



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

Consideration of disputed claims of privilege as referred by the House



Report 84

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Privileges Committee

Consideration of disputed claims of privilege as referred by the House

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Table of contents

	Terms of reference	iv
	Committee details	v
	Chair’s foreword	vi
Chapter 1	Disputed claims of privilege and reports of the independent legal arbiter	1
	<i>Forestry operations in public forests</i>	2
	<i>Incident on Lockyer Street, Goulburn</i>	2
	<i>Strike Force Wyndarra</i>	3
	<i>Courses offered by TAFE NSW</i>	4
	<i>Monaro Farming Systems</i>	4
Appendix 1	Minutes	7
Appendix 2	Report of the Independent Legal Arbiter – Forestry Operations in Public Forests	16
Appendix 3	Report of the Independent Legal Arbiter – Incident on Lockyer Street, Goulburn	18
Appendix 4	Report of the Independent Legal Arbiter – Strike Force Wyndarra	20
Appendix 5	Report of the Independent Legal Arbiter – Courses offered by TAFE NSW	22
Appendix 6	Report of the Independent Legal Arbiter – Monaro Farming Systems	24

Terms of reference

- (1) That this House notes that the opportunity for the House to sit over the coming months may be limited due to ongoing public health concerns.
- (2) That, until the House orders otherwise, if the House is not sitting due to ongoing public health concerns and is not expected to meet within one week:
 - (a) on receiving a report of the Independent Legal Arbiter appointed to evaluate a disputed claim of privilege on documents returned to the House under standing order 52 the Clerk is to refer the report to the Privileges Committee for consideration,
 - (b) the Privileges Committee is authorised to undertake the role usually performed by the House in dealing with disputed claims of privileges over returns to order under standing order 52, including taking the decision to make public the report of the Independent Legal Arbiter and any documents over which privilege has been claimed but not upheld by the Independent Legal Arbiter,
 - (c) any document authorised to be made public by the committee under this resolution is deemed to have been presented to the House and published by authority of the House, and
 - (d) on the next sitting day, the committee is to report to the House what action, if any, it has taken under this resolution.

The terms of reference were referred to the committee by the Legislative Council on 24 March 2020.¹

¹ *Minutes*, NSW Legislative Council, 24 March 2020, p 861.

Committee details

Committee members

The Hon Peter Primrose MLC	Australian Labor Party	<i>Chair</i>
Revd the Hon Fred Nile MLC	Christian Democratic Party	<i>Deputy Chair</i>
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Cate Faehrmann MLC	The Greens	
The Hon Scott Farlow MLC	Liberal Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Natasha Maclaren-Jones MLC	Liberal Party	
The Hon Shayne Mallard MLC	Liberal Party	

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Chair's foreword

I am pleased to present this report of the Privileges Committee on activity taken by the committee during a time in which the House was unable to sit, owing to ongoing public health concerns about the spread of COVID-19 in New South Wales in mid-2021. These activities relate to the committee's consideration of disputes as to the validity of claims of privilege on papers returned to the House under standing order 52, a requirement conferred by the House in a resolution agreed to on 24 March 2020.

This report details the actions of the committee regarding five disputed claims of privilege. With respect to the fifth disputed claim, regarding a return to order relating to Monaro Farming Systems, the committee resolved to publish the report of the Independent Legal Arbiter on the dispute and according to the resolution of the House, the report was deemed to have been published by authority of the House and made available on the Legislative Council's website that day. As the Legislative Council was scheduled to sit within one week of the committee's last meeting, the committee resolved that the determination as to whether to publish the documents considered by the arbiter not to be privileged be made by the House.

I would like to thank the members of the committee for their careful consideration of the matters placed before us during this inquiry, and the secretariat for their professional assistance throughout.

Hon Peter Primrose MLC

Chair

Chapter 1 Disputed claims of privilege and reports of the independent legal arbiter

1.1 On 24 March 2020, the House adopted a resolution, owing to ongoing public health concerns, authorising the Privileges Committee to undertake the role usually performed by the House in dealing with disputed claims of privilege over documents returned to orders of the House under standing order 52:

- (1) That this House notes that the opportunity for the House to sit over the coming months may be limited due to ongoing public health concerns.
- (2) That, until the House orders otherwise, if the House is not sitting due to ongoing public health concerns and is not expected to meet within one week:
 - (a) on receiving a report of the Independent Legal Arbiter appointed to evaluate a disputed claim of privilege on documents returned to the House under standing order 52 the Clerk is to refer the report to the Privileges Committee for consideration,
 - (b) the Privileges Committee is authorised to undertake the role usually performed by the House in dealing with disputed claims of privileges over returns to order under standing order 52, including taking the decision to make public the report of the Independent Legal Arbiter and any documents over which privilege has been claimed but not upheld by the Independent Legal Arbiter,
 - (c) any document authorised to be made public by the committee under this resolution is deemed to have been presented to the House and published by authority of the House, and
 - (d) on the next sitting day, the committee is to report to the House what action, if any, it has taken under this resolution.²

1.2 As required by the resolution, this report documents the action taken in relation to disputed claims of privilege over documents relating to the following returns to order:

- forestry operations in public forests
- incident on Lockyer Street, Goulburn
- Strike Force Wyndarra
- courses offered by TAFE NSW
- Monaro Farming Systems.

² Minutes no. 39, 24 March 2020, p 861.

Forestry operations in public forests

- 1.3 At a meeting on 28 July 2021, the committee considered a report of the Independent Legal Arbiter, the Hon Keith Mason AC, QC, received by the Clerk on 14 July 2021. This report considered a claim of privilege over a document relating to forestry operations in public forests, which was disputed by Mr David Shoebridge MLC. The document was contained in a return to order received by the Clerk on 2 June 2021.
- 1.4 Mr Mason did not uphold the claim of privilege, noting that the Department of Regional New South Wales' 'appeal to responsible and effective government as a basis for privilege' did not outweigh the public interest in open and informed parliamentary debate.
- 1.5 The committee resolved to publish Mr Mason's report and, according to the resolution of the House, the report was deemed to have been published by authority of the House and made available on the Legislative Council's website that day (see Appendix 2). At this meeting the committee also noted that, as it had previously resolved to follow the established practice in the House where possible, it would need to meet a second time to consider publication of the document considered by the arbiter not to be privileged.
- 1.6 At a meeting on 4 August 2021, the committee considered the document over which privilege had been claimed and, noting the findings of Mr Mason's report, resolved to publish this document. As per the committees' resolution, the Clerk tabled these documents on the same day, at which point they were made public.

