



LEGISLATIVE COUNCIL

PUBLIC ACCOUNTABILITY COMMITTEE

Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry



Report 9

November 2021

Public Accountability Committee

**Special report on the
examination, publication
and use of cabinet
documents by Legislative
Council committees as part
of an inquiry**

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Terms of reference

1. That the Public Accountability Committee inquire into and report on on the Transport Asset Holding Entity, including:
 - (a) its establishment and operation, and
 - (b) any other related matter.

The terms of reference were referred to the committee by the Legislative Council on 23 June 2021.¹

¹ *Minutes*, NSW Legislative Council, 23 June 2021, p 2360.

Committee details

Committee members

Mr David Shoebridge MLC	The Greens	<i>Chair</i>
The Hon Robert Borsak MLC	Shooters, Fishers and Farmers Party	<i>Deputy Chair</i>
Ms Abigail Boyd MLC*	The Greens	
The Hon Daniel Mookhey MLC**	Australian Labor Party	
The Hon Scott Farlow MLC	Liberal Party	
The Hon John Graham MLC	Australian Labor Party	
The Hon Courtney Houssos MLC	Australian Labor Party	
The Hon Trevor Khan MLC	The Nationals	
The Hon Peter Poulos MLC	Liberal Party	

* Ms Abigail Boyd MLC is a participating member from 26 August 2021 for the duration of the inquiry.

** The Hon Daniel Mookhey MLC is a participating member from 26 August 2021 for the duration of the inquiry.

Contact details

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Recommendation

Recommendation 1

3

That the House refer to the Privileges Committee, for inquiry and report by the end of the calendar year, the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry.

Special Report

The Public Accountability Committee makes the following Special Report to the House:

- 1.1 On Wednesday 23 June 2021, the Legislative Council referred an inquiry into the Transport Asset Holding Entity to the Public Accountability Committee. The committee subsequently met on Monday 5 July 2021 to discuss the inquiry's activities.
- 1.2 At the committee's first hearing on Friday 1 October 2021, the Hon Daniel Mookhey MLC tabled the following documents in relation to the establishment and operation of the Transport Asset Holding Entity:
 - Brief, Treasury and Minister Tudehope, Remuneration of the Acting Chief Executive Officer of TAHE (referred to as TAHE Tender 001 during the hearing)
 - Brief, Treasurer, Commercial Policy and Governance Frameworks of the Transport Asset Holding Entity (TAHE) (referred to as TAHE Tender 002 during the hearing)
 - KPMG, TAHE: Long-term operating model assessment, 8 November 2020 (referred to as TAHE Tender 003, Transport Tender 003, Treasury Tender 004 during the hearing)
 - Emails between former TAHE CEO Anne Hayes, and former TAHE Company Secretary, Andrew Alam (referred to as TAHE Tender 004 during the hearing)
 - Joint briefing to Minister for Transport and Treasurer, Public Transport Asset Holding Corporation (AssetCo) Establishment (referred to Transport Tender 001 during the hearing)
 - Cabinet submission, Establishment of a Transport Asset Holding Entity, May 2016 (referred to as Transport Tender 002, Treasury Tender 003 during the hearing)
 - Transport Asset Holding Entity ('TAHE'), Treasury update (referred to as Treasury Tender 001 during the hearing)
 - Public Transport Asset Holding Corporation (AssetCo) Establishment, Joint Briefing to Minister for Transport and Treasurer, 29 September 2014 (referred to as Treasury Tender 002 during the hearing).
- 1.3 Following the hearing, the committee resolved to accept and publish the documents tabled by Mr Mookhey on the committee's website. The minutes of this meeting are attached at Appendix 1.
- 1.4 On Friday 22 October 2021, the committee received correspondence from Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, advising that three of the documents published on the committee's website are subject to cabinet confidentiality:
 - Cabinet submission, Establishment of a Transport Asset Holding Entity, May 2016 (Transport Tender 002 and Treasury Tender 003)
 - Transport Asset Holding Entity ('TAHE'), Treasury update (Treasury Tender 001)
 - KPMG, TAHE: Long-term operating model assessment, 8 November 2020 (TAHE Tender 003, Transport Tender 003, Treasury Tender 004).

