

REPORT OF PROCEEDINGS BEFORE

PRIVILEGES COMMITTEE

INQUIRY INTO THE 2009 MOUNT PENNY RETURN TO ORDER

At Sydney on Monday 24 June 2013

The Committee met at 11.00 a.m.

PRESENT

The Hon. T. Khan (Chair)

The Hon. J. Ajaka

The Hon. J. Buckingham

The Hon. G. J. Donnelly

The Hon. J. A. Gardiner

The Hon. M. R. Mason-Cox

Reverend the Hon. F. J. Nile

CHAIR: I welcome you to the second day of hearing of the Privileges Committee inquiry into the 2009 Mount Penny return to order. I will address some procedural matters before we commence the hearing. The Committee is holding a public meeting today which means that the media or members of the public will be in the room. The transcript of today's evidence will also be made public. I note that Mr Ian Macdonald was invited to attend today's public hearing. We have been advised that he is unavailable today. Witnesses who appear before parliamentary committees are protected by parliamentary privilege. This means that what is said cannot be used against them later in court proceedings.

The inquiry's terms of reference will require the Committee to inquire into and report on the failure to provide documents in the return to order tabled in the Legislative Council on 26 November 2009 concerning the Mount Penny mining exploration licence and tender process. This includes documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the Legislative Council on 14 March 2013.

The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines governing the broadcast of the proceedings are available from the table by the door. In accordance with the guidelines a member of the Committee and witnesses may be filmed or recorded. However, people in the public gallery should not be the primary focus of any filming or photographs.

In reporting the proceedings of this Committee members of the media must take responsibility for what they publish or for what interpretation is placed on anything that is said before the Committee. Witnesses, members and their staff are advised that any messages should be delivered through the Committee clerks. I also advise that under the standing orders of the Legislative Council any documents presented to the Committee that may not have yet been tabled in Parliament may not, except with the permission of the Committee, be disclosed or published by any member of such Committee or by any other person. I ask everyone to turn off their mobile phones for the duration of the hearing, including mobile phones on silent, as it interferes with the recording of the proceedings.

At the commencement of your evidence I will invite you to make a short opening statement, if you wish. If you have copies that you can provide to the members of the Committee, that would be appreciated. Members of the Committee will then ask you questions. I note in that respect that perhaps somewhat differently from the budget estimate approach we are taking a more flexible approach to timing and a less combative approach between members of the Committee. You might find it a more collaborative approach than perhaps you have seen from upper House members before. The committee has resolved that any answers to questions taken on notice during the hearing must be provided within 21 days of the delivery of the questions to you.

CHRIS ECCLES, Director General, Department of Premier and Cabinet, and

PAUL RICHARD MILLER, General Counsel, Department of Premier and Cabinet, affirmed and examined:

CHAIR: Do you wish to make an opening statement?

Mr ECCLES: We do not have an opening statement.

CHAIR: We have your submission before the Committee.

The Hon. JENNIFER GARDINER: So that the Committee has a picture of how the responses to a call for papers are dealt with by the Department of Premier and Cabinet in a general context, will you each in turn explain your role when a letter is received from the Clerk of the Parliaments advising the Department of Premier and Cabinet of an order for papers from the House? What happens when you receive such a letter?

Mr ECCLES: I might ask Mr Miller as the custodian of the process to address that question.

Mr MILLER: The order, when it is made by the Legislative Council, has immediate effect. The writing to the department or any other government official is a courtesy which is done by the Clerk of the Parliaments. The Clerk of the Parliaments writes to the Department of Premier and Cabinet and copies in the Leader of the Government in the upper House. It is the Ministers in the upper House who have primary responsibility for complying with these orders. The Department of Premier and Cabinet coordinates the Government's response on behalf of those Ministers.

Once we receive a notice that such an order has been made search memos are prepared to each of the agencies, including Minister's offices which are named in that order. Those search memos are sent by the General Counsel of the Department of Premier and Cabinet to either the head of the agency, so the director general of the relevant department, or in the case of Ministers, to the Minister's chief of staff. Attached to those memos is a detailed set of guidelines explaining how agencies and Ministers are to respond to the order. Essentially what they need to do is search for documents that fall within the scope of the order, prepare and index them, produce them to the Department of Premier and Cabinet and we then pass them on to the Legislative Council.

In preparing those documents they are asked also to identify whether any of the documents are subject to privilege. If they are they must still provide them to the Department of Premier and Cabinet and ultimately to the Council, but they are entitled to separately index them and make a case as to why they should be considered privileged and not released further than the members of the Legislative Council. In the case of orders that require the production of documents from the Department of Premier and Cabinet, we obviously search our own records so there is an internal process that goes on at the same time.

The Hon. JENNIFER GARDINER: You are principally responsible. Are there other officers in the Department of Premier and Cabinet who help you in getting an outcome?

Mr MILLER: Yes. To explain structurally, the information access unit is a small unit of three people. It sits within the legal branch of the Department of Premier and Cabinet. The legal branch is part of the Office of General Counsel which I head.

CHAIR: Are you aware of the document comparison matrix that was provided by the Independent Commission Against Corruption?

Mr MILLER: Yes, I am.

CHAIR: Mr Miller, were you responsible for responding to the section 22 notices that were issued by the Independent Commission Against Corruption to the Department of Premier and Cabinet?

Mr MILLER: Yes.

CHAIR: A return to a section 22 notice was made on 22 December 2011, which was the first return with respect to the Mount Penny inquiry into the Independent Commission Against Corruption. How was that done?

Mr MILLER: I am not immediately familiar with the return to which you are referring. Is it a return from the Department of Premier and Cabinet?

CHAIR: Yes, it is.

Mr MILLER: I do not have those details in front of me.

CHAIR: It seems to be very plain that in the return of 22 December 2011 you, on behalf of Mr Eccles, produced the ministerial emails that showed that a number of ministerial staff were requesting that Mount Penny be investigated as a possible site for inclusion in the tender process. How did you do that?

Mr MILLER: I understand your question now. We can from time to time receive compulsory notices to produce documents from ICAC, including notices requiring the production of electronic material that the department may hold in its capacity as an IT service provider for ministerial offices. When the ICAC does that it generally asks for the particular email boxes; it does not necessarily tell us what the subject matter is or it does not ask us to look for particular emails. It will just say, "We want the email boxes of these individuals." We comply with that order by going to the relevant branch of the department that provides the IT support asking them to burn the inbox or sent items or whatever onto a CD. I don't look at them; I just produce them to the ICAC either under a letter from myself or from the director general.

CHAIR: But it is fair to say, is it not, that even though the ministerial emails were not produced in response to the call for papers they existed somewhere on a hard drive that was accessible at least by the Department of Premier and Cabinet?

Mr MILLER: What would exist after the passage of time is what are known as backup tapes. So they may or may not be—in fact, they would not be after that period of time—the actual emails that you and I could sort of access. They would be forms of electronic material that could potentially be restored into emails. When we produce documents to the ICAC, where they ask for these sorts of backup tapes, we generally—in fact, we don't with the ICAC seek to restore the backups ourselves. We provide them with the backup and they do whatever restoration, or provide the sort of forensic and IT expertise that is needed to recreate an email from that material.

CHAIR: I am sure other members will come back to that but I will now turn to an entirely different subject. Are you aware that in November of 2011, I will describe it as "the Government" produced a review into the Mount Penny tender process—that is, a review undertaken by Clayton Utz?

Mr MILLER: I am aware now from having read the transcript. I don't know if I was aware previously.

CHAIR: Mr Eccles, were you aware?

Mr ECCLES: I have a similar level of awareness.

CHAIR: That is none.

Mr ECCLES: I have read the transcript.

CHAIR: Does it concern you somewhat that a firm of lawyers is retained for the purposes of undertaking a review process of something as notorious, might I suggest, as the Mount Penny tender process and yet essentially in its interim report of November 2011 it comes up with, in a sense, there seems to be nothing wrong?

Mr ECCLES: I am sorry, what is the point of the question?

CHAIR: The point is does it not raise some concern in you that the Government has gone through a process of reviewing the Mount Penny tender process itself and came up with what, in essence, is a nil return—that is, there apparently was nothing to worry about?

Mr ECCLES: Again I am not familiar with the detail but the Government commissioned Clayton Utz to conduct an inquiry; I do not know the specific terms of that inquiry.

CHAIR: Perhaps before the end of today we can provide you with a copy of the report.