Incident on Lockyer Street, Goulburn

- 1.7 At the same meeting on 28 July 2021, the committee considered a report of the Independent Legal Arbiter, the Hon Keith Mason AC, QC, received by the Clerk on 14 July 2021. This report considered claims of privilege over documents relating to an incident on Lockyer Street, Goulburn, which were disputed by the Hon Rod Roberts MLC and Mr David Shoebridge MLC. The documents were contained in a return to order received by the Clerk on 8 June 2021.
- 1.8 In his evaluation, Mr Mason concluded that the public interest lay clearly in favour of unrestricted parliamentary access to most of the documents, subject to certain redactions being made, agreed to by both Mr Roberts and Mr Shoebridge. These redactions would remove information relating to unrelated cases and incidents in the police records, individual phone numbers and emails, details relating to informants, media inquiry emails and certain telephone records, as set out in the report.
- 1.9 The committee resolved to publish Mr Mason's report and according to the resolution of the House, the report was deemed to have been published by authority of the House and made available on the Legislative Council's website that day (see Appendix 3). At this meeting the committee also noted that, as it had previously resolved to follow the established practice in the House where possible, it would need to meet a second time to consider publication of documents considered by the arbiter not to be privileged.
- 1.10 The committee met again on 4 August 2021 to consider documents over which privilege had been claimed and, noting the findings of Mr Mason's report, resolved to publish them, subject to the agreed redactions being made. The committee also resolved that on receipt of the

redacted documents, the Clerk should invite Mr Roberts and Mr Shoebridge to inspect the documents and confirm their satisfaction with the redaction.

- 1.11** Following the committee's resolution, the Clerk wrote to the Department of Premier and Cabinet, requesting that documents with the requested redactions be provided. These documents were provided by NSW Police Force on 12 August 2021 and by NSW Ambulance on 18 August 2021.
- 1.12** As neither Mr Roberts nor Mr Shoebridge raised a further dispute regarding either set of redactions, the documents were tabled by the Clerk and made public on the 12 August and 18 August, respectively.

Strike Force Wyndarra

- 1.13** At a meeting on 12 August 2021, the committee considered a report of the Independent Legal Arbiter, the Hon Keith Mason AC, QC, received by the Clerk on 6 August 2021. This report considered claims of privilege over documents relating to Strike Force Wyndarra, which were disputed by Mr David Shoebridge MLC. The documents were contained in a return to order received by the Clerk on 9 April 2021.
- 1.14** Mr Mason determined that, notwithstanding claims of 'personal information' privilege made by NSW Police, unrestricted parliamentary access to most of the documents should be permitted, subject to certain redactions accepted by Mr Shoebridge as appropriate. These redactions excluded personal contact details, the name of the complainant, the names of police officers below Assistant Commissioner, any material relating to other cases and information relating to the complainant's actual or perceived mental health issues, or the police perception of the same, from publication.
- 1.15** The committee resolved to publish Mr Mason's report and according to the resolution of the House, the report was deemed to have been published by authority of the House and made available on the Legislative Council's website that day (see Appendix 4). At this meeting the committee also noted that, as it had previously resolved to follow the established practice in the House where possible, it would need to meet a second time to consider publication of documents considered by the arbiter not to be privileged.
- 1.16** The committee met again on 23 August 2021 to consider documents over which privilege had been claimed and, noting the findings of Mr Mason's report, resolved to publish them, subject to the agreed redactions being made. The committee also resolved that the secretariat or Office of the Clerk seek to contact the family of the deceased to notify them that the redacted documents would be published on receipt. The family was subsequently notified through an intermediary prior to the publication of the documents.
- 1.17** Following the committee's resolution, the Clerk of the Parliaments wrote to the Department of Premier and Cabinet, requesting that documents with the requested redactions be provided. These documents were provided by NSW Police Force on 30 August 2021 and tabled by the Clerk on receipt, at which point they were made public.

Courses offered by TAFE NSW

- 1.18** At a meeting on 12 August 2021, the committee considered a report of the Independent Legal Arbitrator, the Hon Keith Mason AC, QC, received by the Clerk on 6 August 2021. This report considered claims of privilege over documents relating to courses offered by TAFE NSW, which were disputed by Hon Mick Veitch MLC. The documents were contained in a return to order received by the Clerk on 21 July 2021.
- 1.19** Mr Mason noted concerns raised by TAFE NSW that unrestricted access to the information in the documents might place TAFE NSW at a disadvantage as a public service-provider in a competitive market. In his evaluation, this did not provide an adequate basis for an assertion of privilege over documents and that instead, effective oversight of executive action required unlimited publication. However, Mr Mason did state that the House might 'devise some method short of unlimited publication' as a compromise, taking into consideration the currency and commercial value of the information it sought to consider.
- 1.20** The committee resolved to publish Mr Mason's report and according to the resolution of the House, the report was deemed to have been published by authority of the House and made available on the Legislative Council's website that day (see Appendix 5). At this meeting the committee also noted that, as it had previously resolved to follow the established practice in the House where possible, it would need to meet a second time to consider publication of documents considered by the arbitrator not to be privileged.
- 1.21** The committee met again on 23 August 2021 to consider documents over which privilege had been claimed. Noting Mr Mason's suggestion that the House might consider withholding some documents from publication based on their commercial value, the committee, at the suggestion of Mr Veitch, resolved to publish all documents listing information from 2011 to 2019. As per the committee's resolution, the Clerk tabled these documents on the same day, at which point they were made public. Regarding documents listing information after 2019, the committee resolved that they should be tabled and published on 1 March 2022. The committee is therefore advising of this future publication, should the House wish any amendment to be made.

Monaro Farming Systems

- 1.22** At a meeting on 7 September 2021, the committee considered a report of the Independent Legal Arbitrator, the Hon Keith Mason AC, QC, received by the Clerk on 3 September 2021. This report considered claims of privilege over documents relating to Monaro Farming Systems, which were disputed by Hon Adam Searle MLC. The documents were contained in various returns to order received by the Clerk on 9 April, 31 May and 4 August 2021.
- 1.23** Mr Mason did not uphold the claims of privilege asserted over the various documents, stating that continued redaction of information within most of the documents would 'severely hamper proper investigation and debate, contrary to the public interest'. On the specific issue as to whether the identity of three departmental officers should remain redacted, based on the potential adverse effect disclosure may have on their mental health, Mr Mason said he lacked sufficient information to advise the House. He instead suggested that the House might come to a reasonable compromise in its consideration as to whether to publish these documents in full, proposing that pseudonyms might offer a feasible solution.

1.24 The committee resolved to publish Mr Mason's report and according to the resolution of the House, the report was deemed to have been published by authority of the House and made available on the Legislative Council's website that day (see Appendix 6). The committee also resolved that, as the Legislative Council was scheduled to sit within one week of this meeting, it would be appropriate for the House to determine whether to implement the recommendations of the arbiter and publish the documents.³

³ Subsequent to this meeting, the House was scheduled to sit on 14 September 2021 but rose on a long adjournment under standing order 34 owing to the absence of a minister in the chamber, preventing the committee's report being tabled. On 15 September 2021 the committee met to authorise publication of the Monaro Farming Systems papers.

Appendix 1 Minutes

Minutes no. 18

Wednesday 28 July 2021
Privileges Committee Via
Webex, 10.02 am

1. Members present

Mr Primrose (Chair)
Revd Mr Nile (Deputy Chair)
Mr Donnelly
Ms Faehrmann
Mr Farlow
Mr Khan
Mrs Maclaren-Jones
Mr Mallard

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. Draft minutes

Resolved, on the motion of Revd Mr Nile: That draft minutes no. 17 be confirmed.