- 1.5 The committee notes that the balance of the documents referred to in paragraph 1.2, other than those referred to in paragraph 1.4, were published on Monday 28 July 2021 as part of a return to order to the House.
- 1.6 Mr Coutts-Trotter stated that the disclosure of the documents to the committee 'directly or indirectly, was not authorised by the Premier or the Cabinet'. As such, he requested that the committee remove the documents from the committee's website, and for all digital copies to be destroyed and hard copies returned to the Department. He also requested that the documents not be used or disclosed as part of the inquiry.
- 1.7 On Tuesday 26 October 2021, with the agreement of members of the committee, the Chair wrote to Mr Coutts-Trotter inviting the department to provide further detail in relation to this request, by way of a written submission. The Chair advised that the committee would meet to consider the matter further once it had received the submission.
- 1.8 In response, Mr Coutts-Trotter provided a more detailed submission in support of the department's proposition that the documents are Cabinet documents that should be removed from the committee's website and not used or disclosed as part of the inquiry. In his submission, Mr Coutts-Trotter reiterated that the disclosure of the documents, directly or indirectly, was not authorised by the Premier or the Cabinet. The correspondence detailed above between Mr Coutts-Trotter and the Chair is provided at Appendix 2.
- 1.9 The committee considered the Department's submission at a meeting on Monday 8 November 2021. At the request of the committee, the Clerk of the Parliaments provided a briefing on the issues and possible options the committee could consider in response to the department's request.
- 1.10 Following the Clerk's briefing, the committee resolved to:
- respond to Mr Coutts-Trotter, noting the request to remove the documents from the committee's website
 - prepare a special report to the House, recommending that the matter be referred to the Privileges Committee for inquiry and report as to the right or otherwise of committees of the Legislative Council to examine, publish and use cabinet documents as part of an inquiry.
- 1.11 The minutes for this meeting are attached at Appendix 3.

Committee comment

- 1.12 The committee has considered the government's request but has not resolved to remove the documents from the committee's website at the current time, pending further consideration of this matter and advice by the Privileges Committee. The legal precedents applicable to inter-partes proceedings in the courts are not necessarily directly applicable to practice and procedure before a committee of the Legislative Council. While there are clearly matters of principle regarding the importance of the cabinet process that the committee is alert to, there is a parallel and compelling requirement on the committee to address its terms of reference and to undertake this inquiry independently of the government of the day. In the present circumstances considering those matters carefully the committee has not resolved to agree to

the request to remove the documents, pending further consideration of this matter by the Privileges Committee.

Recommendation 1

That the House refer to the Privileges Committee, for inquiry and report by the end of the calendar year, the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry.

Appendix 1 Minutes – 1 October 2021

Minutes no. 61

Friday 1 October 2021

Public Accountability Committee

Via videoconference at 9.17 am

1. Members present

Mr Shoebridge, *Chair* (until 1.30 pm)

Mr Farlow

Mr Graham

Mrs Houssos

Mr Khan

Mr Poulos

Ms Boyd (participating for the duration of the inquiry into the Transport Asset Holding Entity, and substituting for Mr Shoebridge from 1.30 pm)

Mr Mookhey (participating for the duration of the inquiry into the Transport Asset Holding Entity)

2. Apologies

Mr Borsak, *Deputy Chair*

3. Correspondence

The committee noted the following items of correspondence:

Received

- 29 September 2021 – Email from Mr Brendan Lyon, Principal, Project Partners and Former Partner, KPMG to the Chair, declining the Chair's invitation to make a submission or provide relevant documents to the TAHE inquiry due to binding legal agreements with KPMG
- 29 September 2021 – Email from Ms Kathy Buck, Assistant Director, Parliamentary, Australian Bureau of Statistics to the Chair, advising that the Australian Bureau Statistics will not be making a submission to the TAHE inquiry.

4. Inquiry into the Transport Asset Holding Entity

4.1 Public submissions

The committee noted that the following submissions were published by the committee clerk under the authorisation of the resolution appointing the committee: submission nos. 1, 2, 4-6.

4.2 Confidential submissions

Resolved, on the motion of Mr Khan: That the committee keep submission no. 3 confidential as per the request of the author.

4.3 Provision of documents to participating members

Resolved, on the motion of Mr Graham: That Mr Mookhey and Ms Boyd, who have advised the committee that they intend to participate for the duration of the inquiry into the Transport Asset Holding Entity, be provided with copies of all inquiry related documents.

4.4 Allocation of questioning

Resolved, on the motion of Mrs Houssos: That the timing of questioning be left in the hands of the Chair.

