



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

# Consideration of disputed claims of privilege as referred by the House (May 2022)



Report 87

May 2022

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Privileges Committee

# **Consideration of disputed claims of privilege as referred by the House (May 2022)**

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Consideration of disputed claims of privilege as referred by the House

“May 2022”.

Chair: Hon Peter Primrose MLC



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## Terms of reference

- (1) That, notwithstanding anything to the contrary in the standing and sessional orders, during the current session and unless otherwise ordered, in instances where a report of the Independent Legal Arbiter on a disputed claim of privilege is received more than three weeks before the next sitting of the House:
  - (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 privilege 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 the 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 6 August 2020.<sup>1</sup>

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<sup>1</sup>*Minutes*, NSW Legislative Council, 6 August 2020, pp 1197-1198.

## Committee details

### Committee members

<b>The Hon Peter Primrose MLC</b>	Australian Labor Party	<i>Chair</i>
<b>Revd the Hon Fred Nile MLC</b>	Independent	<i>Deputy Chair</i>
<b>The Hon Greg Donnelly MLC</b>	Australian Labor Party	
<b>Ms Cate Faehrmann MLC</b>	The Greens	
<b>The Hon Wes Fang MLC</b>	The Nationals	
<b>The Hon Scott Farlow MLC</b>	Liberal Party	
<b>The Hon Shayne Mallard MLC</b>	Liberal Party	
<b>The Hon Taylor Martin MLC</b>	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 in recess, in circumstances where six reports of the Independent Legal Arbiter on a disputed claim of privilege were received more than three weeks before the next sitting of the House.

Under a resolution of the House agreed to on 6 August 2020, in these circumstances, the Clerk was required to refer the six reports to the Privileges Committee for consideration and the committee was authorised to undertake the role usually performed by the House in dealing with disputed claims of privilege under standing order 52, including publishing a report of the arbiter and any documents over which privilege has been claimed but not upheld by the arbiter. The six reports considered related to claims of privilege over documents contained within five returns to orders relating to:

- Western lands lease conversion program
- Transport Asset Holding Entity of NSW – Further order (24 February 2022) (two reports)
- Health funding and health infrastructure commitments
- Cemeteries
- Sight lines for the Crown Towers, Barangaroo.

In each case, the committee resolved to publish the report of the arbiter and, at a subsequent meeting, the documents considered not to be privileged by the arbiter. In two cases the committee ordered that documents be redacted of certain information prior to being published, consistent with the recommendations of the arbiter.

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  
**Committee Chair**

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

1.1 On 6 August 2020, the House adopted a resolution 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, where a report of the Independent Legal Arbiter is received more than three weeks before the next sitting of the House:

That, notwithstanding anything to the contrary in the standing and sessional orders, during the current session and unless otherwise ordered, in instances where a report of the Independent Legal Arbiter on a disputed claim of privilege is received more than three weeks before the next sitting of the House:

- (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 privilege 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 the 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.<sup>2</sup>

1.2 This report documents the action taken by the committee in relation to disputed claims of privilege over documents relating to the following returns to order:

- Western lands lease conversion program
- Transport Asset Holding Entity of NSW – Further order (24 February 2022) (two reports)
- Health funding and health infrastructure commitments
- Cemeteries
- Sight lines for the Crown Towers, Barangaroo.

1.3 The matters canvassed in these reports were considered across two meetings. At the first, which took place on 12 April 2022, the committee resolved to publish the reports of the respective Independent Legal Arbiters. 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 documents considered by the arbiters not to be privileged. These documents were considered and published at a meeting held on 22 April 2022. The details of the reports and the committee's deliberations are set out below.

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<sup>2</sup> *LC Minutes*, 6 August 2020, pp 1197-98.

***Western lands lease conversion program***

- 1.4 At the meeting of 12 April 2022, the committee considered a report of the Independent Legal Arbitrator, the Hon Keith Mason AC, QC, dated 4 April 2022. This report considered a claim of privilege over redacted documents relating to the western lands lease conversion program, received by the Clerk on 16 March 2022 and disputed by Mr David Shoebridge MLC.
- 1.5 Specifically, Mr Shoebridge did not oppose the redaction of contact details, signatures and addresses but did dispute the suppression of the names of the applicant lessees for reasons set out in the arbitrator's report.
- 1.6 Mr Mason did not uphold the claim of privilege, noting that the House had explicitly called for papers disclosing the names of all purchasers and no basis of privilege had been advanced or established.
- 1.7 Under the authority of the resolution of the House, the committee resolved to publish Mr Mason's report.
- 1.8 At a meeting held on 22 April 2022, the committee considered the documents over which privilege had been claimed and, noting the findings of Mr Mason's report, resolved to order that all Department of Planning and Environment documents received by the Clerk on 16 March 2022, considered by the Independent Legal Arbitrator not to be privileged, be returned to the Clerk within 7 days, subject to the redaction of all contact details including phone numbers, email addresses, signatures and addresses, with the exception of the names of the applicant lessees. Under the authority of the resolution of the House, the documents were authorised to be published on their return to the Clerk on 29 April 2022]

***Transport Asset Holding Entity of NSW – Further order (24 February 2022)***

- 1.9 The committee considered two reports of the Independent Legal Arbitrator, the Hon Keith Mason AC, QC, dated 4 and 6 April 2022. These reports considered claims of privilege over documents relating to TAHE, the Transport Asset Holding Entity of NSW, and disputed by the Hon Daniel Mookhey MLC. TAHE has been the subject of various orders for papers, and these documents related specifically to those ordered on 24 February 2022. The documents were subsequently received by the Clerk in two tranches – the first on 24 March 2022, the second on 31 March 2022.
- 1.10 The first report of Mr Mason was dated 4 April 2022 and related to eight documents in the first tranche received on 24 March 2022, which were subject to a claim of commercial in confidence privilege. In his evaluation, Mr Mason stated that, should the documents be published, he did not perceive any instance of providers of services to TAHE being at prejudice in future dealings with TAHE, nor any situation involving TAHE itself obtaining competitive tenders and/or prices for future projects or any situation of contractual or commercial negotiation. He did subsequently did not uphold the claim of privilege.
- 1.11 The second report of Mr Mason was dated 6 April 2022 and related to a selection of the second tranche of documents, received on 31 March 2022. Two documents were subject to a claim of commercial in confidence; 14 documents were subject to a claim of parliamentary privilege; one document was subject to a claim of legal professional privilege; and one document was subject

to a claim of personal information. Mr Mason determined that the claims of privilege made were either not substantiated, rejected or, in the case of one document covered by commercial in confidence, outweighed by the public interest in having access to the information contained therein. Mr Mason did not uphold the claims of privilege.

- 1.12 At its meeting of 12 April 2022 the committee resolved to publish both reports.
- 1.13 At a subsequent meeting held on 22 April 2022, the committee resolved that, in view of the reports of Mr Mason, the documents determined not to be privileged, be published.

### *Health funding and health infrastructure commitments*

- 1.14 The committee considered a report of the Independent Legal Arbiter, the Hon Keith Mason AC, QC, dated 4 April 2022. The report considered claims of privilege over documents relating to health funding and health infrastructure commitments, contained in a return to order received by the Clerk on 18 March 2022.
- 1.15 Two of the documents were subject to a claim of parliamentary privilege and subsequently disputed by the Hon Walt Secord MLC. The arbiter observed that in his letter of dispute Mr Secord had drawn attention to previous reports of the arbiter that have consistently determined that parliamentary privilege is not a valid ground on which to prevent the publication of documents provided to the House. The arbiter accordingly determined that the claim was without substance.
- 1.16 At its meeting of 12 April 2022 the committee resolved to publish the report of the arbiter.
- 1.17 At a subsequent meeting held on 22 April 2022, the committee resolved that, in view of the finding of Mr Mason, the documents determined not to be privileged, be published.