3. Consideration of disputed claims of privilege as referred by the House

The committee noted that the House had referred to the committee, by resolution of 24 March 2020, the authority, while the House is not sitting owing to ongoing public health concerns and is not expected to meet within one week, to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order under standing order 52.

3.1 Method of consideration

The committee noted that it had previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process whereby the consideration of whether to publish an arbiter's report be resolved at one meeting and the consideration of whether to publish documents considered by the arbiter to be not privileged be resolved at meeting held on a subsequent day.

3.2 Report of the Independent Legal Arbiter on the disputed claim of privilege regarding the incident on Lockyer Street, Goulburn

Resolved, on the motion of Revd Mr Nile: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding the incident on Lockyer Street, Goulburn be published.

3.3 Report of the Independent Legal Arbiter on the disputed claim of privilege regarding the Forestry operations in public forests

Resolved, on the motion of Ms Faehrmann: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding Forestry operations in public forests be published.

Revd Mr Nile moved: That the committee meet in the following week to consider implementation of the recommendations from the two reports of the Independent Legal Arbiter.

Mr Khan moved: That the motion of Reverend Nile be amended by inserting after 'Arbiter':

'2. That the Clerk contact NSW Police to advise of the publication of the Independent Arbiter's Report, that the committee will meet to consider implementation of its recommendations, and to invite NSW Police to make a submission to the committee responding to the Arbiter's recommendations by 5.00pm, Friday 30 July 2021'.

Question put and passed.

Motion of Revd Mr Nile, as amended, agreed to.

4. Other business

The Committee Clerk provided an update following the tabling of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics entitled 'Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer' on 19 July 2021.

The Committee Clerk advised that he had been requested to work with the Deputy Clerk of the Legislative Assembly to determine points of similarity and difference between the reports produced by the Privileges Committees of each House on models for a Compliance Officer.

5. Adjournment

The committee adjourned at 10.22 am *sine die*.

Steven Reynolds
Committee Clerk

Minutes no. 19

Wednesday 4 August 2021
Privileges Committee
Via Webex, 10.02 am

1. Members present

Mr Primrose (*Chair*)
Revd Mr Nile (*Deputy Chair*)
Mr Donnelly (via teleconference)
Ms Faehrmann
Mr Farlow
Mr Khan
Mrs Maclaren-Jones
Mr Mallard

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 18 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Sent:

- 28 July 2021 – Email from Committee Clerk to Ms Sarah Johnson, Director, Legal Branch, Department of Premier and Cabinet providing a copy of a report of the independent legal arbiter on the disputed claims of privilege relating to an incident on Lockyer St, Goulburn and inviting

the NSW Police to make a submission regarding the recommendations of the arbiter contained within the report.

Received:

- 2 August 2021 – Email from Ms Sarah Johnson, Director, Legal Branch, Department of Premier and Cabinet to Committee Clerk advising that the NSW Police would not be providing a further submission.

4. Consideration of publication of privileged documents relating to an incident on Lockyer Street, Goulburn

Resolved, on the motion of Mr Khan: That:

- (1) In view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege on papers regarding the Incident on Lockyer Street, Goulburn, dated 14 July 2021, the committee orders that the documents considered by the Independent Legal Arbiter not to be privileged be returned to the Clerk of the Parliaments within 7 days, subject to the following redactions, as recommended by the Independent Legal Arbiter:
 - (a) all information regarding unrelated cases and incidents in NSW Police Force documents (a)(i)1 – (a)(i)5, including:
 - (i) entries not related to the Lockyer St Incident on pages 66 and 71 of document (a)(i)(2),
 - (ii) information not related to the Lockyer St Incident in document (a)(i)(4),
 - (b) all phone numbers and email addresses of individuals in NSW Police Force documents (a)(i)1 – (a)(i)5, including:
 - (i) the name and contact details of the civilian informant in document (a)(i)(1),
 - (ii) names and contact details not related to the Lockyer St Incident in document (a)(i)(4),
 - (iii) the name and contact details of the civilian informant on pages 1 and 3 of document (a)(i)(5), and
 - (c) all phone numbers and email addresses of individuals in NSW Ambulance documents, including the name and contact details of the informant on page 1 of document 1.
- (2) On receipt of the redacted documents, the Clerk is to invite the members who raised the dispute on the claim of privilege, Mr Roberts and Mr Shoebridge, to review the documents.
- (3) Provided Mr Shoebridge and Mr Roberts make no further dispute, the committee orders the redacted documents to be laid upon the table by the Clerk.
- (4) On tabling, the documents are authorised to be published.
- (5) Should Mr Shoebridge or Mr Roberts instead further dispute the redactions made, the matter be referred back to the Privileges Committee.

5. Consideration of publication of privileged documents relating to forestry operations in public forests

Resolved, on the motion of Ms Faehrmann: That:

- (1) In view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege on papers regarding forestry operations in public

forests, dated 14 July 2021, the committee orders that the Department of Regional NSW document numbered (2)(a) 091 in the privileged return to order received by the Clerk on 2 June 2021, considered by the Independent Legal Arbiter not to be privileged be laid upon the table by the Clerk.

(2) On tabling, the document is authorised to be published.

6. Other business

The Committee Clerk advised that the secretariat would produce two reports for consideration by the committee prior to the next sitting of the House, detailing the actions taken by the committee with regards to the two disputed claims of privilege.

The Committee Clerk also advised that the Independent Legal Arbiter was currently considering two more disputed claims of privilege, for future consideration by the committee.

7. Adjournment

The committee adjourned at 10.12 am.

Steven Reynolds
Committee Clerk

Minutes no. 20

Thursday 12 August 2021

Privileges Committee

Via Webex, 2.30 pm

1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly (via teleconference)

Mr Farlow

Mr Khan

Mrs Maclaren-Jones

Mr Mallard.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. Apologies

Ms Faehrmann.

3. Draft minutes

Resolved, on the motion of Revd Mr Nile: That draft minutes no. 19 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Sent:

- 4 August 2021 – Letter from Mr David Blunt, Clerk of the Parliaments to Mr Tim Reardon, Secretary, Department of Premier and Cabinet, advising the Department of the resolution of the Privileges Committee regarding the redaction of documents relating to an incident on Lockyer Street, Goulburn.

5. Consideration of disputed claims of privilege as referred by the House

The committee noted that the House had referred to the committee, by resolution of 24 March 2020, the authority, while the House is not sitting owing to ongoing public health concerns and is not expected to meet within one week, to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order under standing order 52.

5.1 Method of consideration

The committee noted that it had previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process whereby the consideration of whether to publish an arbiter's report be resolved at one meeting and the consideration of whether to publish documents considered by the arbiter to be not privileged be resolved at meeting held on a subsequent day.

5.2 Report of the Independent Legal Arbiter on the disputed claim of privilege regarding Strike Force Wyndarra

Resolved, on the motion of Revd Mr Nile: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding Strike Force Wyndarra be published.

5.3 Report of the Independent Legal Arbiter on the disputed claim of privilege regarding courses offered by TAFE NSW

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding courses offered by TAFE NSW be published.