Mr ECCLES: The point I am getting at is that I think the concern or otherwise that I might have about how the Government treated that particular report would depend upon the nature of the commissioning and the nature of the content of the report. So I feel a little bit unable to be definitive about whether I should be expressing concern about the treatment by the Government.

CHAIR: Could I invite that my concern relates to what documents were provided to Clayton Utz to allow them to come to the outcome—that is, you might come to the conclusion that they were not provided with documents that would have demonstrated that something potentially quite dodgy went on?

Mr ECCLES: I think the best I can do is to note your concern and take it into account when I have the opportunity to review, in the same way you have, the material.

CHAIR: Excellent. I will provide you with a copy before you leave today.

Mr ECCLES: Thank you.

The Hon. JOHN AJAKA: I will go back a step. If we start with the proposition that there has been a change in ministry, a Minister is decommissioned, if I can use that term, immediately a new Minister is appointed and there is some controversy in relation to how that occurs. I want to understand what then occurs with all of the documents within the Minister's office. I want to understand whether someone obtains a complete copy of those, whether it be the Department of Premier and Cabinet or someone else, to ensure that those documents are available in future for an order under Standing Order 52 and, if I can add, knowing that there is in fact such a request on the table when this occurs. What would happen from your perspective?

Mr ECCLES: It partly depends on the nature of the documentation. If the documentation is of Cabinet material then the Department of Premier and Cabinet has a direct interest in its retrieval. If the documentation is of a departmental nature and not Cabinet material then it is a matter for the department to source the material that they believe should be retrieved.

Mr MILLER: The State Records Authority has issued what is called a general retention and disposal authority for records at a Minister's office. The primary direction is that an outgoing Minister should return any departmental-related documents, which will be the bulk of what a Minister is dealing with in their official ministerial capacity, to the department. That is what we would expect to happen.

The Hon. JOHN AJAKA: Let us take the scenario of emails between staff members within a Minister's department. How do you get access to those emails to ensure that it is not just a matter of simply handing over folders of hard copies but that you actually have got all of the communications that occurred?

Mr MILLER: The disposal authority provides that where an electronic document is a State record it needs to be kept as a State record. The outgoing Minister's responsibility and their office's responsibility is to print those electronic records and either return them to the department where they are relevant to the department or deposit them with the State Records Authority. The authority provides that ephemeral records—inconsequential sort of traffic—can be deleted.

CHAIR: How do you do that in a case such as this where Mr Macdonald comes into work on the Tuesday morning, he is called into the Premier's office and speared? How does he get involved in the processes of making sure that State Records—

The Hon. JENNIFER GARDINER: Actually printing them.

CHAIR: Yes. He is actually out of the building?

Mr ECCLES: The Minister himself has limited ability to respond according to the procedures.

CHAIR: None.

Mr ECCLES: His office remains, and even if his office were not to remain then there are departmental liaison officers who are to presumably give effect to the required procedures. The one constant in all of this, irrespective of the speed of departure of Ministers and staff, is the Department of State. The Department of State, assuming that there has not been tampering with the material, would have the ability to go into the records and treat them according to due process.

The Hon. JOHN AJAKA: Is my understanding correct that we do not have, I use the term, "the Cloud"? We do not have a file server where every ministerial computer message between staff et cetera goes into one repository and the information is there no matter what happens in the Minister's office, do we?

Mr ECCLES: I think you are better qualified than me.

Mr MILLER: I think the answer is no.

The Hon. JOHN AJAKA: That is my understanding.

Mr MILLER: I think the answer is that each Minister's office is ultimately responsible for its own electronic record keeping, but the Department of Premier and Cabinet is for all of the current Ministers but not all Ministers of the former Government—there was at least one Minister in the former Government whose IT system was actually run I think by the parliamentary department and not by the Department of Premier and Cabinet. So I think the answer to your question is no.

The Hon. MATTHEW MASON-COX: The Department of Premier and Cabinet runs the email system for Ministers.

Mr MILLER: That is correct.

The Hon. MATTHEW MASON-COX: You just said that.

Mr MILLER: Yes.

The Hon. JOHN AJAKA: To continue on with what the Chair was indicating, when you have a situation when Minister Macdonald is suddenly decommissioned, Minister Primrose immediately comes in. From what we have heard from Minister Primrose, he does not receive any of the files, documents, correspondence between any of the staff. So when he looks at the Standing Order 52 he produces what he has, which turns out to be almost nothing. We are trying to understand who has the responsibility to absolutely ensure that when a Minister is decommissioned someone gains immediate access to all relevant material to ensure that it does not simply, and whether deliberately or accidentally, disappear into a system.

Mr MILLER: That is a difficult question. The 2009 order was the only occasion that I am aware of where there was this change of Minister during the course of when an order was made and when an order was produced. If that issue arose now and I were to be called upon to provide advice on how to deal with it, I am actually not sure what advice I would give. The difficulty is as you say. The new Minister is not in a position practically to produce those documents.

The former Minister may or may not be but is no longer a Minister at any rate, and for the Department of Premier and Cabinet, although in a technical and practical sense we do have access to the electronic documents, we do not search Ministers' email accounts and I would suggest that it is probably not a good idea to be suggesting that a department should, given what might be on those emails. Those emails might deal with parliamentary matters, personal matters, party political matters which are also dealt with under the disposal authority. So I am actually not sure what answer I would give if that question arose now. I would almost certainly seek advice from either the Crown Solicitor or the Solicitor General on it because I do not think it is an easy question.

CHAIR: If you received a subpoena from a court that called for you to produce all documents relevant to a particular matter, you would accept that emails are a document that would fall within the terms of the subpoena, would you not?

Mr MILLER: Yes, I would.

CHAIR: And you would know at the time of receiving that email that, for instance, taking a scenario somewhat similar to the Mount Penny one, that you actually have the electronic documents in the form of the former Minister under your control, you would comply with the subpoena by producing the emails, would you not?

Mr MILLER: Yes we would and in doing so we would inform the court that it will take considerable time and resources to restore—

CHAIR: Sure. That is a different issue, is it not?

Mr MILLER: That is correct but we would.

CHAIR: And in a sense if what ICAC had done was to write to you and say, "Give us Macca's emails", even though you might find it uncomfortable you would comply with the order, would you not?

Mr MILLER: Yes, we would.

CHAIR: When you get a Standing Order 52 why do you equivocate in terms of what you would do?

Mr MILLER: I was speaking hypothetically about what I would do now if a Standing Order 52 were issued and there was a change in the Minister, and I am saying I would seek advice because I do not know what I would do.

CHAIR: I am not being critical of you but I am trying to work out why there is a difference in mindset between compliance with a court order, compliance with an ICAC order and compliance with an order from the Legislative Council. What is the difference?

Mr MILLER: There are differences and I will give you an example. Standing Orders 52 will sometimes—in fact, usually—use the same terminology as a subpoena or a summons and say, "All documents in the possession, custody and control of", say, the Premier. We, and my understanding is the Legislative Council, have always interpreted that to mean the Minister—the Premier and the Premier's staff. In the context of a subpoena it would be much broader than that. Documents held by DPC are in the possession, custody and control of the Premier because the Premier could ask us for those documents. So there are differences like that.

CHAIR: I will have to go and read the transcript because it is not compelling for me so far.

The Hon. JOHN AJAKA: I go back to one of the matters you raised earlier. You get contacted by ICAC, as you say you go to the depository, you burn a CD and you hand over the CD. You do not examine what is on the CD, you do not use whatever forensic IT expertise you need to be able to identify and in many cases you do not even know what ICAC is looking for. Do I take that as correct so far?

Mr MILLER: We produce what ICAC asks us to produce.

The Hon. JOHN AJAKA: From a period to a period to a person.

Mr MILLER: That is correct.

The Hon. JOHN AJAKA: When you have a Standing Order 52 order would you go into those same areas and ask your staff to see whether they can find anything by extracting from that same depository any information, which is far more specific and, I take it, would take a lot more hours?

Mr MILLER: You mean in relation to Minister's offices?

The Hon. JOHN AJAKA: Yes. Ministers who have left.

Mr MILLER: No.

The Hon. JOHN AJAKA: If today the Legislative Council was to forward a Standing Order 52 in relation to something that occurred with the previous Government, a previous Minister, was to send it to Premier and Cabinet, would you undertake those same inquiries as you did for ICAC in trying to obtain from that depository the necessary information?

