Investment NSW to Ron Taylor noting geological data is available on CD.	No		
B4	19/11/2009 3:44PM - Email from William Hughes, Principal Adviser Coal and Strategic Projects, Industry & Investment NSW to Ron Taylor attaching "Release Areas Inform Pack August 2008" and "2nd Release Inform Pack January 2009"	No		
B5	19/11/2009 11:54AM - Email from William Hughes, Principal Adviser Coal and Strategic Projects, Industry & Investment NSW to Ron Taylor attaching TRIM number re DDG Approval for 11 Coal Release Areas EOI. TRIM INTO08/62117	No		
B6	23/11/2009 - Letter to Leigh Sanderson, General Counsel, Dept Premier and Cabinet from Richard Sheldrake, Director General of Industry & Investment NSW certifying all documents have been provided	No		

Appendix 6 The 'Maddocks report'

Maddocks

Independent review of response to Mt Penny call for papers under Standing Order 52

Final Report

July 2013

PRIVATE & CONFIDENTIAL

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[6040127: 11354714_6]

Maddocks

- 2.1.9 Witness I – by telephone and email;
- 2.1.10 Witness J – by telephone and email;
- 2.1.11 Witness K – in person;
- 2.1.12 Witness L – in person;
- 2.1.13 Witness M – in person;
- 2.1.14 Witness N – by telephone and email;
- 2.1.15 Witness O – by telephone and email.
- 2.2 A list of these witnesses forms confidential annexure A to this report.
- 2.3 At each interview with a current Departmental employee, the interviewee signed a confidentiality undertaking and was informed of the Department's Employee Assistance Program.
- 2.4 The events the subject of the Review occurred in November 2009, some four years ago. Since that time, many Departmental staff have been involved in producing documents to ICAC pursuant to several Notices issued to the Department. Accordingly, the Departmental staff we interviewed uniformly had very limited memory of their involvement in responding to the Order in 2009. In fact, not one of those staff members could actually recall their involvement in that process.
- 2.5 We also made a number of enquiries with the Department's IT section (IT). These consisted of the following:
- 2.5.1 IT providing the inboxes and sent items for the period 12 November 2009 – 23 November 2009 inclusive for the Departmental staff listed in paragraph 2.1. The emails were then reviewed by us to determine whether there were any relevant emails – additional to those briefed to us – which demonstrated what actions were taken in response to the Order.
- We were not provided with any emails in the relevant period for Witness E and Witness G. We were informed by IT that those witnesses' archived inboxes located on the Department's archive server had been searched and no emails for the relevant period had been found. We were told that the explanation for the lack of emails on the archive server is that those individuals or someone with access to their account must have personally deleted emails before they ceased employment with the Department. We were informed by IT that there is now a compliance archiving system which automatically captures emails in the Department's vault (even if deleted by a user) but that this system was not in place at the relevant time (it commenced June/July 2012).
- We were informed on 12 July 2013 that IT had ascertained, after further inquiries, that Witness G had been using an email archive located on the IT system of another Department at the relevant time (Department of Water and Energy). Email files recovered from a search of this Department's archives and point-in-time backups were provided to us on 12 July 2013. IT informed us that they were unaware of any other witnesses using an email archive located on the IT system of another Department at the relevant time, however there is no way to confirm this.
- IT also performed a search of point-in-time backups of the email inboxes of all witnesses and failed to find any emails for the relevant period for Witnesses E and G. We were told that prior to 2011, monthly point-in-time backups were kept in a 7-

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year pool. The records contained in these pool tapes are missing some months due to failures in the backup system.

On 15 July 2013, we were informed that further point-in-time backups, made at a date closer in time to the relevant period, had been found in the 7-year pool for five witnesses. These further point-in-time backups contained additional emails for the relevant period for all five witnesses, including Witness E.

2.5.2 In relation to the 139 documents which were not produced in 2009, we asked IT on 18 June 2013:

- (a) to ascertain which of the documents are on TRIM. If a document was on TRIM, we asked whether it could be determined when it was added to TRIM. On 3 July 2013, IT informed us that only 22 of the 139 documents were registered on TRIM prior to the Order and provided us with the TRIM references; and
- (b) to determine if any of the documents were accessed during the period 12 November 2009 to 23 November 2009. By "access", we mean that, for example, somebody opened up the document or otherwise dealt with it in some way. On 3 July 2013, IT provided audit logs for each of the 22 documents that were on TRIM. Only one document was accessed in the relevant period (by Witness A).

These enquiries were relevant to determining:

- where the documents that were not produced in 2009 were held within the Department;
- whether the documents could have been located using a TRIM search; and
- if someone within the Department accessed those documents but failed to produce them.

2.5.3 In relation to the fax from Department of Premier and Cabinet (DPC) to Witness M dated 13 November 2009 which sets out the Order, we asked IT:

- (a) whether it was on TRIM. This was confirmed by IT.
- (b) when was that document added to TRIM and by whom. We were informed that Individual 1 registered the document on TRIM on 16/11/2009 at 8:27am.
- (c) if it could be determined who accessed that document and when. IT provided us with an audit log which records access to the document on TRIM.

These enquiries assisted us in ascertaining the actions taken by the Department in response to the Order.

2.5.4 IT providing us with a copy of the documents that were attached to, or referred to in, the emails that record how the Department responded to the Order (e.g. TRIM INT08/62117, TRIM folder 09/5739, EOI information packs). The purpose of this enquiry was to determine which documents were provided to Witness A by various employees in responding to the Order and to then compare these documents with those that were provided to DPC in November 2009.

2.6 In this report, we have relied upon information provided to us by IT, which we assume to be accurate and complete, without independent verification.

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3. The policies and procedures that applied to the Order

3.1 The Department did not have a written or formal policy for responding to Standing Order 52 in place at the time (November 2009).

3.2 From the evidence gathered by way of the interviews (see paragraph 2.1), Witness A was considered by those within the Department to be responsible for coordinating responses to requests for information, be it Standing Order 52 or GIPA requests. The usual practice consisted of Witness A sending the request to those areas of the Department which were relevant to the request, invariably with guidance from Witness L as to the most appropriate recipients.

4. The process followed in responding to the Order

4.1 We have documented the actions taken by the Department in responding to the Order. This forms confidential annexure B.

4.2 This chronology has been generated by reference to the emails that record how the Department responded to the Order and by evidence gathered in the interviews referred to in paragraph 2.1. There was no central document created at the time which records:

4.2.1 which Departmental staff were involved in identifying documents; and

4.2.2 the searches performed (including both search terms used and which records were searched).

4.3 Further, one of the Departmental staff interviewed suggested that it was quite deliberate to limit the emails sent about the Order as it was known that these would then need to be produced (adding to the burden of complying with the Order).

4.4 For these reasons, it is impossible to determine definitively what actions were taken by the Department in responding to the Order. Accordingly, the chronology is based upon the available emails that evidence the steps taken by the Department and any information provided by Departmental staff in our interviews. There may have been communications between Departmental staff in response to the Order which are not captured, for example, telephone calls or emails which were deleted.

4.5 Where there is documentary evidence available to us which demonstrates that a certain fact occurred, this is coloured in black in the attached chronology. Where the facts outlined are based on evidence given by Departmental staff which cannot be independently verified, this is coloured in red.

5. The documents that were not produced in November 2009

5.1 One of the terms of reference of the Review was to examine and report on where and how the 139 documents that were not produced were held by the Department. We note that ICAC identified 139 documents in its "document comparison matrix" which were not provided to the Legislative Council in response to the Order but were produced to ICAC. The Privileges Committee, on the advice of Bret Walker SC, was satisfied that at least 124, if not all, of the documents identified by ICAC in the document comparison matrix should have been provided in response to the Order. However, for the purposes of the Review, we have relied upon ICAC's identification of 139 documents in its document comparison matrix as being the number of additional documents that ought to have been produced by the Department in response to the Order.

5.2 Of the 139 documents that were not produced in answer to the Order in November 2009, 106 of the documents are emails and:

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Confidential Annexure A

Witness Name	Witness Name
Witness A	Ron Taylor
Witness B	William Hughes
Witness C	Julie McInerney
Witness D	Tracey Goodwin
Witness E	David Agnew
Witness F	Kevin Rurning
Witness G	Mark Duffy
Witness H	Sara Macwilliam
Witness I	Tony Herleman
Witness J	Susan Janis
Witness K	Vince Fallico
Witness L	Phil Acquell
Witness M	Richard Sheelrake
Witness N	Brad Mulland
Witness O	Karen Smith
Individual T	Fiona Hooke

CONFIDENTIAL

BM40127: 11366186_3'

Appendix 7 Draft standing order 52 policy provided by Mr Taylor

Attachment A

Ref:

POLICY



NSW DEPARTMENT OF
PRIMARY INDUSTRIES

Finance and Administration
Locked Bag 21, Orange NSW 2880
Tel: 9527 8453 Fax: 9527 8576

Title	Standing Order No 52	Version	##
Policy no.	Issued upon registration	Effective date	dd/mm/yyyy
Authorised by	Position	Authorisation date	dd/mm/yyyy

1. OVERVIEW

The Legislative Council may order the production of documents held by the NSW Government and Government Agencies under Standing Order No 52. NSW DPI must respond to these orders within the stipulated timeframe.

2. BACKGROUND

The reply to all such Orders is co-ordinated by Premiers Department and may require multi-agency input. Premiers Department is required to provide the documents within 14 days of the Order being issued.

Most documents provided are made public without any restriction on access. If a claim of 'privilege' is made and upheld the documents must still be provided, but can only be inspected by members of the Legislative Council.

3. SCOPE

All documents held by NSW DPI relevant to the Order are required to be produced and referred to Premiers Department.

An indexed list of all documents showing the date of creation, a description of the documents and the author must be included. Any claim for exemption also needs to be detailed and explained in a covering submission.

4. POLICY

- 4.1. The Principal Manager, Corporate Projects will liaise with Premiers Department and Deputy Directors General/Executive Directors regarding actions required under Standing Order No 52.
- 4.2. Deputy Directors General/Executive Directors are responsible for ensuring all relevant documents are identified, copied and referred to the Principal Manager, Corporate Projects within the specified timeframe. This will include an indexed list and, where appropriate, recommendations concerning claims for privilege.
- 4.3. The Principal Manager, Corporate Projects will be responsible for ensuring copies of relevant documents and the NSW DPI response is available for endorsement by the Director General and subsequent referral to Premiers Department.

5. PROCEDURES

Upon notification by Premiers Department of an Order for the production of documents under Standing Order No 52, the Principal Manager, Corporate Projects will advise the Director, Sydney Office and seek confirmation of the Deputy Director General/Executive Director responsible for providing the documents sought.

POLICY | NSW DEPARTMENT OF PRIMARY INDUSTRIES

The Principal Manager, Corporate Projects will then consult with the relevant Deputy Director General/Executive Director and advise the timeframe to provide the necessary documentation.

The Principal Manager, Corporate Projects will prepare the NSW DPI response based upon the documentation and advice provided. This will be referred to the Director, Sydney Office for endorsement and issue to Premiers Department by the Director General.

6. DEFINITIONS

None

7. RELATED LEGISLATION

Freedom of Information Act 1989

8. RELATED POLICIES

None

9. RELATED DELEGATIONS

None

10. RELATED DOCUMENTS

None

11. REVISION HISTORY

Version	Date
XX	dd mmmm yyyy

12. DATE OF NEXT REVIEW

[dd/mmmm/yyyy]

13. CONTACT OFFICER

Principal Manager, Corporate Projects – 02 9527 8453

Appendix 8 Correspondence from Dr Sheldrake to Ms Sanderson dated 23 November 2009 in relation to the Mt Penny order for papers



New South Wales

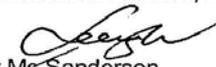
INDUSTRY & INVESTMENT NSW

Ms Leigh Sanderson
Deputy Director General (General Council)
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

23 NOV 2009

Attn: Mr Paul Miller
Executive Director, Legal Branch

By Hand


Dear Ms Sanderson,

Standing Order 52 – Order for Papers – Exploration Licence – Pt Penny

I refer to your advice dated 13 November 2009 of the Order by the Legislative Council for the production of all documents held by Industry & Investment NSW (I&I NSW) relating to Exploration Licence 3771 – Mt Penny.