4.5 Public hearing

Witnesses were admitted via videoconference.

The Chair made an opening statement regarding the broadcasting of proceeds and other matters.

The following witnesses were sworn and examined:

- Ms Benedicte Colin Chief Executive Officer, Transport Asset Holding Entity
- Mr Peter Crimp Executive General Manager, Finance and Business Performance, Transport Asset Holding Entity.

Mr Mookhey tabled the following documents:

- TAHE Tender 001 – Brief, Treasury and Minister Tudehope, Remuneration of the Acting Chief Executive Officer of TAHE
- TAHE Tender 002 – Brief, Treasurer, Commercial Policy and Governance Frameworks of the Transport Asset Holding Entity (TAHE)
- TAHE Tender 003 – KPMG, *TAHE: Long-term operating model assessment*, 8 November 2020
- TAHE Tender 004 – Emails between former TAHE CEO Anne Hayes, and former TAHE Company Secretary, Andrew Alam.

The evidence concluded and the witnesses withdrew.

The following witnesses were sworn and examined:

- Ms Trudi Mares Deputy Secretary, Corporate Services, Transport for NSW
- Mr John Hardwick Executive Director, Asset Management, Safety Environment & Regulation, Transport for NSW
- Mr Matt Longland Chief Executive, Sydney Trains.

Mr Mookhey tabled the following documents:

- Transport Tender 001 – Joining briefing to Minister for Transport and Treasurer, Public Transport Asset Holding Corporation (AssetCo) Establishment
- Transport Tender 002 – Cabinet submission, Establishment of a Transport Asset Holding Entity, May 2016
- Transport Tender 003 – KPMG, *TAHE: Long-term operating model assessment*, 8 November 2020.

The evidence concluded and the witnesses withdrew.

4.6 Change of hearing time

Resolved, on the motion of Mr Graham: That the time for hearing evidence from NSW Treasury witnesses be moved back 30 minutes.

4.7 Public hearing

Mr Shoebridge left the meeting.

In the absence of the Chair, Mrs Houssos took the Chair for the purposes of the meeting.

The following witnesses were sworn and examined:

- Mr San Midha Deputy Secretary Policy and Budget, NSW Treasury
- Ms Cassandra Wilkinson Executive Director Transport and Planning/Industry, NSW Treasury.

Mr Mookhey tabled the following documents:

- Treasury Tender 001 – Transport Asset Holding Entity ('TAHE'), Treasury update
- Treasury Tender 002 – Public Transport Asset Holding Corporation (AssetCo) Establishment, Joint Briefing to Minister for Transport and Treasurer, 29 September 2014
- Treasury Tender 003 – Cabinet submission, Establishment of a Transport Asset Holding Entity, May 2016
- Treasury Tender 004 – KPMG, *TAHE: Long-term operating model assessment*, 8 November 2020.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 2.50 pm.

4.8 Tabled documents

Resolved, on the motion of Mr Graham: That the committee accept and publish the following document(s) tendered by Mr Mookhey during the public hearing:

- TAHE Tender 001 – Brief, Treasury and Minister Tudehope, Remuneration of the Acting Chief Executive Officer of TAHE
- TAHE Tender 002 – Brief, Treasurer, Commercial Policy and Governance Frameworks of the Transport Asset Holding Entity (TAHE)
- TAHE Tender 003 – KPMG, *TAHE: Long-term operating model assessment*, 8 November 2020
- TAHE Tender 004 – Emails between former TAHE CEO Anne Hayes, and former TAHE Company Secretary, Andrew Alam
- Transport Tender 001 – Joining briefing to Minister for Transport and Treasurer, Public Transport Asset Holding Corporation (AssetCo) Establishment
- Transport Tender 002 – Cabinet submission, Establishment of a Transport Asset Holding Entity, May 2016
- Transport Tender 003 – KPMG, *TAHE: Long-term operating model assessment*, 8 November 2020
- Treasury Tender 001 – Transport Asset Holding Entity ('TAHE'), Treasury update
- Treasury Tender 002 – Public Transport Asset Holding Corporation (AssetCo) Establishment, Joint Briefing to Minister for Transport and Treasurer, 29 September 2014
- Treasury Tender 003 – Cabinet submission, Establishment of a Transport Asset Holding Entity, May 2016
- Treasury Tender 004 – KPMG, *TAHE: Long-term operating model assessment*, 8 November 2020.