Mr MILLER: It would depend on the terms of the order but generally speaking no, unless the order specifically requested us to. If, for example, an order were made now that sought all documents, all correspondence from former Premier Keneally, for example, we would search for documents held within DPC full stop. We would not try to restore the Premier's old office in an electronic sense in order to search for those, no. And it would not be practical for us to do so.

The Hon. JOHN AJAKA: The reason we ask these questions is not only are we looking at what went wrong last time but we are also looking at how the system can be improved so that the same problem does not arise. I take it, on your example, if there were emails between the chief of staff and deputy chief of staff that did not go directly to the Premier, they are in the depository. We are just not going to get access to those in an SO52 in the circumstances you have just given us.

Mr MILLER: That is correct. They may or may not exist. They may or may not still exist, depending on what backups have been kept because the backups are not kept for the purpose of maintaining a permanent record of that Minister's office's email traffic. The backups are kept for IT purposes; if the system were to go down they would be able to work on it and try to retrieve particular emails. So if the Legislative Council made an order, for example, requesting the inbox of a former Premier at a particular date I am not sure that even with all the IT resources in the world we would be able to do that.

CHAIR: It concerns me that you look towards what the purpose for a backup is as opposed to the fact that it exists. Documents can have been created for a whole multiplicity of reasons, but in answering a subpoena, for instance, you would not go to determining whether you will produce the document on the basis of why you happened to have that document; you go to the question: Do I have it?

Mr MILLER: That is correct. It is probably more analogous to Government Information (Public Access) Act, the freedom of information situation.

CHAIR: I know what the Government Information (Public Access) Act is.

Mr MILLER: Under the Government Information (Public Access) Act there is a provision that says in relation to electronic backups of material you do not ever need to search those unless you have reason to believe that a State record was deleted or destroyed in contravention of the State Records Act. If a document were a State record it should be on the relevant file so it should not be necessary to go to the backup tape.

CHAIR: But you are using either a legislative or regulatory function to make that distinction. Is that right?

Mr MILLER: Yes, that is correct. I am just explaining what happens in the other context.

CHAIR: Sure, but with an SO52, instead of looking to a legislative constraint dealing with something else, would you not go that way but go to common law principles of how you deal with these things? Common law principle says if a document is in existence and you are called to produce it by a court you produce the document.

Mr MILLER: I take the point that you are making. The only point I will make is that within 14 days of complying an order—I mean, it simply would not be possible in a month.

The Hon. JOHN AJAKA: That was my last question. I have asked this to other witnesses as well. Is the problem with the 14 days in having to produce all the documents? Should one look at a system, for example, the order says 14 days, you produce what you find within the 14 days, but if you know there is the possibility of further documentation and you need more time, you seek an extension of time to produce part B of the documents, if I can call it that?

Mr MILLER: To a certain extent, we have done that in the past. We work very hard to comply with the 14 days but there have been occasions where additional documents have been identified after that 14 days and we still produce them within the same Parliament to do that.

The Hon. JOHN AJAKA: Would it be appropriate from a procedural point of view that it lists, "here are the documents produced within 14 days. We hereby give you notice that these are not all the documents we believe are on our system. We just require another seven days or 14 days to locate the balance and we will send them to you."?

Mr MILLER: There are two comments I would make on that. The first relates to resourcing. I think if that were done the Legislative Council would need to understand the costs of doing that and the cost it is imposing on the public purse because it is not insignificant and ICAC might be able to provide you with more information about that. Actually there are three comments I will make. The second one is a legal question which I do not know the answer to and that is around the powers of the Legislative Council to require the Executive Government to do something. There have been various debates—

CHAIR: We have a view. It may be different from yours.

Mr MILLER: I am not sure I have a view but I know that the Crown Solicitor has previously expressed the view about, for example, whether the Legislative Council could require the Government to create an index of documents. He has expressed the view that the Council cannot require you to create something that does not exist now. So I am not sure what his view would be about whether the Council could require the Executive to create emails that do not exist in a particular form. But that is a question perhaps for another day. The third issue is the one I raised earlier, which is that generally speaking—and I take the point that has been made previously about court proceedings—I am not sure that it is a good idea for the department to be routinely trawling through Ministers' and Ministers' staff emails, searching for documents relating to particular subjects.

The Hon. MATTHEW MASON-COX: These are unusual circumstances, we certainly agree with that. If I could take you, Mr Miller, to the general retention and disposal authority, what happens to records in a Minister's office if the Minister leaves that office for whatever reason. I note at 1.8 of the document it states that briefing notes or papers of other Ministers or the Minister concerning portfolios specifically or whole-of-government issues of significance, such as those attracting media attention, et cetera, it nominates they are required as State archive documents, and there are a whole range of categories that go through which some or other of the emails that were provided to ICAC would, I think, probably fall into one or other of these categories as documents that would be required for State archives or State records.

You might want to give me a response later to that specifically, but let us assume that for a moment. What happens at the time that a Minister leaves his office in relation to allocating all the documents in his office to State records or State archives or as not needing to be recorded? If there is an email that falls into that requirement—it is either 1.8 or some other section—is that email then printed and sent off so that it no longer forms the bulk of his email, if you like, address or email archive, which you say is too hard to carve up? What happens in those situations?

Mr MILLER: I think I understand your question.

The Hon. MATTHEW MASON-COX: Let me articulate it in this way: You have said to us that when a Minister leaves his office you have this amorphous email account and it is too hard to go in there to really carve out a search which would be meaningful within the 14 days. What I am saying to you is, that when the Minister leaves his office, as Macdonald did, two days after the Standing Order 52 was actually given to—

CHAIR: I think it was four.

The Hon. MATTHEW MASON-COX: Four days, thank you. What happens if that email is a State record or a State archive document? Is it printed and then sent off to State Records or State Archives?

Mr MILLER: I can tell you what should happen, I am not sure I can tell you what actually happened in that particular case.

The Hon. MATTHEW MASON-COX: What should happen in those circumstances?

Mr MILLER: If it is an email between the Minister's office and the department, which a lot of these would be if they are technically State Archives, then it is reasonable to expect the department will take primary responsibility. It will have the email at its end, either as being the sender or the recipient and should be treating it in accordance with its State records policy. So the document will be captured, in that sense. In relation to the Minister's office, as I said, what should happen is that documents are either returned or provided to the department, or if they are not relevant to the department, then the Minister's office should provide them directly to State records, in hard copy.

The Hon. MATTHEW MASON-COX: Do you think that because they are emails, they are not taken as seriously as hard copy documents and perhaps might be overlooked in that process? Is that part of the issue here, that they are emails and therefore not as tangible as hard copies?

Mr MILLER: I cannot speculate. One way of answering that is that the way that departments and Minister's offices engage, it is true to say the most important documents will be in hard copy. Formal briefs do not just come up electronically, they come up in hard copy.

Mr ECCLES: I would not have thought it was an absence of awareness of the potential significance of emails that is the problem. These requirements have been around for a long time now so I do not know that it is an awareness issue. It is more about whether you act on your awareness to do what is required.

The Hon. MATTHEW MASON-COX: We had evidence from Mr Primrose's office in relation to when they took over the office of Mr McDonald, as the incoming Minister and his office requested advice from the general counsel of the Department of Premier and Cabinet at the time as to what they should do in relation to various documents. They were given specific instructions, in compliance with the general circular in relation to what happens in these matters, and specifically the retention and disposal authority. Do you think—and this is perhaps a hypothetical question, Mr Miller—do you think, if you were in the shoes of the general counsel at that time, that it would have been obvious to you that there was an email account from Mr Macdonald that may not have been picked up by the in-coming Minister or dealt with in any other way?

Mr MILLER: I am not sure and I will seek guidance from the Chair as to whether it is appropriate for me to answer that question as a hypothetical. What I can say is, I am not aware of what, if any, advice was given by the former general counsel to the Minister on that occasion. What I can say is that, if the issue arose now, as I indicated earlier, it is not an easy issue and it is not one that I would be giving off-the-cuff advice about.

The Hon. MATTHEW MASON-COX: You would seek advice, I think was your evidence previously.

Mr MILLER: It is a hard question.

The Hon. MATTHEW MASON-COX: I ask you a different question, in relation to supplementary returns. You mentioned earlier that, should you perhaps be in a situation or your expectation would be if a department was in a position where they could not respond within the 14 days or there is other information that came up and they would put in a supplementary return. That happens from time to time, is that correct?