Enclosed are copies of the required documents presented in the suggested format.

Separate indexed lists are provided for Privileged and Non-Privileged papers.

Where privilege has been claimed over part of a document two versions of the document have been provided - a full copy in the schedule of Privileged Documents, and an edited version with the privileged information obscured in the schedule of Non-Privileged Documents.

I certify to the best of my knowledge all documents held by I&I NSW and covered by the terms of the resolution have been provided.

Yours sincerely


RICHARD SHELDRAKE
DIRECTOR GENERAL

Appendix 9 The new policy adopted by Trade and Investment for responding to order for papers

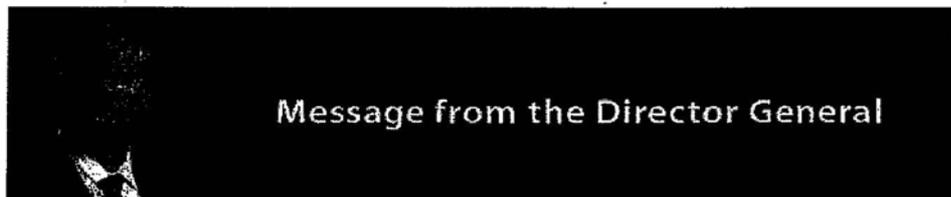


Standing Order 52 Responses

Director General to:

Mark Paterson, Jeannine Biviano, David Kennedy,
Bcc: Lucinda Warren, Michelle Keygan, Katherine Tollner,
Christopher Martin, David Anderton, Tim Holden,

21/06/2013 04:00 PM



I would like to clarify how we as an agency respond to Legislative Council orders to supply documents held by NSW Trade & Investment under Standing Order 52.

As you will be aware, Standing Order 52 enables the Legislative Council to compel the production of documents (other than Cabinet documents). The response to such orders is co-ordinated by the Department of Premier and Cabinet as multi-agency input may be required. Documents must be provided to Parliament within the specified timeframe. Failure to fully satisfy such an Order may constitute contempt of Parliament.

In providing the response to an Order I am required to certify that all documents covered by the terms of the Order held within NSW Trade & Investment have been provided.

To close the loop on the response process, we have reviewed our policy and procedures to ensure Division Heads provide a suitable level of confidence in the search process and results. Division Heads are required to provide detailed information about the searches performed. This ensures there is a verifiable record of what occurred if the adequacy of the search is subsequently questioned.

These search verification and certification procedures will also apply to searches undertaken in accordance with GIPA, ICAC and Ombudsman requirements. All staff will be informed of the new requirements through Max Express when those updated policies and procedures are available.

Internally, Standing Order 52 responses are coordinated by the Manager Governance & Information Requests, Ron Taylor (02) 9995 0911. Ron is responsible for liaising with Division Heads and coordinating our collective response.

Policy TI-G-147 Responding to Standing Order 52 and associated procedures are attached and will be available on the intranet shortly.

Please ensure relevant staff are briefed about our obligations and aware of internal response process.



Standing Order 52 - response policy.docx Search record - Branch 13.5.2013.docx



Search Certification - Division Head 13.5.2013.docx

Mark I Paterson AO

Director General

Department of Trade & Investment, Regional Infrastructure & Services

Level 49 MLC Centre 19-29 Martin Place, Sydney NSW Australia 2000 | T: 61 2 9338 6696 | F: 61 2 9338 6809 | E: mark.paterson@industry.nsw.gov.au W: www.trade.nsw.gov.au





Trade &
Investment

Policy

Standing order 52 - responses

NUMBER TI-G-147

VERSION 1.0

AUTHORISED BY Deputy Director General Finance Strategy & Operations AUTHORITY DATE 04/06/2013

ISSUED BY Legal Services

EFFECTIVE DATE 04/06/2013

Policy statement

NSW Trade & Investment will respond to orders for the production of documents under the Legislative Council's Standing Order 52 within the specified timeframes and scope of the order. The department will

- use a rigorous and verifiable procedure for identifying documents for production
- prevent the inappropriate release of Cabinet documents
- ensure that, where appropriate, claims of privilege are made in relation to produced documents.

Scope

This policy applies to NSW Trade and Investment, the NSW Food Authority and the Office of the Rural Assistance Authority. It does not automatically apply to the Cultural Institutions, Catchment Management Authorities or other statutory authorities within the cluster but may be adopted by those bodies.

Requirements

1. All documents (other than Cabinet documents) within the scope of the Order must be provided.
2. Documents created for the dominant purpose of being submitted to Cabinet must not be produced (whether or not they were submitted to Cabinet).
3. Officers conducting the search must fully document who conducted the search and the scope of the search that was undertaken by completing the Branch Search Record form (Attachment A).
4. Division Heads must certify that appropriate searches have been conducted and all relevant information has been provided (Attachment B).
5. Appropriate claims for privilege must be made by the Division Head.
6. *Claims for privilege*

Documents provided are made publicly available without any restriction on access unless a claim for privilege is made. Claims for privilege may be made where it is considered against the public interest for documents to be available for public inspection. Privilege is most commonly sought to restrict the release of the personal information of individuals, commercial-in-confidence and commercially sensitive information of third parties and where legal or parliamentary privilege may apply. If a claim for privilege is made the documents must still be provided, but can only be inspected by members of the Legislative Council unless the claim is refused.

Claims of privilege may be in relation to an entire document or only to those portions of a document concerning the information for which privilege is claimed. Where privilege is claimed for parts of a document two versions are to be provided - a complete copy over which privilege is claimed, and an edited version from which the sensitive information has been redacted.

The Government Information (Public Access) Act 2009 (GIPA Act) is informative when determining public interest immunity considerations which potentially warrant a claim for privilege. At Section 14 and Schedule 1 of the GIPA Act these are specified as matters concerning:

- Responsible & Effective Government
- Law Enforcement & Security
- Individual Rights, Judicial Processes & Natural Justice
- Business Interests of Agencies & Other Persons
- Environment, Culture, Economy & Other Matters
- Secrecy Provisions of Acts or Statutory Rules
- Cabinet Information
- Executive Council Information
- Contempt of Court & Parliamentary Privilege
- Legal Professional Privilege

Information concerning Cabinet related material which is not actually a Cabinet document must be provided but may be subject to a separate claim for privilege. This would be appropriate where a document which was not created for the dominant purpose of being submitted to Cabinet includes material referring to Cabinet deliberations or the position taken by, or recommended to be taken by, a Minister in such deliberations and decisions.

To validate the search process and methodology, suitable records are to be kept of who was involved in the search for documents, the search parameters or criteria and what records were searched

Procedures

1. The Manager Governance & Information Requests (MGIR) emails the Order to all Division Heads with a date by which a response is required with a copy to the Director General. If any recipient is aware of an area that may hold relevant information that has not been included in this initial request for documents the MGIR is to be advised immediately.
2. Division Heads will identify the areas holding relevant documents, issue directions for searches to appropriate staff, and provide adequate resources to comply with the Order.
3. Staff must undertake a thorough search (including for example, TRIM, physical file holdings, individual and Branch computer drives, electronic or pocket diaries/notebooks, emails etc), record details of the search and provide electronic and hard copies of the documents and search records to the Division Head.
4. Division Heads are to review the search records and documents and certify that a suitable search has been undertaken and all relevant documents provided.
5. Division Heads provide an electronic copy of following documents to the MGIR: the identified documents, the Search Record forms, copies of all communications concerning the Order, and the completed Division Head Certification of Search Results.
6. If there has been a significant exchange of relevant documents with other agencies Staff must advise the MGIR and the MGIR will consult with those agencies to ensure all relevant documents are identified and discuss possible claims of privilege for common documents.
7. The MGIR prepares a draft Departmental response, based upon the documentation and advice provided by Division Heads.
8. The DDG Finance, Strategy & Operations reviews the proposed response to ensure compliance with this Policy and submits for endorsement and issue by the Director General.

Roles and responsibilities

- Division Heads are responsible for:
 - Ensuring a thorough search is undertaken within their area.
 - Advising MGIR of areas outside their portfolio which may hold relevant information.
 - Ensuring all relevant documents within the scope of the Order are identified, copied and referred to the MGIR within the specified timeframe, including: the identified documents, the Search Record forms, copies of all communications concerning the Order, and the completed Division Head Certification of Search Results.
 - Identifying and explaining the basis of any claims for privilege and where privilege is only claimed in relation to part of a document providing both a complete and a partially redacted copy to the MGIR.

- The MGIR liaises with Department of Premier & Cabinet (DPC) and Division Heads regarding actions required to comply with the Order and the preparation of draft responses.
- The DDG Finance, Strategy & Operations ensures compliance with the requirements of this Policy, including that all necessary certifications have been received.
- The Director General issues the response when satisfied it fully complies with the Order.
- The Director Media and Communications in the relevant Division/s will prepare a Rapid Response Note where appropriate after the date for the documents to be tabled in Parliament has passed.

Safety considerations

The safety and wellbeing of staff will be enhanced by being fully informed of their obligations and able to respond comprehensively to the orders.

Delegations

- Not applicable

Definitions

- Division Heads are:
 - Deputy Director General Industry, Innovation, Hospitality & the Arts
 - Deputy Director General Finance, Strategy & Operations
 - Deputy Director General Resources & Energy
 - Deputy Director General, Agriculture NSW
 - Deputy Director General, Catchments & Lands
 - Commissioner, NSW Office of Water
 - CEO, NSW Food Authority
 - Executive Director, Biosecurity NSW
 - Executive Director, Fisheries NSW
 - Executive Director Business Services - for the remaining areas of NSW DPI

Legislation

- None

Related policies

- None

Other related documents

- None

Superseded documents

- None

Revision history

Version	Date issued	Notes	By
1.0		New policy developed for NSW Trade & Investment.	MGIR

Review date

30/06/2015

Contact

Manager Governance & Information Requests 9995 0911

Search Record - BRANCH

Notice/Order concerning:

Branch: _____

TRM - File Searches		Time taken: _____	hours
- List key words and date ranges searched, and by whom			
- List file numbers of hard copy files manually searched, and by whom			
Electronic document searches (including servers)		Time taken: _____	hours
- List key words, date ranges, folders and drives searched, and by whom			
Email searches		Time taken: _____	hours
- List key words and date ranges searched and names and position titles of people whose inboxes have been searched, and by whom			

Search Record - BRANCH

Other searches	Time taken: _____ hours
- Please provide details of any other searches undertaken, and by whom:	

Certification

I have reviewed the attached search results and: *(please tick relevant box)*

- to the best of my knowledge appropriate searches have been conducted and no information within the scope of the Notice/Order is held by the*

(Branch)

OR

- to the best of my knowledge appropriate searches have been conducted and all information within the scope of the Notice/Order held by*

_____ *has been provided.*
(Branch)

Signature: _____
Name: _____
Position: _____
Date: _____

Division Head Certification – Search results

Certification

I have reviewed the attached search results and: *(please tick relevant box)*

- to the best of my knowledge appropriate searches have been conducted and no information within the scope of the Notice/Order is held by the*

_____ *Division*

OR

- to the best of my knowledge appropriate searches have been conducted and all information within the scope of the Notice/Order held by the*

_____ *has been provided.*

_____ *Division*

Signature: _____
Name: _____
Position: _____
Date: _____

Appendix 10 Minutes

Minutes No. 19

Tuesday 7 May 2013

Members' Lounge, Parliament House, Sydney, at 7.02 pm

1. Members present

Mr Khan, *Chair*

Mr Ajaka

Mr Buckingham

Mr Donnelly

Mr Mason-Cox

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore

2. Apologies

Ms Fazio, *Deputy Chair*

Miss Gardiner

Revd Mr Nile

3. New member of the Committee

The Chair noted the appointment of Mr Buckingham to the Committee for the purposes of the Inquiry into the 2009 Mt Penny return to order.

4. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Mason-Cox: That minutes no. 18 be confirmed.

5. Correspondence

The Committee noted the following item of correspondence received as part of the Inquiry into possible non-compliance with the 2009 Mt Penny order for papers:

- Letter dated 26 April 2013 from the Commissioner of ICAC to the Chair in relation to the waiving of privilege over the 2009 Mt Penny return to order.

6. Inquiry into the 2009 Mt Penny return to order

The Chair noted the following terms of reference referred by the House on 7 May 2013:

1. That this House notes the findings and recommendations of the Privileges Committee in Report No. 68 entitled 'Possible non-compliance with the 2009 Mt Penny order for papers', dated 30 April 2013.
2. That the Privileges Committee inquire into and report on the failure to provide documents in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process, including documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the House on 14 March 2013, and in particular:
 - a. the reasons for and circumstances leading to the failure to provide documents in the return,
 - b. whether other documents held by offices identified in the resolution passed by the House on 12 November 2009 and captured by the terms of the resolution were not provided in the return,

- c. any deficiencies in processes or policies of a minister, ministerial office, department or other agency regarding the identification of documents captured by orders for the production of documents under standing order 52, or the inclusion of documents in a return,
 - d. the identity of the person or persons whose actions resulted in the failure to provide documents in the return,
 - e. any further action the House should take in relation to this matter, including:
 - (i) whether a person or persons should be adjudged guilty of contempt,
 - (ii) the scope of sanctions that may be imposed,
 - (iii) any possible further involvement by the Independent Commission Against Corruption,
 - f. guidelines and policies for the process by which ministers, ministerial offices, departments and agencies respond to orders for the production of documents under standing order 52, in light of current guidelines and policies, and
 - g. any other related matter.
3. That in order to ensure procedural fairness, natural justice and the protection of witnesses before the Committee, the Committee shall observe the procedures laid down in the standing orders and the practices and procedures of the House, and may adopt and report to the House any additional procedures as the Committee sees fit.
 4. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser or advisers.
 5. That notwithstanding anything to the contrary in the resolution establishing the Committee, for the purposes of this inquiry:
 - a. the Committee consist of eight members, and
 - b. the additional member be Mr Buckingham.

The Chair briefed the Committee.

The Committee deliberated.

Resolved, on the motion of Mr Ajaka: That the Committee Chair write to individuals specifically nominated by Committee members seeking a submission to the inquiry by COB Monday 27 May 2013.

Resolved, on the motion of Mr Donnelly: That the Committee Chair write to the Commissioner of the ICAC seeking advice on how the ICAC obtained the documents provided to the President on 14 March 2013 in the document comparison matrix and which agency they came from.

Resolved, on the motion of Mr Buckingham: That the Committee Chair distribute a media release on behalf of the Committee indicating the commencement of the inquiry.

7. Adjournment

The Committee adjourned at 7.45 pm *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 20

Thursday 9 May 2013

Members' Lounge, Parliament House, Sydney, at 4.08 pm

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Buckingham
Mr Donnelly
Mr Mason-Cox
Revd Mr Nile

In attendance: Steven Reynolds, Jenelle Moore, Samuel Griffith

2. Apologies

Mr Ajaka
Miss Gardiner

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Donnelly: That minutes no. 19 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent as part of the Inquiry into the 2009 Mt Penny return to order:

- Letter dated 8 May 2013 from the Chair to the Commissioner of the ICAC in relation to the documents in the document comparison matrix.
- Letters dated 8 May 2013 to the following inviting a submission to the Committee's Inquiry into the 2009 Mt Penny return to order:
 - Mr Ian Macdonald
 - The Hon Peter Primrose
 - The Hon Nathan Rees
 - Mr Graeme Wedderburn, Former Chief of Staff to the Premier
 - Mr Chris Eccles, Director General, Department of Premier and Cabinet
 - Mr Stephen Knight, Chief Executive, New South Wales Treasury
 - Mr Mark Paterson AO, Director General, Department of Trade and Investment, Regional Infrastructure and Services
 - Dr Richard Sheldrake, Director-General, Department of Primary Industries
 - [position vacant] Deputy Director General, Resources and Energy
 - Mr John Lee, Former Director General, Department of Premier and Cabinet
 - Ms Julie Moloney, Former Senior Project Officer, Development Co-ordination, Department of Primary Industries
 - Mr William Hughes, Former Principal Adviser, Coal and Strategic Projects, Industry and Investment NSW

- Mr David Agnew, Manager, Coal and Petroleum Titles and Systems, Industry and Investment NSW
- Mr Brad Mullard, Executive Director, Mineral Resources, Industry and Investment NSW.

5. Inquiry into the 2009 Mt Penny return to order

The Chair noted the document distributed by Mr Buckingham listing further individuals for the Committee to write to seeking a submission to the inquiry.

The Committee deliberated.

Resolved, on the motion of Revd Mr Nile: That the Committee Chair write to the following individuals listed on Mr Buckingham's document, subject to the deletions made by the Committee, seeking a submission to the inquiry by COB Monday 27 May 2013:

- Mr Tony Kelly
- Mr Jason Stewart
- Revd Craig Munnings
- Mr Laurie Brown
- Mr Michael Schur
- The Hon. Walt Secord MLC
- Mr Paul Miller
- ***
- Mr George Makrides
- Ms Nazli Munir
- Ms Joanne Paizes
- Mr Michael Petrie
- Mr Peter Duncan
- Ms Dianne Leeson
- Mr Peter Heron
- Ms Leigh Sanderson
- Ms Patricia Madden
- Mr Graham Hawkes
- Ms Shirley Hibbs
- Ms Leslie Wiles
- Mr Robert Larkings
- Mr Mark Duffy
- Ms Tracey Godwin.

6. Adjournment

The Committee adjourned at 4.30 pm *sine die*.

Steven Reynolds
Clerk to the Committee

Minutes No. 21

Wednesday 22 May 2013

Members' Lounge, Parliament House, Sydney, at 6.31 pm

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*

Mr Ajaka
Mr Buckingham
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: David Blunt, Steven Reynolds, Stephen Frappell, Jenelle Moore.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Ms Fazio: That minutes no. 20 be confirmed.

3. Correspondence

The Committee noted the following item of correspondence received as part of the Inquiry into the 2009 Mt Penny return to order:

- Letter with accompanying table dated 21 May 2013 from the Commissioner of the ICAC to the Chair regarding documents obtained by ICAC but not included in the 2009 return to order.

4. Inquiry into the 2009 Mt Penny return to order

The Chair briefed the Committee in relation to the letter from the Commissioner of the ICAC. The letter was provided to the Committee by the Commissioner in accordance with section 111(4) of the *Independent Commission Against Corruption Act 1988*.

A hard copy of the letter, but not the accompanying table, was distributed to members of the Committee.

The Clerk of the Parliaments briefed the Committee in relation to the application of section 111, and statutory secrecy provisions generally, to the proceedings of the Committee, and the ramifications of any unauthorised disclosure of the document.

The Deputy Clerk indicated that the table accompanying the letter was available for inspection by members in the Clerk's Office.

The Chair noted the cooperation of the Commissioner of the ICAC in providing the information contained in the letter and accompanying table to the Committee.

The Committee deliberated.

Resolved, on the motion of Mr Ajaka: That the Committee Chair write to Mr Bret Walker SC seeking advice on the application of section 111 of the *Independent Commission Against Corruption Act 1988* to the Committee's proceedings.

Members of the Committee returned their copies of the letter to the Clerk.

5. Adjournment

The Committee adjourned at 7.07 pm *sine die*.

Steven Reynolds
Clerk to the Committee

Minutes No. 22

Tuesday 28 May 2013

Members' Lounge, Parliament House, Sydney, at 6.35 pm

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*
 Mr Ajaka
 Mr Buckingham
 Mr Donnelly
 Miss Gardiner
 Mr Mason-Cox
 Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Samuel Griffith.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Ms Fazio: That minutes no. 21 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence sent and received as part of the Inquiry into the 2009 Mt Penny return to order:

Sent

- 8 May 2013 – Letter to Mr Alan Coutts, former Deputy Director General of the Department of Primary Industries inviting him to make a submission to the Committee’s Inquiry into the 2009 Mt Penny return to order.
- 9 May 2013 – Email from the Committee secretariat to Mr Gareth Lewis, Senior Solicitor, the ICAC forwarding correspondence inviting Mr Alan Coutts to make a submission to the Inquiry into the 2009 Mt Penny return to order.
- 10 May 2013 – Letters from Committee Chair to the following inviting a submission to the Committee’s Inquiry into the 2009 Mt Penny return to order:
 - Mr Tony Kelly, former Minister for Primary Industries and Leader of the House in the Legislative Council
 - Mr Jason Stewart, former staff member for the Honourable Ian Macdonald MLC
 - Revd Craig Munnings, former staff member for the Honourable Ian Macdonald MLC
 - Mr Michael Schur, former Treasury Secretary, NSW Treasury
 - The Hon. Walt Secord MLC, former Chief of Staff to the Treasurer
 - Mr Paul Miller, General Counsel, Department of Premier and Cabinet
 - ***, former Acting Chief of Staff to the Minister for Mineral Resources
 - Mr Peter Duncan, former Deputy Director General, Government Coordination, Department of Premier and Cabinet
 - Ms Dianne Leeson, former Director of Major Projects Coordination, Department of Premier and Cabinet
 - Ms Leigh Sanderson, former Deputy Director General (General Counsel), Department of Premier and Cabinet
 - Ms Patricia Madden, former Manager Operations, Mineral Resources, Department of Industry and Investment NSW
 - Ms Shirley Hibbs, former Executive Assistant to the Director of Industry and Investment, Department of Industry and Investment NSW
 - Mr Robert Larkings, Manager Resource Assessment, Department of Trade and Investment
 - Mr Mark Duffy, former Deputy Director General, Minerals and Energy in the Department of Industry and Investment NSW
 - Ms Tracey Godwin, Team Leader, Department of Trade and Investment
 - Ms Leslie Wiles, former Manager of Coal Advice, Department of Industry and Investment
 - Mr Graham Hawkes, former Account Manager, Department of Trading and Investment.
- 10 May 2013 – Email from the Committee secretariat to Mr Paul Miller, General Counsel, Department of Premier and Cabinet in relation to contacting the following former Ministerial and Department of Premier and Cabinet staff:

- Ms Laurie Brown
- Mr Jaime Gibson
- Mr George Makrides
- Ms Nazli Munir
- Ms Joanne Paizes
- Mr Michael Petrie
- Mr Peter Heron.
- 10 May 2013 – Draft letters to former Ministerial and Department of Premier and Cabinet staff inviting them to make a submission to the Committee’s Inquiry into the 2009 Mt Penny return to order.
- 13 May 2013 – Email from the Committee secretariat to Mr Gareth Lewis, Senior Solicitor, the ICAC forwarding correspondence from the Committee Chair inviting Ms Leslie Wiles and Mr Graham Hawkes to make a submission to the Inquiry into the 2009 Mt Penny return to order.
- 16 May 2013 – Letter from Committee Chair to Ms Joanne Paizes, Branch Manager, Cabinet Secretariat, Department of Premier and Cabinet, inviting her to make a submission to the Committee’s Inquiry into the 2009 Mt Penny return to order.
- 23 May 2013 – Letter from the Clerk of the Parliaments to Mr Bret Walker SC regarding advice on section 111 of the Independent Commission Against Corruption Act 1988.
- 28 May 2013 - Letter to Mr Jamie Gibson, former Deputy Chief of Staff to the Minister for Primary Industries inviting him to make a submission to the Committee’s Inquiry into the 2009 Mt Penny return to order.