### *Cemeteries*

- 1.18 The committee considered a report of the Independent Legal Arbiter, the Hon Keith Mason AC, QC, dated 6 April 2022. This report considered claims of privilege over documents relating to the sale or management of cemeteries, in particular the cemetery at Rookwood, received by the Clerk on 22 December 2021.
- 1.19 The claim of privilege over a small selection of the documents was disputed by Mr David Shoebridge on 1 February 2022. On 24 February 2022, the Department of Planning and Environment further narrowed the dispute to the redacted portions of a letter from the Office of OneCrown Cemeteries to the Attorney General dated 27 October 2021; a Memorandum of Advice from Anthony Cheshire SC and Alistair Oakes ('the Cheshire Advice'); and a letter from Carroll & O'Dea, Lawyers summarising that advice.
- 1.20 The arbiter determined that the issues raised in the Cheshire Advice were already in the public domain and that the documents and parts of documents still in dispute were 'not relevantly privileged'.
- 1.21 At its meeting of 12 April 2022 the committee resolved to publish the report of the arbiter.

- 1.22 At a subsequent meeting held on 22 April 2022, the committee resolved that, in view of the finding of Mr Mason, the documents determined not to be privileged, be published.

*Sight lines for the Crown Towers, Barangaroo*

- 1.23 The committee considered an interim report of the Independent Legal Arbitrator, the Hon Alan Robertson SC, dated 8 April 2022. This report considered claims of privilege over documents relating to discussions between Infrastructure NSW, Crown Sydney Property (Crown) and Lendlease (Millers Point) (Lendlease) regarding sight lines for the proposed Crown Towers at Barangaroo, received by the Clerk on 9 February 2022.
- 1.24 The claim of commercial in confidence privilege made on a selection of documents was disputed by the Hon Anthony D'Adam on 16 March 2022. These documents were also covered by a claim of public interest immunity that was tied to the claim of commercial in confidence. During the course of the Independent Legal Arbitrator's consideration of the documents, Mr D'Adam subsequently indicated that it would be acceptable to him in the first instance if the claims for privilege were assessed only in relation to the documents or parts of documents which directly concerned the sight lines referred to in the House's original resolution ordering the documents (agreed to on 24 November 2021).
- 1.25 While the arbitrator observed that the department had argued that the names of employees or officers, their official positions, their email addresses and their mobile telephone numbers should be excluded from wider access, he subsequently determined that this broad claim of privilege had not been made out. The arbitrator recommended that (a) prior to any documents being published, they be redacted of mobile telephone numbers, and (b) that where the relevant section for publication is contained within a lengthy document, the cover page should also be published to provide context. The detail of the redactions proposed was set out in a schedule attached to the report.
- 1.26 At its meeting of 12 April 2022 the committee resolved to publish the interim report of the arbitrator.
- 1.27 At a subsequent meeting held on 22 April 2022, the committee considered the documents over which privilege had been claimed and, noting the findings of Mr Robertson, resolved to order that those documents or sections of documents considered by the Independent Legal Arbitrator not to be privileged, identified in the schedule to the report, be returned to the Clerk within 7 days, subject to redaction of mobile telephone numbers. Under the authority of the resolution of the House, the documents were authorised to be published on their return to the Clerk on 29 April 2022.

# Appendix 1 Minutes

## Minutes no. 29

Tuesday 12 April 2022

Privileges Committee

Room 1136 at 11.00 am

### 1. Members present

Mr Primrose (*Chair*)

Revd Mr Nile (*Deputy Chair*)

Mr Donnelly

Ms Faehrmann

Mr Fang (*via Webex*)

Mr Farlow

Mr Martin (*via Webex*).

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

### 2. Apologies

Mr Mallard.

### 3. Draft minutes

Resolved, on the motion of Mr Donnelly: That draft minutes no. 28 be confirmed.

### 4. Correspondence

The committee noted the following items of correspondence:

#### *Sent:*

- 7 April 2022 - Correspondence from Hon Peter Primrose MLC, Chair, Privileges Committee, to the Assistant Commissioner, ICAC, in response to the submissions from the corruption prevention division of the Commission.

### 5. Disputed claims of privilege

The committee noted that, by resolution of 6 August 2020, the Privileges Committee is given the authority, while the House is not sitting for more than three weeks, 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 has 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 proposed that consideration of whether to publish an arbiter's report be resolved at this meeting and that a further meeting be scheduled to publish documents considered by the arbiter to be not privileged.

#### 5.2 Publication of the report of the Independent Legal Arbitrator - Western lands lease conversion program

Resolved, on the motion of Revd Mr Nile: That the report of the Independent Legal Arbitrator on the disputed claim of privilege regarding the Western lands lease conversion program be published.

#### 5.3 Publication of the report of the Independent Legal Arbitrator - Transport Asset Holding Entity of NSW – Further order (24 February 2022)

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbitrator on the disputed claim of privilege regarding the Transport Asset Holding Entity of NSW – Further order (return received 24 March 2022) be published.

**5.4 Publication of the report of the Independent Legal Arbiter -Health funding and health infrastructure commitments**

Resolved, on the motion of Revd Mr Nile: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding the Health funding and health infrastructure commitments return be published.

**5.5 Publication of the report of the Independent Legal Arbiter - Transport Asset Holding Entity of NSW – Further order (24 February 2022)**

Resolved, on the motion of Mr Donnelly: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding the Transport Asset Holding Entity of NSW – Further order (return of additional documents received 31 March 2022) be published.

**5.6 Publication of the report of the Independent Legal Arbiter – Cemeteries**

Resolved, on the motion of Ms Faehrmann: That the report of the Independent Legal Arbiter on the disputed claim of privilege regarding the Cemeteries be published.

**5.7 Publication of the report of the Independent Legal Arbiter – Sight lines for the Crown Towers, Barangaroo**

Resolved, on the motion of Mr Donnelly: That the interim report of the Independent Legal Arbiter on the disputed claim of privilege regarding the Sight lines for the Crown Towers, Barangaroo be published.

**6. Adjournment**

The committee adjourned at 11.18 am, *sine die*.

Steven Reynolds  
**Committee Clerk**

**Minutes no. 30**

Friday 22 April 2022  
Privileges Committee  
Room 1136 at 11.30 am

**1. Members present**

Mr Primrose (*Chair*)  
Mr Donnelly  
Ms Faehrmann  
Mr Fang (*via Webex*)  
Mr Farlow (*via Webex*)  
Mr Martin.

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

**2. Apologies**

Revd Mr Nile (*Deputy Chair*).

**3. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 29 be confirmed.

**4. Disputed claims of privilege**

Following the publication of six reports of the Independent Legal Arbiter on 12 April 2022, the committee consider the publication of documents.

**4.1 Publication of documents – Western lands lease conversion program**

Resolved, on the motion of Ms Faehrmann:

- (1) That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege regarding the Western Lands Lease Conversion Program, dated 4 April 2022, the committee orders that all Department of Planning and Environment documents received by the Clerk on 16 March 2022, considered by the Independent Legal Arbiter not to be privileged, be returned to the Clerk within 7 days, subject to the redaction of all contact details including phone numbers, email addresses, signatures and addresses, with the exception of the names of the applicant lessees.
- (2) That on receipt, the redacted documents be published.

#### **4.2 Publication of documents – Transport Asset Holding Entity of NSW – Further order (24 February 2022)**

Resolved, on the motion of Mr Donnelly:

- (1) That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege regarding the Transport Asset Holding Entity of New South Wales, dated 4 April 2022, the committee orders that the following documents received by the Clerk on 24 March 2022, considered by the Independent Legal Arbiter not to be privileged, be published
  - (a) Transport Asset Holding Entity of New South Wales documents numbered 93, 95, 104, 105, 107, 108, 109 and 111.
- (2) That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege regarding the Transport Asset Holding Entity of New South Wales, dated 6 April 2022, the committee orders that the following documents received by the Clerk on 31 March 2022, considered by the Independent Legal Arbiter not to be privileged, be published:
  - (a) NSW Treasury documents numbered (M)(iii)1, (L)1, (G)1 to (G)15 and (F)1.

#### **4.3 Publication of documents – Health funding and health infrastructure commitments**

Mr Donnelly moved: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege regarding health funding and health infrastructure commitments, dated 4 April 2022, the committee orders that the following documents received by the Clerk on 18 March 2022, considered by the Independent Legal Arbiter not to be privileged, be published:

- (a) Office of the Minister for Health document numbered (a)1, and
- (b) NSW Ministry of Health document numbered (a)1.