Mr MILLER: It is less a case that they cannot meet the 14 days. It is more a case that they had produced everything they thought they had within 14 days and realised later. We try very hard to make sure that the Government meets its 14-day requirement. It is rare—there may have been one or two—where an agency has come back and said, "We are going to be a couple of days late with this". So, we have let the clerks know but we work extremely hard to meet the 14 days. If there is a supplementary return, it is not expected, when we produce the first return, if I can put it that way.

The Hon. MATTHEW MASON-COX: It is unusual.

Mr MILLER: Yes.

The Hon. MATTHEW MASON-COX: Can I ask you, in the circumstances where Mr Macdonald returned as Minister, a number of days or shortly after the return of papers had been given to the Upper House, again this is hypothetical, but do you think those circumstances were sufficient to warrant a supplementary return if, in the Minister's view, there were other documents that obviously he would be aware of, that had not been provided in the first instance?

Mr MILLER: You could make that argument, yes. I think it is not clear under Standing Order 52, or the terms of the resolution, whether such supplementary returns are indeed possible. We have done it as a matter of good faith, although the question has arisen where, for example, the order requires us to produce privileged documents. It is important to the Government that we only produce those if compelled to do so, so that we do not lose any possible privilege over those documents. It is an important question for us as to whether there is actually a process for providing supplementary returns, if I can put it that way. Certainly, you could put that to the former Minister.

The Hon. MATTHEW MASON-COX: We are aware that a few times a year that it is encouraged, if there are things overlooked that they be provided. Is that something that is part of the practice in relation to responding to a Standing Order 52?

Mr MILLER: As you say, it is not uncommon.

The Hon. MATTHEW MASON-COX: I think you are saying it is not explicitly in the instructions for a response to a Standing Order 52.

Mr MILLER: No because part of the reason why it is not in the document and instructions is because we want agencies to produce the documents within 14 days, which is what the Government has been directed to do. So, we do not give the agencies an out to say: But if you think it will take too long, let us know and we will tell the Parliament. We seek to comply with the 14 days and it is only in the case of an "oops" where we will produce a supplementary return.

It happened in the most recent Standing Order 52 when the Office of Heritage had moved from Planning to Environment or vice versa and both of those agencies had been subject to the Standing Order 52 but Planning had not realised that it still held a particular file relating to Heritage until after the order was made. It realised after the order had been returned and told us and we produced the documents. It is more in that context.

The Hon. MATTHEW MASON-COX: I understand that each agency head has to certify that, to the best of their knowledge, all efforts have been made to obtain information requested.

Mr MILLER: That is a requirement that the Government imposes upon itself, it is not a requirement under Standing Order 52, but it is a long-standing requirement.

CHAIR: What is the certification that the director general gives?

Mr MILLER: Essentially it is that, to the best of their knowledge they have produced all documents that are caught by the order.

The Hon. MATTHEW MASON-COX: Yes it is words to exactly that effect, "best of my knowledge". So in those circumstances, where your knowledge is then, if you like, improved by the other documents coming to your possession or awareness, in your view does that not give rise to an ethical responsibility to offer those documents up as a supplementary return?

Mr MILLER: In the case of the Department of Premier and Cabinet [DPC], if we became aware of documents that were caught by the order but had not been produced, we would consider ourselves under an obligation to produce them, yes.

The Hon. MATTHEW MASON-COX: Do you think that we should be amending the guideline which is given to all departments and agencies in respect how to respond to a Standing Order 52, to give them knowledge of their responsibilities to offer up a supplementary return, in the circumstances I have described?

Mr MILLER: Yes and one way that you could do that would be to add a paragraph to the actual resolution under Standing Order 52, to that effect.

CHAIR: We talked about certification, you read the evidence that Mr Sheldrake gave to the Independent Commission Against Corruption [ICAC] in respect of the Doyles Creek inquiry?

Mr MILLER: I have not read it.

CHAIR: Could I summarise it this way, and I am not being unfair to him: That with regards to mineral issues he left it to others to do the business and did not really take any involvement in it at all, and he nominated some people. If that was his evidence, how does a director general who has delegated one of his functions to that extent, then give any certification at all as to the production of the documents?

Mr ECCLES: I can talk to what I would expect of my department and that is that there would be absolute diligence. So, if the certification is attesting to the diligence of the department in responding to the request, then I am happy to certify that. Self-evidently, you cannot certify as to the material being absolute.

CHAIR: We have a certification here which, to be frank, self-evidently was worth nothing.

Mr MILLER: Within the Department of Premier and Cabinet, given that either Chris or I have to certify that all the documents that we hold, the department holds, have been produced, the searches are conducted across the department because it is evident that documents might be held by various branches. So we ask the heads of those branches to provide a certification to us so that we may then provide a certification to the Parliament. That is how we do it in the DPC.

CHAIR: You might be building your certification, in a sense, on sand.

Mr ECCLES: Not in my department—it is very substantial foundations.

CHAIR: Are you provided with the search terms that the departments have used in order to undertake their searches?

Mr MILLER: No. Do you mean other departments? No, we do not. Each department is responsible for producing its own documents.

CHAIR: There was a return to a call for papers in a matter of Yaralla in the last week. Did you inspect that return?

Mr ECCLES: I can say that, when the material is put before me, I weigh the heft of the document and will ensure that I have thumbed my way through the document. But as to examining the detail of every page of every return, that is not something that I—

CHAIR: That is a good answer but it is not where I was going on this. In that Yaralla return, I think it was the Department of Health, in responding, actually provided detail of the search terms that were used in obtaining the documents. Have you seen that done before?

Mr MILLER: No I have not. Although, if such a document is produced, then we would take the view that it needs to be provided in response to the order because usually those orders have that final paragraph that says, "any document" et cetera.

CHAIR: I was going to come to that issue but I invite you, in respect of the future, that you give consideration as to—and you might take this on notice—whether the form of the Yaralla response, providing to the Legislative Council the actual search term used, may be an appropriate, in a sense, standard practice, so that, for instance, directors general and the like actually know what procedure has been adopted, as well as the Legislative Council, in finding the documents.

Mr ECCLES: It is a reasonable proposition.

CHAIR: That brings me then to the final line of this standing order and the standard final line of most Standing Orders 52 and that is, "any document which records or refers to the production of documents as a result of this order of the House". When the search is being done for documents, I take it that it is like what the GIPA officer does in getting the papers together and sending out a raft of emails to officers who they think may be relevant in identifying the documents. Is that what happens?

Mr MILLER: In the Department of Premier and Cabinet physical memos are sent under a signature from usually the head of legal branch to the heads of all the relevant branches and to the deputy directors-general.

CHAIR: Would it be fair to say that if it is done either by an email or a hard copy document those documents would fall within the words "and any document which records or refers to the production of documents as a result of this order of the House"?

Mr MILLER: That is correct, and we produce those documents where an order is directed to our department.

CHAIR: So, as a matter of course we would expect it from all departments?

Mr MILLER: Yes, if they have the same process of a written memo and a written response then we would interpret that as requiring production of both of those.

CHAIR: I am not seeking to misquote you, Mr Eccles, but do I take it your view is that the procedure that you adopt with regard to responding to calls for papers is essentially the same as under the former Government, as best you understand it?

Mr ECCLES: Not being in the jurisdiction at the time—

Mr MILLER: There has been no change to process between the former Government and the current Government.

CHAIR: I am not trying to be tricky but it seems that in this call for papers we got none of that sort of documentation at all and I am just trying to work out why there was such a degree of deficiency.

Mr ECCLES: That would make it inconsistent with current practice. The motivation is not for us to speculate about.

Mr MILLER: Can I just confirm whether that order included a direction to the Department of Premier and Cabinet? Was Premier and Cabinet named in that order?

CHAIR: Yes.

Mr MILLER: And did not produce any search documents?

CHAIR: I do not believe so, no.

The Hon. JOHN AJAKA: Mr Eccles, having regard to an earlier answer, can I take it that when you flip through and have a look to ensure that you believe the appropriate documents are being produced and you have obtained your certificate from the deputy directors or managers of various departments, in providing a certificate we really have a situation where, in a sense, you are certifying that you have been informed and you believe that the documents are produced? You physically are not going out looking for the documents, are you?

Mr ECCLES: That is correct.

The Hon. JOHN AJAKA: You are taking it on the best information that has been provided to you through certificates from their deputies et cetera that everything is correct?

Mr ECCLES: That is correct. It would not be a particularly productive use of my time to second-guess the product from others in the department.