The Committee Clerk noted that the Clerk would approach Mr Veitch to provide any guidance to the committee, if he wishes, regarding implementation of the final paragraph of the report.

6. Other business

The Committee Clerk provided an update on the request for redactions to documents relating to the incident on Lockyer Street, Goulburn.

The committee noted that the Clerk would consult Mr Shoebridge and Mr Roberts regarding the redactions made prior to making these documents public.

7. Adjournment

The committee adjourned at 2.39 pm.

Steven Reynolds
Committee Clerk

Minutes no. 21

Monday 23 August 2021
Privileges Committee
Via Webex, 2.30 pm

1. Members present

Mr Primrose (Chair)
Revd Mr Nile (Deputy Chair)
Mr Donnelly
Ms Faehrmann
Mr Farlow
Mr Khan

Mrs Maclaren-Jones
Mr Mallard.

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 20 be confirmed.

3. Correspondence

The committee noted the following items of correspondence:

Received

- 16 August 2021 – Letter from the President of the Legislative Council, Hon Matthew Mason-Cox to the Chair, noting the recent reports tabled by this committee and its Legislative Assembly counterpart on possible models for a Compliance Officer, and forwarding a new terms of reference to inquire into a single model for a Compliance Officer.

**4. Inquiry into the proposal for a Compliance Officer for the NSW Parliament (No. 2)
Consideration of disputed claims of privilege as referred by the House**

The committee noted the following terms of reference referred by the President under on Monday 16 August 2021, under paragraph 2 (a) of resolution of the House establishing the Privileges Committee, 8 May 2019:

1. That, noting:
 - (a) In May 2021 the Privileges Committee tabled its report no 83 entitled “Proposal for a Compliance Officer” which supported the proposal to establish the position
 - (b) Recommendation 12 of the report stated the Privileges Committees in both Houses should attempt to expeditiously find agreement on a form of the resolution acceptable to the members they represent
 - (c) in July 2021 the Legislative Assembly Standing Committee on Privilege and Ethics tabled its report no 1/57 entitled “Review of the proposed resolution for the establishment of a Parliamentary Compliance Officer for NSW Parliament”, which also endorsed the establishment of the position, with 42 recommendations and 6 findings, and
 - (d) while there are some differences between the two committees recommendations, none appear to be incapable of resolution by further discussion and negotiation.
2. That the Privileges Committee is therefore to inquire into and report as expeditiously as possible on resolution of the remaining differences between the two privileges committee reports, and include in its report a draft resolution which is supported by the committees of both Houses.

Resolved, on the motion of Reverend Nile: That the Chair, together with the Clerk of the Parliaments and the Committee Clerk, meet with their Legislative Assembly counterparts to discuss options for a single Compliance Officer model and report back to the committee with a new resolution for consideration.

5. Report of the Independent Legal Arbiter on the disputed claim of privilege regarding Strike Force Wyndarra

Resolved, on the motion of Revd Mr Nile:

1. That in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege on papers regarding Strike Force Wyndarra, dated 6 August 2021, the committee orders that documents C4, C5, C8, C9, C10 and C11 considered by the Independent Legal Arbiter not to be privileged be returned to the Clerk of the Parliaments within 7 days, subject to the following redactions being made, as recommended by the Independent Legal Arbiter:
 - (a) all references to the name of and pseudonym used to refer to the complainant and their friend,
 - (b) all contact details such as email addresses and phone numbers,
 - (c) all references to the names and signatures of police officers below Assistant Commissioner,
 - (d) all material relating to cases other than the complainant's, and
 - (e) all information referring to the actual or perceived mental health of the complainant, including:
 - (i) the sentence in document C4 commencing with the words 'Concerns exist',
 - (ii) the sentence in document C11 commencing with the words '[X] disclosed to investigators',
 - (iii) the sentence in document C11 commencing with the words '[X] also advised'.
2. The committee orders the redacted documents be laid upon the table by the Clerk and, on tabling, the documents are authorised to be published.
3. That the secretariat or the Office of the Clerk attempt to contact the family of the deceased to notify them of the impending release of the redacted documents.
4. That the secretariat consider developing a protocol for issues of this nature, for consideration by the committee.

6. **Report of the Independent Legal Arbiter on the disputed claim of privilege regarding courses offered by TAFE NSW**

Resolved, on the motion of Mr Nile:

- (1) That in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege on papers regarding courses offered by TAFE NSW, dated 6 August 2021, the committee orders that the following documents in the privileged return to order received by the Clerk on 21 July 2021, considered by the Independent Legal Arbiter not to be privileged be laid upon the table by the Clerk:
 - (a) all documents listing information from 2011 to 2019 be laid upon the table by the Clerk this day, and
 - (b) on 1 March 2022, all remaining documents be laid upon the table by the Clerk.
- (2) That on tabling, the documents are authorised to be published.

7. **Other business**

The Committee Clerk confirmed that redacted documents had been received from NSW Ambulance regarding the incident on Lockyer St Goulburn and published as per the committee's previous resolution.

8. **Adjournment**

The committee adjourned at 2.46 pm.

Steven Reynolds
Committee Clerk

Draft Minutes no. 21

Tuesday 7 September 2021

Privileges Committee

Via Webex, 2.30 pm

1. **Members present**

Mr Primrose (Chair)
Revd Mr Nile (Deputy Chair)
Mr Donnelly
Ms Faehrmann
Mr Farlow
Mr Khan
Mrs Maclaren-Jones
Mr Mallard (from 1.10pm)

In attendance: Steven Reynolds, Jenelle Moore, Laura Ismay, Taylah Cauchi.

2. **Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 20 be confirmed.

3. **Report of the Independent Legal Arbiter on the disputed claim of privilege regarding Monaro Farming Systems**

The committee noted that it had previously resolved that, wherever possible and unless circumstances require otherwise, the committee follow the established practice in the House and adopt a two-step process. The committee also noted that the House was scheduled to sit in one week on Tuesday 14 September 2021.

Resolved, on the motion of Reverend Nile:

- (1) That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding Monaro Farming Systems be published.
- (2) That:
 - (a) if the House sits as scheduled on Tuesday 14 September, consideration of whether to publish documents considered by the arbiter to be not privileged be a matter for the House, and
 - (b) if the House does not sit at this time, that the committee meet on Wednesday 15 September to consider publication of these documents.

4. **Consideration of disputed claims of privilege as referred by the House**

The committee considered the Chair's draft report, entitled 'Consideration of disputed claims of privilege as referred by the House'.

Resolved, on the motion of Mr Nile:

- (1) That the draft report be the report of the committee and that the committee present the report to the House.

Resolved, on the motion of Mrs Maclaren-Jones:

- (1) That the secretariat be authorised to insert an additional paragraph prior to tabling, reflecting the decisions of this meeting relating to the disputed claim of privilege regarding Monaro Farming Systems.

Mr Mallard joined the meeting.

5. Other business

The Committee Clerk informed the committee that a report outline for its inquiry into the execution of search warrants by the Australian Federal Police No 3 would be circulated prior to the next meeting.

