Submission No 3

INQUIRY INTO EXAMINATION, PUBLICATION AND USE OF CABINET DOCUMENTS BY LEGISLATIVE COUNCIL COMMITTEES

Name: The Hon Daniel Mookhey

Date Received: 19 January 2022

SUBMISSION TO THE PRIVILEGES COMMITTEE -
CONSIDERATION OF CABINET DOCUMENTS

Dear Chair,

My actions in the *Transport Asset Holding Entity* inquiry *("TAHE Inquiry)* led to the Public Accountability Committee referring this inquiry to the Privileges Committee. I am pleased to make the following submission.

EVENTS AT THE PUBLIC ACCOUNTABILITY COMMITTEE

1. The Legislative Council referred an inquiry into the *Transport Asset Holding Entity ("TAHE")* to the Public Accountability Committee in June. At the committee's first hearing (1 October 2021), I tabled three documents marked 'Cabinet-In-Confidence' - 'Treasury Tender 001, Transport Tender 002, and Transport Tender 003. I, and other committee members, then referred to those documents repeatedly during the questioning of several witnesses who appeared that day. I also questioned other witnesses about the same documents at subsequent hearings.

2. The Public Accountability Committee *("the PAC")* then resolved to publish the documents on the inquiry's website. It also agreed to publish several other documents I tabled that were also marked 'Cabinet-in-Confidence.' Those documents were given to the House following a call for papers made earlier this year. None of the respondent departments or agencies claimed privilege over them either at the time of production, or thereafter.

THE SECRETARY RAISES CONCERNS

3. Three weeks later (22 October 2021), the committee received correspondence from Mr Michael Coutts-Trotter, Secretary, Department of Premier and Cabinet, stating that the disclosure of three of the documents I tabled in the inquiry was not 'directly or indirectly…authorised by the Premier or the Cabinet'.[1] As such, he requested that the committee remove the said documents from the committee's

[1]Michael Coutts-Trotter to David Shoebridge, October 22, 2021 in '*Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry'*, p.8

website.[2] He also requested that the documents not be used or disclosed as part of the inquiry.

4. In later correspondence, Mr Coutts-Trotter gave his reasons. The Secretary repeated his department's view about 'the paramount importance of protecting the confidentiality of Cabinet documents.'[3] He referred to the High Court's decision in *Sankey v Whitlam* (1978) 142 CLR 1. He then cited the NSW Supreme Court's decision in *Egan v Chadwick* (1999) 46 NSWLR 563 to argue 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.'

5. Finally, the Secretary drew an analogy with the circumstance the High Court decided in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* (2013] HCA 46) - where privileged documents had been mistakenly produced to the opposing side during court-ordered discovery. The High Court ruled that a court should ordinarily permit that mistake to be corrected and order the document's return.

DOCUMENTS AND PARLIAMENTARY PRIVILEGE

6. In my view neither of the Court's decisions in *Egan v Chadwick,* or *Expense Reduction* affect the matter this committee is enquiring into as neither the PAC or the House obtained the documents by exercising the power to order the production of a state paper. Nor did the executive produce them by mistake. My actions in the TAHE inquiry are not analogous to the questions those Courts had to decide.

7. Rather, I obtained and kept the documents, intending to use them in the Parliament's proceedings. I then did use them in an actual parliamentary proceeding. As such, they are part of the corpus of documents belonging to a

[2] Ibid.
[3] Michael Coutts-Trotter to David Shoebridge, November 2, 2021 in '*Special report on the examination, publication and use of cabinet documents by Legislative Council committees as part of an inquiry'*, p. 10-11.

member that various Courts, as well as this House, has found to be immune from seizure, according to the laws of parliamentary privilege.[4]

8. Had the PAC decided to accede to the Secretary's request, it would have caused a farce: parliamentary privilege would have stopped an external agency from seizing the three documents I tabled, but committee practice would have barred me from tabling them in the parliamentary proceedings which the privilege aims to protect!

9. Instead of endorsing this absurdity, I favour committees treating cabinet documents similarly to the other sensitive papers they come to possess without exercising their (or the House's) compulsive powers. Because committees routinely inspect and publish such documents. Absent a further compelling reason, status as a cabinet document is no reason for a committee to automatically distinguish them from the other documents that might also attract privilege in other settings. Or documents which might be covered by confidentiality provisions that stop their publication. Especially if the document is directly relevant to the inquiry the committee is undertaking.

THE 'HARM' TEST

10. A committee should only refrain from publishing a cabinet document if it decides that publication will do overriding harm to the 'proper functioning of the executive arm and of the public service.' This standard is modelled on the 'harm test' the High Court first honed in *Sankey v Whitlam.* Australian courts have since used it to determine a wide variety of public interest immunity claims that involve the same tensions between executive oversight and the executive's need to function as the TAHE inquiry triggered. As a prevailing House standard, it should prevail in committees too.

[4] S Reynolds, Parliamentary Privilege and Searches by Investigatory Agencies, Paper presented to a seminar on Parliamentary Law conducted by Legalwise Seminars, Sydney, 9 June 2017.

11. Each committee should have to decide whether 'overriding harm' will result if they publish a cabinet document. Those committees can (in-turn) access the reports of the arbiters, who assist the House in privilege disputes, which catalogue the incidents when the House has chosen to accede to the executive in disputes about publication. If they use the arbiter's reports as a passel of precedents to define 'overriding harm to the proper functioning of the executive arm and of the public service', the committees will develop a consistent standard for treating documents they have obtained by compulsion, with documents obtained without compulsion.

THE TAHE DOCUMENTS AND THE 'HARM' TEST

12. The PAC's decision to publish the three cabinet documents I tabled did not create any 'overriding harm to the proper functioning of the executive arm and of the [NSW] public service. Nor did it damage the state's power to set a budget. Nor did it damage the state's ability to safely operate a rail service. Rather, by inspecting the documents, the PAC furthered its inquiry. The PAC used them to thoughtfully and forcefully cross-examine government witnesses, especially since the documents were more candid about the reasons why the Government established the TAHE than the Government's own submissions were. And especially after witnesses gave sworn evidence which was (obviously) contradicted by the story the documents were revealing.

13. PAC's choice may have led to some embarrassment for the executive; that might have grown more acute after the media developed an interest in the TAHE controversy. But 'embarrassment' is not a species of harm which should lead the House, or its committees, to volunteer to curb its own powers. Afterall, we are a house of review: embarrassment is a by-products from our labour. As Mason J said in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52: "It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action."

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