The Hon. JENNIFER GARDINER: I have a question in relation to some evidence that was given at our previous hearing by the Director General of Trade and Investment, Mr Paterson. He was asked to supply the Committee with the processes in the department in relation to standing order 52. He has now said to the Committee that while there was a policy that applied to the former Department of Industry and Investment NSW regarding requests for information under the Government Information (Public Access) Act, prior to the new standing order 52 policy being approved by the executive committee of his department on 4 June 2013 there was no written policy or procedure in place for responding to standing order 52 requests in his department. What do you have to say about that from a Department of Premier and Cabinet point of view?

Mr ECCLES: I can only reiterate the practice that we have within my department. It is for other directors-general to determine their procedures.

The Hon. JENNIFER GARDINER: So the Department of Premier and Cabinet does not have a coordinating role in terms of the general transparency of the Government? Each department operates in a totally autonomous way in that regard?

Mr ECCLES: We would see ourselves as having a role in relation to whole-of-government matters as they relate to accountability and transparency of performance.

The Hon. JENNIFER GARDINER: And yet there was no policy in the department which had mineral resources as part of its jurisdiction until basically after this inquiry was established.

Mr MILLER: The only comment I make on that is that in the context of standing order 52 we issue a memorandum to the directors-general of the relevant agencies in the case of each standing order 52 which attaches a detailed explanation of what they need to do. Frankly, apart from the quite technical issue that arose in this case about a change of Minister, it is not that hard. You are asked for these documents and you produce documents. Essentially, apart from one limited exception for Cabinet material—which will not affect most agencies; it will affect DPC—for most agencies there is limited excuse for not producing, so they just produce. What I am saying is I am not sure they need a very complex policy to deal with this.

The Hon. JENNIFER GARDINER: They did not have any policy.

The Hon. JEREMY BUCKINGHAM: The resolution of the House in standing order 52 requests usually states the matter to which the resolution is addressed. In particular, the resolution that Mr Gay moved in November 2009 said, "in relation to exploration 3771". It did not state any particular time period. Is it the case that there have been standing order 52 resolutions of the House that have covered a number of Ministers and documents have been provided across a range of Ministers and from Ministers' offices relating to a particular issue?

Mr MILLER: I think the simple answer to your question is yes. If documents caught by a relevant order spanned multiple Ministers and those documents were still held by the agencies you would expect them to be produced. If the brief went up to one Minister who signed off on a licence, for example, and that Minister was no longer the Minister the department would still produce that document in response to the order.

The Hon. JEREMY BUCKINGHAM: You said the department would produce. Would it be the department attached to that Ministry or the Department of Premier and Cabinet?

Mr MILLER: No, the relevant portfolio department.

The Hon. JEREMY BUCKINGHAM: I turn to a separate issue. When the resolution is passed by the House you are acting on behalf of the Ministers in the Legislative Council and the memos go out to the different departments and Ministers. What happens when they have collated those documents? Do those directors-general sign off "to the best of my knowledge"? Does that bundle of documents go anywhere before it goes to the Department of Premier and Cabinet? Does it go to a Minister's office?

Mr MILLER: No, it does not. Each agency produces its own bundle of documents, index and certification and they are delivered to DPC. We do not scrutinise those documents in any comprehensive fashion. We essentially put them all together and produce them to the Council.

The Hon. JEREMY BUCKINGHAM: From that point, even though you are doing it on behalf of the Ministers in the Legislative Council, no-one from the Executive reviews those documents?

Mr MILLER: That is correct.

The Hon. JEREMY BUCKINGHAM: No-one from Premier's or the Leader of the Government has a capacity to come and see those before they are produced?

Mr MILLER: By "Premier's" do you mean the Premier's office?

The Hon. JEREMY BUCKINGHAM: The Premier's office.

Mr MILLER: From a legal perspective, given the responsibility falls on the Leader of the Government and the Ministers in the upper House, if those Ministers wanted to see those documents before we provided them to the Legislative Council they would have a right to do so. In my experience no Minister has ever asked to scrutinise those documents before they are produced.

The Hon. JEREMY BUCKINGHAM: So there would be no role for a Minister or a Minister's chief of staff to review the documents from a department before they were handed on to general counsel?

Mr MILLER: What happens between a portfolio department and the portfolio Minister may not be entirely visible to us. For example, if a department were subject to a standing order 52 and their Minister were also subject to a standing order 52 I do not know whether conversations might occur between them. It is quite possible they would, but that is not visible to us.

The Hon. JEREMY BUCKINGHAM: So, they may be made aware of that material?

Mr MILLER: Yes. One of the reasons that may happen is, for example—I will speak about DPC—if an order is made requiring production of documents and it names DPC and the Premier and for whatever reason a brief is making its way through and is in the Premier's office but has not been signed off by the Premier. Provided that brief is produced in response to the standing order 52 it does not matter if it is under the Premier's office return or the DPC return. We may well say that before the Premier has signed it off it is still a DPC document so we will produce it rather than the office. There may well be conversations like that going on.

The Hon. JEREMY BUCKINGHAM: We have had evidence from the former chief of staff of Minister Primrose that he sought advice as to the process for complying with standing order 52. We have had other evidence suggesting that that advice fleshed out a range of legal and technical matters. Would you be surprised if that advice from general counsel was just verbal advice; that there was no written record, no email of that advice?

Mr MILLER: No, I would not be surprised. It is not entirely uncommon for people to come to me or to legal branch in response to a standing order 52 and ask for some advice, I guess, on "How do we read this. Do you think this document is in or out?" It would be uncommon for that sort of conversation to be documented.

The Hon. JEREMY BUCKINGHAM: In relation to the specifics here, advice was sought as to whether or not a particular Minister was responsible for sourcing a former Minister's documents—

CHAIR: I do not know whether that is actually the evidence. I do not know that we know that that was what was asked.

The Hon. JEREMY BUCKINGHAM: No, that is true. Advice was sought as to their role and the scope of their role. Combine that with the fact that Premier and Cabinet had sent out two memos, one to former Minister Macdonald and one to the current Minister. The department was aware that it had an issue with the change in Ministry. I may be using the wrong term but there were two agencies there and two different Ministers. Could you elaborate on why no other action was taken, or whether action was taken, to source material from the former Minister's office?

Mr MILLER: I cannot really add to what I have said previously. It is a difficult question and I do not know what, if any, specific advice was given at the time. I will make two comments. One is that, in a sense, an agency referred to in the order ceased to exist before the order was complied with. It may well be that there is an argument that the order cannot be complied with in its terms. That might be a possibility. The second point is that in returning documents to the House in response to that order—assuming that it was the same way that it is always done—a covering letter from the Department of Premier and Cabinet would set out the agencies from which documents were sourced and presumably did not list Minister Macdonald's office as one of those agencies.

The Hon. JEREMY BUCKINGHAM: There is a contradiction there. My first questions were how Standing Order 52s have provided documents from a range of Ministers in regards to an issue over time. They have done that, because some issues run for many years, across different Ministers and even across different governments, and they have provided different documents from different Ministers. I do not understand why

that was not applied in this instance when it was clear to the department that there had been this change in Ministry, that there was not going to be the document supplied from the former Minister's office, why a search was not done or any action taken to find those documents?

Mr MILLER: I think we may be talking about two different things. If the department holds briefs or other documents relating to a Minister who is no longer a Minister, and the Standing Order 52 captures those documents, they will be produced, or they should be produced by the department, notwithstanding the change of Minister. For example, without going to the specifics, if you look at the Independent Commission Against Corruption matrix, if there are briefs there from the department to the former Minister that were relevant to the Standing Order 52, they should have been produced by the department. It is not a matter necessarily of searching the old Minister's office for those documents. It is a matter that the department should hold those documents.

The Hon. JEREMY BUCKINGHAM: Should they not be provided by both? Should there not actually be both documents?

Mr MILLER: If they are hard copy briefs, they should be returned to the department. In the case of electronic records, the disposal authority provides that the email records should have been printed and returned to the department or returned to State Records.

Reverend the Hon. FRED NILE: Mr Miller, are documents that have previously been sent to State Records by a Minister or agency provided and returned to order? If not, why not?

Mr MILLER: Yes. To the extent that the order covers those documents, yes. If, for example, a Standing Order 52 were issued to the Department of Premier and Cabinet calling for the production of documents that are 20 years old that happen no longer to be on the department's premises or held by us, but we have records of what is in State Records, we would retrieve them from State Records and produce them. The alternative is that if they are very, very old documents and it is not clear to which current agency they might relate, then a Standing Order 52 could actually be directed towards the State Records Authority itself.

