



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

**By email: [public.accountability@parliament.nsw.gov.au](mailto:public.accountability@parliament.nsw.gov.au)**

Dear Chair

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

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

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

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

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

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

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

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

Yours sincerely

**Michael Coutts-Trotter**  
**Secretary**

22 October 2021



LEGISLATIVE COUNCIL

PUBLIC ACCOUNTABILITY COMMITTEE

26 October 2021

Our Ref: D21/55627

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

Dear Mr Coutts-Trotter

### **Inquiry into the Transport Asset Holding Entity**

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

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

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

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

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

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

Yours sincerely

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

Mr David Shoebriidge MLC  
**Committee Chair**

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

**By email: [public.accountability@parliament.nsw.gov.au](mailto:public.accountability@parliament.nsw.gov.au)**

Dear Chair

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

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

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

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

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

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

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

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

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

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

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

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

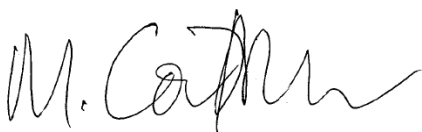
In your letter, you mentioned that similar issues of Cabinet confidentiality were recently considered by the Independent Commission Against Corruption (**ICAC**), which I understand to be a reference to the Assistant Commissioner's ruling in relation to the use of Cabinet documents in the ICAC's Operation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

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

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

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

Yours sincerely



**Michael Coutts-Trotter**  
**Secretary**

2 November 2021

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



LEGISLATIVE COUNCIL

PUBLIC ACCOUNTABILITY COMMITTEE

10 November 2021

Our Ref: D21/58582

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

Dear Mr Coutts-Trotter

### **Inquiry into the Transport Asset Holding Entity**

Thank you for your submission dated 2 November 2021 in which you provide further detail in relation to your request that certain documents be removed from the committee's website and not further used or disclosed as part of the inquiry. The committee notes your position that these documents are subject to Cabinet confidentiality and that their disclosure to the committee was not authorised by the Premier or Cabinet.

The committee has considered your position and has not resolved to remove the documents from the committee's public website. The committee has further resolved to prepare a Special Report on the matter to the House, recommending that the matter be referred to the Privileges Committee for inquiry and report, on the right or otherwise of the Legislative Council to examine, publish and use Cabinet documents as part of an inquiry.

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

Yours sincerely

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

Mr David Shoebridge MLC  
**Committee Chair**