4.9 Invitation to make a submission

Resolved, on the motion of Mr Graham: That the Chair, on behalf of the committee, write to Ms Fiona Trussell, Former Deputy Secretary, Transport for NSW, and invite her to provide a submission and any documents she considered relevant to the terms of reference to the inquiry.

5. Adjournment

The committee adjourned at 2.55 pm, until Monday 11 October 2021 via videoconference (public hearing – building standards).

Shaza Barbar
Committee Clerk

Appendix 2 Correspondence



Ref: A5152927

The Hon David Shoebridge MLC
Chair, Public Accountability Committee
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: public.accountability@parliament.nsw.gov.au

Dear Chair

It has come to my attention that Cabinet documents have been used and disclosed in connection with the Public Accountability Committee's inquiry into the Transport Asset Holding Entity (the **Inquiry**).

In particular, the following Cabinet documents, tabled by the Hon Daniel Mookhey MLC, have been published on the NSW Parliament's website for the Inquiry:

- draft Cabinet submission entitled 'Establishment of Transport Asset Holding Entity' dated May 2016 (described on the Committee's website as 'Transport Tender 002' and 'Treasury Tender 003');
- Treasury presentation entitled 'Transport Asset Holding Entity ("TAHE") – Treasury update' (described as 'Treasury Tender 001'); and
- KPMG report entitled 'TAHE: Long-term operating model assessment' dated 8 November 2020 (described as 'TAHE Tender 003', 'Transport Tender 003' and 'Treasury Tender 004').

The collective responsibility of Ministers for government decisions is a convention at the core of the Cabinet system. The unauthorised disclosure of Cabinet documents, including draft Cabinet documents, undermines collective ministerial responsibility and the convention of Cabinet confidentiality.

Each of the documents identified above is subject to Cabinet confidentiality. I understand that their disclosure to the Committee, directly or indirectly, was not authorised by the Premier or the Cabinet.

I therefore request that you arrange for the Cabinet documents identified above to be immediately removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department. I also request that the Cabinet documents not be further used or disclosed as part of the Inquiry.

I would be grateful if you could confirm that these steps have been taken by return letter as soon as possible.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Mr Mark Hare, A/Deputy Secretary, General Counsel on

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Coutts-Trotter'.

Michael Coutts-Trotter
Secretary

22 October 2021



LEGISLATIVE COUNCIL

PUBLIC ACCOUNTABILITY COMMITTEE

26 October 2021

Our Ref: D21/55627

Mr Michael Coutts-Trotter
Secretary
Department of Premier and Cabinet
52 Martin Place
SYDNEY NSW 2000

Dear Mr Coutts-Trotter

Inquiry into the Transport Asset Holding Entity

Thank you for your correspondence dated 22 October 2021 requesting that the following cabinet documents tendered during the Public Accountability Committee inquiry into the Transport Asset Holding Entity be removed from the committee's website:

- draft Cabinet submission entitled 'Establishment of Transport Asset Holding Entity' dated May 2016
- Treasury presentation entitled 'Transport Asset Holding Entity ("TAHE") – Treasury update'
- KPMG report entitled 'TAHE: Long-term operating model assessment' dated 8 November 2020.

The committee resolved that I write to you requesting that the Department of Premier and Cabinet provide further detail by way of a written submission to the committee in support of the department's proposition that the documents be removed from the committee's website and not be further used or disclosed as part of the inquiry. I note that similar issues on cabinet confidentiality have been recently considered at the [Independent Commission Against Corruption](#).

On receipt of the submission, the committee will meet to consider the matter further.

Please email the department's submission to public.accountability@parliament.nsw.gov.au by **COB Tuesday 2 November 2021**. Please also indicate the department's requested publication status for the submission.

If you have any questions on this matter, please contact Ms Shaza Barbar, Principal Council Officer, on 9230 3067.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D Shoebridge'.

Mr David Shoebridge MLC
Committee Chair

Parliament House, Macquarie Street, Sydney NSW 2000 AUSTRALIA
Telephone (02) 9230 3067 Facsimile (02) 9230 2981
public.accountability@parliament.nsw.gov.au



Ref. A5159073

Mr David Shoebridge MLC
Chair, Public Accountability Committee
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: public.accountability@parliament.nsw.gov.au

Dear Chair

Thank you for your letter dated 26 October 2021, received on 27 October 2021, inviting the Department to provide further information by way of written submissions in relation to the Department's request that certain Cabinet documents be removed from the Committee's website and not used or disclosed any further by the Committee.

