REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

Register of Buildings Containing Potentially Combustible Cladding

The Hon Keith Mason AC QC

13 December 2019

The disputed claim of privilege

On 17 October 2019 the Legislative Council ordered the production of the Register of buildings containing potentially combustible cladding maintained by the Department of Customer Service, NSW Cladding Taskforce.

In response, the Secretary of the Department of Premier and Cabinet (DPC) lodged a document created on 29 October 2019 containing data extracted from the Register. Privilege was claimed on various public interest grounds that were enunciated in a Schedule.

On 11 November 2019 the Hon David Shoebridge MLC wrote to the Clerk disputing the claim of privilege and setting out his reasons. The President has appointed me to evaluate the claim and report to the House.

On 21 November 2019 DPC forwarded additional material in support of the claim, being:

- A letter from the Acting General Counsel, Department of Customer Service dated 21 November 2019, enclosing the *NSW Fire Safety & External Wall Cladding Taskforce Terms of Reference July 2019;* and
- A letter from the NSW Commissioner of Police dated 21 November 2019.

At my request, these later documents were provided to Mr Shoebridge. He maintains his objection to the claim, setting out reasons in a letter dated 28 November 2019.

DPC has requested that, to the extent that the supporting submissions reveal information that is itself privileged, those submissions should be accorded similar confidentiality. I shall endeavour to accommodate that request consistent with my duty to provide the House with a report that explains its reasoning. I do not intend to attach the submissions to this Report.

Background

In 2017 there was a catastrophic fire in the Grenfell Tower in London. Seventy-two people died. An ongoing lawsuit alleges the fire was spread by highly combustible materials in the insulation and exterior cladding of the structure. Two years earlier, in Melbourne, a fire at the Lacrosse Building was also attributable to external wall cladding alleged to be non-compliant with building standards.

Cracking and failures in Opal Towers, Sydney Olympic Park and Mascot Towers, Mascot have raised much public and governmental concern in this State. There are calls for legislation and other action to address still emerging problems and to allay concerns for the present and the future.

The Legislative Council Public Accountability Committee, chaired by Mr Shoebridge, published a detailed Report in November 2019. It has been ordered to be printed. Measures to address combustible cladding are discussed along with many other matters of concern. Para 2.105 and Recommendation 3 state:

> *2.105 The committee will be holding a further hearing specifically on the issue of flammable cladding, and expects that it will have further recommendations to address the issue in more detail. However, the committee was deeply concerned by evidence already received that shows a disjointed and lacklustre response from the NSW Government. ...*
>
> *Recommendation 3*
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> *That the NSW Government act now to address the issue of flammable cladding. The committee supports a more centralised approach to the issue of flammable cladding on New South Wales buildings, including a financial support package to assist building to rectify and remove it as a matter of urgency.*

Appended to the Report is a Dissenting statement by the Hon Trevor Khan MLC on behalf of government members. It includes the following:

> *Recommendation 3 is obsolete as the NSW Government currently provides centralised support and advice to consent authorities and owners on cladding through the Department of Customer Service. Government Members also note that detailed fire safety assessments for all building referred to consent authorities by the NSW Cladding Taskforce are progressing per the required process. ...Given the final state-wide scope of any rectification is unknown it is not possible to establish any level of direct financial assistance.*

The Register

The existence of the Register is public knowledge. According to the submissions it is "a working list of...buildings that include ones that have been assessed and confirmed to have combustible cladding and others that have yet to be confirmed or cleared by the consent authorities. A categorisation of the status of each building, as per latest reports from the consent authority, is also included where available."

The methodology for compiling and constantly updating the list is outlined in the submissions. It is a "point in time snapshot" based on information received from councils and other sources. The agencies which have access to the list appear to include the spectrum of departments represented on the Taskforce. The numbers fluctuate as buildings are identified for inclusion or are excluded. The status of individual buildings is constantly updated. The current number of listed buildings is in the mid 400s. Because the Register is constantly revised, the hardcopy that has been tabled does not represent the current state of information at hand.

The hardcopy document extracted from the Register as at 29 October 2019 that has been tabled in the House contains addresses and other identifying information, the class and height of each building and its current "status" in the sense of a brief indication of the assessment process underway for the individual building.

The Register is simple to understand. Members of the Public Accountability Committee addressed questions about it and its accessibility to witnesses on 11 December. It would appear that the entire focus of the privilege dispute relates to the **addresses** of the buildings listed.

The contested grounds of privilege

The Department and the Taskforce press the claim for public interest immunity on the basis that the document tabled contains information which, if disclosed, could:

- endanger public safety
- unfairly prejudice the financial interests of building and apartment owners, and building managers and the interests of those who otherwise provided the information
- breach confidentiality expectations in relation to the information; and
- prejudice the effective exercise by Government of its regulatory functions.

In my evaluation, the weakness of the second, third and fourth of these grounds only serves to heighten the need for scrutiny about the strength of the first.