Received

- 14 May 2013 – Email from Ms Leslie Wiles to the Committee secretariat regarding the Committee’s invitation to make a submission.
- 15 May 2013 – Email from Mr Gareth Lewis, Senior Solicitor, the ICAC to the Committee secretariat regarding correspondence to Ms Leslie Wiles and Mr Graham Hawkes.
- 15 May 2013 – File note by Committee secretariat regarding a phone call from Mr Tony Kelly, former Minister for Primary Industries, regarding the Committee’s invitation to make a submission.
- 15 May 2013 – Email from Ms Shirley Hibbs to the Committee secretariat regarding the Inquiry into the 2009 Mt Penny return to order.
- 16 May 2013 – Email from Mr Paul Miller, General Counsel, Department of Premier and Cabinet to the Committee secretariat regarding contacting Ms Joanne Paizes, Mr Peter Heron and Mr Michael Petrie.
- 22 May 2013 – Email from Mr Alan Coutts to the Committee regarding the Committee’s invitation to make a submission.
- 23 May 2013 – Letter from The Hon Walt Secord MLC to the Chair regarding the Committee’s invitation to make a submission.
- 28 May 2013 – File note by Committee secretariat regarding a phone call from Nazli Munir, former Manager of Policy in the National Reform Unit in the Department of Premier and Cabinet regarding the Inquiry in the 2009 Mt Penny return to order.

4. Inquiry into the 2009 Mt Penny return to order

4.1 Submissions

The Committee noted receipt of the following eight submissions:

- No. 1: Mr Ian Macdonald
- No. 2: Mr Jason Stewart
- No. 3: Mr Michael Schur
- No. 4: The Hon Peter Primrose MLC
- No. 5: Ms Dianne Leeson

- No. 6: Mr Mark Paterson, NSW Trade and Investment
- No. 7: Confidential
- No. 8: Department of Premier and Cabinet.

The Committee deliberated.

Resolved, on the motion of Revd Mr Nile: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 233(1), the Committee authorise the publication of submissions nos 1 to 6 and No. 8.

4.2 Correspondence with the Commissioner of the Independent Commission Against Corruption

Resolved, on the motion of Revd Mr Nile: That the Committee Chair reply to the letter from the Commissioner of the ICAC dated 21 May 2013 regarding documents obtained by ICAC but not included in the 2009 return to order, thanking the Commissioners for the information provided and indicating that the Committee would like to use the correspondence and accompanying table to inform questions to witnesses, but without disclosing the document itself.

4.3 Hearing on 11 June 2013

The Chair briefed the Committee in relation to the hearing on 11 June 2013.

The Committee deliberated.

Resolved, on the motion of Mr Ajaka: That the hearing on 11 June 2013 be held in camera, with consideration to be given to the publication of the evidence of individual witnesses after the hearing, and that the following witness be invited to attend and give evidence:

- ***
- The Hon Peter Primrose MLC
- Mr Chris Eccles, Director General, Department of Premier and Cabinet, and Mr Paul Miller, General Counsel, Department of Premier and Cabinet
- Mr Mark Patterson, Director General, NSW Trade and Investment.

5. Adjournment

The Committee adjourned at 7.00 pm until 9.30 am on 11 June 2013.

Stephen Frappell
Clerk to the Committee

Minutes No. 23

Tuesday 11 June 2013

Macquarie Room, Parliament House, Sydney, at 9.30 am

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Ajaka
Mr Buckingham
Mr Donnelly
Miss Gardiner
Mr Mason-Cox

Apologies: Revd Mr Nile

In attendance: David Blunt, Steven Reynolds, Stephen Frappell, Velia Mignacca, John Young, Jenelle Moore, Samuel Griffith.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Mason-Cox: That minutes no. 22 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence sent and received:

Sent

- 29 May 2013 - Letter to The Hon David Ipp AO QC, Commissioner of the ICAC from the Chair thanking him for his correspondence.

Received

- 28 May 2013 – File note by Committee secretariat regarding a phone call from Ms Nazli Munir, former Manager of Policy in the National Reform Unit, Department of Premier and Cabinet, regarding the Inquiry into the 2009 Mt Penny return to order.
- 29 May 2013 – File note by Committee secretariat regarding a phone call from Mr Peter Heron, former Secretary to the Executive Council, Department of Premier and Cabinet, regarding the Inquiry into the 2009 Mt Penny return to order.
- 29 May 2013 – File note by Committee secretariat regarding a phone call from Mr Laurie Brown, former Chief of Staff to Minister Kelly, regarding the Inquiry into the 2009 Mt Penny return to order.
- 29 May 2013 – File note by Committee secretariat regarding a phone call from Mr Michael Petrie, former Chief of Staff to the Director General, Department of Premier and Cabinet, regarding the Inquiry into the 2009 Mt Penny return to order.
- 29 May 2013 – Letter from The Hon David Ipp AO QC, Commissioner of the ICAC to the Chair regarding the Committee using documentation provided previously by the ICAC together with an attachment.
- 4 June 2013 – Letter from Mr Peter Duncan, former Deputy Director General, Government Coordination, Department of Premier and Cabinet to the Chair regarding the Committee's invitation to make a submission.

4. Inquiry into the 2009 Mt Penny return to order**4.1 Submission**

The Committee noted the receipt of a further submission, requested to remain confidential:

- No. 9 – Confidential.

4.2 Background papers

The Chair noted the following background papers, previously circulated to the Committee:

- Background paper No. 1 – Mt Penny timeline
- Background paper No. 2 – Summary of the SO 52 process
- Background paper No. 3 – Summary of the General Retention and Disposal Authority relating to ministerial offices
- Background paper No. 4 – Key stakeholders mud map.

4.3 Social media policy

The Chair noted the 'Interim guidelines on the use of social media and electronic devices during committee proceedings', previously circulated to the Committee.

Resolved, on motion of Miss Gardiner: That the Committee adopt the 'Interim guidelines on the use of social media and electronic devices during committee proceedings' for the purposes of this inquiry

4.4 Time allocated for questions

Resolved, on motion of Miss Gardiner: That the Committee adopt a flexible approach to questioning, with members able to pursue a line of questioning until concluded without the imposition of time limits, but with regard to the right of all members to ask questions.

4.5 Answers to questions on notice

Resolved, on motion of Mr Ajaka: That the following witnesses be requested to return answers to questions on notice from members within 21 days of the date on which questions are forwarded to the witnesses by the Committee clerk:

- ***
- The Hon Peter Primrose MLC, former Minister for Mineral Resources
- ***, former Acting Chief of Staff to the Minister for Mineral Resources

Resolved, on motion of Ms Fazio: That the following witness be requested to return answers to questions on notice from members within 10 days of the date on which questions are forwarded to the witness by the Committee clerk:

- Mr Mark Paterson, Director General of NSW Trade and Investment

4.6 In camera hearing

Witnesses were admitted.

The Chair made an opening statement regarding the conduct of the hearing and other matters.

The Hon Peter Primrose MLC, former Minister for Mineral Resources, was examined.

The following witness was sworn and examined:

- ***

Mr Buckingham joined the meeting.

The evidence concluded and the witnesses withdrew.

*** was admitted.

*** was examined.

The evidence concluded and the witness withdrew.

The Chair advised the Committee that a request had been received from Mr Mark Paterson that Ms Amy Brice, Manager, External Legal Procurement, Legal Branch of NSW Trade and Investment be permitted to attend the in camera hearing for the purposes of observation and taking notes.

The Committee deliberated.

Resolved, on motion of Miss Gardiner: That the request for Ms Amy Brice to attend the in camera hearing for the purposes of observation and taking notes be declined.

Mr Mark Paterson, Director General of NSW Trade and Investment was admitted.

The following witness was sworn:

- Mr Mark Paterson, Director General of NSW Trade and Investment.

Mr Paterson made an opening statement.

The evidence concluded and the witness withdrew.

The in camera hearing concluded at 2.36 pm.

4.7 Deliberative

The Chair briefed the Committee in relation to the hearing on 24 June 2013.

The Committee deliberated.

Ms Fazio left the meeting.

Resolved, on the motion of Miss Gardiner: That the next hearing be held on 24 June 2013, and that the following witnesses be invited to attend and give evidence:

- Mr Chris Eccles, Director General, Department of Premier and Cabinet
- Ms Leigh Sanderson, Deputy Director General (General Counsel)
- Mr Paul Miller, General Counsel, Department of Premier and Cabinet
- Mr John Lee, former Director General, Department of Premier and Cabinet
- Mr Ian Macdonald, former Minister for Primary Industries
- Mr Jamie Gibson, former Chief of Staff to the Minister for Primary Industries

Resolved, on the motion of Mr Mason-Cox: That Mr Paterson be invited to join the deliberative meeting for the purposes of answering a question taken on notice.

Mr Paterson was admitted.

Mr Paterson addressed the Committee.

Mr Paterson withdrew.

5. Adjournment

The Committee adjourned at 3.16 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 24

Tuesday 18 June 2013

Members' Lounge, Parliament House, Sydney, at 6.41 pm

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Ajaka
Mr Buckingham
Mr Donnelly
Mr Mason-Cox
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell.

2. Apologies

Miss Gardiner

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Ms Fazio: That minutes no. 23 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent as part of the Inquiry into the 2009 Mt Penny return to order:

Sent

- 14 June 2013 - Letter from Committee secretariat to Mr Ian Macdonald inviting him to appear at the Committee's hearing on 24 June 2013.
- 17 June 2013 - Letter from Committee Chair to Mr George Makrides inviting him to make a submission to the Committee's Inquiry into the 2009 Mt Penny return to order.
- 18 June 2013 - Letter from Committee secretariat to Mr Jamie Gibson inviting him to appear at the Committee's hearing on 24 June 2013.

5. Inquiry into the 2009 Mt Penny return to order

5.1 Submissions

The Committee noted receipt of the following submission:

- No. 10: Mr John Lee

The Committee deliberated.

Resolved, on the motion of Ms Fazio: That following further consultation with the author, and according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the partial publication of submission No. 7 with certain paragraphs suppressed.

Resolved, on the motion of Mr Ajaka: That following further consultation with the author, and according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the partial publication of submission No. 9 with the name and other identifying information of the author suppressed.

Resolved, on the motion of Mr Mason-Cox: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of submission No. 10.

5.2 Publication of transcript

The Chair noted the distribution of the transcript of the hearing on 11 June 2013 with suggested redactions.

The Committee deliberated.

Resolved, on the motion of Buckingham: That following further consultation with the witnesses, and according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(2), the Committee authorise the partial publication of the in camera transcript of the hearing on 11 June 2013.

5.3 Hearing on 24 June 2013

The Committee noted the draft hearing program for the hearing of the Committee scheduled on Monday 24 June 2013.

The Committee deliberated.

Ms Fazio moved: That the hearing be held in public, with the exception of the final witness.

Mr Buckingham moved: That the motion of Ms Fazio be amended to omit the words 'with the exception of the final witness'.

Amendment put.

The Committee divided.

Ayes: Mr Buckingham, Revd Mr Nile, Mr Mason-Cox.

Noes: Mr Ajaka, Ms Fazio, Mr Donnelly, Mr Khan.

Question resolved in the negative.

Original question put.

The Committee divided.