Debate ensued.

Question: That the motion of Mr Donnelly be agreed to.

The committee divided.

Ayes: Mr Donnelly, Ms Faehrmann, Mr Primrose.

Noes: Mr Fang, Mr Farlow, Mr Martin.

There being an equality of votes, the Chair gave his casting vote with the ayes. He gave as his reason that a casting vote should reflect the recommendation made by the independent legal arbiter, who had been appointed by the House to make an independent assessment as to the validity of the claim of privilege on the papers in question.

#### **4.4 Publication of documents – Cemeteries**

Resolved, on the motion of Mr Donnelly: That, in view of the report of the Independent Legal Arbiter, the Honourable Keith Mason AC QC, on the disputed claim of privilege regarding cemeteries, dated 6 April 2022, the committee orders that the following documents provided by the Minister for Planning and Public Spaces received by the Clerk on 22 December 2021, considered by the Independent Legal Arbiter not to be privileged, be published:

- (a) Email from Ms Shearer to the Attorney General, dated 27 October 2021, and the attached letter from the Office of OneCrown Cemeteries of the same date, and

- (b) Letter from Carroll and O'Dea Solicitors to Ms Shearer, dated 26 October 2021, and the attached Memorandum of Advice from Anthony Cheshire SC and Alistair Oakes, dated 25 October 2021.

#### **4.5 Publication of documents – Sight lines for the Crown Towers, Barangaroo**

Resolved, on the motion of Ms Faehrmann:

- (1) That, in view of the interim report of the Independent Legal Arbiter, the Honourable Alan Robertson SC, on the disputed claim of privilege regarding sight lines for the proposed Crown Towers, Barangaroo, dated 8 April 2022, the committee orders that those documents or sections of the Infrastructure NSW documents received by the Clerk on 9 February 2022 and identified in the Schedule attached to the report, considered by the Independent Legal Arbiter not to be privileged, be returned to the Clerk within 7 days subject to redaction of mobile telephone numbers, as recommended by the Independent Legal Arbiter.
- (2) That on receipt, the redacted documents be published.

#### **4.6 Report to the House**

The committee noted that it would need to meet briefly prior to 10 May to consider a report to inform the House of its decisions under the delegated power given to it under sessional order.

### **5. Adjournment**

The committee adjourned at 11.37 am, *sine die*.

Steven Reynolds  
**Committee Clerk**

#### **Draft Minutes no. 31**

Thursday 5 May 2022  
Privileges Committee  
Room 1136 at 3.00 pm

#### **1. Members present**

Mr Primrose (*Chair*)  
Mr Donnelly  
Ms Faehrmann  
Mr Fang  
Mr Farlow  
Mr Martin.

In attendance: Steven Reynolds.

#### **2. Apologies**

Ms Faehrmann  
Revd Mr Nile (*Deputy Chair*).

#### **3. Draft minutes**

Resolved, on the motion of Mr Donnelly: That draft minutes no. 30 be confirmed.

#### **4. Disputed claims of privilege**

##### **4.1 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 Donnelly: That the draft report be the report of the committee and that the committee chair present the report to the House.

**5. Independent Complaints Officer – role of Privileges Committee in appointment**

Resolved, on the motion of Mr Donnelly: That when the Presiding Officers have a recommended appointment for the Independent Complaints Officer, and prior to implementing the appointment, the applicant be invited to an informal meeting with the committee.

**6. Adjournment**

The committee adjourned at 3.10 pm, *sine die*.

Steven Reynolds  
**Committee Clerk**

## Appendix 2 Report of the Independent Legal Arbiter – Western lands lease conversion program

### REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

#### WESTERN LANDS LEASE CONVERSION PROGRAM

The Hon Keith Mason AC QC

4 April 2022

On 18 November 2021 the House called for papers relating to the Western Lands lease conversion program. The call extended explicitly to papers showing the names of all persons who purchased land through this program. The required documents were produced in two tranches, with proposed redactions. Privilege was claimed by the Department of Planning and Environment on the basis of 'Personal Information' 'Privacy'.

Mr David Shoebridge MLC wrote to the Clerk on 28 March 2022 disputing the claim in part. The Member voices no objection to redactions of contact details, signatures and addresses. But he has disputed the suppression of the names of the applicant lessees. His letter expresses concerns about the sale price being offered (3% of the unimproved value of the land), contending that it is 'effectively a gift to leaseholders'. He wants it to be 'clear what entities have benefited from this generous government policy'.

The President appointed me to evaluate this dispute and report.

Naturally, I express no opinion on the policy matters that the Member wishes to raise. And I remind the Members that my task under the Standing Order is not that of deciding a freedom of information dispute. Nevertheless, the House explicitly called for papers disclosing the names of all purchasers. Its capacity to debate and explore should not be hampered by suppressing the identities of the landholder participants. No basis of privilege has been advanced or established in my evaluation.

  
The Hon Keith Mason AC QC

## Appendix 3 Report of the Independent Legal Arbiter – Transport Asset Holding Entity of NSW – Further order (24 February 2022)

### REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

#### Transport Asset Holding Entity of NSW - Further Order

The Hon Keith Mason AC QC

4 April 2022

On 24 February 2022 the House called for listed categories of recent papers relating to the Transport Asset Holding Entity (TAHE). The required documents were lodged with the Clerk on 24 March 2022, privilege being claimed over some of them. The Hon Daniel Mookhey MLC has disputed the claim regarding eight documents, and I have been appointed to evaluate the dispute and report.

TAHE invokes the public interest under the rubric of 'commercial in confidence'. Its submissions are admittedly 'general in application' and there is the now almost standard request for the opportunity to make further submissions in the event that a Member disputes a claim of privilege made in relation to any particular document. I would remind the Executive that the Standing Order requires 'reasons for the claim of privilege' to accompany the return of papers that entail such a claim. This is not to signal a change of my existing practice of offering a second bite at the cherry that is focussed on particular documents where I perceive that would assist my endeavours. But this should be exceptional.

Parliament's interest in the documents is indicated in the detailed resolution. I have also informed myself generally by perusal of the Auditor-General's Report on *State Finances 2021* dated 9 February 2022 and the Report on proceedings before the Public Accountability Committee Inquiry into TAHE on 10 and 21 February 2022. Examining these documents indicates what is already in the public domain, what matters relevant to my task appear to be of particular interest to Parliament, and the massive sums of public money for which untrammelled accountability is being sought.

The Auditor-General's Report details the action taken by NSW Government after 14 December 2021 in response to the following (p 3):

*Having reviewed all evidence provided, the Audit Office communicated to NSW Treasury that unless corrected, the State's accounts would be qualified as the \$2.4 billion transfer made by the [General Government Sector (GGS)] to TAHE should have been reported as a grant expense instead of an investment. The GGS's estimated rate of return was not sufficient to cover:*

- *TAHE's final revaluation loss of \$20.3 billion in 2020-21*
- *a dollar value equal to, or exceeding a 2.5 per cent rate of return on the equity invested in TAHE (ie: at least equal to the long term interest rate).*

The action subsequently taken, as reported, included NSW Treasury revising its calculations of estimated returns. Despite these and other measures, the Auditor-General reported that, although she was now prepared to support an unqualified set of accounts, there remained 'significant uncertainty with regards to judgements around the commerciality of TAHE's operations' (p 4).

It is also apparent that members of the Public Accountability Committee are intent upon further detailed exploration both of the events that led up to the initial stand-off between the Auditor-

General and Treasury and of the corrective actions taken in response. Serious governance issues were flagged for further investigation, including the extent and manner of engagement of external consultants.

The eight disputed documents are numbered 93, 95, 104, 105, 107, 108, 109 and 111 in TAHE's Index of Privileged Documents. They all relate to activity by senior officers of Treasury and/or TAHE in late 2021 and early 2022 designed to address the Auditor-General's concerns. That activity included steps taken to support and implement the total asset revaluation of TAHE including the formulation of TAHE's heads of agreement with Sydney Trains and NSW Trains over access fees and licence fees (specifically sought in para (c) of the resolution calling for papers). These core documents entail vast sums of money and appear to be essential to any proper understanding of the steps taken to achieve the sign-off of the State's Accounts as well as any continuing fiscal issues. The public interest in Parliament having unhampered access to the information they contain is demonstrable.

