

**Submission**

**No 8**

## **INQUIRY INTO THE 2009 MT PENNY RETURN TO ORDER**

**Organisation:** Department of Premier and Cabinet

**Date Received:** 27/05/2013

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# Premier & Cabinet

27 MAY 2013

2013-181581

The Hon Trevor Khan MLC  
Chair  
Privileges Committee  
Legislative Council  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Khan

I refer to your letter to the Director General of 8 May 2013 inviting the Department of Premier and Cabinet (DPC) to provide a submission to the inquiry of the Privileges Committee into the 2009 Mt Penny Return to Order.

I am aware that the Committee has written separately to numerous current and former officers of DPC, including me, inviting them also to make a submission.

The Director General wrote to all DPC staff foreshadowing that DPC would be making this submission. He asked any officers aware of any records that may be relevant to the Committee's inquiry to provide those records so that they could be considered in making this submission. Individual officers were advised that they are free to provide their own submission should they wish to do so.

In this submission, a reference to the "Committee Report" means the Privileges Committee's report on its previous investigation, being Report No. 68 of April 2013, "Possible non-compliance with the 2009 Mt Penny order for papers".

### ***The process for complying with orders under Standing Order 52***

1. The standard administrative steps taken by DPC in respect of an order made under Standing Order 52 were outlined by the Director General in his letter to the Committee dated 18 January 2013.<sup>1</sup>
2. The particular steps taken by DPC in respect of the Mt Penny Order are detailed chronologically in the Attachment to this submission.

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<sup>1</sup> That letter is reproduced at Appendix 4 of the Committee Report and the procedures are summarised in paragraph 2.22 of the Committee Report.

3. Apart from a change to Ministerial portfolio responsibilities which occurred shortly after the Order had been made, the response by DPC to the Mt Penny Order followed the usual process. There does not otherwise appear to be anything else that makes this Order unusual in terms of the manner in which DPC responded to it.

#### ***DPC's compliance with the Order***

4. DPC has reviewed the "Document Comparison Matrix" set out in Appendix 8 of the Committee Report and in particular the documents in the right-hand column, which I understand to be documents that have been publicly disclosed as exhibits to the current Independent Commission Against Corruption (ICAC) proceedings.
5. It does not appear on the face of those documents that they are or should be ones that would be held by DPC. To the extent that they comprise written communications, neither the stated author nor the stated recipient is a current or former staff member of DPC.<sup>2</sup>
6. DPC has not identified any documents held by DPC that were subject to the 2009 Order but not provided at the time.

#### ***Possible explanations for a failure to provide documents in the return***

7. The Committee has requested comments on paragraph 2(a) of its terms of reference: the reasons for and circumstances leading to the failure to provide documents in the return.
8. In considering this question, it would appear that it may be useful for the Committee to know from where the ICAC obtained the documents that are set out in the Document Comparison Matrix.
9. The secrecy provisions of the *Independent Commission Against Corruption Act 1988* mean that it would be most appropriate for the Committee to obtain this information from the ICAC itself. The ICAC is clearly in the best position to know whether the disclosure of any source of documents might in any way prejudice its proceedings.<sup>3</sup>
10. With that said, I do not know and it would not be appropriate for me to speculate as to why documents that appear to be covered by the Order might not have been produced.
11. I can, however, offer the following general observations as to possible circumstances in which a document that appears to be responsive to an order might not be produced, beyond the obvious possibility of deliberate non-compliance. Please note that these

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<sup>2</sup> Excluding staff in Ministers' offices. Ministerial staff are currently employed as "special temporary employees" by the Director General of DPC under Part 2.5 of the *Public Sector Employment and Management Act 2002*. The documents of Ministerial staff are, for the purpose of responding to orders under Standing Order 52, considered to be the relevant Minister's documents. Where an order is made requiring the production of documents held by a particular Minister, the relevant Minister's office is required to provide a return that covers all documents held both by that Minister personally and by his or her staff: see also the definition of "agency" under the *Government Information (Public Access) Act 2009*.

<sup>3</sup> Under section 114 of the *Independent Commission Against Corruption Act 1988*, a person who is subject to an ICAC notice or summons is prohibited from disclosing any information about the notice or summons that is likely to prejudice the investigation to which it relates. The maximum penalty for breach of the section is 50 penalty units or imprisonment for 12 months, or both.

observations are offered in general terms only; they should not be taken as suggesting that any or all of them are relevant to the specific Order that is currently under consideration by the Committee.