The Chair updated the committee on his work with the Chair of the Legislative Assembly Privileges Committee regarding the reports of each House on models for a Compliance Officer. The Committee Clerk confirmed a document would be circulated to the committee, outlining items requiring further discussion between each House.

6. Adjournment

The committee adjourned at 1.17 pm.

Steven Reynolds
Committee Clerk

Appendix 2 Report of the Independent Legal Arbiter – Forestry Operations in Public Forests

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Forestry Operations in Public Forests

The Hon Keith Mason AC QC

14 July 2021

On 12 May 2021 the Legislative Council called for papers relating to forestry operations in public forests. In response, documents were tabled subject to claims of confidentiality and privilege, supported by submissions from the Department of Regional New South Wales. Only the claim relating to document (2)(a) 091 is disputed by Mr David Shoebridge in his letter dated 8 July 2021. That dispute has been referred to me for evaluation and report.

The document is called the Customer Engagement Plan. It was created on 24 March 2021 by the Forestry Commission. According to Mr Shoebridge, the document shows the proposed timeline for forestry operations throughout the State in the context of the significant reduction in timber supply as a result of the 2019/20 fires. The document is a table showing, by reference to timber types (eg 'high quality sawlogs') the regions expected to produce the various products and 'intended action' within a proposed timeframe with respect to each region and timber type. The 'basis' of the intended action is spelt out (eg by reference to the expiry of existing contracts, need for market and investment certainty).

The privilege claim over the document is labelled 'Commercial/Government Functions'. On my reading, the arguments in page 1 and the first half of page 2 of the Department's Submission in Support address the claims relevant to the disputed document. The Department points to the information about the commercial interests of third parties and the State which is represented by **some** of the data under the 'Intended Action' and 'Basis' columns. The submission implicitly and correctly recognises that 'commercial in confidence' is not in itself a basis of privilege in the parliamentary context. The argument advanced is that disclosure of actions or proposed actions to be taken [by Forestry Corporation]...could reasonably be expected to place Forestry Corporation, as a contract holder, at a substantial commercial disadvantage in relation to other contractors or potential contractors in future tendering processes or contract negotiations'.

The legitimate commercial interests of the third party contractors are also invoked. It is submitted that the proposed timeframes may not eventuate yet they may create potentially misleading expectations. Current or future commercial processes or negotiations might be undermined.

The appeal to 'responsible and effective government' as a basis for privilege over the disputed document alludes to unspecified provisions of the GIPA Act and the Forestry Corporation's charter responsibility to operate as a successful business and to maximise the net worth of the State's investment.

It is not easy to align these concerns with the generalisations in the document itself. At its highest it is a forecast prepared for government purposes produced to the parliament under compulsion: any contractor relying on it for anything more would do so at its peril. It contains the sort of information that one would expect to find in the workings of a responsible public administrator faced with the need to assess its present and likely future courses of action. Timber contracts that are shortly to

expire are identified. There are no commercial or contractual details about current negotiations that might prejudice the hand of the Forestry Corporation in current negotiations.

As Mr Shoebridge points out, the document concerns matters of importance and of concern to persons and interests beyond the parties to existing or expiring timber contracts. 'The logging of publicly owned forests is a matter that the public has a right to have information on and the right to be informed of before logging begins.' On my evaluation, the very generalised matters relied upon in the Department's submissions do not outweigh the public interest in open and informed parliamentary debate or offer a convincing basis for upholding the claims made.

I thank Ms Noora Hijazi for her assistance.

A handwritten signature in blue ink, appearing to be 'KM', with a long horizontal stroke extending to the right.

The Hon Keith Mason AC QC

Appendix 3 Report of the Independent Legal Arbiter – Incident on Lockyer Street, Goulburn

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Incident on Lockyer Street, Goulburn

The Hon Keith Mason AC QC

14 July 2021

On 5 May 2021 the Legislative Council called for papers relating to an incident on Lockyer Street, Goulburn. In response documents were tabled subject to claims of privilege, supported by submissions, from NSW Police Force and the NSW Ministry of Health on behalf of NSW Ambulance. The substance of the claims has been disputed by two Members, Mr David Shoebridge MLC and the Hon Rod Roberts MLC.

Aspects of the incident are already in the public domain through press reportage and questioning of the Police Commissioner, Mr Fuller, by the Portfolio Committee on 12 March 2021. On 24 February 2021 at 2259 there was an ambulance call about a man lying in a Goulburn public street, near a hotel, apparently unconscious. Ambulance officers attended promptly and police officers were later called to the scene. The unconscious man was attended to, assessed as intoxicated by alcohol, and ultimately conveyed to his motel room. He was Deputy Police Commissioner Lanyon.

Privilege is asserted on the grounds that the information in the documents represents ‘personal information’ within the scope of the *Privacy and Personal Information Act 1998* and ‘health information’ within the scope of the *Health Records and Information Privacy Act 2002*. The submissions do not suggest that these statutes offer a direct barrier to parliamentary scrutiny but the principles underlying the statutory regimes are invoked to shore up claims that the public interest would be prejudiced if there were disclosure beyond Members (cf *Standing Order 52 (5) (b)*). NSW Health submits that the candour of communications between patients and ambulance officers may be impeded if there were disclosure.

I have examined the disputed documents. In my evaluation, these claims are not established and the public interest lies clearly in favour of unrestricted parliamentary access to most of the documents.

The letters of Mr Shoebridge and Mr Roberts indicate issues they wish to explore in debate by reference to the documents. It is not my role to find facts conclusively. So I confine myself to observing that the documents cast light on several matters, many of which appear to be contested: the causes of Mr Lanyon’s condition, his response to the assistance provided by the attending ambulance officers, the conduct of the attending police officers, the response of the head of the Ambulance Service who was telephoned by Mr Lanyon while at the scene, and the preparation and ministerial authorisation of press statements about the incident. These matters may (and I stress ‘may’) reflect on issues of fitness for office of various persons as well as on issues going to the relationship between the Police and Ambulance Services.

The Members have indicated that they do not object to certain exclusions or redactions. Mr Shoebridge describes them as ‘unrelated cases and incidents in the police records’, ‘individual phone numbers and emails’. Mr Roberts describes them as ‘entries on pages 66 and 71 [of Police documents (a)(i)2 and (a)(i)4] that do not relate to this incident’; ‘the personal details of the informant on pages 1 and 3 [of document (a)(i)5]; ‘the detail of the informant on page 1 [of NSW

Ambulance document 1]; 'media inquiry emails' [documents 12 and 13] and 'telephone records of Dominic Morgan' [document 14]. I am content to treat the dispute as withdrawn so far as relates to the information referred to in this paragraph. If there is any confusion or continuing dispute regarding the particular exclusions or redactions involved it may be remitted to me for further report.

I thank Ms Noora Hijazi for her assistance.

A handwritten signature in blue ink, consisting of stylized initials 'KM' followed by a long horizontal stroke.