Documents 107, 108, 109 and 111 are similarly of high significance to Parliamentary oversight of TAHE's action. They are the 'Board packs' for TAHE Board Meetings that gave approval to the Financial Statements of TAHE for the year ending 30 June 2021 and otherwise took steps designed to comply with legal obligations and to satisfy the requirements of the Auditor-General. The TAHE Board meeting of 27 January 2022 focussed upon the media reporting of the process involving the Auditor-General as well as TAHE's Annual Report and the accounts for the last two quarters in 2021. The later meeting of 24 February 2022 also considered the response to the recent Parliamentary activity along with operational matters none of which have been singled out as attracting any public interest in non-disclosure. No redactions have been proposed and nothing has been advanced to suggest that particular snippets of information have any special sensitivity.

On the contrary, TAHE has in its submission (para 10) simply propounded a number of factors that it considered before making the claim and which, by implication, may apply to the now-disputed documents. Yet none of these factors appear to have any relationship to those documents. I do not perceive any instance of providers of services to TAHE being at prejudice in future dealings with TAHE, nor any situation involving TAHE itself obtaining competitive tenders and/or prices for future projects, nor any situation of contractual or commercial negotiation.

In my evaluation, none of the above documents is privileged from full debate or scrutiny in the House or its committees.



The Hon Keith Mason AC QC

**REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE****Transport Asset Holding Entity of NSW – Further Order, further return**

The Hon Keith Mason AC QC

6 April 2022

This report should be read together with my TAHE Report of 4 April 2022.

An additional tranche of documents was delivered to the Clerk on 31 March 2022. The claims of privilege over some of them have been disputed by the Hon Daniel Mookhey MLC. I have been appointed to evaluate and report.

Document (F) 1 is claimed to be privileged on the basis of 'commercial in confidence'. It is a letter from TAHE's chief executive officer Benedicte Colin to senior Transport executives reporting on the negotiations about access and licence fees in the lead-up to the heads of agreement mentioned on p 2 of my earlier Report. As I endeavoured to explain there, these negotiations were key steps taken by and within government in order to meet the Auditor-General's concerns about the State Finances. The House's demonstrated interest in fully examining these events explains why the generalised Treasury submissions about commercial in confidence cannot be accepted as establishing a relevant ground of privilege.

'Parliamentary Privilege' is claimed and disputed with respect to documents (G) 1-6, 8-15. 'Legal Professional Privilege' is claimed and disputed with respect to document (G) 7. All of the documents are said to be 'preparation material' for the Public Accountability Committee inquiry into TAHE. Cases dealing with courts processes are cited in relation to the 'Parliamentary Privilege' claim. This line of argument has been repeatedly answered and rejected in earlier reports under the Standing Order in the context of House Folder Notes. It is equally unattractive in the present context.

The 'Legal Professional Privilege' claim relates to a memo from Treasury's General Counsel that offers generalised advice about two simple topics, one item being no more than an extract from a statute. The submissions contain the (surprising and unhelpful) assertion that publication of this information is 'not reasonably necessary for the proper exercise of the House's functions'; as well as generalised submissions about the privileged status of legal advice. My position on this topic has been frequently stated in reports adopted by the House: more needs to be shown to generate a persuasive assertion of privilege in the Order 52 context. Nothing advanced by Treasury shows that this innocuous memo qualifies as privileged.

Document (L) 1 is a consultant's report dated 18 March 2021 about inquiries made concerning an applicant for the position of chief executive officer of TAHE. Privilege is asserted on the ground of 'personal information'. Undoubtedly it is, but the issue is whether there is a public interest in limiting disclosure and debate on the information. NSW Treasury asserts privilege over the whole document 'on the basis of personal information [that] may generally be described as [a] curriculum vitae...' No argument is advanced to support the assertion that it is not in the public interest to disclose this information. The person concerned is Ms Colin who is the current CEO of TAHE. This document is not privileged in my evaluation.

Document (M) (iii) 1 is claimed to be privileged on the basis of 'commercial in confidence'. It is described as the TSSA Engagement Closing Report of the Audit Office dated 24 December 2021. The document is a draft of what became the Auditor-General's Report to Parliament on State Finances 2021 which was finalised on 9 February 2022 (hereafter referred to as the final audit report). NSW Treasury's submissions state that the draft document is one of three that contain 'sensitive pricing information relevant to ongoing commercial negotiations of access fees and licence fees between Sydney Trains, NSW Trains, TAHE and Transport for NSW'. No redactions have been suggested despite the fact that the draft document addresses much more than the last-mentioned topic. More to the point, the portion of the draft document that addresses this topic (pp 12ff) appears to include the same detailed information that is found in the final audit report (pp 12-19). The final report also discusses the impact of the 18 December 2021 Heads of Agreement that had only just been finalised when the draft document was written. The negotiations and dealings involving these four public entities are of obvious concern to Members whose continuing interest and oversight is demonstrated by the activities of the Public Accountability Committee. If the draft document truly contains anything of substance additional to what went into the final audit report I am not persuaded that the public interest requires that such information should be confined to Members only.

In my evaluation privilege does not attach to the disputed documents.

I thank Ms Christine Rayes for her assistance.



The Hon Keith Mason AC QC

## Appendix 4 Report of the Independent Legal Arbiter – Health funding and health infrastructure commitments

### REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

#### HEALTH FUNDING AND HEALTH INFRASTRUCTURE COMMITMENTS

The Hon Keith Mason AC QC

4 April 2022

On 23 February 2022 the House called for papers on this topic. The required documents were produced. Two of them were subject to a claim of 'Parliamentary Privilege'. They are House Folder Notes.

Mr Walt Secord MLC has disputed the claim, drawing attention to previous reports on this topic, tabled and accepted by the House. I have been appointed by the President to examine the documents and evaluate the disputed claim. Having done so I advise that the claim is without substance.



The Hon Keith Mason AC QC

## Appendix 5 Report of the Independent Legal Arbiter – Cemeteries

### REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

#### Cemeteries

The Hon Keith Mason AC QC

6 April 2022

On 17 November 2021 the Legislative Council called for papers relating to the sale or management of cemeteries, in particular the cemetery at Rookwood. Ministers and government agencies lodged the required documents, with schedules and submissions. On 1 February Mr David Shoebridge MLC disputed the claim of privilege over a handful of documents. A letter from the Department of Planning and Environment dated 24 February 2022 and its accompanying Submission have further narrowed that dispute so that it is now confined to the redacted portions of a letter from the Office of OneCrown Cemeteries to the Attorney General dated 27 October 2021, a Memorandum of Advice from Anthony Cheshire SC and Alistair Oakes ('the Cheshire Advice'), and a letter from Carroll & O'Dea, Lawyers summarising that Advice.

The disputed communications constitute or disclose confidential legal advice about the status of 'Rookwood Catholic Land' and the application of income derived from it over many years. The Member correctly accepts that the advice would be privileged in litigation at common law. Equally correctly, he submits that more needs to be established to generate an acceptable claim of privilege under the Standing Order (see my Report on *Insurance and Care NSW and the State Regulatory Authority* dated 22 September 2020 and the earlier reports there cited). I note that the Government maintains the contrary position, opposing what it terms the additional 'balancing' test that has been reiterated in many recent reports adopted by the House.

The context is the proposed consolidation of Catholic Metropolitan Cemeteries Trust (CMCT) into OneCrown Cemeteries. This action has been recommended in the tabled 2020 Report *The 11<sup>th</sup> Hour, Solving Sydney's Cemetery Crisis, Statutory Review of the Cemeteries and Crematoria Act* but the proposal has reportedly been opposed by the Catholic Archdiocese. Consolidation has already occurred with respect to the cemetery trusts relating to the Anglican, other denominational and non-denominational cemeteries. A statutory mechanism for similarly consolidating the CMCT land and assets appears to be in place (see counsel's Advice paras 45-50), but that would be a decision for government and further legislation may be needed for this to occur smoothly. I mention these matters to show that the documents in dispute fall clearly within the scope of the House's constitutional powers and its current interests. According to the Member, the documents reveal matters of concern arising out of what may be termed past irregularities appropriate for unfettered inquiry and debate in the House.