Reverend the Hon. FRED NILE: This is a general question in the whole matter of documents being provided under a Standing Order 52. As you know, in *Egan v Chadwick* it was held that the House's powers to call for documents did not extend to Cabinet documents, but there were differences in how the judgement defined these documents. Why is there seemingly a blanket exclusion of all so-called Cabinet documents from return to order under Standing Order 52? What definition does the Department of Premier and Cabinet use for orders for papers in determining what is a Cabinet document, that is the actual deliberations of the Cabinet, or the broader view of any document prepared for the Cabinet?

Mr MILLER: You are right, there are differences of view about this. With respect, the Committee's previous report canvassed those differences quite clearly. The approach that the Department of Premier and Cabinet takes is obviously that the official Cabinet documents are not subject to Standing Order 52. Otherwise we apply the definition that applies under the Government Information (Public Access) Act. As a basic rule of thumb, we say that the Legislative Council should not be precluded from obtaining documents that could be obtained under the Government Information (Public Access) Act.

Reverend the Hon. FRED NILE: Is there any confusion in that area about what is a Cabinet document or deliberations? Is there a temptation to label documents Cabinet documents when they should not have been labelled Cabinet documents?

Mr MILLER: I have not found that in recent experience. With the change from the Freedom of Information Act to the Government Information (Public Access) Act the definition of Cabinet documents or Cabinet information is much tighter than it used to be. In relation to some documents it still may require an exercise of judgement, because it talks about documents that are prepared for submission to Cabinet or that will reveal Cabinet's deliberations, so some exercise of judgement is required. Certainly my experience as General Counsel is that there have not been attempts, for example, to expand that definition in order to avoid a Standing Order 52.

The Hon. JENNIFER GARDINER: Is that a change in philosophy?

Mr MILLER: It goes back to before my time with the department, but I am aware, because I was involved in the reforms of the Government Information (Public Access) Act that there had been criticisms about the use of the Cabinet exemption at least in relation to freedom of information previously.

Reverend the Hon. FRED NILE: Are there shredding machines provided in Ministers' offices and departmental offices?

Mr ECCLES: I do not know the answer to that. It would be surprising to deal with the volume of paperwork that is transacted through Ministers' offices that there was not some capacity to dispose of irrelevant material, but I have not done an audit of what is provided and what is used by Ministers' offices.

Reverend the Hon. FRED NILE: Should there be some instruction in the office as to what documents can be legally shredded if they are just a photocopy or something unimportant. Does a girl in the office make that decision?

Mr ECCLES: I do not know that there needs to be a specific guideline around the use of shredders. It normally would fall from what is appropriate or inappropriate use of documentation and paperwork. The means of disposal is less important, I think, than being respectful for the rules of how you treat documents.

Reverend the Hon. FRED NILE: Is there any custom or tradition that when Ministers change the outgoing Minister has what he regards as personal documents shredded? Is there anything to stop him doing that?

Mr MILLER: No. No, there is nothing stopping a Minister from doing that.

Mr ECCLES: No.

Mr MILLER: I know in relation to the most recent change of government that the State Records Authority did sit down with the ministerial officers of the outgoing Ministry to outline their obligations in respect of leaving their offices.

Reverend the Hon. FRED NILE: Were you personally surprised when it became public there was a difference between the documents supplied to counsel as opposed to the Independent Commission Against Corruption? You probably did not know until the Independent Commission Against Corruption revealed it.

Mr MILLER: I first became aware when the Clerk of the Parliaments called me to say that the issue had been raised by a member of the Legislative Council. To be honest, I had forgotten entirely that there might have been a Standing Order 52 relating to Mount Penny. I am not sure that "surprise" is the right descriptor of my reaction.

Reverend the Hon. FRED NILE: What was your reaction then?

Mr MILLER: It was, "Good on the member." I thought it was a good pick-up.

CHAIR: Take a bow, Jeremy.

The Hon. JEREMY BUCKINGHAM: Thank you.

Reverend the Hon. FRED NILE: There was some discussion whether those missing documents really are important. There was some reference that some of them might have been copies that the staff may have thought were not important. Do you have the view that any of those missing documents were important?

Mr MILLER: I do not have a view on the importance of the documents. All I would say is that to the extent that the Department of Premier and Cabinet is required to produce documents, if they are caught, they are caught. We do not make an assessment as to their importance or otherwise.

Reverend the Hon. FRED NILE: You may have referred to this already, but in your mind is there any technical difference between the request from the Standing Order 52 and the request from the Independent Commission Against Corruption? Does the Independent Commission Against Corruption give you more detail?

Mr MILLER: The Independent Commission Against Corruption probably gives us less detail. The Independent Commission Against Corruption would be more inclined—I have to be careful because we generally do not discuss what we provide to the Independent Commission Against Corruption, either specifically or generally. I am just careful of not giving away something about their process.

CHAIR: I can tell you in regard to this, if it makes you more comfortable, they have provided us with considerable detail of what you provided.

Mr MILLER: In that case, they generally ask for—as I indicated before, if they were asking for electronic documents—they would ask for a whole batch of documents rather than by subject matter, generally. They will often ask for particular documents and that will lead them on a chain of inquiry to ask for more documents. It is quite different from a Standing Order 52 both in relation to the speed, but also a Standing Order 52 tends to be a one-off: this is the order, you comply, whereas our involvement with the Independent Commission Against Corruption tends to take place over a much longer period of time, and it is a much more iterative process, if I can put it that way.

Reverend the Hon. FRED NILE: They are following a paper trail?

Mr MILLER: Yes, that is right.

Reverend the Hon. FRED NILE: Mr Eccles, when you were speaking earlier about the Mount Penny report that had been produced by a legal company, did you say you had not seen it?

Mr ECCLES: I do not recall seeing that particular report.

Reverend the Hon. FRED NILE: Would that not be a fairly important report that you should see or be given to you? I am puzzled why you were not aware of it.

Mr ECCLES: I would probably need to refresh my memory of the circumstances around the production of that report to be helpful to the Committee.

Reverend the Hon. FRED NILE: Can you take that on notice?

Mr ECCLES: I am very happy to do so.

The Hon. MATTHEW MASON-COX: It was commissioned by Mr Hartcher.

Mr ECCLES: For me, the distant past is not so distant so I would need to go back to refresh my memory.

The Hon. JEREMY BUCKINGHAM: Mr Miller, you were with the Department of Premier and Cabinet in 2009. What was your role at that time?

Mr MILLER: At the time of the order, I am not sure whether I was acting or had been appointed to what was then known as the Executive Director in the legal branch; so I sat under the General Counsel.

The Hon. JEREMY BUCKINGHAM: Did you play any role in responding to the call for papers back in 2009?

Mr MILLER: Apparently I did because I see my signature on some of the documents.

The Hon. JOHN AJAKA: Good answer.

The Hon. JEREMY BUCKINGHAM: In respect of that time, do you have any recollection of any discussion or memos, emails, between the Department of Premier and Cabinet offices or other agencies regarding the issue of documents held by the outgoing Minister Macdonald?

Mr MILLER: No, I do not. I am not sure whether that was because there were not any such discussions or that I was not involved in them. In respect of my involvement, I noticed that the document—the brief that went up when there had been a change in Minister, under which the department issued memos to the

new Ministers, was not signed by me because I was sick—I just happened to be sick on those two days. All I can say is that I am not aware of any such advice being sought or given.

The Hon. JEREMY BUCKINGHAM: I am interested in Mr Eccles's response in which he said that when a call for papers is received you might "weigh the heft" of it. As background, when I retrieved the Standing Order 52 file from State Archives I was surprised that it was not very hefty given the lorry loads of documents being trolleyed into the Independent Commission Against Corruption. It looked a little skinny. I am a stonemason by trade—I am not a lawyer. However, a cursory perusal of the documents revealed a number that referred to other documents that were not there. A case in point is a speech prepared on behalf of the Minister opposing the Standing Order 52 that referred to probity audits and other documents that were not there. Does anyone in the Department of Premier and Cabinet review those calls for papers to look for those sorts of holes?

Mr MILLER: I can answer that question. The simple answer is no. In 2009, we would have received around 30 orders under Standing Order 52—about two each sitting week—and we have 14 days to comply. We receive the returns from the agencies, but there is no detailed review process within our department. I take the point that where documents refer to other documents there is potentially an avenue where if that were done that might reveal something. Where a Standing Order 52 relates to documents within the particular relevance of a portfolio agency it will not be apparent to the central agency what might or might not be missing. It is an obvious point and I hesitate to make it, but if people are deliberately not providing documents, no amount of scrutiny of the documents produced by the Department of Premier and Cabinet will reveal that.