The Hon Keith Mason AC QC

Appendix 4 Report of the Independent Legal Arbiter – Strike Force Wyndarra

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Strike Force Wyndarra

Hon Keith Mason AC QC

6 August 2021

On 17 March 2021 the Legislative Council called for papers relating to any proposal or request for the NSW Police Force to travel to South Australia to interview a sexual assault complainant. In response, documents were tabled subject to claims of privilege and proposed redactions. Some of those claims have been disputed by Mr David Shoebridge MLC and that dispute has been referred to me for evaluation and report.

The broad context has become a matter of public record. In late 2019 a woman contacted police in Adelaide, where she lived, seeking advice on the process of reporting that she had been sexually assaulted in 1970 in Redfern, New South Wales. The alleged assailant was Christian Porter who had by 2019 become the federal Attorney-General. In February 2020 the complainant formally reported the matter to South Australia Police. NSW Police were contacted and their investigation commenced under the title of Strike Force Wyndarra. It was decided that two NSW police officers would travel to Adelaide to interview the complainant, but the arrival of the COVID-19 pandemic delayed their departure. Interview by phone/video call was requested by the complainant but this was not supported at the time by NSW Police for various reasons. On 24 June 2020 the complainant took her own life.

The tabled documents reveal details of the actions taken by NSW Police and their reasons. Disclosure (other than to Members) of identified portions of the documents is resisted under the rubric of 'personal information' and on the ground that the public interest in non-disclosure outweighs the interest in disclosure.

The Member's position is outlined in a letter dated 8 July 2021. He wishes to explore why the police acted as they did but he accepts that redactions are appropriate as regards:

- personal contact details such as emails, names and contact numbers
- the name of the complainant
- the names of police officers below Assistant Commissioner
- any material relating to cases other than the complainant
- information relating to the complainant's actual or perceived mental health issues or the police perception of the same.

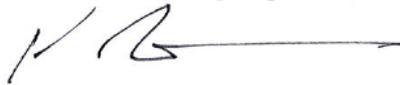
It is neither necessary or helpful for me to indicate the extent to which these details conform to 'privileged' information in the relevant sense. Fortunately, there is now much common ground between the positions advanced by the Police Force and by the Member. Nevertheless, there are proposed redacted portions of the documents which the Member wishes to discuss openly in Parliament. All of them pertain to an understanding of the adequacy of the police response, obviously a matter appropriate for the scrutiny of the House. The issue is whether the case for restricting publication of the still contested portions on the basis of an accepted ground of privilege

has been made out.

I have examined the portions of documents C4, C5, C8, C9, C10 and C11 over which the Member presses his objection to the claims of 'personal information' privilege. In my evaluation those portions are not privileged, except (by agreement) as regards any particular information falling within the five dot points above.

If this report is adopted by the House, hopefully it will be a simple task to prepare freshly redacted versions of the key documents. For the assistance of those concerned I indicate that the Member's reference to 'the first sentence of the first dot point' in Document C4 is understood to be a reference to the sentence commencing 'Concerns exist'. That sentence may be redacted. So too the sentences commencing '[X] disclosed to investigators...' and '[X] also advised...' in Document C11.

Any specific matter of continuing dispute can be remitted back to me.

A handwritten signature in black ink, appearing to be 'K Mason', with a long horizontal line extending to the right.

The Hon Keith Mason AC QC

Appendix 5 Report of the Independent Legal Arbiter – Courses offered by TAFE NSW

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Courses offered by TAFE NSW

The Hon Keith Mason AC QC

6 August 2021

On 23 June 2021 the Legislative Council called for papers relating to courses offered by TAFE NSW for each campus and each Connected Learning Centre since 2011. The required documents were lodged with the Clerk on 21 July 2021. The information sought included lists of courses offered, full time equivalent staffing level for each year, student enrolment numbers and student completion rates. Privilege was claimed in relation to three boxes of documents containing the said information which has been provided by way of detailed spread sheets created ad hoc and helpfully elucidated in TAFE's letter of 19 July 2021.

The claim is disputed by Mr Mick Veitch MLC in an email to the Clerk dated 23 July 2021. He points out that some of the information is or was once publicly available and that some of it is nearly ten years old. The Member seeks unrestricted access to all of the information in order to prepare for parliamentary debate and questions for budget estimates. Having regard to the issues raised in support of the claim of privilege I shall not describe the documents in detail. In my assessment, general access is necessary to enable parliamentary oversight of this significant aspect of governmental activity. The complexity and detail would preclude effective scrutiny if Members were unable to seek assistance in analysing it or to debate aspects of it without restraint.

The TAFE submissions in support of privilege invoke public interest immunity. They recognise that a balancing of prospective harms is required. The information is said to be commercially sensitive having regard to the fact that TAFE operates across the State in a market in which it does not enjoy a monopoly. It would be unproductive for me to spell out the details, but I do note that the issue was canvassed in the vigorous debate on the resolution calling for papers.

Many activities of modern government (including health, roads and education) are delivered by government under statutory guidelines that allow 'consumers' the freedom to choose non-governmental service providers. The latter are themselves partly supported and partly regulated by government under statutory regimes that are constantly being renegotiated under rubrics such as 'privatisation' and 'level playing field'. In economic terms, competition between public and private service-providers is inevitable. But the need for parliamentary oversight and regulation is not affected.

Previous reports have recognised that the public interest may require the non-publication of specific commercially sensitive information in the context of current tendering processes in which government has an interest in getting best value for a particular asset or contractual offering. Here, by contrast, one is dealing with essential components of an entire field of governmental activity. Concerns about maximising governmental monetary returns are raised in support of secrecy. Yet the information in question needs to be accessed without the restriction proposed if there is to be effective oversight of executive action and debate that might lead to the re-calibration of the statute-book. Cf the reports on *Forestry Operations in Public Forests*, *Narrandera to Tocumwal Rail Line Reopening Feasibility Study*, *Sydney Stadiums*. See generally *Report of Roundtable meeting to consider aspects of the operation of order 52*, Feb 2021, pp 63-66.

The basis for the privilege asserted has not been established in my evaluation.

It is of course open to the House to devise some method short of unlimited publication of the information in the contested documents that would enable Members to inform themselves sufficiently and allow effective debate. The currency or otherwise of particular information may be relevant. So too the extent to which information in the contested documents is already in the public domain, as much of it is. The House might also choose not to publish beyond Members the detailed submissions in support of privilege which are usually attached to my Report. But these matters are for the House.



The Hon Keith Mason AC QC

Appendix 6 Report of the Independent Legal Arbiter – Monaro Farming Systems

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Monaro Farming Systems

The Hon Keith Mason AC QC

3 September 2021

On 17 March 2021 the Legislative Council called for papers on a range of topics related to Monaro Farming Systems CMC Inc. That resolution was amended on 5 May 2021. There was a second call for papers on 27 June 2021, this time focussing on the response to the first call and legal or other advice relating to that response.

The required documents were lodged with the Clerk in stages, supported by Indexes and Submissions advancing claims of privilege with respect to some of the documents under the rubrics of legal professional privilege, commercial in confidence and personal information/privacy. As to documents over which privilege has been claimed in part, redacted versions have been made available. Less helpfully, the Submissions do not always identify the documents to which each rubric of privilege is assigned.