Ayes: Mr Buckingham, Revd Mr Nile, Mr Mason-Cox, Mr Donnelly, Ms Fazio.

Noes: Mr Ajaka, Mr Khan.

Question resolved in the affirmative.

6. Adjournment

The Committee adjourned at 7.20 pm until 10.45 am on Monday 24 June 2013.

Stephen Frappell

Clerk to the Committee

Minutes No. 25

Thursday 20 June 2013

Members' Lounge, Parliament House, Sydney, at 4.32 pm

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Ajaka

Mr Buckingham

Mr Donnelly

Miss Gardiner

Mr Mason-Cox

Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Samuel Griffith.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Ms Buckingham: That minutes no. 24 be confirmed.

3. Correspondence

The Committee noted the following items of correspondence sent and received as part of the Inquiry into the 2009 Mt Penny return to order:

Sent

- 19 June 2013 – Letters from the Committee Secretariat to the following witnesses regarding the confidentiality of their evidence to the inquiry into the 2009 Mt Penny return to order:
 - ***
 - The Honourable Peter Primrose MLC
 - ***
 - Mr Mark Paterson.
- 19 June 2013 – Letters from the Committee Secretariat to the following witnesses regarding their appearance at the hearing on 24 June 2013 as part of the inquiry into the 2009 Mt Penny return to order:
 - Mr Jamie Gibson
 - Ms Leigh Sanderson.
- 19 June 2013 – Email from the Committee Secretariat to Mr Gareth Lewis, Senior Solicitor, the ICAC forwarding correspondence inviting Mr Ian Macdonald to appear at the hearing on 24 June 2013 as part of the inquiry into the 2009 Mt Penny return to order.
- 19 June 2013 – Email from the Committee Secretariat to Mr Nicholas Dan, legal representative for Mr Ian Macdonald, forwarding correspondence inviting Mr Ian Macdonald to appear at the hearing on 24 June 2013 as part of the inquiry into the 2009 Mt Penny return to order.

Received

- ***

4. Inquiry into the 2009 Mt Penny return to order**4.1 Consideration of email received from *****

The Committee noted the email received this day from *** in relation to his evidence and submission to the inquiry.

The Committee deliberated.

Ms Fazio moved: That the transcript of *** evidence from the hearing on 11 June 2013 be kept in camera, ***.

Revd Mr Nile moved: That the motion of Ms Fazio be amended by inserting the words ‘at the current time,’ after the word ‘That’.

Amendment resolved in the affirmative.

Original question, as amended, put.

The Committee divided.

Ayes: Mr Khan, Ms Fazio, Mr Ajaka, Mr Donnelly, Miss Gardiner, Mr Mason-Cox, Revd Mr Nile.

Noes: Mr Buckingham.

Question resolved in the affirmative.

4.2 Hearing on 24 June 2013

The Committee noted the updated draft hearing program for the hearing of the Committee scheduled on Monday 24 June 2013.

The Committee deliberated.

Resolved, on the motion of Mr Buckingham: That Mr John Lee and Mr Graeme Wedderburn be invited to a future hearing of the Committee.

5. Adjournment

The Committee adjourned at 4.55 pm until 10.45 am on Monday 24 June 2013.

Stephen Frappell
Clerk to the Committee

Minutes No. 26

Monday 24 June 2013

Macquarie Room, Parliament House, Sydney, at 10.45 am

1. Members present

Mr Khan, *Chair*
Mr Ajaka
Mr Buckingham
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: David Blunt, Steven Reynolds, Stephen Frappell, Velia Mignacca, Jenelle Moore, Samuel Griffith, Kerry Blandon.

2. Apologies

Ms Fazio, *Deputy Chair*

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Donnelly: That minutes no. 25 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent and received:

Received

- 21 June 2013 – Letter from Mr Nicholas Dan, legal representative for Mr Ian Macdonald stating Mr Macdonald is unavailable to attend the hearing on 24 June 2013 as part of the inquiry into the 2009 Mt Penny return to order.
- 24 June 2013 – Letter from Mr Nicholas Dan, legal representative for Mr Ian Macdonald regarding an article published in the Sydney Morning Herald on 22 June 2013 which made reference to Mr Macdonald's invitation to appear before the Committee.

Sent

- 24 June 2013 – Email from Stephen Frappell, Director of the Privileges Committee, to Mr Nicholas Dan, legal representative for Mr Ian Macdonald, responding to Mr Dan's letter dated 24 June 2013.

5. Inquiry into the 2009 Mt Penny return to order

5.1 Time allocated for questions

Resolved, on motion of Mr Ajaka: That the Committee adopt a flexible approach to questioning, with members able to pursue a line of questioning until concluded without the imposition of time limits, but with regard to the right of all members to ask questions.

5.2 Answers to questions on notice

Resolved, on motion of Mr Ajaka: That the following witnesses be requested to return answers to questions on notice from members within 21 days of the date on which questions are forwarded to the witnesses by the Committee clerk:

- Mr Chris Eccles, Director General, Department of Premier and Cabinet
- Mr Paul Miller, General Counsel, Department of Premier and Cabinet
- Mr Jamie Gibson, Former Deputy Chief of Staff to the Minister for Primary Industries.
- Ms Leigh Sanderson, Former Deputy Director General, General Counsel, Department of Premier and Cabinet.

The Clerk distributed answers to questions taken on notice by Mr Mark Paterson AO, Director General of NSW Trade and Investment, together with nine related attachments.

The Committee deliberated.

Resolved, on motion of Revd Mr Nile: That the answers to questions provided by Mr Paterson, together with accompanying attachments, be published, with the exception of the documents comprising Attachment No. 6.

5.3 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Chris Eccles, Director General, Department of Premier and Cabinet
- Mr Paul Miller, General Counsel, Department of Premier and Cabinet

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Mr Jamie Gibson, Former Deputy Chief of Staff to the Minister for Primary Industries.

The evidence concluded and the witness withdrew.

The public hearing concluded at 4.13 pm.

The public and the media withdrew.

5.4 In camera hearing

The following witness was sworn and examined:

- Ms Leigh Sanderson, Former Deputy Director General, General Counsel, Department of Premier and Cabinet.

Revd Mr Nile left the meeting.

The evidence concluded and the witness withdrew.

The *in camera* hearing concluded at 5.25 pm.

5.5 Deliberative

The Chair briefed the Committee in relation to a further hearing.

The Committee deliberated.

Resolved, on motion of Mr Ajaka: That the next hearing of the Committee be held on 23 July 2013, and that the following witnesses be invited to attend and give evidence:

- Mr John Lee, former Director General, Department of Premier and Cabinet
- Mr Ian Macdonald, former Minister for Primary Industries

Resolved, on motion of Mr Buckingham: That any additional questions on notice be lodged with the secretariat by close of business on Wednesday 26 June 2013.

6. Adjournment

The Committee adjourned at 5.32 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 27

Tuesday 23 July 2013

Macquarie Room, Parliament House, Sydney, at 10.00 am

1. Members present

Mr Khan, *Chair*
Mr Ajaka
Mr Buckingham
Miss Gardiner
Mr Mason-Cox

In attendance: David Blunt, Steven Reynolds, John Young, Jenelle Moore, Kerry Blandon.

2. Apologies

Ms Fazio, *Deputy Chair*
Mr Donnelly
Revd Mr Nile

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Ajaka: That minutes no. 26 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent and received:

Received

- 27 June 2013 – Letter from Ms Leigh Sanderson, former Deputy Director General (General Counsel), Department of Premier and Cabinet confirming that she has no objection to her in camera evidence being made public, together with an answer to a question taken on notice.
- 9 July 2013 – Letter from Mr Nicholas Dan, legal representative for Mr Ian Macdonald in reply to an invitation for Mr Macdonald to appear as a witness before the Committee on 23 July 2013.
- 16 July 2013 – Letter from Mr Mark Patterson, Director General, NSW Trade & Investment, enclosing an additional five section 22 notices issued to the department, in answer to a question taken on notice on 11 June 2013, and providing an amended schedule of answers to questions

previously provided to the Committee on 21 June 2013 from which personal information concerning certain individuals has been redacted.

- 17 July 2013 – Letter from Mr Nicholas Dan, legal representative for Mr Ian Macdonald in reply to correspondence dated 9 July 2013 regarding legal representation and reimbursement of expenses for Mr Macdonald pursuant to an invitation to give evidence before the Committee on Tuesday 23 July 2013.
- 19 July 2013 – Letter from Mr Chris Eccles, Director General and Mr Paul Miller, General Counsel, Department of Premier and Cabinet attaching answers to questions taken on notice and a further submission from the Department.
- 19 July 2013 – Letter from Ms Kristy Sullivan on behalf of Mr Nicholas Dan, legal representative for Mr Ian Macdonald, in response to the Committee’s request for confirmation of Mr Macdonald’s availability to give evidence on Tuesday 23 July 2013.
- 19 July 2013 – Letter from Ms Kristy Sullivan on behalf of Mr Nicholas Dan, legal representative for Mr Ian Macdonald, confirming Mr Macdonald’s attendance on Tuesday 23 July 2013 and making further comment as to other matters.
- 19 July 2013 – Letter from Ms Kristy Sullivan on behalf of Mr Nicholas Dan, legal representative for Mr Ian Macdonald, requesting that the Committee provide copies of any media releases at the time they are released and confirming Mr Macdonald’s intention to make a statement at the commencement of the hearing scheduled for 23 July 2013.

Sent

- 2 July 2013 – Letter from the Chair to Mr Stephen Larrison regarding comments made by Mr Shoebridge in the House on 16 June 2013.
- 3 July 2013 – Email from Steven Reynolds, Clerk to the Committee, to Paul Miller, General Counsel, Department of Premier and Cabinet, forwarding a copy of the transcript of evidence of Ms Leigh Sanderson.
- 9 July 2013 – Letter from the Chair to Mr Nicholas Dan, legal representative for Mr Ian Macdonald, together with published transcripts of the Committee’s hearings to date, in reply to his correspondence dated 9 July 2013.
- 18 July 2013 – Letter from the Chair to Mr Mark Paterson AO, Director General, NSW Trade & Investment, in response to his correspondence dated 17 July 2013.
- 18 July 2013 – Letter from the Chair to Mr Nicholas Dan, legal representative for Mr Ian Macdonald, in response to matters raised in his correspondence dated 17 July 2013.
- 19 July 2013 – Email from the Chair to Ms Kristy Sullivan on behalf of Mr Nicholas Dan, legal representative for Mr Ian Macdonald, in response to her correspondence dated 19 July 2013.
- 19 July 2013 – Letter from the Chair to Mr Nicholas Dan, legal representative for Mr Ian Macdonald, acknowledging Mr Macdonald’s intention to appear before the Committee on Tuesday 23 July 2013 and commenting on other matters relevant to the hearing.

5. Inquiry into the 2009 Mt Penny return to order

5.1 Transcript of evidence of Ms Leigh Sanderson

Resolved, on motion of Miss Gardiner: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(2), the Committee authorise the full publication of the in camera transcript of Ms Leigh Sanderson taken on 24 June 2013.

5.2 Answers to questions on notice

5.2.1 Answer from Ms Leigh Sanderson

Resolved, on motion of Mr Buckingham: That the answer to a question taken on notice provided by Ms Sanderson be published.

5.2.2 Answers from NSW Trade & Investment

Resolved, on motion of Mr Ajaka: That the redacted answers to questions taken on notice provided by Mr Paterson on 19 July 2013 be published and substituted for the answers previously provided on 21 June 2013.

Resolved, on motion of Miss Gardiner: That the Clerk to the Committee write to Mr Paterson to advise that the redacted answers to questions had been published, and to request that Mr Paterson advise when the Committee will receive the Department of Trade & Investments further submission to the inquiry foreshadowed in the hearing of 24 June 2013.