CHAIR: Mr Jeremy Buckingham referred to the speech, which was never given but which was nevertheless was provided in the call for papers. Where did that come from? There is a dearth of documents from the Minister's office, but we have his speech. Where would it have come from?

Mr MILLER: Has it been produced under the Standing Order 52?

CHAIR: Yes.

Mr MILLER: Is it not referred to in one of the agency's document indexes?

CHAIR: Would a Minister's speech end up in the department?

Mr MILLER: It might have been returned to the department for filing.

The Hon. JEREMY BUCKINGHAM: I think it may have been caught by the department because the departmental staff wrote it.

Mr ECCLES: I am not sure it is that odd. It is important for departments to be aware of what is being said publicly by their Minister. I keep scrupulous account of what the Premier says and I expect other departments to do the same with their Minister.

Reverend the Hon. FRED NILE: They give advice to the Minister in preparing speeches.

Mr ECCLES: Indeed.

CHAIR: Would that also include briefing notes used by the Minister in answering questions in the House?

Mr ECCLES: It depends on where the briefing notes are produced. If they are produced in the department then I have access to them.

The Hon. MATTHEW MASON-COX: Which happens in the normal course of events; they are normally produced in the department.

Mr ECCLES: We have a comprehensive process for preparing and providing House folder notes. However, Ministers' officers often supplement the material that departments provide to assist their Ministers before the Parliament.

CHAIR: Would we anticipate that they would be caught by a call for papers?

Mr MILLER: Where the Department of Premier and Cabinet holds House folder notes and they are caught, we produce them. There is an interesting legal argument—

CHAIR: I knew this was coming.

Mr MILLER: —about parliamentary privilege. While the court in the Egan cases made a decision in relation to Cabinet and cabinet privilege, there is a question in my mind about whether the Legislative Council can compel members to produce to it documents that are subject to parliamentary privilege in relation to that particular member. It is not a point that has ever been made or raised, but—

CHAIR: It has now.

The Hon. GREG DONNELLY: We have been given three documents. One is a copy of the report. I assume that you have a copy of your submission. I have a bundle of documents with mauve tabs. I refer to the third last tab and the last tab. Either of you can answer my questions. I apologise in advance if I cut across answers you provided earlier; you can refresh my memory. I refer to a letter signed by Mr Miller dated 27 May 2013 and addressed to Mr Kahn as chair of the Committee. At the bottom of page 1 of your submission you refer to the process for complying with orders under Standing Order 52. It states that the standard administrative steps taken by the Department of Premier and Cabinet in respect of an order made under the Standing Order 52 were outlined by the director general in his letter to the Committee dated 18 January 2013. That is footnoted as footnote number one. I take you to appendix 4 of the Committee's earlier report at page 61. Page 63 contains a reference to a letter dated 13 November 2009.

I now refer you to the purple tabbed document and the third last purple tab, which is on NSW Trade and Investment letterhead and which is entitled "Standing Order 52 Responses Policy". I refer back to your submission, and specifically to Mr Miller's letter. Are the steps referred to in point one at the bottom of the page still in place for the Department of Premier and Cabinet or are they the steps associated with the call for papers in respect of this particular matter?

Mr MILLER: Both. With respect, the summary provided by the Committee in the previous report at paragraph 2.22 is a fair summary both of the process that applied in 2009 and the process that currently applies.

The Hon. GREG DONNELLY: Do you agree that that summary is based on the content of the letter that commences on page 63?

Mr MILLER: That is correct.

The Hon. GREG DONNELLY: How much discussion has transpired in the Department of Premier and Cabinet about amending, changing, altering, improving or enhancing the process? Given that we are dealing with this matter and there is some history to it, can you take the Committee through the process of looking at what is there and how it can be improved?

Mr MILLER: There has been no change and no change has been proposed to the process, subject to any recommendation that this Committee might make. From the department's perspective, we are of the view that we have complied with Standing Order 52s and continue to do so adopting this process.

Mr ECCLES: I am reminded of some of the commentary by Mr Miller in our submission that goes to issues to do with the period in which we are required to respond and also the clarity of the references themselves. I saw within that the opportunity for some possible change or reform. That has been canvassed in an indirect way through the course of this hearing today.

The Hon. GREG DONNELLY: But the position as it stands is that the procedure you have in place now is essentially the same as what you effectively inherited as a department from the previous Government?

Mr ECCLES: Yes.

The Hon. GREG DONNELLY: I take you to the third tab—the policy document authorised by the Deputy Director General, Finance, Strategy and Operations. We need to look at that in conjunction with the last tab, which is a message from the director general. It is the cover note that he issued dated 21 June 2013. I note

that that is post the actual policy release date. If you refer to the third last tab you will see that the effective date is 4 June 2013. The document hit the deck on 4 June 2013 and it was issued to his department under this cover note. Did the department or did he himself liaise with either of you about the development of this policy?

Mr ECCLES: The director general had no conversation with me about that matter.

Mr MILLER: Nor with me.

The Hon. GREG DONNELLY: Have you seen these two documents?

Mr ECCLES: I have not.

The Hon. GREG DONNELLY: This is the first time you have seen them?

Mr ECCLES: Yes.

The Hon. GREG DONNELLY: Are you aware of any other directors general in government departments who have published or released documents like this, which in effect provide a process or procedure associated with Standing Order 52s?

Mr ECCLES: I have no awareness, but nothing should be read into that.

The Hon. GREG DONNELLY: Have any directors general of departments other than Trade and Investment spoken to you about work that they are doing or have done in regard to their guidance or procedure notes for Standing Order 52s?

Mr ECCLES: Not to my recollection.

Mr MILLER: Not to mine, either.

Reverend the Hon. FRED NILE: Was that document produced because of this inquiry?

Mr ECCLES: I cannot respond to that question.

The Hon. GREG DONNELLY: As far as you can recall, you have not—

Mr ECCLES: I can recall that I have not seen any such published material from any other department. I have no recollection of any conversation with a director general about their process for responding to Standing Order 52s.

The Hon. GREG DONNELLY: Other than directors general, with respect to senior bureaucrats inside the offices of any of any departments, have you liaised with them over what might be the drafting of updated procedures or processes associated with a Standing Order 52 request?

Mr ECCLES: No.

Mr MILLER: No.

The Hon. GREG DONNELLY: In relation to the issuing of this policy does it surprise you that a director general has issued it in this way without any discussion, consideration or input from the Department of Premier and Cabinet?

Mr ECCLES: No, it does not surprise me. They have individual responsibility to comply with requirements such as the responses to Standing Order 52 and they do not need to seek my approval to refresh their processes or to invent their processes. That is a matter for them.

The Hon. GREG DONNELLY: In light of what this inquiry is considering and in light of some of the matters of which you are well aware relating to concerns by the Legislative Council about how a particular matter was dealt with, are you surprised that a director general has decided to produce a new policy document and release it into this department without consultation with the Department of Premier and Cabinet?

Mr ECCLES: I am not aware whether this is a new process within the department or whether it is a refresh of an existing process.

CHAIR: It is version 1.0 so that would suggest that it is a new process.

Mr ECCLES: That suggests that it is a new process.

The Hon. GREG DONNELLY: Have you seen this document before?

Mr ECCLES: No.

The Hon. JOHN AJAKA: He has said that a couple of times.

The Hon. GREG DONNELLY: Would you look at page 2 of the policy document and at about point 4 or point 5 which states that documents created for the dominant purpose of being submitted to Cabinet must not be produced. Is that the test to be applied?

Mr MILLER: That reflects the wording of the Government Information (Public Access) Act.

The Hon. GREG DONNELLY: Has that test been communicated to all directors general and ministerial staff as the test to be applied to a Standing Order 52 request?

Mr MILLER: Not in any formal sense relating to Standing Order 52, so generally no.

The Hon. GREG DONNELLY: How do you know if we have a problem with people avoiding answering a Standing Order 52 request with respect to an application of a Cabinet document test if you do not know what test they are applying?

Mr MILLER: Agencies will be aware of the test because, as I understand it, in most agencies the unit or branch that is responsible for dealing with applications under the Government Information (Public Access) Act will be the same unit or branch that is responsible for dealing with a Standing Order 52 request.