In addition to the matters set out in my letter of 22 October 2021, the Department makes the following observations.

Each document identified in my letter of 22 October 2021 contains Cabinet information and is subject to Cabinet confidentiality.

I am advised that their disclosure to the Committee, directly or indirectly, was not authorised by the Premier or the Cabinet, who are the only persons who may authorise the disclosure of Cabinet documents.

The paramount importance of protecting the confidentiality of Cabinet documents is firmly established. In *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 at 39, Gibbs ACJ stated:

[T]he law recognizes that there is a class of documents which in the public interest should be immune from disclosure. The class includes cabinet minutes and minutes of discussions between heads of departments . . . papers brought into existence for the purpose of preparing a submission to cabinet . . . and indeed any documents which relate to the framing of government policy at a high level. According to Lord Reid, the class would extend to 'all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies': *Conway v Rimmer* [1968] AC 910 at 952.

In *Conway v Rimmer* [1968] AC 910 at 952, Lord Reid said:

I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest . . . To my mind the most important reason is that such disclosure would create or fan ill-informed or capricious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those with some axe to grind. And that must, in my view, apply to all documents concerned with policy making within departments . . .

In *Egan v Willis* (1998) 195 CLR 424 at 453-454, the High Court found that the Legislative Council had the power to order State papers based on constitutional principles relating to responsible government, the separation of powers and the rule of law. However, the majority judgment of Spigelman CJ and Meagher JA in *Egan v Chadwick* (1999) 46 NSWLR 563 found that the power of the Legislative Council to order the production of documents does not extend to ordering the production of Cabinet documents, as this would directly undermine the constitutional principle of collective Ministerial responsibility.

I note that Cabinet confidentiality, unlike legal professional privilege, cannot be waived.

In 2013, the High Court considered the appropriate action to be taken where privileged documents had been mistakenly produced to the opposing side during court-ordered discovery (*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46). The High Court concluded that a court should ordinarily permit that mistake to be corrected and order the document's return. The High Court noted that the Australian Solicitors' Conduct Rules contain a duty of a solicitor to return material, which is known or reasonably suspected to be confidential, where a solicitor is aware that its disclosure was inadvertent. It concluded that such a rule should not be necessary, but provides "an example of professional, ethical obligations of legal practitioners supporting the objectives of the proper administration of justice".

An analogy may be drawn to the present case, in which the Committee has received confidential Cabinet documents in circumstances where the disclosure of those documents was not authorised.

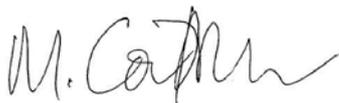
In your letter, you mentioned that similar issues of Cabinet confidentiality were recently considered by the Independent Commission Against Corruption (ICAC), which I understand to be a reference to the Assistant Commissioner's ruling in relation to the use of Cabinet documents in the ICAC's Operation Keppel investigation. The Department respectfully submits that these are not comparable circumstances, given that the ICAC has the power to compel the production of Cabinet documents and information.¹ The Legislative Council does not.

For these reasons, the Committee should arrange for the relevant documents to be immediately removed from the Parliament's website, and for all digital copies to be destroyed and hard copies returned to the Department. The Committee should also ensure that the Cabinet documents not be further used or disclosed as part of its inquiry. I would be grateful if you could confirm that these steps have been taken by return letter as soon as possible.

This submission is made in the Department's capacity as custodian of official Cabinet records of the State. The submission is not confidential and may be published.

Should you require any clarification, or to make arrangements for the return of hard copies, please contact Ms Kate Boyd, Deputy Secretary, General Counsel on

Yours sincerely



Michael Coutts-Trotter
Secretary

2 November 2021

¹ Sections 24(3) and 37(2) of the *Independent Commission Against Corruption Act 1988*.