5.2.3 Answers from the Department of Premier and Cabinet

Resolved, on motion of Mr Mason-Cox: That answers to questions taken on notice provided by the Department of Premier and Cabinet be published.

5.3 Submission – Department of Premier and Cabinet

The Committee considered submission no. 8A, being a supplementary submission of Mr Chris Eccles, Director General, and Mr Paul Miller, General Counsel, Department of Premier and Cabinet.

Resolved, on motion of Mr Mason-Cox: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of submission no. 8A.

Resolved, on motion of Miss Gardiner: That the Clerk of the Parliaments be invited to make a submission in response to the proposals suggested in submission 8A of the Department of Premier and Cabinet.

5.4 Legal counsel for Mr Ian Macdonald

The Committee considered a request from Mr Macdonald that he be accompanied, but not represented, by legal counsel at the table during his evidence before the Committee this day.

Resolved, on motion of Mr Buckingham: That Mr Macdonald be permitted to be accompanied, but not represented, by legal counsel at the table during his evidence before the Committee.

5.5 Time allocated for questions

Resolved, on motion of Miss Gardiner: That the Committee adopt a flexible approach to questioning, with members able to pursue a line of questioning until concluded without the imposition of time limits, but with regard to the right of all members to ask questions.

5.6 Answers to questions on notice

Resolved, on motion of Mr Mason-Cox: That Mr Ian Macdonald be requested to return answers to questions on notice from members within 14 days of the date on which questions are forwarded to the witness by the Committee clerk.

5.7 Public hearing

Witness, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr Ian Macdonald, Former Minister for Mineral Resources and Minister for Primary Industries

The witness made an opening statement.

The evidence concluded and the witness withdrew.

The public hearing concluded at 12.57 pm.

The public and the media withdrew.

5.8 Deliberative

The Chair briefed the Committee in relation to comments made during the hearing held this day and an administrative error which occurred on 22 July regarding the posting on line of in camera evidence from 11 June 2013.

The Committee deliberated.

Resolved, on motion of Mr Ajaka: That the Committee notes and authorises the asking of questions by Mr Buckingham and Mr Mason-Cox this day drawing upon in camera evidence given on 11 June 2013.

6. Adjournment

The Committee adjourned at 1.25 pm, *sine die*.

Steven Reynolds

Clerk to the Committee

Minutes No. 28

Wednesday 24 July 2013

Members' Lounge, Parliament House, Sydney, at 2.45 pm

1. Members present

Mr Khan, *Chair*
Mr Ajaka
Mr Donnelly

In attendance: Steven Reynolds, Jenelle Moore, Samuel Griffith.

2. Apologies

Ms Fazio, *Deputy Chair*
Miss Gardiner
Revd Mr Nile

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Ajaka: That minutes no. 27 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent:

Sent

- 23 July 2013 – Email from Clerk to the Committee ***.
- 24 July 2013 – Email from Clerk to the Committee ***.
- 24 July 2013 – Letter from the Chair to Mr Mark Paterson, Director General, NSW Trade & Investment, advising of the publication of redacted answers to questions on notice.

5. Inquiry into the 2009 Mt Penny return to order

5.1 ***

5.2 Mr Macdonald's ICAC submissions

The Chair noted the offer made by Mr Macdonald at the hearing on 23 July 2013 to provide to the committee a submission on a confidential basis that detailed his response to what was canvassed in the ICAC inquiry, but only if the Committee requested him to do so.

The Committee deliberated.

Resolved, on motion of Mr Ajaka: That the Committee write to Mr Macdonald advising him that the Committee does not want to request this document from him as evidence.

Resolved, on motion of Mr Ajaka: That the Committee Chair distribute a media release on behalf of the Committee indicating that the Committee would not be requesting that Mr Macdonald provide the document to the Committee and that a further hearing date would be decided once the Committee receives a supplementary submission from the Department of Trade and Investment.

6. Adjournment

The Committee adjourned at 3.25 pm, *sine die*.

Steven Reynolds

Clerk to the Committee

Minutes No. 29

Thursday 8 August 2013

Room 1136, Parliament House, Sydney, at 2.36 pm

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Buckingham

Mr Clarke

Mr Donnelly

Miss Gardiner

Mr Mason-Cox

Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Samuel Griffith.

2. New member of the Committee

The Chair noted the appointment of Mr Clarke to the Committee, in place of Mr Ajaka.

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Donnelly: That minutes no. 28 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent and received:

Received

- 26 July 2013 – Email from the Committee Clerk to Committee members advising the number of times a transcript of evidence incorrectly posted on the Parliament's website had been downloaded between 22 July and 23 July 2013.

Sent

- 24 July 2013 – Letter from the Committee Clerk to Mr Ian Macdonald care of Mr Nicholas Dan, stating the Committee would not be requesting submissions Mr Macdonald had made to the ICAC.

5. Inquiry into the 2009 Mt Penny return to order

5.1 ***

5.2 NSW Trade and Investment supplementary submission

The Chair circulated a supplementary submission received from NSW Trade and Investment, including a report by Maddocks on a review of the process by which the Department compiled its return to the Mt Penny order for papers in 2009.

The Committee deliberated.

Resolved, on the motion of Miss Gardiner: That the supplementary submission remain confidential until the Committee has had an opportunity to examine NSW Trade and Investment employees at a further hearing.

Resolved, on the motion of Mr Mason-Cox: That the supplementary submission, including the appendices, be provided on a confidential basis to all members of the Committee.

5.3 Further hearing

The Chair briefed the Committee in relation to a further hearing.

The Committee deliberated.

Resolved, on the motion of Mr Donnelly:

1. That the next hearing be held on Monday 26 August 2013.
2. That the following witnesses be invited to attend and give evidence in public:
 - Mr Mark Paterson AO, Director General, NSW Trade and Investment,
 - Dr Richard Sheldrake, former Director General, Industry and Investment NSW,
 - Mr Mark Duffy, former Deputy Director General, Minerals and Energy, Industry and Investment NSW,
 - Mr John Lee, former Director General, Department of Premier and Cabinet, and
 - Mr David Blunt, Clerk of the Parliaments.
3. That the following witnesses be invited to attend and give evidence in-camera:
 - Mr Brad Mullard, Executive Director – Mineral Resources Development, NSW Trade and Investment, and
 - Mr Ron Taylor, Manager Governance & Information Requests, NSW Trade and Investment.
4. That Committee members advise the secretariat of further witnesses to invite to the hearing by close of business Thursday 15 August 2013.
5. That the Committee Secretariat confirm with each witness before the hearing whether they have seen the final report by Maddocks and, if they have not, provide them with a copy of the report on a confidential basis, including the appendices containing identifying information.
6. That a motion for the publication of the supplementary submission provided by NSW Trade and Investment be listed as an agenda item for consideration during the Committee's pre-hearing deliberative at 9.45 am on 26 August 2013.

Resolved, on the motion of Miss Gardiner: That the Chair write to Mr Mark Paterson AO, Director General, NSW Trade & Investment, to request that he provide the following documents to the Committee by 21 August 2013:

- (a) the terms of reference provided to Maddocks Lawyers for the purposes of conducting the review of the process by which the Department compiled its return to the Mt Penny order for papers in 2009,
- (b) all drafts and versions of the report,
- (c) any correspondence between Maddocks Lawyers and NSW Trade and Investment regarding the review,
- (d) all witness statements taken during the course of the review,
- (e) any file notes produced during the course of the review,
- (f) any other supporting documentation produced during the course of the review or the process of retaining Maddocks Lawyers for the purposes of conducting the review.

6. Adjournment

The Committee adjourned until Monday 26 August 2013 at 9.45 am.

Steven Reynolds

Clerk to the Committee

Minutes No. 30

Monday 26 August 2013

Macquarie room, Parliament House, Sydney, at 9:45 am

1. Members present

Mr Khan, *Chair*
Mr Buckingham
Mr Clarke
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Samuel Griffith, Kerry Blandon.

2. Apologies

Ms Fazio, *Deputy Chair*

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Mason-Cox: That minutes no. 29 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent and received:

Received

- 15 August 2013 – ***
- 15 August 2013 – Letter from Mr Mark Paterson AO, Director General, NSW Trade & Investment, in relation to the Maddocks Lawyers Report and the hearing of the Committee on Monday 26 August 2013.
- 22 August 2013 – Letter from Mr Mark Paterson AO, Director General, NSW Trade & Investment, forwarding documents previously requested by the Committee relating to the compilation of the Maddocks Lawyers Report.

- 23 August 2013 – Letter from Mr David Blunt, Clerk of the Parliaments, attaching a submission to the Committee in response to proposals made by the Department of Premier and Cabinet in their submission.

Sent

- 9 August 2013 – ***
- 12 August 2013 – Letter to Mr Mark Paterson AO, Director General, NSW Trade & Investment, in relation to the Maddocks Lawyers Report and the hearing of the Committee on Monday 26 August 2013.
- 20 August 2013 – Letter to Mr Mark Paterson AO, Director General, NSW Trade & Investment, in relation to the Maddocks Lawyers Report and the hearing of the Committee on Monday 26 August 2013.

5. Inquiry into the 2009 Mt Penny return to order

5.1 Supplementary submission of NSW Trade and Investment

The Committee considered a supplementary submission received from NSW Trade and Investment dated 30 July 2013, including a report compiled by Maddocks Lawyers.

Resolved, on the motion of Revd Mr Nile: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission No. 6A.

5.2 Submission of Mr David Blunt, Clerk of the Parliaments

The Committee considered a submission received from the Clerk of the Parliaments.

Resolved, on the motion of Mr Buckingham: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and standing order 223(1), the Committee authorise the publication of Submission No. 11.

5.3 Evidence of Mr Mark Duffy, Former Deputy Director General, NSW Industry and Investment

The Committee considered a request from Mr Duffy that his evidence be taken *in camera*.

Resolved, on the motion of Mr Donnelly: That the evidence of Mr Duffy be taken *in camera*.

5.4 Time allocated for questions

Resolved, on the motion of Miss Gardiner: That the Committee adopt a flexible approach to questioning, with members able to pursue a line of questioning until concluded without the imposition of time limits, but with regard to the right of all members to ask questions.

5.5 Answers to questions on notice

Resolved, on the motion of Mr Buckingham: That the following witnesses be requested to return answers to questions on notice from members within 21 days of the date on which questions are forwarded to the witnesses by the Committee clerk:

- Mr David Blunt, Clerk of the Parliaments.
- Mr Mark Paterson AO, Director General, NSW Trade and Investment,
- Mr Mark Duffy, former Deputy Director General, Minerals and Energy, Industry and Investment NSW,
- Mr Brad Mullard, Executive Director – Mineral Resources Development, NSW Trade and Investment,
- Ms Patricia Madden, Operations Manager, Office of Coal Seam Gas, NSW Trade and Investment.

- Mr Ron Taylor, Manager Governance & Information Requests, NSW Trade and Investment.

5.6 Public hearing

Witnesses, the public and the media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Mr David Blunt, Clerk of the Parliaments.

The witness made an opening statement.

The evidence concluded and the witness withdrew.

The following witness was examined, having been sworn previously:

- Mr Mark Patterson AO, Director-General, NSW Trade and Investment.

The witness made an opening statement.

The evidence concluded and the witness withdrew.

The public and the media withdrew.

5.7 In camera hearing

The following witness was sworn and examined:

- Mr Mark Duffy, Former Deputy Director-General, Industry and Investment NSW.

The witness made an opening statement.

Resolved, on the motion of Mr Mason-Cox: That the NSW Trade and Investment policy entitled “Standing order 52 – Responses” (Policy No. YI-G-147) be referred to the Clerk of the Parliaments for comment.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Brad Mullard, Executive Director – Mineral Resources Development, NSW Trade and Investment.