The Executive submits that publication beyond Members would not be in the public interest, at least at this point of time. Most of the reasoning appears in the abovementioned letter from the Office of OneCrown Cemeteries that is no longer considered privileged save

for minor redactions. The rest can be discerned by Members from the paragraphs of the Cheshire Advice to which they have access and to which I refer below. The Cheshire Advice discusses an earlier opinion of Michael Izzo SC commissioned in relation to the historical and legal status of the Rookwood Catholic Land. The earlier Opinion 'raised issues around the potential existence of an equitable charitable trust' arising out of the terms of the Necropolis Act 1867 when that land was granted to earlier trustees for use as a Catholic cemetery. Those issues may affect the trusts upon which that land is presently held and the trusts applicable to the income-derived assets of CMCT.

The focus of the Cheshire Advice is the land and other assets relating to other denominations that are already vested in OneCrown Cemeteries. It is, however, clear that similar matters of concern could apply to the Rookwood Catholic land. The Cheshire Advice departs at times from the conclusions of the earlier opinion. There is a potential gap in the presently contemplated mechanism for any transfer of the income of the CMCT that may need the attention of Parliament before it could appropriately take place. See esp Cheshire Advice paras 22-25, 34, 42-43, 51, 53-55, 60-68.

The 'Catholic' assets and potential liabilities at stake are very extensive. The Auditor-General states in her recently tabled Report on *State Finances 2021*:

*"NSW Treasury considers that Catholic Metropolitan Cemeteries Trust (CMCT) is controlled by the State and is included in the Total State Sector Accounts as a consolidated entity. The CMCT has not submitted their financial statements to the Audit Office as required by the GSF Act.*

*The CMCT assert that they are not controlled by the State. While not material to the Total State Sector Accounts, the value of their combined assets and liabilities included in the State's financial statements was \$298 million."*

The no longer disputed portion of the letter from the Office of OneCrown Cemeteries to the Attorney General states:

*"Whilst advice as to the lands designated for other denominations is yet to be secured, the Cheshire advice raises urgent and significant questions which may be found to apply to the other trusts.*

*The preferred option currently under consideration for the future management of the Crown cemetery sector may need to be amended to accommodate the legal issues identified in the Cheshire advice."*

I also draw to the attention of Members the redacted and still disputed portion of the letter that immediately follows the paragraphs I have just quoted.

The recent submission from the Department advises that the documents in question have been provided confidentially to government agencies in addition to OneCrown Cemeteries and the Attorney General. A further submission received by the Clerk today from the Acting Executive Director, Legal Branch, Office of General Counsel, Department of Premier and

Cabinet takes this matter further. It relays advice from the Department of Justice that the documents in question were provided confidentially to the Attorney General in his capacity as protector of charities in relation to possible breaches of charitable trust. It is said that: 'The Attorney General has no investigatory or oversight powers over charitable trusts, and is therefore reliant on trustees or other interested parties coming forward to alert him to potential issues. Where a trustee proactively alerts the Attorney General to charitable trust issues on a confidential basis in a bona fide attempt to resolve those issues, and the Attorney General subsequently makes that correspondence public, there is a risk that other trustees may be discouraged from raising such issues, which may limit the Attorney General's ability to exercise his functions as protector of charity generally.'

I place to one side the debatable width of the assertion that the Attorney General has no oversight powers over charitable trusts. I record that assertions of the 'risk' that misconduct may not come to light unless revelations are privileged are always speculative. And I remind Members both that there has been no voluntary disclosure by the Attorney-General of these 'confidential' documents and that contractual and equitable obligations of confidentiality are no answer to a call for papers. Neither do they establish, without more, a basis of 'privilege' under the Standing Order. I nevertheless acknowledge that the matters to which Ms Johnson has drawn attention require consideration in determining the proper status of these disputed documents in the House.

On 13 December 2021 the administrator of OneCrown Cemeteries commenced proceedings in the Supreme Court seeking judicial advice on certain matters relating to the Anglican portions of the Rookwood Necropolis. Orders have been made joining the Attorney General in his role as protector of charities. The proceedings are set down for hearing on 20 April 2022. There is no proposal for the matter to be dealt with in closed court.

On 21 March 2022 I communicated with the Member and the Executive branch through a Memo addressed to the Clerk. I asked the Member to indicate if he maintains his dispute to the privilege claim, despite its recent narrowing. He does.

I also invited the Executive to provide me with the summons and supporting material in the Equity proceedings if that would assist, bearing in mind that the onus of persuasion in these matters rests upon an Executive seeking to restrict full debate on a matter of obvious importance. In response, the Executive has indicated that neither it nor the plaintiff in the Equity proceedings wish to place any further material before me. I thank them for their cooperation and am in no way critical of their response.

The Member points out that the Cheshire advice has been made available to the parties to the Equity proceedings. I would add that much of it is recounted in documents or portions of tabled documents over which privilege is no longer asserted. It would appear that the significant issues it raises will be ventilated in the judicial advice proceedings. Parties interested in any ensuing substantive litigation will be free to oppose adverse conclusions or remedies. The advice addresses a die that has long been cast. And it overlaps matters of obvious concern to a Parliament intent on moving to some finality in its response to the *11<sup>th</sup> Hour Report*.

In my Memo to the Clerk of 21 March 2021 I flagged my particular interest in understanding any direct impact that the OneCemeteries judicial advice proceedings and any litigation triggered by those proceedings could have in relation to the issues touching the Rookwood Catholic land that the Member has indicated he wishes to explore. And also why unrestricted parliamentary consideration of those issues should be held back in the meantime. I indicated my:

*'impression ... that all the matters at stake relate to very significant land and assets that are subject to statutory and/or equitable charitable trusts. No private interests are involved. If there have been irregularities they have occurred in the past, hopefully not too distant past as to raise limitation issues. It is difficult to understand why scrutiny in the House and/or legislative action may not take place concurrently with or even in advance of protracted judicial proceedings.'*

This remains my view, strengthened by the limited response to my Memo from the Executive. I have not overlooked the submission from the Department of Justice, but the issues raised in the Cheshire Advice are already in the public domain and there is, in my view, no compelling reason why the House should be fettered in its capacity to access, debate and rely upon all of the matters that it so helpfully canvasses.

In my evaluation the documents and parts of documents still in dispute are not relevantly privileged.

I thank Ms Christine Rayes and Ms Taylah Cauchi for their assistance.



The Hon Keith Mason AC QC

## Appendix 6 Report of the Independent Legal Arbiter – Sight lines for the Crown Towers, Barangaroo

### REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

#### INTERIM REPORT OF INDEPENDENT LEGAL ARBITER:

THE HON ALAN ROBERTSON SC

#### Background

1. On 24 November 2021, the Legislative Council agreed to the following resolution:

"That, under standing order 52, there be laid upon the table of the House within 21 days of the date of passing of this resolution the following documents created since 1 January 2014 in the possession, custody or control of the Department of Premier and Cabinet, Premier or Infrastructure NSW relating to discussions about the sight lines for the proposed Crown Towers at Barangaroo between Infrastructure NSW, Crown Sydney Property (Crown) and Lendlease (Millers Point) (Lendlease):

  - (a) all documents, including correspondence, submissions and proposals relating to the negotiation of a development agreement between Infrastructure NSW, Crown and Lendlease,
  - (b) the development agreement between Infrastructure NSW and Lendlease, including all draft versions with amendments and edits, and
  - (c) any legal or other advice regarding the scope or validity of this order of the House created as a result of this order of the House."
2. Standing Order 52 is as follows, so far as relevant:

**52. Order for the production of documents**

  - (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
  - (2) When returned, the documents will be laid on the table by the Clerk.
  - (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
  - (4) ...
  - (5) Where a document is considered to be privileged:
    - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
    - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
      - (i) made available only to members of the Legislative Council,
      - (ii) not published or copied without an order of the House.

- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.
  - (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
  - (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
    - (a) made available only to members of the House,
    - (b) not published or copied without an order of the House.
  - (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.
3. In the present case, the Secretary of the Department of Premier and Cabinet lodged the required documents with the Clerk of the Parliaments on 9 February 2022, the due date of 15 December 2021 having been extended by consent, as I understand it. A claim for privilege was made, accompanied by indexes of all documents claimed to be privileged and a submission in support of the case for privilege.
  4. On 16 March 2022, the Hon Anthony D'Adam disputed the claim for privilege made over certain documents. He made a detailed written submission in support of his contention that the claim of privilege should be overturned on all documents over which a claim of "Commercial in Confidence" privilege had been made.
  5. In accordance with paragraph 7 of Standing Order 52, the President of the Legislative Council, the Hon Matthew Mason-Cox MLC appointed me as independent legal arbiter to evaluate the claim of privilege.
  6. The papers were delivered to me on 21 March 2022. On 6 April 2022 I had the benefit of discussions, first with the Hon Anthony D'Adam, to assist me in understanding the documents or parts of documents which he considered relevant to the 24 November 2021 resolution of the Legislative Council, and second with representatives of Infrastructure NSW so I could better understand the claimed sensitivities of the documents.

#### **The scope of the dispute**

7. As originally framed, the present dispute, or part, concerned only the 58 or so privileged documents where the privilege claim in the schedule was stated to be "PII/Commercial in Confidence".
8. The relevant claims for privilege were set out in 44 paragraphs of an attachment by Infrastructure NSW. These commercial in confidence claims were supported by letters dated 3 February 2022 by Lendlease and by Crown Resorts.
9. Infrastructure NSW submitted it was not in the public interest for the documents to be made publicly available. It identified the Crown Development Agreement (**CDA**) and the Fifth Deed of Amendment to the Project Development Agreement (**PDA**) and noted that redacted versions of those documents was released in July 2015.

10. The documents over which Infrastructure NSW claimed privilege were categorised as the redacted sections of the Redacted PDA and the Redacted CDA on the basis that the redacted information contains commercially sensitive details; and on the basis that the documents generally contain negotiations between Lendlease, Crown Resorts and the (former) Barangaroo Delivery Authority, including for example, costings, rates, indemnity insurance and design specifications in relation to the Crown Towers (the Other Documents).
11. Also, public interest immunity was being claimed in relation to those documents on the basis that the public release of them would prejudice the proper functioning of government by undermining the public trust in its ability to preserve the confidentiality of sensitive third-party information. Accordingly, Infrastructure NSW submitted, disclosure of those documents was not in the public interest as it would prejudice Infrastructure NSW's ability to perform its functions.
12. Infrastructure NSW submitted the disclosure of the information in the Redacted PDA and CDA and the Other Documents would:
  - (a) reveal commercially sensitive information with respect to:
    - (i) a third party contractor's intellectual property and methodology/ project planning, which would cause harm to that contractor by revealing specific and bespoke methodologies and details to competitors if publicly available;
    - (ii) a third party contractor's financial details which would cause harm by enabling competitors to take advantage of the information in relation to future tenders/competitive processes;
    - (iii) the NSW Government's bargaining position as outlined in particular conditions of the CDA and PDA which would cause harm by allowing contractors to leverage the information in the CDA and PDA to seek more favourable conditions in future negotiations with the NSW Government which may be less advantageous to the NSW taxpayer;
  - (b) prejudice the proper functioning of government by impacting on INSW's ability to discharge its functions under the *Infrastructure NSW Act 2011* (NSW) (INSW Act) by undermining the trust and confidence of third parties engaging with INSW and NSW Government more broadly in future competitive processes due to a potential risk of the release of confidential and sensitive commercial information.
13. In addition, Infrastructure NSW submitted, the public disclosure of the information in the documents would have a significant adverse impact on Crown Resorts and Lendlease as that confidential information was commercially sensitive, was of significant commercial value and would cause substantial commercial harm if released. A significant amount of commercially sensitive material in the documents was not relevant to the terms of the Order which are specific to discussions about sight lines for the proposed Crown Towers at Barangaroo.
14. Infrastructure NSW submitted the public release of the information would cause considerable harm to Lendlease and Crown Resorts and accordingly they had each prepared a letter in support of Infrastructure NSW's submission.

15. In summary, Infrastructure NSW submitted Lendlease and Crown were concerned that the disclosure of the redacted information in the Redacted PDA and CDA, and the Other Documents will have a prejudicial impact on:
  - (a) a number of key aspects of their business activities and their competitive positions in the marketplace;
  - (b) the relationships with their employees, public and private sector clients, subcontractors engaged in relation to the Barangaroo Precinct and more broadly in the commercial market; and
  - (c) their commercial advantages in the market with respect to future projects and competitive tender processes, including that it would weaken their leverage in future negotiations;
  - (d) Lendlease's legitimate business interests by disclosing its approach and commercial compromises that may have been made in attempting to resolve litigation and contractual disputes;
  - (e) ongoing negotiations of terms in relation to draft documents which would reveal sensitive commercial information, including such information contained in draft documents that are annexures to the CDA which are still subject to negotiations with the NSW Independent Liquor and Gaming Authority (ILGA) as well as the terms of a sublease contained in the State Crown Financial Deed between ILGA and various other Crown entities; and
  - (f) the willingness of commercial parties to enter into tripartite agreements, including the NSW Government as a result of the disclosure of contractual terms/rights and obligations that operate only between Lendlease and Crown.
16. The Hon Anthony D'Adam identified the dispute as the papers in question relating to negotiations between the Government, the former Barangaroo Delivery Authority, Infrastructure NSW, Crown Resorts and Lendlease over 'sight lines' for the Crown Casino Tower development at Barangaroo. He submits, in essence, that the claims of privilege are dubious in a technical legal sense and are, in any event, not in the public interest.
17. As to the former proposition, he submits that none of these documents relate to ongoing commercial negotiations nor is there any evidence that the publication of the documents would jeopardise a present or future commercial interest of the Government.
18. As to the latter proposition, the Hon Anthony D'Adam submits that the controversial nature of the development and the dubious behaviour of Crown Resorts means there is a public interest in scrutinising their dealings in and around the negotiations over the 'sight lines'.
19. Infrastructure NSW submitted it had attempted to specifically identify the privileged information in each of the Documents. However, it was possible that not all privileged information had been identified.
20. In the event that there was any dispute in relation to the claim of privilege and the matter was referred to an Independent Arbiter pursuant to Standing Order 52(6), Infrastructure NSW requested the opportunity to provide further detailed submissions to the Independent Arbiter via the NSW Legislative Council to consider the bases for any claims of privilege.
21. As it emerged in the course of the discussions I have referred to in [6] above, the Hon Anthony D'Adam indicated that it was acceptable to him in the first instance if the

claims for privilege were assessed by me only in relation to the documents or parts of documents which directly concerned the sight lines referred to in the resolution of 24 November 2021, which I have set out at [1] above. After considering how this pragmatic approach “without prejudice” to the broader scope of the resolution might be effected, it seemed to me that an Interim Report, limited to assessing the claims for privilege in respect of the documents which directly concerned the sight lines, was desirable. That is the course that I have adopted. If, after access has been granted, the Hon Anthony D’Adam wishes to have the claims for privilege assessed in relation to the balance of the documents, or some of them, then I have proceeded on the basis that that would be a course open to him.

### **Principles**

22. Within that parameter, in the present case, I am looking at the moment only at claims for privilege on the basis of commercial in confidence. The claims for public interest immunity stand or fall, in my view, by reference to the substantive claim of privilege by reason of commercial in confidence, as emphasising the submission that it is not in the public interest that the commercial in confidence material be published.
23. The Hon Keith Mason AC QC in his Report dated 13 December 2019 “Register of Buildings Containing Potentially Combustible Cladding”, observed that the House has a constitutional role to supervise government action, consider any legislative response, and weigh the cost to the public purse. He quoted from pp 8-9 his report re WestConnex Business Case dated 8 August 2014:

The arbiter's primary task, as I see it, is to report whether legally recognised privileges as claimed apply to the disputed documents notwithstanding their production to the House and the restricted access adhering to them pending an order of the House for their publishing or copying.