Appendix 3 Minutes – 8 November 2021

Minutes no. 64

Monday 8 November 2021

Public Accountability Committee

Macquarie Room, Parliament House, Sydney at 9.32 am

1. Members present

Mr Shoebridge, *Chair*

Mr Farlow

Mr Graham (until 1.56 pm)

Mr Khan

Mr Mookhey (substituting for Mrs Houssos)

Mr Moselmane (substitution for Mr Graham from 1.56 pm)

Mr Poulos

Ms Boyd (participating for the duration of the inquiry into the Transport Asset Holding Entity) (via videoconference)

2. Apologies

Mr Borsak, *Deputy Chair*

3. Previous minutes

Resolved, on the motion of Mr Khan: That draft minutes no. 63 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Received

- 1 November 2021 – Email from Ms Louise Warren, Executive Officer to Damon Rees, Chief Executive Officer, Service NSW, to secretariat, advising on the confidentiality of answers to questions on notice and supplementary questions following the hearing on 30 September 2021 (Grants inquiry)
- 2 November 2021 – Email from Ms Louise Warren, Executive Officer to Damon Rees, Chief Executive Officer, Service NSW, to secretariat, identifying the answers to questions on notice and supplementary questions for which confidentiality is requested (Grants inquiry)
- 3 November 2021 – Letter from Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, to Chair, in relation to their request that certain Cabinet documents be removed from the website and not used or disclosed as part of the inquiry (TAHE inquiry)
- 3 November 2021 – Email from Mr James Copsey, Director, Government & Regulatory Affairs KPMG Australia to the secretariat, advising that Ms Heather Watson, Partner, KPMG Australia will be accepting the further invitation to appear before the committee (TAHE inquiry)
- 4 November 2021 – Email from Mr Brendan Lyon, former Partner, KPMG Australia, to secretariat, declining the further invitation to appear before the committee (TAHE inquiry).

Sent

- 3 November 2021 – Letter from the Chair to Mr Brendan Lyon, former Partner, KPMG Australia, reissuing the invitation to appear before the committee noting that the committee has resolved to issue a summons should he decline again (TAHE inquiry)
- 3 November 2021 – Letter from the Chair to Ms Heather Watson, Partner, National IGH Lead, CFO Advisory, KPMG Australia, reissuing the invitation to appear before the committee noting that the committee has resolved to issue a summons should she decline again (TAHE inquiry)

- 3 November 2021 – Letter from the Chair to Mr Rodd Staples, former Secretary, Transport for NSW, reissuing the invitation to appear before the committee noting that the committee has resolved to issue a summons should he decline again (TAHE inquiry)
- 4 November 2021 – Letter from the Chair to Mr Frank Yi, Parliamentary Accountant, Department of Parliamentary Services, authorising a cheque to be issued to Mr Brendan Lyon who is being summoned to appear before the committee on Monday 8 November 2021 (TAHE inquiry)
- 5 November 2021 – Summons from the Chair to Mr Brendan Lyon, former Partner, KPMG Australia, ordering Mr Lyon to attend and give evidence at a hearing on Monday 8 November 2021 (TAHE inquiry).

5. Inquiry into the integrity, efficacy and value for money for NSW Government grant programs

5.1 Extension of reporting date

Resolved, on the motion of Mr Mookhey: That the committee amend the terms of reference to extend the inquiry reporting date to 28 February 2022 and that the Chair inform the House of this amendment to the terms of reference.

5.2 Core Integrity witnesses

Resolved, on the motion of Mr Graham: That the committee invite Mr Dylan Bohnen, Senior Manager, Core Integrity, to attend the hearing on 9 December 2021.

5.3 Answers to questions on notice

Resolved, on the motion of Mr Mookhey: That the committee authorise the publication of answers to questions on notice from Service NSW, received 30 October 2021, with the exception of answers to question 1 (questions on notice) and questions 2-6 (supplementary questions), which are to remain confidential, as per the request of the author.

6. Inquiry into the Transport Asset Holding Entity

6.1 Attendance of Mr Brendan Lyon at hearing on Monday 8 November 2021

Resolved, on the motion of Mr Mookhey: That:

- the committee, under the authority of s 4(2) of the *Parliamentary Evidence Act 1901*, issue a summons to Mr Brendan Lyon to attend and give evidence before the committee on Monday 8 November 2021 at 9.45 am and to produce any document in relation to the establishment and operation of the Transport Asset Holding Entity
- the committee reserve the first 15 minutes of Mr Lyon's appearance time to be held in camera.

6.2 Answers to questions on notice

Resolved, on the motion of Mr Mookhey: That the committee authorise the publication of answers to questions on notice from NSW Treasury, received 1 November 2021.

6.3 Clarification of evidence

Resolved, on the motion of Mr Farlow: That the committee authorise:

- the publication of NSW Treasury's clarification of evidence dated 5 November 2021
- the insertion of a footnote in the hearing transcript for 1 October 2021, linked to NSW Treasury's correspondence.