The claims of privilege have been robustly disputed by the Hon Adam Searle MLC. His letter of 27 August 2021 outlines various enquiries that he wishes to pursue and debate, and advances reasons why those enquiries and debates would be hampered were access restricted to Members alone.

The principles applied by me in these matters have been rehearsed in many reports that have been adopted by the House. They are summarised in the *Report of the Roundtable meeting to consider aspects of the operation of standing order 52* dated February 2021. There is also a fair summary of the position taken by myself and the House (on the one hand) and by the Crown Solicitor (on the other) with regard to disputed claims invoking legal professional privilege in the advice from the Crown Solicitor that is one of the disputed documents (*(b)001a*, in the documents responsive to the second call).

The present matter reminds of a Babushka doll because the dispute extends outwards well beyond the status of the documents that prompted the initial call for papers. This is evident in the terms of the amended first call, the terms of the second call, and the matters raised in the letter from the Member. Whether the public interest lies in favour of restricted or unrestricted access to the presently disputed documents requires to be addressed in several contexts which the Member has himself flagged: the true basis of the \$50,000 payment to Monaro Farming Systems apparently contracted for and presumably paid; whether a Services Agreement signed at least on behalf of Monaro was a sham and/or a contract tainted by illegality; the departmental handling of concerns and enquiries raised about the transaction; compliance with obligations arising under s11 of the *Independent Commission Against Corruption Act 1988*; the framing and management of the brief for the Crown Solicitor to advise whether a particular document was ‘privileged’ under the Standing Order; the quality and scope of the advice given; and the manner in which the House’s calls for papers were responded to.

These are, of course, matters for the Members to pursue as they see fit. It is not the independent arbiter’s role to make findings on the issues of public accountability raised or likely to be raised.

The arbiter's duty to evaluate a disputed claim and provide the House with a reasoned report may, in extreme cases, require conclusions about conduct to be formed (for example whether an apparent occasion of privilege at common law did not in truth arise because of the impropriety of the underlying transaction). However, the processes under which the arbitrator functions do not lend themselves easily to the making of such judgments, even by way of advisory report to the House. *A fortiori*, when such judgments might themselves be seen to suggest that the arbiter was hinting at some conclusion on the ultimate issues of public accountability. The analogy of Occam's razor counsels a minimalist rather than an expansive approach in these matters.

While presenting a reasoned Report, the arbitrator should also avoid pre-empting any decision of the House as to publication of that Report or the adoption of its recommendations. In the present matter I will advert to the contested portions of disputed documents only so far as necessary to reveal my reasoning. Members already have full access to those documents.

The creation of the 'Services Agreement'

At the core of the Babushka are four documents that have been tabled in both redacted and unredacted form. Each is listed in both the Privileged and Non-Privileged Indexes accompanying the returns of papers. The proffered redacted versions enable one to deduce the portions over which privilege is asserted and, hopefully, to deduce what part of the Submissions applies to a contested redaction.

The first document is an email dated 29 September 2020 headed '*Monaro Farming Systems – Barilaro Funding Commitment*'. It is indexed as item 16 in the documents produced by the Office of the Minister for Agriculture and Western NSW. The email attaches a redacted letter from a representative of Monaro Farming Systems which states in part:

"Over the last 12 months I have been dealing with John Barilaro over our group funding woes.

In June this year John committed \$70,000 for the groups ongoing survival. I was told the funding was sourced from the Primary Industries Ministers Discretionary funds..."

The Submission on behalf of the Minister states that this document 'contain[s] personal information and that the public interest in the non-disclosure of that information outweighs the interest in its disclosure'. Perusal of the redacted version that has been proffered reveals that this information discloses the identity of Monaro's representative and his postcode. These redactions should be rejected by the House. Contrary to the Submission, the information is highly relevant to any exploration of the genesis, true nature and legitimacy of the Services Agreement that is the third of the four documents.

The second document (indexed (i)029) is an email dated 19 January 2021. The names of two public servants of relative seniority in the Department appear in the unredacted version, apparently as those responsible for the document. The addressees (who shall be referred to in this Report as P and S) are persons whose identity the Department of Regional NSW seeks to suppress by its proposed redactions. The email states:

"Also we need to get in touch with the CEO of Monaro Farming Systems to send them a contract (short form services contract) from us – we have been directed by the Deputy Premier to provide them with \$50K to provide 'outreach services and support adoption' – they need to send us an invoice as well. I have nothing that I can send in terms of a schedule of work – you will just need to keep it high level and vague."

I will address the disputed redactions below.

The third document (indexed (b)001) is described as *'Services agreement – signed'* and stated to have been created by the Department of Regional NSW on 20 January 2021. The document is labelled *Short Form Services Agreement DPI reference CONT21/32*. The document has somewhat the appearance of a cut and paste exercise: there is a cover page, followed by pages numbered 2-4, followed by standard form pages numbered 2-11, a signing page (p12) and an Appendix (p13).

Privilege is claimed with respect to the entirety of the document after the first page 4. In my evaluation, to accept the proposed redactions would severely hamper proper investigation and debate, contrary to the public interest. The Department of Regional NSW Submission invoking 'Commercial in confidence' is quite extraordinary. Lest this judgment appears harsh, I remind Members of the first two documents. I also draw attention to the contrast between the nomination of **the Crown** as the 'Service Provider' on the first unredacted page when read with the apparently standard Terms and Conditions that form the bulk of the redacted pages on the one hand; and the description of the 'Services' to be provided by MFS in Schedule A leading to the Crown's obligation to pay MFS a fee of \$50,000 on the other hand. The various dates scattered across the document, including the date when it appears to have been signed by two directors of Monaro, are further aspects of this opaque document that could only be effectively explored and debated if all proposed redactions are refused.

The fourth document (indexed (1)038) appears to be the conscientious work of a junior lawyer who was evidently surprised and 'concerned' by information she had just received about a contract that she had been asked to review. I shall refer to her as D. Her identity is proposed to be redacted along with the identity of the more senior person (S) from whom she apparently received highly relevant information about the genesis of the Services Agreement. That information is recorded in the unredacted memo which presents as one from D to D. It partly records the substance of a phone call with a superior officer about 'the contract I had reviewed'. It records information 'that was not included in the documents', information that, to say the least, raises issues about the underlying transaction.

The memo culminates in DS recording:

"I am concerned about the nature of this agreement. I am concerned about the ethics of this – is it favouritism? Is it bribery? This does not sit well with me. Would I be complicit? I need to discuss this with Lauren."

It would appear that the legal review of the fourth document passed to another branch of the Department. Whether or not the information in D's memo went across is not revealed.

The very limited redactions to the fourth document proposed by the Department enable one to infer that the generalised Submissions delivered on 31 May 2021 on the topic of legal professional privilege must be read as directed at documents other than this document. This inference is strengthened by observing that nothing has been advanced by the Department in the way of adopting the detailed factual and legal analysis of the document's privileged status in the advice of the Crown Solicitor dated 22 April 2021 that I consider below in a different context.