Mr Mullard tendered an email dated 23 November 2009 from Mr Ron Taylor to Phil Anquetil and copied to William Hughes, Jeannine Biviano and himself.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Patricia Madden, Operations Manager, Office of Coal Seam Gas, NSW Trade and Investment.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Ron Taylor, Manager Governance and Information Requests, NSW Trade and Investment.

The evidence concluded and the witness withdrew.

The hearing concluded at 4.30 pm.

5.8 Deliberative

The Committee deliberated.

Resolved, on the motion of Mr Donnelly: That the Committee accept and publish, according to section 4 of the *Parliamentary Papers Act 1975* and standing order 223(1), the following document tendered during the in camera hearing:

- Email dated 23 November 2009 from Ron Taylor to Phil Anquetil and copied to William Hughes, Brad Mullard and Jeannine Biviano.

Resolved, on the motion of Mr Mason-Cox: That the following witnesses be invited to attend and give evidence in public:

- Dr Richard Sheldrake, former Director General, Industry and Investment NSW,
- Mr Phil Anquetil, former Executive Officer to the Director-General, Industry and Investment NSW
- Mr William Hughes., former A/Director Development Coordination, Department of Primary Industries.

Resolved, on the motion of Miss Gardiner: That the words “***.” be redacted from the transcript of evidence given by Mr Mark Patterson this day.

6. Adjournment

The Committee adjourned at 4.40 pm *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 31

Thursday 29 August 2013

Members’ Lounge, Parliament House, Sydney, at 2.17 pm

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Clarke
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Samuel Griffith.

2. Apologies

Mr Buckingham

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Revd Mr Nile: That minutes no. 30 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent and received:

Sent

- 28 August 2013 – Letter to Mr David Blunt, Clerk of the Parliaments, NSW Legislative Council in relation to the NSW Trade & Investment's SO 52 Policy document.

Received

- 28 August 2013 – Letter from Mr Mark Paterson AO, Director General, NSW Trade & Investment, in relation to the Maddocks Lawyers Report.

5. Inquiry into the 2009 Mt Penny return to order

5.1 Transcript of evidence of Mr Mark Duffy, Ms Patricia Madden and Mr Brad Mullard

Resolved, on motion of Mr Mason-Cox: That according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(2), the Committee authorise the full publication of the in camera transcript of Ms Patricia Madden and Mr Brad Mullard taken on 26 August 2013, and the partial publication of the *in camera* transcript of Mr Mark Duffy taken on 26 August 2013.

5.2 Next hearing of the Committee

Resolved, on the motion of Mr Donnelly: That the Committee hold a further hearing on Monday, 16 September 2013 at 2.00 pm.

6. Adjournment

The Committee adjourned at 2.28 pm until Monday, 16 September 2013 at 2.30 pm.

Stephen Frappell
Clerk to the Committee

Minutes No. 32

Monday 16 September 2013

Members' Lounge, Parliament House, Sydney, at 2.20 pm

1. Members present

Mr Khan, *Chair*
Mr Buckingham
Mr Clarke
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Kerry Blandon.

2. Apologies

Ms Fazio, *Deputy Chair*

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Revd Mr Nile: That minutes no. 31 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence received:

Received

- 10 September 2013 - Letter from Mr Mark Paterson, Director General, NSW Trade & Investment enclosing corrections to transcript and answers to questions on notice.
- 13 September 2013 - Letter from Mr Mark Paterson, Director General, NSW Trade & Investment enclosing a further answer to a question on notice.
- 16 September 2013 – A submission and answers to questions on notice from Mr Ron Taylor.

5. Inquiry into the 2009 Mt Penny return to order

5.1 Submission

The Committee noted receipt of the following submission:

- No. 12: Mr Ron Taylor

The Committee deliberated.

Resolved, on the motion of Mr Clarke: That the submission of Mr Taylor be kept confidential at the current time.

5.2 Answers to questions on notice from Mr Ron Taylor

Resolved, on the motion of Mr Mason-Cox: That the answers to questions taken on notice provided by Mr Taylor be kept confidential at the current time.

5.3 Maddocks Report – Transcripts of interviews

At the Committee's meeting on 29 August 2013, the Committee noted correspondence from Mr Mark Paterson AO, Director General, NSW Trade & Investment, dated 28 August 2013 in relation to the Maddocks Lawyers Report. The correspondence forwarded material used by Maddocks Lawyers in the preparation of the Maddocks Report.

The Secretariat distributed to members of the Committee interview discussion notes prepared by Maddocks Lawyers as part of their review and made available in the correspondence of 28 August 2013.

5.4 Time allocated for questions

Resolved, on the motion of Mr Buckingham: That the Committee adopt a flexible approach to questioning, with members able to pursue a line of questioning until concluded without the imposition of time limits, but with regard to the right of all members to ask questions.

5.5 Answers to questions on notice

Resolved, on the motion of Miss Gardiner: That the following witnesses be requested to return answers to questions on notice from members within 21 days of the date on which questions are forwarded to the witnesses by the Committee clerk:

- Dr Richard Sheldrake, Deputy Director of NSW Trade and Investment
- Mr William Hughes, Acting Director, Mineral Operations, NSW Trade and Investment
- Mr Phil Anquetil, Executive Director, Business Services, NSW Trade and Investment.

5.6 In camera hearing

The Chair made an opening statement.

The following witness was sworn and examined:

- Dr Richard Sheldrake, Deputy Director of NSW Trade and Investment.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr William Hughes, Acting Director, Mineral Operations, NSW Trade and Investment.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Phil Anquetil, Executive Director, Business Services, NSW Trade and Investment.

The evidence concluded and the witness withdrew.

The hearing concluded at 4.41 pm.

6. Deliberative

The Committee deliberated.

Resolved, on the motion of Miss Gardiner That the Chair prepare a draft report.

7. Adjournment

The Committee adjourned at 4.47 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 33

Friday 25 October 2013

Rm 1153, Parliament House, Sydney, at 11.05 am

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Buckingham
Mr Clarke
Mr Donnelly
Miss Gardiner
Mr Mason-Cox

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Velia Mignacca, John Young, Kerry Blandon.

2. Apologies

Revd Mr Nile

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Mason-Cox: That minutes no. 32 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent and received:

Sent

- 14 October 2013 – Email from the Deputy Clerk to Mr Taylor in relation to the publication of his *in camera* evidence.
- 14 October 2013 – Further email from the Deputy Clerk to Mr Taylor in relation to the publication of his *in camera* evidence.

Received

- 13 September 2013 – Annual report of the Parliamentary Ethics Adviser for 2012-2013.
- 4 October 2013 – Response to questions on notice from the Clerk of the Parliaments
- 14 October 2013 – Email from Mr Taylor to the Deputy Clerk in relation to the publication of his *in camera* evidence
- 16 October 2013 – Further correspondence from Mr Mark Paterson, Director General, NSW Trade & Investment, in relation to further documents not provided in the 2009 Mr Penny return to order or the ‘document comparison matrix’.
- 17 October 2013 – Further email from Mr Taylor in relation to the proposal to publish his *in camera* evidence.
- 22 October 2013 – Email from the Clerk to the Committee in relation to procedural fairness and the findings in the draft report.
- 25 October 2013 – Email from Revd Nile to the Chair apologising for his absence from the Committee’s deliberative but accepting the Chair’s draft report, including its findings and recommendations.

5. Inquiry into the 2009 Mt Penny return to order

5.1 *In camera* transcript

Resolved, on the motion of Mr Buckingham: That the Committee publish the *in camera* evidence of Dr Sheldrake, Mr Hughes and Mr Anquetil of 16 September 2013.

Resolved, on the motion of Mr Buckingham: That the Committee publish the *in camera* evidence of Mr Taylor of 26 August 2013 on the tabling of the Committee’s report on the Mt Penny return to order.

5.2 Response to questions on notice from Mr Taylor

Resolved, on the motion of Ms Fazio: That the Committee publish the response to questions on notice received from Mr Taylor on the tabling of the Committee’s report on the Mt Penny return to order.

5.3 Submission of Mr Taylor

Resolved, on the motion of Miss Gardiner: That the Committee publish the submission of Mr Taylor on the tabling of the Committee’s report on the Mt Penny return to order.

5.4 Publication of additional notes from Maddocks

On 28 August 2013, the Director General of NSW Trade and Investment provided the Committee with copies of documents produced by Maddocks Lawyers as a result of undertaking its review. The material was not published by the Committee at the time.

Resolved, on the motion of Mr Donnelly: That to the extent required for the publication of the Committee’s Report, the Committee publish certain material produced by Maddocks Lawyers as part of the Maddocks Review and provided to the Committee in correspondence from the Director General of NSW Trade and Investment dated 28 August 2013, but that the remainder of the material be kept confidential.

5.5 Report of the Committee

The Chair tabled his draft report, which, having been previously circulated, was taken as being read.

Chapter One read.

Resolved, on the motion of Ms Fazio: That Chapter One, as read, be adopted.

Chapter Two read.

Resolved, on the motion of Mr Donnelly: That paragraph 2.44 and Finding 1 be amended to omit the words 'In the event' and insert 'As events transpired'.

Resolved, on the motion of Mr Mason-Cox: That Finding 1 be amended to omit the words 'the information revealed would have created significant controversy. It is also possible that the matter would' and insert 'the information revealed would have materially contributed to establishing the truth surrounding the issue of the Mt Penny exploration licence. As a result, the matter may'.

Resolved, on the motion of Mr Clarke: That Chapter Two, as amended, be adopted.

Chapter Three read.

Resolved, on the motion of Ms Fazio: That the third paragraph of the introduction to Chapter Three be amended to omit the words 'there was speculation that he, or his office, may have also sought to suppress or destroy documents' and insert 'it was necessary to examine if his response, and that of his office, had been appropriate'.

Resolved, on the motion of Mr Mason-Cox: That Finding 2 be amended to insert 'The committee did not rely on the evidence of Mr Macdonald' after the word 'unreliable' and to delete the words 'other more' before the word 'reliable'.

Resolved, on the motion of Mr Mason-Cox: That Finding 4 be amended to omit the words 'there is no evidence' and insert 'no evidence was placed before it'.

Resolved, on the motion of Mr Buckingham: That Finding 3 be deleted.

Mr Buckingham moved: That paragraph 3.100 and Finding 7 be amended to omit the words 'and his Acting Chief of Staff'.

Debate ensued.

Question put.

The Committee divided:

Ayes: Mr Buckingham.

Noes: Mr Khan, Ms Fazio, Mr Clarke, Mr Donnelly, Miss Gardiner, Mr Mason-Cox.

Question resolved in the negative.

Mr Buckingham moved: That Finding 6 be amended to omit the words 'They responded appropriately and fully in the circumstances'.

Debate ensued.

Question put.

The Committee divided:

Ayes: Mr Buckingham.

Noes: Mr Khan, Ms Fazio, Mr Clarke, Mr Donnelly, Miss Gardiner, Mr Mason-Cox.

Question resolved in the negative.

Resolved, on the motion of Mr Donnelly: That Chapter Three, as amended, be adopted.

Chapter Four read.

Resolved, on the motion of Mr Mason-Cox: That Finding 9 be amended to insert 'by the Director, Executive Support' after the word 'failure'.

Resolved, on the motion of Mr Mason-Cox: That paragraph 4.151 and Finding 14 be amended to omit the word ‘consciously’ and insert ‘deliberately’.

Resolved, on the motion of Mr Mason-Cox: That paragraph 4.151 and Finding 14 be amended to omit the words ‘there is no evidence that any’ and insert ‘on the evidence available to it, no’.

Resolved, on the motion of Ms Fazio: That Chapter Two be re-committed.