6.4 Submission from the Department of Premier and Cabinet

The committee received a submission from the Department of Premier and Cabinet in relation to their request to remove the following cabinet documents from the committee's website and not use or disclose the documents as part of the inquiry:

- draft Cabinet submission entitled 'Establishment of Transport Asset Holding Entity' dated May 2016
- Treasury presentation entitled 'Transport Asset Holding Entity ("TAHE") – Treasury update'
- KPMG report entitled 'TAHE: Long-term operating model assessment' dated 8 November 2020.

The Clerk provided advice to the committee.

Mr Khan moved: That the committee:

- remove relevant documents from the committee's website
- refer the matter to the Privileges Committee to report back to the committee by the end of the calendar year.

Question put.

The committee divided.

Ayes: Mr Farlow, Mr Khan, Mr Poulos.

Noes: Mr Graham, Mr Mookhey, Mr Shoebridge.

There being an equality of votes, question resolved in the negative on the casting vote of the Chair.

Resolved, on the motion of Mr Graham: That the committee:

- respond to Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet noting the request to remove the documents from the committee's website
- prepare a special report to the House, recommending that the matter be referred to the Privileges Committee for inquiry and report as to the right or otherwise of committees of the Legislative Council to examine, publish and use cabinet documents as part of an inquiry.

6.5 Election of acting Deputy Chair

The Chair noted the absence of the Deputy Chair for the meeting.

Mr Mookhey moved: That Mr Graham be elected acting Deputy Chair of the committee.

There being no further nominations, the Chair declared Mr Graham acting Deputy Chair.

6.6 Request to take photos at the hearing

Resolved, on the motion of Mr Mookhey: That Ms Kate Geraty, a photographer with the Herald, by authorised to take photo's during the public hearing, subject to her signing the broadcasting guidelines.

6.7 *In camera* hearing

The committee proceeded to take *in camera* evidence.

Persons present other than the committee Tina Higgins, Shaza Barbar, Kate Bogatova, Mr Lyon's wife and Hansard Reporters (via videoconference).

The following witness was sworn and examined:

- Mr Brendan Lyon, Former Partner, KPMG.

In accordance with a summons to produce documents, Mr Lyon produced a folder of documents in relation to the establishment and operation of the Transport Asset Holding Entity, numbered 1 to 301.

6.8 Public hearing

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 examined on his former oath:

- Mr Brendan Lyon, Former Partner, KPMG.

Mr Lyon tendered his opening statement.

Mr Mookhey tabled the following documents:

- Letter from Mr Rodd Staples, Former Secretary Transport for NSW, to Mr Michael Pratt, Secretary, NSW Treasury.
- Letter from the Hon Andrew Constance MP, Minister for Transport and Infrastructure to Mr David Jurd, A/Chief Executive Officer, Transport Asset Holding Entity, Statement of expectation, dated 9 June 2021.

The evidence concluded and the witness withdrew.

The following witnesses were sworn and examined:

- Mr Bruce Morgan, Chair, Transport Asset Holding Entity
- Mr Trevor Bourne, Board Director, Transport Asset Holding Entity.

The evidence concluded and the witnesses withdrew.

The hearing concluded at 2.31 pm.

6.9 Tabled documents

Resolved, on the motion of Mr Mookhey: That:

- the committee publish the following documents tendered by Mr Lyon with the exception of identifying information: 49, 131, 132, 140, 142, 143, 145, 146, 147, 191, 246, 247, 250, 251, 252, 253, 254, 255, 256, 257, 263, 264, 265, 266
- the secretariat review the rest of the documents tendered by Mr Lyon and provide a recommendation to the committee on their publication status
- in accordance with the procedural fairness resolution, the secretariat review the documents tendered by Mr Lyon and circulate to the committee a list of names and any suggestions in relation to allowing any individual/organisation to provide a written response to potential adverse mention.

Resolved, on the motion of Mr Mookhey: That the committee accept and publish the following documents tendered by Mr Mookhey during the public hearing:

- Letter from Mr Rodd Staples, Former Secretary Transport for NSW to Mr Michael Pratt, Secretary, NSW Treasury
- Letter from the Hon Andrew Constance MP, Minister for Transport and Infrastructure to Mr David Jurd, A/Chief Executive Officer, Transport Asset Holding Entity, Statement of expectation, dated 9 June 2021.