*The agencies referred to in the order do not hold the document.*

12. In responding to an order under Standing Order 52, searches are only conducted and documents are only produced by those agencies identified in the order. If a document that is otherwise covered by the description in an order is held by an agency that is not named in the order, then that document is not required to be, and is not, produced.
13. In the case of orders which call for the production of documents in the possession, custody or control of a particular Minister, it is accepted practice that this means documents held by the Minister and his or her Ministerial office.<sup>4</sup>

*An agency referred to in the order may not be aware that it holds the document.*

14. It has become practice for the Legislative Council to afford only 14 days in which to respond to an order under Standing Order 52. Unlike a subpoena, the *Government Information (Public Access) Act 2009* or other compulsory processes for the production of documents, there is no scope for agencies to negotiate an extension of time. Searches must be conducted quickly and often across multiple parts of the agency.
15. In addition to relying on the actual knowledge of individual officers as to what files and documents are held (which can be made more difficult if relevant staff have moved on or happen to be on leave at the time), an agency will typically only have the time and resources to interrogate file management and other electronic sources of information using obvious keyword searches.
16. On occasion, agencies have provided their return to an order under Standing Order 52 and have shortly after discovered that they hold another document or documents that should have been produced. In those circumstances, DPC has provided the documents by way of a supplementary return to the House.

*The agency may believe the document is not covered by the terms of the order.*

17. It may not always be clear whether a particular document is covered by the terms of an order and an agency may need to exercise judgment. Unlike some other compulsory production processes, there is little scope for agencies to seek a clarification as to the scope of an order. Further, and with respect, orders under Standing Order 52 are not often drafted with the same degree of precision that one might expect to see in other legal documents that require the compulsory production of documents, such as court-issued subpoenae or notices to produce.
18. It is possible that an agency, acting honestly and reasonably, might form a view as to whether a document is or is not covered by a particular order in circumstances where someone else might have come to a different view.

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<sup>4</sup> See footnote 2 above.

*Cabinet documents are not required to be disclosed.*<sup>5</sup>

19. As noted in the Committee Report, the Legislative Council's power to compel the production of documents does not extend to Cabinet documents. Accordingly, even if otherwise covered by the terms of an order, Cabinet documents are neither identified nor produced in response.

*A document may not exist in a form that is immediately accessible by the agency.*

20. The retention and storage of documents by agencies, including by Ministerial offices, is required to be carried out in accordance with the *State Records Act 1998*, which places obligations on a person (which includes a public office and a body) to protect State records subject to appropriate document disposal schedules.

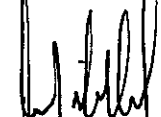
21. The documents provided in a return to an order under Standing Order are retrieved and collated from agencies' physical files and electronic records, which are kept in accordance with these State records obligations.

22. There may, however, be other potential sources of documents that are not immediately accessible to an agency. For example, DPC's information technology system may at any time include certain electronic information that is not accessible to DPC using its usual hardware and software programs. Electronic material that has been deleted or over-written might survive in some form for a period of time on the back-up tapes of servers for disaster recovery purposes. In some cases, it might be possible to re-construct a document that has been deleted or saved over using this electronic material.

23. Such 'documents' are, however, no longer held for State records purposes.<sup>6</sup> The back-up material is for disaster recovery purposes only. The material is not easily searchable and the re-construction of documents from the material can require significant and costly specialist IT resources.

Thank you for inviting this submission from the Department.

Yours sincerely



Paul Miller  
**General Counsel**

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<sup>5</sup> DPC is not aware of any claim that any of the documents listed in the Document Comparison Matrix in Appendix 8 of the Committee Report are Cabinet documents.

<sup>6</sup> See also section 53(4) of the *Government Information (Public Access) Act 2009*, which provides that an agency is not required to search for information in records held by the agency in an electronic backup system unless a record containing the information has been lost to the agency as a result of having been destroyed, transferred, or otherwise dealt with, in contravention of the *State Records Act 1998* or contrary to the agency's established record management procedures.

## **Attachment 1 –**

### **Administrative steps taken in response to the MT Penny Order**

- A1. On 12 November 2009, the Legislative Council agreed to a motion for an order for the production of papers in relation to the Mt Penny mining exploration licence and tender process (the "Order"). The Order required the production of relevant documents within 14 days.
- A2. On the date on which the Order was made, the then Clerk of the Legislative Council, Ms Lynn Lovelock, sent a letter to the then Director General of DPC, Mr John Lee, informing the Department of the Order.<sup>1</sup> The letter was copied to the then Attorney General, the Hon John Hatzistergos, being the most senior Minister in the Legislative Council at the time.
- A3. The Order called for the production of documents in the possession, custody or control of DPC and each of the following:
- a. the Premier
  - b. the Treasurer
  - c. the Minister for Mineral Resources and Minister for Primary Industries
  - d. the NSW Treasury, and
  - e. the Department of Industry and Investment.

### **Returns from other agencies**

- A4. On 13 November 2009, the then Deputy Director General (General Counsel) of DPC, Ms Leigh Sanderson, wrote to the following persons informing them of the Order and asking that they deliver their agency's return to the Order to the Legal Branch of DPC:
- a. the Chief of Staff of the Premier's Office
  - b. the Chief of Staff of the Treasurer's Office
  - c. the Chief of Staff of the Minister for Mineral Resources and Minister for Primary Industries
  - d. the Secretary of the NSW Treasury, and
  - e. the Director General of the Department of Industry and Investment.<sup>2</sup>

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<sup>1</sup> A copy of this letter was included in the DPC return to the Order: Document No 1 in the DPC Index of non-privileged documents.