The House has a constitutional role to supervise government action, consider any legislative response, and weigh the cost to the public purse. Hansard and the media confirm that government agencies, insurers, building regulators, councils, professional bodies and owners are anxious to see well-informed, speedy and economical responses to serious issues that are not confined to cladding. Some of them, including combustible cladding, entail matters of human safety. I am entirely unpersuaded that the short-term financial interests of building owners or the practices of banks and insurers should carry any weight in the calculus of where the public interest lies in the present context.

What are little more than assertions that "confidentiality expectations" outweigh the interests of full and effective debate in Parliament seldom carry weight in any public interest analysis and they are particularly thin in the present context in my evaluation. Similarly, the assertion that "the relationship the Cladding Taskforce has with other agencies, and the relationship those agencies have with third parties who provide information" could be undermined by identification of the particular addresses is, to me, entirely unconvincing. So too the suggestion that owners and councils providing information to the Taskforce might be deflected from performance of their public obligations most of which will be underwritten by legal duties.

But, as indicated above, this dispute also touches matters of public safety and those concerns always require close attention. Their relevance to disputed privilege claims have been considered before by the Hon TRH Cole AO, RFD, QC (*Circular Quay Pylons,* 17 August 2005) and by myself (*Greyhound Welfare,* 14 February 2017, p 9). The letter from the Commissioner of Police when read with the recent evidence of Mr Hudson to a Committee of the House paints a scenario that deserves to be taken into account no matter how limited the risk may be.

The following extract from pp 8-9 of my Report re *WestConnex Business Case* dated 8 August 2014 sets out my understanding of presently relevant principles:

> *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 thirdparties 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 Whit/am (1978) 142 CLR 1 at 56 per Stephen J), public debate stemming potentially from such sources is of the essence of representative democracy.

If there .is a collateral risk of access being abused by particular members (see Twomey-op cit, pp 266-9) then the House should be expected to take disciplinary action. If the House wants to limit any perceived risk stemming from unconditional publication of confidential but unprivileged documents it is of course free to do so. I reiterate that these considerations do not in themselves justify the overriding of a privilege recognised by law. But, as regards public interest immunity at least, they are aspects of the countervailing interest favouring disclosure that have to be weighed.

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.

In its submissions on behalf of DPC, the Crown Solicitor's Office has suggested that, when determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it

will be necessary for the arbiter to understand:

i) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published;

ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of the function; and

iii) how publication of the documents is reasonably necessary for the House to fulfil that function.

I am not persuaded that my task extends to items (ii) and (iii), if the invitation is for me to inquire into the particular goals being pursued or likely to be pursued by individual members or the House as a whole with the papers in question. I would have thought that the House should be taken to have decided that a reasonable basis existed for the original call for papers and that the Government should be taken to have accepted as much by producing the papers. As I indicated in the passage from my first report set out above, these are matters outside the remit of the independent arbiter. I should not assume any likely abuse of the House's constitutionally-derived powers.

This latitudinal approach is not designed to give the House a blank cheque privilege-wise. But I do not see that it is part of the arbiter's role under the Standing Order to be calling upon the House or its individual members to declare their hands in advance. If, however, nothing particular is obvious or advanced by submissions as favouring full disclosure and if persuasive reasons are offered by Government showing why the balance of public interest falls in favour of non-disclosure, then this may determine the outcome of any public interest immunity evaluation as regards a particular document.

I remind myself that in Egan v Willis (1998) 159 CLR 424 at 453, the High Court cited with approval the observations of Priestley JA when he referred to:

> *"...the imperative need for both the Legislative Assembly and the Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws. The first of these subjects clearly embraces the way in which the Executive Government is executing the laws."*

I draw particular attention to the remarks in the paragraphs starting "it should be noted" and "This latitudinal approach". Over the past year or so some concerns have been raised in my mind that lead me to remind Members that, while I would never require those objecting to a claim of privilege to declare in advance their intentions with the disputed information, I will always be assisted by such explanation. I do not see my role as that of granting what in effect is a freedom of information request for the sole purpose of publishing information to the world. My focus is upon the needs of the House in its constitutional roles.

What tips the balance in favour of upholding the instant claim (on the first ground) is that the House can readily arm itself with a procedure that would permit *ad hoc* disclosure beyond Members of information identifying the address of a specific site if and when there is a perceived reason to do so. This is a judgment that I should leave with the House, not overlooking Mr Shoebridge's remarks about the House's role in supervising the risk assessment processes of the Police Force and others (letter dated 28 November 2019, p 3).

And nothing in this Report is intended to cast doubt upon the House's role in oversight of the work of the Taskforce.

In my evaluation, the hardcopy document that I have examined is relevantly privileged. I wish to make it clear that this is not intended to preclude public debate about the general contents, role, use and dissemination of the Register but is limited to such of its contents as would disclose or identify the location of individual buildings.

The Hon Keith Mason AC QC