7. Adjournment

The committee adjourned at 2.45 pm until Monday 15 November 2021, Macquarie Room, Parliament House, Sydney (public hearing – TAHE inquiry).

Shaza Barbar
Committee Clerk

Appendix 4 Minutes – 12 November 2021

Draft minutes no. 65

Friday 12 November 2021

Public Accountability Committee

Members' Lounge, Parliament House, Sydney at 1.34 pm.

1. Members present

Mr Shoebridge, *Chair*

Mr Farlow

Mr Graham

Mr Khan

Mr Mookhey (substituting for Mrs Houssos)

Mr Poulos

Ms Boyd (participating for the duration of the inquiry into the Transport Asset Holding Entity)

2. Apologies

Mr Borsak, *Deputy Chair*

3. Previous minutes

Resolved, on the motion of Mr Farlow: That draft minutes no. 64 be confirmed.

4. Correspondence

The committee noted the following items of correspondence:

Sent

- 10 November 2021 – Letter from the Chair to Ms Margaret Crawford, NSW Auditor-General, providing documents produced by Mr Lyon at the TAHE hearing (TAHE inquiry)
- 10 November 2021 – Letter from the Chair to Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, advising that the committee notes the request to remove certain documents from the committee's website and has resolved to prepare a Special Report to the House on the matter (TAHE inquiry).

5. Inquiry into the Transport Asset Holding Entity

5.1 Letter to the Auditor-General

Mr Mookhey moved: That the committee authorise the publication of the letter dated 10 November 2021 from the Chair to Ms Margaret Crawford, NSW Auditor-General, providing documents produced by Mr Lyon at the TAHE hearing on Monday 8 November 2021.

Question put.

The committee divided.

Ayes: Mr Graham, Mr Mookhey, Mr Shoebridge

Noes: Mr Farlow, Mr Khan, Mr Poulos.

There being an equality of votes, question resolved in the affirmative on the casting vote of the Chair.

5.2 Request from the Department of Premier and Cabinet

Resolved, on the motion of Mr Graham: That the committee authorise the publication of correspondence between Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet and the Chair in relation to the request to remove certain documents from the committee's website.

5.3 Publication of recordings of hearings

Resolved, on the motion Mr Farlow: That the committee upload the recordings of any hearings for the inquiry into the Transport Asset Holding Entity on the NSW Parliament's YouTube page and publish a link to the recordings on the inquiry webpage as soon as practicable after hearings subject to any comments or concerns from the secretariat or the committee after the hearings.

5.4 Consideration of the Chair's draft Special Report to the House

The Chair submitted his draft report entitled *Special report on the right or otherwise of committees of the Legislative Council to examine, publish and use cabinet documents as part of an inquiry (arising from the inquiry into the Transport Asset Holding Entity)*.

Resolved, on the motion of Mr Mookhey: That the following new paragraph be inserted after paragraph 1.4:

'The committee notes that the balance of the documents referred to in paragraph 1.2, other than those referred to in paragraph 1.4, were published on Monday 28 July 2021 as part of a return to order to the House.'

Resolved, on the motion of Mr Mookhey: That recommendation 1 be amended by omitting at the end: 'the right or otherwise of committees of the Legislative Council to examine, publish and use cabinet documents as part of an inquiry' and inserting instead 'the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry.'

Resolved, on the motion of Mr Farlow that:

- the draft report, as amended, be the report of the committee and that the committee present the report to the House;
- the committee secretariat correct any typographical, grammatical and formatting errors prior to tabling;
- dissenting statements be provided to the secretariat by 3.30 pm Friday 12 November 2021;
- the report be tabled by 5.00 pm Friday 12 November 2021.

5.5 KPMG submission

Resolved, on the motion of Mr Graham: That:

- the committee authorise the publication of submission no. 8 at 9.00 am on Monday 15 November 2021.
- Mr Brendan Lyon, Former Partner, KPMG Australia and Mr Rodd Staples, Former Secretary, Transport for NSW be provided with a confidential copy of the submission and requested to provide any comments on it by 9.00 am Monday 15 November 2021, at which point it will also become public.

6. Adjournment

The committee adjourned at 1.54 pm until Monday 15 November 2021, 9.15 am, Macquarie Room (public hearing – TAHE inquiry).

Stephen Frappell
Committee Clerk