If, in the present situation one asked: "Privileged from what?" the answer must be: "From dissemination to the general public either through unconditional release, or through disclosure of their particular contents". Speaking hypothetically, the impact of such dissemination or disclosure potentially cuts both ways. From Government's perspective, there is risk of harm if confidential information gets into "the wrong hands" (in the sense of hands other than those chosen by Government or the hands of members of the House). From the House's perspective, there is the desirability of stimulating further information-gathering and of debate proceeding without the restrictions consequent upon complying with Standing Order 52 (5) (b) (ii). The latter restrictions are potentially significant because the Order would appear to preclude a member from obtaining assistance from any source when seeking to understand the meaning or significance of a document. While I have unfeigned respect for the natural capacities of individual members, it would be absurd to think that their endeavours would not be assisted if they could at least be free to share what they have and to talk freely about it, both in the House and elsewhere.

Wider public interests also deserve acknowledgement, again speaking hypothetically. Those addressed by legal professional privilege include assisting the administration of justice by facilitating the representation of clients by legal advisers. Those addressed by public interest immunity include Government's need to garner and process information from third parties under assurances of confidentiality that will not be lightly overridden by the House

and the House's need to stimulate the production of information from the public by broadcasting or allowing the media to broadcast the papers it has had returned. I do not see why the arbiter should in principle be troubled by the possibility that non-privileged documents duly called for may, under the House's control, be accessed by the media or by members of the public with axes to grind. So long as overriding harm is not done to the "proper functioning of the executive arm of government and of the public service" (*Sankey v Whitlam* (1978) 142 CLR 1 at 56 per Stephen J). public debate stemming potentially from such sources is of the essence of representative democracy.

...

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

### Conclusions

24. Applying these principles, my conclusions in relation to the documents are set out in the attached Schedule. I have taken into account claims that the names of employees or officers, their official positions, their email addresses and their mobile telephone numbers should be held to be excluded from wider access. Having regard to the seniority of those employees or officers, I am not persuaded that that broad claim is made out, but I do agree that the mobile telephone numbers should be redacted from the documents I have reported, in the Schedule, as not privileged as not commercial in confidence.
25. It follows from what I have said that in some instances part only of particular documents should be held to be privileged as commercial in confidence. I have indicated those instances by referring to the part in bold type in the Schedule. Where the relevant part is in a lengthy document which has a cover page, then to provide context the cover page should also be made available.



Alan Robertson SC

8 April 2022

**SCHEDULE**

<b>No.</b>	<b>Document ID</b>	<b>Title</b>	<b>Assessment by ILA</b>
Box 1/9	Nil	The two page document consists of two emails dated 13 and 14 September 2017 requesting a meeting with the Premier in relation to an ongoing issue with Barangaroo Sight Lines.	In my evaluation these emails are not privileged.
1.	ICT.001.001.0001	BDA and Lend Lease: Agenda and Status Report for Meeting 15 August 2014	This email cover page refers to, but does not have attached, the Agenda and Status Report to which it refers. It does not appear to refer to sight lines but, in my evaluation, if relevant, it is not privileged. It is not commercial in confidence.
2.	ICT.001.001.0097	Sight Lines	In my evaluation, this single page email is not privileged: it is not commercial in confidence.
3.	ICT.001.001.0098	Re: Sight Lines	This three-page email is not, in my evaluation, privileged: it is not commercial in confidence.
4.	ICT.001.001.0102	Re: Sight Lines	This three-page email is not, in my evaluation, privileged: it is not commercial in confidence.
5.	ICT.001.001.0106	Re: Sight Lines	This three-page email is not, in my evaluation, privileged: it is not commercial in confidence.

6.	ICT.001.001.0111	Re: Sight Lines	This three-page email is not, in my evaluation, privileged: it is not commercial in confidence.
7.	ICT.001.001.0119	Confirmation - Barangaroo central Height	This two-page email is not, in my evaluation, privileged: it is not commercial in confidence.
8.	ICT.001.001.0121	Re: Confirmation - Barangaroo central Height	This four-page document is not, in my evaluation, privileged: it is not commercial in confidence.
9.	ICT.001.001.0185	FW: Combined Issues/ Action Lists	This email cover page refers to, but does not have attached, the Lists to which it refers. That is the next document, ICT.001.001.0187. It does not appear to refer to sight lines but, in my evaluation, if relevant, it is not privileged: it is not commercial in confidence.
10.	ICT.001.001.0187	LLMP Issues: Crown Development Agreement (CPA)	This 16 page document refers at 0194 and 0197 to sight lines. In my evaluation, <b>those pages</b> are not privileged: they are not commercial in confidence.
11.	ICT.002.001.0043	Pre-briefing James Packer	This one page document is relevant to sight lines. It is not, in my evaluation, privileged: it is not commercial in confidence.
12.	ICT.002.001.0067	Central height	This one page document is relevant to sight lines. It is not, in my evaluation, privileged: it is not commercial in confidence.

13.	ICT.002.001.0069	FW: Central height	This one page document is relevant to sight lines. It is not, in my evaluation, privileged: it is not commercial in confidence.
14.	ICT.002.001.0079	Re: Central height	This one page document is relevant to sight lines. It is not, in my evaluation, privileged: it is not commercial in confidence.
15.	ICT.002.001.0081	FW: Sight Lines	This one page document is relevant to sight lines. It is not, in my evaluation, privileged: it is not commercial in confidence.
16.	ICT.003.001.0022	BDA and Lend Lease: Agenda and Status Report for Meeting 15 August 2014	This email cover page is the same document as document No 1. It refers to, but does not have attached, the Agenda and Status Report to which it refers. It does not appear to refer to sight lines but, in my evaluation, if relevant is not privileged: it is not commercial in confidence.
17.	ICT.003.001.0029	FW: BDA and Lend Lease: Path to Contract Close (Privileged)	A small part of this 9 page document, ICT.003.001.0034-35 is relevant, but in my evaluation <b>that part, item 70</b> , is not privileged: it is not commercial in confidence.
18.	ICT.003.001.0038	FW: PDA Fifth Deed of Amendment	This email is the cover page for ICT.003.001.0039. It does not

			appear to me to be relevant but for my evaluation, if relevant, it is not privileged: it is not commercial in confidence.
19.	ICT.003.001.0039	PDA Fifth Amending Deed CU 12-2-15.docx	Clauses 2.5 and 54 are relevant.  In my evaluation, <b>those clauses</b> are not privileged: they are not commercial in confidence.
20.	ICT.003.001.0411	Fifth PDA CU 12-2-15. pdf	Clauses 2.5 and 54 are relevant.  In my evaluation, <b>those clauses</b> are not privileged: they are not commercial in confidence.
21.	ICT.003.001.0805	FW: PDA Fifth Deed of Amendment	This is an email cover page. ICT.003.001.0805-0806 themselves are not relevant. In my evaluation, they are not privileged: they are not commercial in confidence.
22.	ICT.003.001.0807	PDA issues list 15.02.2015.DOCX	Page ICT.003.001.0807 is relevant. In <b>so far as the whole document refers to sight lines</b> , in my evaluation it is not privileged: it is not commercial in confidence.
23.	ICT.003.001.0809	PDA Fifth Amending Deed (JD draft).DOCX	<b>Clause 2.5</b> on pages ICT.003.001.0864-0865 is relevant. in my evaluation <b>that clause</b> is not privileged: it is not commercial in confidence.
24.	ICT.003.001.1487	Fwd: Height & Views	This 3 page email is relevant. In my evaluation it is not

			privileged: it is not commercial in confidence.
25.	ICT.003.001.2276	Fwd: Sight Lines	The top half of this email, ICT.003.001.2276, is subject to a claim for legal professional privilege and I do not deal with that at this stage. <b>The balance</b> , in my evaluation, is not privileged: it is not commercial in confidence.
26.	ICT.003.001.2279	RE: Sight Lines	<b>Parts</b> of pages ICT.003.001.2279-2280 are relevant to sight lines/central height. <b>Those parts</b> , in my evaluation, are not privileged: they are not commercial in confidence.
27.	ICT.003.001.2281	RE: Sight Lines	<b>Parts</b> of this three page email are relevant to sight lines/central height. <b>Those parts</b> , in my evaluation, are not privileged: they are not commercial in confidence.
28.	ICT.003.001.2284	RE: Sight Lines	<b>Parts</b> of this three page email are relevant to sight lines/central height. <b>Those parts</b> , in my evaluation, are not privileged: they are not commercial in confidence.
29.	ICT.003.001.2287	RE: Fifth Deed of Amendment	This three page email is subject to a claim for legal professional privilege and I do not deal with that at this stage. It is not relevant to sight lines. If relevant, in my evaluation, it is