As for the limited claim of privilege relating to the second and fourth document, it is advanced under the rubric of Personal Information/Privacy. The Submission from the Department proposes redacting the identity of P, S and D because they are the names of 'junior officers and to disclose those names has the real potential to cause anxiety and have an impact on their mental health. Such work health and safety issues far outweigh the public interest.' The Member disputes the redactions on the basis that what the public servants said and did is important to exploring the matters in issue.

I do not have sufficient information at present to advise the House on these specific and limited

claims of privilege. If pressed to decide instantly I would reject the claim because the burden of persuasion has not been met. But since potential mental health matters must be considered carefully, I venture a few observations. They may be sufficient to guide the Member and a representative of the Department to discuss and arrive at an agreed outcome. Or they may prompt the Member and the Department to provide me with additional information. An outcome for one of P, S and D may not be appropriate for the others.

Some people who have been told something of significance that they are called upon to affirm publicly will not relish that prospect. Some will be deterred only by fear of cross-examination, assuming that this is likely. Some may feel nervous, rightly or wrongly, about exposure of their own complicity. Some will understand that witnesses and whistle-blowers are protected in law. Some will be upset if their opportunity to speak out is denied. Has anyone asked the three persons about their preference?

Turning more specifically to the present matter, I have no understanding of the juniority of the three persons concerned. Or of the extent to which their involvement is already known in their Department or generally. Nor do I know how much of the disputed information about identity is already in the public domain. Or whether upholding the claim of privilege will hamper any likely inquiry as to what these persons were informed and by whom or what they in turn reported to others. Will any parliamentary investigation be impeded by the inability to disclose the identity of these persons?

Is this a matter on which the House may be able to come to its own mind after considering the matters discussed herein? Would an arrangement to use pseudonyms for the time being be feasible?

Documents produced in answer to the second call over which the claim of privilege is disputed

The second call for papers issued on 23 June 2021. It required the production of all documents relating to the first call (as amended) and instructions for legal or other advice relating to the scope of the earlier call with a particular focus upon any advice touching the non-production of ‘probity reports’ regarding Monaro Farming Systems. The call was answered on 4 August 2021 and several documents were delivered, some of them subject to claims of privilege asserted by the Department of Regional NSW, invoking the three rubrics already mentioned without clear indication as to which documents were said to attract which head of privilege. All of the claims of privilege are disputed by the Member who (like myself) has assumed that the sole ground of these particular claims is legal professional privilege.

The documents in question are indexed *a)025a, a)028a, a)088a, a)110a, b)001a, b)004, b)004a, b)004b, b)004c, b)005, b)007, b)007a, b)008, b)009, b)009a, b)009b* and *b)010*. Details of the Member’s challenge to the several claims are set out in his letter.

Consistent with the approach referred to on p 2 of this Report, I propose to address only so much of the issues raised as are necessary to explain why the claims of privilege should not be accepted, in my evaluation.

All of the disputed documents appear to have been created in 2021 as part of the decision-making about the response to the first call (as amended). Some relate to consideration of the scope of the call or the logistics of getting urgent advice. Others focus upon whether a particular document might attract a claim of privilege based on legal professional privilege that applies (at least in a non-parliamentary context) to the provision of confidential legal advice and the gathering of information

for the dominant purpose of the same.

Some documents (including *a)028a* and *a)088a*) contain much that is not privileged on any account, being addressed to the logistics of responding to the call for papers or containing no disclosure of confidential material. They may, however, contain isolated sharing of information directed to the seeking or giving of legal advice. Others are unclear on the present evidence as to the dominant purpose of their creation, but I am prepared to assume that they were steps taken by the client to assist the giving of legal advice or by the Crown Solicitor's Office by way of information-gathering for that purpose.

Most of the documents record information relevant to the creation of the fourth document that I refer to on p 3 of this Report, the role or status of D when she recorded that information, and her purpose in doing so. This gathering of information was obviously with a view to completing the Crown Solicitor's advice about the arguably 'privileged' status of that document. As indicated, that advice contains a detailed factual and legal analysis according both to the legal criteria considered relevant by the Crown Solicitor and her officers and to those applied by independent legal arbiters including myself in several reports under the standing order.

On my evaluation, none of these documents are privileged in the current context. At the highest, some of them record information that would attract legal professional privilege in a forensic context. But none divulge information that the public interest requires to be kept secret to Members only. The advice of the Crown Solicitor dated 22 April 2021 discloses the position adopted by the Executive on the approach to 'legal professional privilege' in the context of Order 52, applies these principles to the known facts, and reaches a conclusion. The advice also recognises the different attitudes of the House and this independent arbiter on the general approach. The enunciation of the Crown Solicitor's understanding of the scope of 'privilege' under the Standing Order reveals nothing new and does not pertain to any litigation between the Executive and the House.

Some useful information is recorded in the advice about the progress of the Services Agreement through various legal officers in the Department and this should be freely available to the House. For whatever reason, legal professional privilege was not ultimately claimed over to the substantive contents of the fourth document. The information in the documents, including the Crown Solicitor's advice itself is clearly relevant to the House investigating, if it wishes, the steps taken or not taken in relation to the creation of the Services Agreement, the investigation of whatever warning signals were or should have gone out about the transaction in question, and any lingering concerns of the House about the time taken to answer its calls for papers.

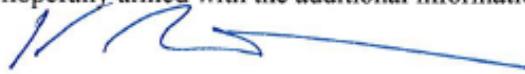
It is evident that the Crown Solicitor differs from myself (and the House) on the question whether a claim of privilege that would be upheld in litigation operates automatically to establish 'privilege' in the context of the Standing Order. I intend respectfully to maintain my course, subject to any fresh arguments being offered on this issue. And, as recognised by the Crown Solicitor, there will be occasions when a report may contain recommendations about steps that the House might consider taking regardless of its ultimate decision whether to accept or reject a particular claim of privilege.

It will be up to the Members to decide how far it is productive to their goals to pursue any inquiry about the scope or content of the Crown Solicitor's legal advice touching issues arising out of this call for papers. I content myself with four observations: (1) much of the rule of law depends on encouraging the seeking of legal advice, so much so that even disclosures of irregular conduct are confidential and privileged if made to a legal advisor for a legitimate purpose; (2) the scope of a lawyer's retainer is generally set by the client; (3) the accuracy of legal advice depends significantly on the adequacy and accuracy of the information provided to the lawyer. (Without attributing any fault, I observe that the first two of the four documents discussed above do not appear to have been

placed in the hands of the Crown Solicitor. Nor does it appear that the Crown Solicitor was asked to provide any advice directed to any 'probity' issue or the application of s 11 of the *ICAC Act*); (4) at the end of the day, for reasons unexplored, privilege was not asserted in relation to the fourth document, but only as to the identity of 'junior officers' associated with it.

Conclusion

With the exception of the redactions of the identity of three of the participants in the two documents referred to above, the claims of privilege should not be accepted in my evaluation. I defer reporting finally as to the privileged status of those redactions. If requested, I will tender a further report on the issue, hopefully armed with the additional information I have adverted to.



The Hon Keith Mason AC QC