<sup>2</sup> Copies of these memoranda were included in the DPC return to the Order: Attachments to Document No. 2 in the Index of DPC non-privileged documents. The Index of DPC non-privileged documents refers to the date of document No 2 being 11 November 2009; this is an error, the memoranda were prepared and dated 12 November 2009 and were signed and sent on 13 November 2009.

- A5. On 17 November 2012, changes were made to the Ministerial responsibility for the Mineral Resources and Primary Industries portfolios. The Hon Ian Macdonald ceased to be a Minister and the Hon Peter Primrose became the Minister for Mineral Resources and the Hon Tony Kelly became the Minister for Primary Industries.
- A6. On 20 November 2009, the Deputy Director General (General Counsel) sent a memorandum to each of the Chiefs of Staff of the new Minister for Mineral Resources and the new Minister for Primary Industries. These memoranda were relevantly in the same terms as that which had previously been sent to the Chief of Staff of the former Minister for Mineral Resources and Primary Industries on 13 November 2009.<sup>3</sup>
- A7. DPC received the following returns from the agencies referred to above:
- a. From the office of the Premier, a written certification from the Chief of Staff, Mr Graeme Wedderburn, that all documents covered by the terms of the Order had been provided. The only such document provided was the memorandum from the Deputy Director General (General Counsel) to the Chief of Staff referred to in paragraph A4 above, together with a schedule of documents showing that as the only document produced.
  - b. From the office of the Treasurer, a written certification from the Chief of Staff, Mr Walt Secord, that all documents covered by the terms of the Order had been provided. The only such document provided was the memorandum from the Deputy Director General (General Counsel) to the Chief of Staff referred to in paragraph A4 above, together with a schedule of documents showing that as the only document produced.
  - c. From the office of the Minister for Primary Industries, a written certification from the Chief of Staff, Mr Laurie Brown, that there were no documents covered by the terms of the Order held by that Minister's office.
  - d. From the office of the Minister for Mineral Resources, a written certification from the Acting Chief of Staff, Mr Jason Kara, attaching the one document covered by the terms of the Order held by that office. The document provided was the memorandum from the Deputy Director General (General Counsel) to the Chief of Staff referred to in paragraph A6 above, together with a schedule of documents showing that as the only document produced.
  - e. From the NSW Treasury, a written certification from the Secretary of the NSW Treasury, Mr Michael Schur, that all documents held by that department and covered by the terms of the Order had been provided. Two documents were provided, one of which was the memorandum from the Deputy Director General (General Counsel) to the Secretary of NSW Treasury referred to in paragraph A4 above. The other document was an email over which the NSW Treasury asserted a claim of privilege. A redacted version of that document was also provided, over which no claim of privilege was made. NSW Treasury also provided schedules showing the two documents produced.

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<sup>3</sup> Copies of these memoranda were included in the DPC return to the Order: Attachment to Document No. 3 in the Index of DPC non-privileged documents.

- f. From the Department of Industry & Investment, a written certification from the Director General, Mr Richard Sheldrake, that all documents held by that department and covered by the terms of the resolution had been provided. Schedules of the documents produced were also provided, separately identifying those in respect of which a claim of privilege was asserted by the department.

A8. The returns referred to in paragraph A7 above were delivered to the Clerk of the Legislative Council by DPC under a letter from the Director General of DPC (signed on his behalf by Ms Sanderson) on 26 November 2009.

### ***Return from DPC***

A9. On 13 November 2009, the Deputy Director General (General Counsel) also sent a memorandum to the heads of all divisions and branches of DPC that might conceivably hold documents responsive to the Order. These were:

- a. Policy and Strategy Division
- b. Government Coordination Division
- c. Infrastructure, Environment and Economic Development Branch
- d. Major Projects Co-ordination
- e. Regional Coordination
- f. Strategic Projects Division
- g. Strategy and Project Delivery Unit
- h. Cabinet Secretariat, and
- i. National Reform Unit.<sup>4</sup>

A10. Confirmation was obtained from each of them that they held no documents required to be produced under the Order.<sup>5</sup>

A11. Accordingly, the only documents produced by DPC were documents which had been created as a result of the Order itself, and therefore fell within the requirement of the Order that the return include "any document which records or refers to the production of documents as a result of this order of the House".

A12. The DPC return, including a schedule of documents, was provided to the Legislative Council with the returns from the other agencies on 26 November 2009. The

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<sup>4</sup> A copy of this memorandum was included in the DPC return to the Order: Attachment to Document No. 2 in the Index of DPC non-privileged documents.

<sup>5</sup> Where those branches provided this confirmation in writing, copies of these were included in the DPC return to the Order: see Documents No. 5, 6, 7, 8, 9 and 10 in the Index of DPC non-privileged documents.



covering letter (referred to in paragraph A8 above) included a certification that all documents held by DPC and covered by the Order had been provided.