



Office of the Director General

DGTO13/351

Privileges Committee
Parliament House
Macquarie Street
Sydney NSW 2000
Attention: Stephen Frappell, Clerk

Dear Mr Frappell

Inquiry into the 2009 Mt Penny return to order (“Inquiry”)

I refer to my appearance before the Inquiry on 11 June 2013 and to your letter dated 27 August 2013 providing a copy of the transcript of my appearance.

I **enclose** a marked up version of the transcript showing my suggested corrections.

Clarification

Page 10 of the transcript records an exchange regarding Mr Taylor not having been interviewed during the review. That understanding is incorrect. Mr Taylor was interviewed by Maddocks Lawyers during the review. Maddocks Lawyers was unable to interview Mr Taylor *again* in relation to the TRIM audit log for a document he viewed, as he was on leave when the Department provided the audit log to the firm. I refer you to paragraph 5.10 of the report of the review in this regard.

I also refer to page 15 of the transcript and the discussion regarding the formulation of the Department’s Standing Order 52 response policy (“Policy”). In my response to the questions I indicated the Department “*engaged the Department of Premier and Cabinet...and we produced the policy position.*” While the Department’s legal branch had some discussions with DPC regarding the Standing Order 52 response and policy, DPC had not finalised a relevant policy at the time of those discussions, and there was no significant policy position communicated by DPC that was incorporated into the Department’s Policy.

Questions on notice

I respond to the questions taken on notice as follows:

Question 1:

Would you agree or disagree that the papers that were not produced in the call for papers were on the whole or significantly papers that pointed to impropriety?....Do you believe that there were a significant number of documents among those found not to have been produced that pointed to impropriety?

Response

In order to respond to this question, a thorough examination of the 124 relevant documents listed in the ICAC document comparison matrix is necessary. The 124 documents amount to almost 1,000 pages and I will not be able to provide a response to this question by 10 September 2013. I will however endeavour to provide a response by 13 September 2013.

Question 2:

Why did the Department not provide to Clayton Utz all relevant documents to allow them to undertake the inquiry that led to the Clayton Utz report of November 2011?

Response

The first point I would make in relation to this question is that Clayton Utz was engaged in July 2011 and the review undertaken after that time, not April as indicated on page 18 of the transcript.

I understand when the Committee refers to "relevant documents" in this question, it is referring to:

"any emails or any documents that would have demonstrated that Mr McDonald or Mr McDonald's office was creating the name Mount Penny...requesting briefings and having staff running around in May of 2008 getting the briefings together so that subsequently we could get a Mount Penny licence put out to tender."

As indicated in the response attached to my letter to the Committee dated 21 June 2013, Mark Duffy was the main Departmental contact for Clayton Utz and the Minister's Office in relation to the Clayton Utz review. As you know, Mr Duffy is no longer with the Department.

To the best of my knowledge, no one presently employed by the Department had a role in determining or guiding the terms of reference or scope of the Clayton Utz review.

It is important to note that Clayton Utz was engaged to undertake an "initial review" in the first instance. Although Clayton Utz was available to undertake further investigations and a more in depth review after the initial review, the firm was not instructed to undertake such further investigations or review after the Clayton Utz Mt Penny report ("Report") was issued.

The following matters demonstrate that the Clayton Utz review was limited in scope, and suggest the firm may not have considered it necessary or possible within the time and costs agreed to request or consider documents other than the primary expressions of interest and tender documents, for the purposes of the initial review:

1. The estimated fees for *both* the Mt Penny review and Doyles Creek review were \$21,560 (meaning effectively the estimated fees for the Mt Penny review were half of the total fees estimated), being:
 - a. Clayton Utz's capped fees of \$12,000, based on an estimate that it would take 5 days to review and analyse the "*available primary documentation*" and provide preliminary reports; and
 - b. Estimated barrister's fees of \$8,360;
2. The Department was asked by Clayton Utz to provide (and did provide) documents relating to the assessment and recommendations with respect to the expressions of interest for the eleven coal release areas including the Mt Penny exploration licence. This suggests a limited request for documents;
3. Clayton Utz interviewed only two Departmental staff (the Chair of the Evaluation Committee for the Eleven Release Areas and the Deputy Director General of the then Department of Primary Industries) during the review;
4. Clayton Utz's proposal and quote to the Department indicates the firm anticipated that "*the outcome of that preliminary or initial review may be a recommendation that other sources of information be reviewed. This might include interviewing witnesses and the investigation of electronic databases (email).*" (I do not propose to provide a copy of the commercial in confidence Clayton Utz proposal);
5. the Report recommended investigation of further avenues of inquiry "*to determine whether a broader and more costly investigation is justified*";
6. the Report is titled "Preliminary Report";
7. Documents that were ultimately "relevant" to the ICAC Operation Jasper Inquiry may not have been considered "relevant" to the scope of the initial or preliminary review undertaken by Clayton Utz.

Searches for additional documents

The Department is continuing its comprehensive searches for additional documents. Broad search terms have been set to minimise the risk of omissions and accordingly the Department is presently reviewing thousands of documents for relevance and comparing those with the documents appearing in the ICAC document comparison matrix. I will keep the Committee updated as to the progress of the searches.

If you require any further information, please do not hesitate to contact me.

Yours sincerely



Mark I Paterson AO
Director General

10/9/13