Resolved, on the motion of Mr Mason-Cox: That paragraph 2.42 be amended to insert the following sentence at the end of the paragraph: ‘The Committee finds it concerning that after the Mt Penny order for papers, the ICAC inquiries, the Clayton Utz review, the previous inquiry of this Committee and the Maddocks Review in relation to this matter, a further 190 additional documents were able to be produced to the Committee late in the inquiry.’

Resolved, on the motion of Ms Fazio: That Chapter Two, as further amended, be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter Four, as amended, be adopted.

Mr Mason-Cox left the meeting.

Chapter Five read.

Resolved, on the motion of Ms Fazio: That paragraph 5.127 be amended to delete the words ‘at this stage,’.

Resolved, on the motion of Ms Fazio: That paragraph 5.132 be amended to delete all words after the second sentence, and that paragraphs 5.133, 5.134 and 5.135 and Recommendation 2 be deleted.

Resolved, on the motion of Ms Fazio: That paragraph 5.144 and Recommendation 3 be amended to delete ‘28’ wherever occurring and insert ‘21’.

Resolved, on the motion of Ms Fazio: That Recommendation 4 be amended to insert the word ‘only’ before the word ‘captures’ and to delete the words ‘, but not routine correspondence and other documentation regarding the collation of a return’.

Resolved, on the motion of Ms Fazio: That paragraph 5.152 be amended to delete the word ‘Happily’.

Resolved, on the motion of Mr Clarke: That Chapter Five, as amended, be adopted.

Executive summary read.

Resolved, on the motion of Ms Fazio: That the Executive Summary be amended to reflect the changes to the Chapters of the report.

Ms Fazio moved: That the minutes of proceedings appended to the report of the Committee be amended to remove the names of individuals and other material that has been determined to be kept confidential by the Committee.

Debate ensued.

Question put.

The Committee divided:

Ayes: Mr Khan, Ms Fazio, Mr Clarke, Mr Donnelly, Miss Gardiner, Mr Mason-Cox.

Noes: Mr Buckingham.

Question resolved in the affirmative.

Resolved, on the motion of Ms Fazio:

- 1) That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House;

- 2) That the transcripts of evidence, submissions, answers to questions on notice, minutes of proceedings, correspondence and briefing notes relating to the inquiry be tabled in the House with the report; and
- 3) That upon tabling, all evidence, submissions, answers to questions on notice, minutes of proceedings, correspondence and briefing notes relating to the inquiry not already made public be made public by the Committee, except for those documents kept confidential by resolution of the Committee.

Mr Buckingham left the meeting.

The Committee considered the advice of the Clerk dated 22 October 2013 in relation to the findings in the draft report.

The Committee deliberated.

Resolved, on the motion of Mr Donnelly: That the secretariat communicate with Mr Paterson prior to the tabling of the report to alert him to the specific findings which refer to officers of NSW Trade and Investment.

Resolved, on the motion of Ms Fazio: That members have until 5.00 pm on Monday, 28 October 2013 to provide dissenting statements if desired.

Resolved, on the motion of Ms Fazio: That the Committee thank the secretariat for its work on the inquiry.

6. Adjournment

The Committee adjourned at 1.15 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Minutes No. 34

Tuesday 29 October 2013

Members' Lounge, Parliament House, Sydney, at 6.33 pm

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Buckingham
Mr Clarke
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile

In attendance: Steven Reynolds, Stephen Frappell, John Young, Jenelle Moore.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Buckingham: That minutes no. 33 be confirmed.

3. Inquiry into the 2009 Mt Penny return to order

The Committee noted the announcement by the ICAC of three new investigations, including Operation Cabot concerning allegations that officials with the former Department of Water and Energy, including Mr Duffy, were lobbied by Mr Obeid in relation to water licences at Cherrydale.

The Committee deliberated.

Ms Fazio moved, by leave: That the resolution of the Committee of Friday, 25 October 2013 that the draft report, as amended, be the report of the Committee and that the Committee present the report to the House be rescinded.

Question put and passed.

The Committee considered the Committee's report.

Resolved, on the motion of Ms Fazio: That Chapter Four be re-committed.

Revd Mr Nile moved: That Chapter Four be amended as follows:

- 1) The insertion of the following heading and paragraphs after paragraph 4.129:

Further investigations by the ICAC

The Committee notes that on 23 October 2013, prior to the tabling of this report, the ICAC announced the conduct of three further investigations (Operations Cyrus, Cabot and Meeka) into allegations concerning Mr Edward Obeid.

Of note, Operation Cabot concerned allegations that, between 2007 and 2008, Mr Obeid misused his position as a member of Parliament to influence public officials to exercise their official functions with respect to the review and grant of water licences at Cherrydale Park at Mt Penny, without disclosing that he, his family or a related entity had an interest in the licences. It is also alleged that during the same period, certain public officials improperly exercised their official functions with respect to the review and grant of the water licences at Cherrydale Park.

The Committee notes that Mr Duffy, in his capacity as the Director General of the Department of Water and Energy prior to 2009, was specifically named in connection with Operation Cabot during initial proceedings before the ICAC on 18 October 2013.

During his appearance before the Committee, the Committee Chair specifically questioned Mr Duffy in relation to meetings he held with Mr Obeid in 2007 and 2008. In his response, Mr Duffy indicated that he believed the meetings were in relation to electricity privatisation. The Committee did not pursue this line of questioning further.

- 2) The insertion of the following paragraph after Finding 9:

The Committee notes that the performance of Mr Duffy in the exercise of his official functions in his previous role with the former Department of Water and Energy is currently being investigated by the ICAC as part of Operation Cabot.

Question put.

Debate ensued.

The Committee divided:

Ayes: Mr Khan, Ms Fazio, Mr Clarke, Mr Donnelly, Miss Gardiner, Mr Mason-Cox, Revd Mr Nile.

Noes: Mr Buckingham.

Question resolved in the affirmative.

Miss Gardiner moved: That Chapter Four, as further amended, be adopted.

Question put.

The Committee divided:

Ayes: Mr Khan, Ms Fazio, Mr Clarke, Mr Donnelly, Miss Gardiner, Mr Mason-Cox, Revd Mr Nile.

Noes: Mr Buckingham.

Question resolved in the affirmative.

Resolved, on the motion of Mr Mason-Cox: That members have until 11.00 am on Wednesday, October 2013 to provide a revised dissenting statement if desired.

Resolved, on the motion of Miss Gardiner:

- 1) That the draft report, as further amended, be the report of the Committee and that the Committee present the report to the House;
- 2) That the transcripts of evidence, submissions, answers to questions on notice, minutes of proceedings, correspondence and briefing notes relating to the inquiry be tabled in the House with the report; and
- 3) That upon tabling, all evidence, submissions, answers to questions on notice, minutes of proceedings, correspondence and briefing notes relating to the inquiry not already made public be made public by the Committee, except for those documents kept confidential by resolution of the Committee.

Resolved, on the motion of Revd Mr Nile: That the Committee Chair publish a media release on Wednesday, 30 October 2013, indicating that the report of the Committee will be tabled and made public on Thursday, 31 October 2013.

4. Adjournment

The Committee adjourned at 7.08 pm, *sine die*.

Stephen Frappell
Clerk to the Committee

Appendix 11 Dissenting statement of the Hon Jeremy Buckingham

*They are the faction. O conspiracy,
Shamest thou to show thy dangerous brow by night
When evils are most free? O, then by day
Where wilt thou find a cavern dark enough
To mask thy monstrous visage? Seek none, conspiracy.
Hide it in smiles and affability.*

~ Shakespeare - Julius Caesar

The failure to provide documents in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process materially contributed to the progression of one of the largest and most damaging corruption scandals in the history of NSW, a scandal that has shaken confidence in the administration of mining in this State.

It is an implausible coincidence the documents not supplied to the Parliament are some of the key documents later relied upon by the ICAC as evidence of corrupt conduct by former Minister Ian Macdonald. Had these missing papers been provided to the Parliament in 2009, it is likely this corruption scandal would have been revealed much earlier.

While I support the majority of findings, I do not subscribe to the ‘cock-up theory’ or the assessment that the failure to comply with the return to order was ‘attributable almost exclusively to administrative failings within the former Department of Industry and Investment’.

Incomplete inquiry

I am concerned that the Privileges Committee inquiry has not exhaustively investigated this matter.

In particular, I am concerned by the following:

- That a further 190 documents, some of which were directly relevant and materially significant, were provided to the Privileges Committee by the Department of Trade & Investment after the Committee had concluded its hearings. These were all documents that should have been, but were not produced by the Department in the call for papers, the ICAC investigation, the Clayton Utz report and the Maddocks review.
- The implausible nature of many of the witnesses’ testimony.
- The Committee’s decision to make some key witness submissions and testimony, and the Committee’s minutes partially confidential.
- The failure of the Committee to call or recall key witnesses. In particular, the failure to examine Mr John Lee and Mr Graeme Wedderburn limited the Committee’s capacity to fully investigate the role of the executive in these matters, including former Premier Nathan Rees.

- The arbitrarily short time-frame of the inquiry.

Disingenuous evidence

I dissent from Findings 6 & 7 of the report in that I do not believe that the evidence of Minister Primrose's Acting Chief of Staff was credible and reliable and I retain serious doubts to whether Minister Primrose's Acting Chief of Staff responded appropriately in the circumstances.

I believe much of the evidence and testimony provided to the inquiry to be disingenuous. In my opinion the evidence from former Minister Macdonald, Mr Jamie Gibson, Acting Chief of Staff to Minister Peter Primrose, Dr Richard Sheldrake, Mr Phil Anquetil, Mr Ron Taylor, Mr Mark Duffy, and Mr Brad Mullard and others is best characterised as feigned disinterest.

This disinterest is not believable given the article by Tracy Ong and Angus Grigg entitled 'Labor powerbroker hits a rich seam' that was published in the Australian Financial Review (AFR) on the 28 October 2009, and that the Hon Duncan Gay gave notice of a call for papers on the 12 November 2009. Among the 190 extra emails released after this inquiry had finished its hearings, are emails that reveal that the government and departmental officials were actually highly agitated by the AFR article and continuing inquiries from the media about this topic. This concern may have been why the Acting Chief of Staff in Mr Primrose's office asked for legal advice from the Department of Premier and Cabinet on how to respond to the call for papers. This concern may also have been why the search for documents was delayed six days in the office of Director General Richard Sheldrake. I contend that it was not disinterest and indifference to the call for papers, but political sensitivity that precipitated these events.

Motive

The failure to supply key documents to the Parliament is either an implausible cascade of coincidences; an attempt to avoid controversy; or more seriously, a conspiracy to cover up corruption.

The failure of the bureaucracy to provide papers involves both unexplained delay and a remarkably narrow search of departmental documents, including ignoring some emails or failing to even contact and retrieve the documents of key officers.

Of particular concern are actions by Mr Mark Duffy which appear to have limited the scope of the call for papers when he failed to refer the order for papers to anyone other than Ms Karen Smith. Of note, he failed to refer the order to Mr Mullard. 63 of the missing documents, including key documents, involve correspondence with, or referred to Mr Mullard.

If the failure to provide the missing papers cannot be blamed on indifference or administrative error, then what was the motive to withhold papers from the Parliament? The motive of Mr Macdonald and potentially staff acting on his behalf may have been to cover up his and the Obeids' corrupt conduct. The motive of other branches of the executive may well have been to prevent another scandal hurting an already scandal plagued government – particularly given at this time Mr Macdonald had been sacked as a minister. The motive of the bureaucracy may have been to act on behalf of the executive, to cover up corruption, or to simply avoid igniting further controversy.

Unfortunately I am not satisfied that this inquiry has been exhaustive or systematic enough to be able to conclude with confidence that corruption or misconduct was not a factor in the failure to provide

documents to the Parliament by those at the highest levels of executive government and the bureaucracy.

The Hon Jeremy Buckingham MLC