			not privileged: it is not commercial in confidence.
30.	ICT.003.001.2290	PDA Fifth Amending Deed (JD draft).DOCX	This document does not appear relevant to sight lines. If there is a clause in it dealing with sight lines then <b>that clause</b> would not be privileged: it is not commercial in confidence. This
31.	ICT.003.001.2710	FW: Sight Lines	This document is subject to a claim for legal professional privilege and I do not deal with that at this stage. For completeness, in my evaluation the document is not privileged: it is not commercial in confidence.
32.	ICT.003.001.2711	FW: Sight Lines	This document is also subject to a claim for legal professional privilege and I do not deal with that at this stage. For completeness, in my evaluation the document is not privileged: it is not commercial in confidence.
33.	ICT.003.001.2712	Crown - draft Crown Development Agreement	This single page is not apparently relevant but attaches the next document, ICT.003.001.2714. It is not commercial in confidence and not privileged on that basis.
34.	ICT.003.001.2714	Draft Crown Development Agreement Ashurst draft 25 Feb 15).DOCX	<b>Clause 5.5</b> , on ICT.003.001.2780, refers to sight lines (Viewlines) and is relevant. <b>That clause</b> , in my evaluation, is not privileged: it

			is not commercial in confidence.
35.	ICT.003.001.2974	233970484_1_WSComparison_#23397046_6v1_Client_Matter_ - Crown Development clean Draft Crown Development Agreement (Ashurst draft 25 Feb 15).DOCX	This document is an attachment to No 33, ICT.003.001.2712. Clause 5.5 on page ICT.003.001.3045 is relevant to sight lines. <b>That clause</b> , in my evaluation, is not privileged: it is not commercial in confidence.
36.	ICT.003.001.3245	CDA Working Draft (CU) 20-2-15 draft Crown Development Agreement (Ashurst draft 25 Feb 15).DOCX	<b>Clause 5.5</b> on page ICT.003.001.3316 is relevant to sight lines. <b>That clause</b> , in my evaluation, is not privileged: it is not commercial in confidence.
37.	ICT.003.001.3521	Fifth Deed of Amendment	This is a single cover page to ICT.003.001.3522, No 38. In my evaluation, it is not privileged: it is not commercial in confidence.
38.	ICT.003.001.3522	PDA Fifth Amending Deed CU 25-2-15.DOCX	Page ICT.003.001.4005 refers to Barangaroo Central Sight Lines. <b>That clause 2.5</b> , in my evaluation, is not privileged: it is not commercial in confidence.
39.	ICT.003.001.3939	Fifth PDA26-2-15.pdf	Page ICT.003.001.3587 refers to Barangaroo Central Sight Lines. <b>That clause 2.5</b> , in my evaluation, is not privileged: it is not commercial in confidence.

40.	ICT.003.001.5263	FW: Combined Issues/Action Lists	This one page document is a cover page to No 41, ICT.003.001.5265. It is not relevant to sight lines. If relevant it is not privileged.
41.	ICT.003.001.5265	RE: Combined Issues/Action Lists	There is a reference to sight lines on ICT.003.001.5265. <b>In so far as that page refers to sight lines</b> , in my evaluation it is not privileged: it is not commercial in confidence.
42.	ICT.003.001.5268	4. Barangaroo Stage 1 Fifth Deed of Amendment Complete (27 May 2015).pdf	Page ICT.003.001.5367 refers to Barangaroo Central Sight Lines. <b>That clause 2.5</b> , in my evaluation, is not privileged: it is not commercial in confidence.
43.	ICT.003.002.0001	5. Combined CDA.pdf	Only <b>clause 5.5</b> at ICT.003.002.0083-0084 appears relevant as dealing with "Central Barangaroo Sight Lines". <b>That clause 5.5</b> , in my evaluation, is not privileged: it is not commercial in confidence.
44.	ICT.003.002.4997	PDA Fifth Deed of Amendment	This one page email is a cover page attaching an amended PDA for the Fifth Deed of Amendment, probably documents 45 and 46. It does not appear to be relevant. If relevant, in my evaluation, it is not privileged: it is not commercial in confidence.

45.	ICT.003.002.4998	PDA Fifth Amending Deed CU 12-2-15.docx	<p><b>Clause 2.5</b> on page ICT.003.002.5063 is relevant to sight lines, as it deals with Barangaroo Central Development Height.</p> <p><b>Clause 54</b> on pages ICT.003.002.5268-9 is also relevant on the same basis. It does not appear to me to be commercial in confidence or privileged.</p> <p><b>Those clauses</b>, in my evaluation, are not privileged: they are not commercial in confidence.</p>
46.	ICT.003.002.5370	Fifth PDA CU 12-2-15.pdf	<p><b>Clause 2.5</b> on page ICT.003.002.5449 is relevant to sight lines, as it deals with Barangaroo Central Development Height.</p> <p><b>Clause 54</b> on page ICT.003.002.5661 is also relevant on the same basis.</p> <p><b>Those clauses</b>, in my evaluation, are not privileged: they are not commercial in confidence.</p>
47.	ICT.003.002.5764	FW: central height as discussed	ICT.003.002.5764 is an email dated 26 February and relevant to sight lines. In my evaluation, it is not privileged: it is not commercial in confidence.
48.	ICT.003.002.5790	Re: Confirmation - Barangaroo central Height	ICT.003.002.5790-5797 dated 25 and 26 February 2015 are emails relevant to sight lines. In my evaluation, they are not

			privileged: they are not commercial in confidence.
49.	ICT.003.002.5794	Barangaroo Sight Lines - clause for PDA and escrow deed	These are emails relevant to sight lines. In my evaluation, they are not privileged: they are not commercial in confidence.
50.	ICT.003.002.5796	Barangaroo Sight Lines - clause for PDA and escrow deed.docx	These are emails relevant to sight lines. In my evaluation, they are not privileged: they are not commercial in confidence.
51.	ICT.003.002.5798	C6. Crown Development Agreement.PDF	<b>Clause 5.5</b> , pages ICT.003.002.5880-5881, relates to sight lines. In my evaluation, <b>that clause</b> is not privileged: it is not commercial in confidence.
52.	ICT.003.002.7233	RE: Barangaroo Central Height and Jemena	This relates to sight lines. In my evaluation, it is not privileged: it is not commercial in confidence.
53.	ICT.003.002.7235	Barangaroo Central Height and Jemena	This relates to sight lines. In my evaluation, it is not privileged: it is not commercial in confidence.
54.	ICT.003.002.7236	Barangaroo Central Height and Jemena.docx	This does relate <b>in part</b> to sight lines. <b>In so far as it relates to sight lines</b> , in my evaluation, it is not privileged: it is not commercial in confidence.

55.	ICT.003.002.7238	B10_AD0_0000_29.pdf	This does relate <b>in part</b> to sight lines. <b>In so far as it relates to sight lines, including the sight lines maps themselves</b> , in my evaluation, it is not privileged: it is not commercial in confidence.
56.	ICT.003.002.7239	B10_AD0_0000_28.pdf	This does relate <b>in part</b> to sight lines. <b>In so far as it relates to sight lines, including the sight lines maps themselves</b> , in my evaluation, it is not privileged: it is not commercial in confidence.
57.	ICT.003.002.7240	FW: Sight Lines	This does relate to sight lines. In my evaluation, it is not privileged: it is not commercial in confidence.
58.	ICT.004.003.0001	Crown Development Agreement - consolidated signed copy.pdf	<b>Clause 5.5</b> , pages ICT.004.003.0083-0084, does relate to sight lines. <b>That clause</b> , in my evaluation, is not privileged: it is not commercial in confidence.



