



25 February 2013

D13/04402

The Hon. David Ipp AO QC
Commissioner
Independent Commission Against Corruption
GPO Box 500
SYDNEY NSW 2001

Dear Mr Ipp

Mt Penny Return to Order

I am writing in relation to the documents tabled in the Legislative Council on Tuesday 19 February 2013 concerning the order for papers in November 2009 concerning a mining exploration licence at Mt Penny.

Compliance and non-compliance with the standing orders of the Legislative Council and orders of the House for the production of documents is ultimately the responsibility of the House itself.

However, I note from the correspondence tabled on 19 February the statement of the Director-General of the Department of Premier and Cabinet that "The allegation that documents may have been withheld from production under Standing Order 52 is a serious one, particularly in the context of the current investigations by the [Commission]," and that he had forwarded the correspondence from the Clerk of the Parliaments and the Hon Jeremy Buckingham MLC to the Commission.

I am advised that, following the tabling of the correspondence last week, the Clerk has been contacted by a Senior Investigator at the Commission noting an intention "to reconcile the material that was returned to Parliament with the Commission's holdings on relevant records that may fall within the gambit of the call for papers made on 12 November 2009. This will enable me to assess whether there is material that potentially should have been included in the return to Parliament. At that point I may seek further advice from you and also legal advice from the Commission in order to conduct the investigation of any allegation of corrupt conduct in a manner that does not infringe upon the House's jurisdiction in regard to any non-compliance with the call for papers." As outlined below, whilst some of the proposed actions contemplated by the Commission may be appropriate, others may not.

You will no doubt recall that in October 2012 concerns were raised with the Commission about its proposed use of material from the register of disclosures by members. This followed legal advice which concluded that the register was a proceeding in parliament, and that if the Commission sought to draw any inferences from what had been included (or not included) in members' returns this would amount to "questioning" or "impeaching" a proceeding in parliament and be contrary to Article 9 of the Bill of Rights of 1689, which is part of the law of NSW.

An analogous situation now appears may be about to arise in relation to some of the Commission's proposed actions in respect of the Mt Penny return to order.

The indexes to both the public and privileged documents, and the associated correspondence, including certification letters, are undoubtedly part of "proceedings in parliament" – the indexes and certification letters being created directly as a consequence of the order of the House and for inclusion in the return tabled in the House. The Commission must therefore take great care to ensure that any actions it may take in respect of this matter does not involve "questioning" or "impeaching" this material.

It is doubtful that a process by which the Commission simply reconciles the material that was returned to the House in November 2009 with the Commission's holdings and advised which, if any, of the material held by the Commission (but not included in the return) might also have fallen within the gambit of the order for papers, would involve "questioning" or "impeaching" "proceedings in parliament." Indeed, on the basis of such advice, the House, likely following a reference to its Privileges Committee, could then determine its own response to any such situation, and itself take full responsibility for dealing with any potential non-compliance with its order for papers which the House itself may conclude may have taken place.

However, it is difficult to see how the Commission could go any further and draw its own inferences from what was or was not included in the return, or to examine conduct of any person in relation to the return, without "questioning" or "impeaching" "proceedings in parliament." This would remain the case, regardless of any reference from the Director-General of the Department of Premier and Cabinet, or even a resolution of the Legislative Council, or its Privileges Committee, requesting the Commission to do so, in the absence of a waiver of privilege over the relevant proceeding in parliament by express statutory enactment.¹

¹ I note that, when the privilege issue arose in respect of the pecuniary interest register, the Parliament expeditiously enacted the *Independent Commission Against Corruption Amendment (Register of Disclosures by Members) Act 2012* which provided, in part, that: "(2) The Commission may use a relevant register: (a) for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter or as to the nature of any matter disclosed, and (b) for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure, and for that purpose Parliament is taken to have waived any parliamentary privilege that may apply to the register." It may be that, noting the capacity of the Commission and the fact that the Commission is currently in the possession of voluminous documentation in relation to Mt Penny, and not wanting to in any way inhibit the capacity of the Commission to investigate any allegation of corrupt conduct, the Parliament might once again be inclined to enact similar legislation that would put beyond doubt the ability of the Commission to draw its own inferences and examine the conduct of any person in relation to this matter. However, in view of the seriousness of any waiver of privilege and the primary responsibility of the House itself to act to ensure compliance with its standing orders and

In order that these matters may be clarified and any potential breach of parliamentary privilege avoided, while also providing for the most effective resolution of these matters, it would therefore be appreciated if you could formally confirm the Commission's intentions in relation to this matter. It would be my intention to table this letter and your response at the earliest opportunity.

This will then provide an opportunity for the Legislative Council to consider the matter and express its view as to the respective responsibilities of the House and the Commission in regard to this matter, and the appropriate way forward.

Should your staff wish to discuss these matters further they should not hesitate to contact the Clerk of the Parliaments, Mr David Blunt, on tel 9230 2323.

Yours sincerely

A handwritten signature in black ink, appearing to read "Don Harwin". The signature is written in a cursive, slightly slanted style.

The Honourable Don Harwin MLC
President

the orders of the House, I believe that in all of these circumstances it would be essential for the Legislative Council to first give consideration to, and express a view upon, these matters before any such legislation is contemplated.