Mr ECCLES: Mr Chair, to reinforce the seriousness with which we hold all the matters before the Committee, I am very happy to draw to the attention of my colleagues on the Senior Management Council that I chair, comprising all directors general, the Commissioner of Police and the Public Service Commissioner, this particular interpretation to ensure that there is consistency across the government service.

CHAIR: It is interesting because, of course, that is a different test, as has been pointed out to me, from any of the tests that were suggested by the Court of Appeal. Chief Justice Spigelman uses a different test to that so essentially we now have four different tests. It would be nice to know that one is being applied and which one that is.

The Hon. MATTHEW MASON-COX: And applied consistently.

CHAIR: Yes.

The Hon. GREG DONNELLY: Potentially, under your respective noses, you could have directors general at the moment drafting their own new policies associated with a Standing Order 52 return to order which you do not know about. Is that possible?

Mr ECCLES: It is not only possible; it is factual.

The Hon. GREG DONNELLY: Each department at the moment is developing its own set of guidelines. Is that the case?

Mr ECCLES: I cannot comment as to whether they are developing them. I would imagine that a lot, if not now perhaps all with Mr Paterson's initiative, have a comprehensive set of procedures to respond to Standing Order 52.

The Hon. GREG DONNELLY: Why do you say that this is a comprehensive response as you have only just seen it? On what basis do you say that this Paterson document is a comprehensive response?

Mr ECCLES: Perhaps it would require more substantial review for me to be confident in saying it is comprehensive.

The Hon. GREG DONNELLY: You just said it was.

Mr ECCLES: I am perfectly happy to take up your suggestion to review the documentation for its comprehensiveness.

The Hon. GREG DONNELLY: Are you not concerned that you may well have a real live possibility that a range of departments are developing their own comprehensive documents in regard to Standing Order 52?

The Hon. JOHN AJAKA: For their specific department?

The Hon. GREG DONNELLY: For their specific departments.

Mr ECCLES: I am perfectly happy as part of my responsibility as the chair of the Senior Management Council to include an item on an upcoming meeting of the council where we as directors general share with each other our current state of documentation in relation to responses to Standing Order 52. You have my assurance that that will be listed for an upcoming meeting of the council.

The Hon. JOHN AJAKA: Is that for the purpose of ending up with, hopefully, one uniform approach for all departments?

Mr ECCLES: Well, I think having something that is both comprehensive and consistent is in everyone's interests, both the Government and the council.

The Hon. GREG DONNELLY: I appreciate Mr Eccles that you have just seen the document for the first time, but you have just said, and I am grateful for it, that you are prepared to put it on the agenda for the next meeting.

CHAIR: No, an upcoming meeting.

The Hon. GREG DONNELLY: Yes, a forthcoming meeting, whenever that might be. Has this issue been on any agenda over the past year or so to discuss with the directors general at these meetings because the issue of Standing Order 52 arises from time to time? Has it been on the agenda up to now?

Mr ECCLES: No.

Reverend the Hon. FRED NILE: Were any attempts made by the Department of Premier and Cabinet to pursue a response to the Mount Penny order from the House from Minister Macdonald's office either before he left office in November 2009 or after he had returned to office in December 2009?

Mr MILLER: There is nothing in the department's file to suggest that that had happened, no.

Reverend the Hon. FRED NILE: Are you aware of any discussions between officers of the Department of Premier and Cabinet and the Director General of the Department of Primary Industries in 2009 Dr Sheldrake regarding the return to order? Was there any discussion between the Department of Premier and Cabinet and officers of the other agency regarding the issue of documents held by the office of the outgoing Minister Mr Macdonald?

Mr MILLER: I am not aware of any such discussions, no.

Reverend the Hon. FRED NILE: What do you understand was the responsibility of the director general to ensure both Ministers' offices complied with the order or was this a responsibility of the Department of Premier and Cabinet?

Mr MILLER: I am sorry, which director general are you referring to?

Reverend the Hon. FRED NILE: The director general of the Department of Primary Industries.

Mr MILLER: As a general proposition I would say that it is not the responsibility of the director general to ensure compliance by Ministers who are separately named in an order.

The Hon. JEREMY BUCKINGHAM: How did Minister Primrose access the memo and supply the memo that had been sent to Minister Macdonald? You might know the answer.

Mr MILLER: They would not have. They would have produced the memo that was sent to them subsequently. The Department of Premier and Cabinet would have produced a copy of the memo that it had sent to Minister Macdonald, to Minister Macdonald's office.

The Hon. JOHN AJAKA: To Minister Primrose?

Mr MILLER: No, to Minister Macdonald's office. The Department of Premier and Cabinet will produce a copy of the memos it sends to all Ministers' offices because the Department of Premier and Cabinet would keep a file copy for itself.

The Hon. JEREMY BUCKINGHAM: I will look at the call for papers because I thought that Minister Primrose included that memo.

CHAIR: I will correct what I said earlier; the Department of Premier and Cabinet did produce relevant correspondence in respect of its search. There are about half a dozen documents that indicate the inquiries it made but that is different—

Mr MILLER: That is good. I was on leave at the time that was returned so I am pleased that our department at least did what it usually does.

The Hon. JOHN AJAKA: Mr Eccles, you can take this question on notice. Having regard to the information you have now seen and the questions asked of you, if you consider that some changes to the current procedures are advisable, would you advise the Committee on notice as to what you believe are appropriate changes in the circumstances for the Committee to recommend?

Mr ECCLES: If you think it is helpful to hear from us on that matter, yes, we would be happy to respond.

CHAIR: The Committee has a collaborative approach.

The Hon. JOHN AJAKA: Absolutely. We would love to hear your suggestions.

Mr ECCLES: I could even broaden the response on our behalf by saying that there is a collective view from the Senior Management Council about how we might respond corporately and collectively to process improvements and then I will also bring it to your attention.

The Hon. JOHN AJAKA: Especially having regard to the time factors that we discussed earlier.

Mr ECCLES: I can see this agenda item at the Senior Management Council now being a substantial one.

Reverend the Hon. FRED NILE: How often does the Senior Management Council meet?

Mr ECCLES: Every two weeks.

The Hon. JEREMY BUCKINGHAM: When a new Minister is appointed how does he or she retrieve the documentation of the former Minister?

Mr MILLER: The answer is that they do not retrieve it. The former Minister's documents, including briefs that are halfway through, will have gone back to the department. Cabinet documents will have gone back to the Department of Premier and Cabinet. They are then resubmitted essentially fresh for the new Minister. So

the brief becomes a brief to the new Minister; it is not a retrieval of a previous brief. If I can explain it this way. On a smaller scale it is like a change of government where upon a change of government you do not have the former ministry providing documents for the new ministry. You have the departments providing an incoming government brief to the new Ministers. It is the same sort of process on a much smaller scale.

The Hon. JEREMY BUCKINGHAM: Those documents would only come from the department; there would be no retrieval from State Records? They could not restore or retrieve documents from the MAP system out of State Records?

Mr MILLER: No, the premise would be that if the Minister needs the documents to perform his or her ministerial functions they will have gone to the department to be resubmitted to the new Minister.

The Hon. JEREMY BUCKINGHAM: How long would that usually take with a new Minister? I assume it would be one of the first orders of business to ask for all current documents?

Mr MILLER: You would expect a fairly immediate briefing from the director general, yes.

The Hon. GREG DONNELLY: Mr Miller, I refer to the last tab on the Mark Paterson letterhead. It has Standing Order 52 responses, director general, and then a list of names. Have any of those individuals spoken to you about these procedures?

Mr MILLER: No.

The Hon. GREG DONNELLY: Mr Eccles, have any of those people spoken to you about these procedures?

Mr ECCLES: No.

CHAIR: I want to go back to the issue of the certification of the compliance with Standing Order 52. I think, Mr Miller, your evidence is that this requirement is adopted by the Department of Premier and Cabinet, and in that sense internal the Government. If a director general or a chief of staff was found to have not provided documents, particularly if it were deliberate, would this become a disciplinary issue in terms of the Public Sector Disciplinary Rules?

Mr ECCLES: It is a judgement call as to whether it would warrant a particular disciplinary response. Could you outline the circumstance again? I was handing back the document.

CHAIR: Let us suppose, quite separate from this, that either a chief of staff or a director general deliberately withheld a range of documents from a call for papers.

Mr ECCLES: No question; that would be viewed very seriously.

CHAIR: What of the circumstance where the certification was effected without making any proper inquiry but just relied upon "Well it seems alright to me" and signing off? Is that in a sense a gross neglect and a disciplinary matter?

Mr ECCLES: On behalf of a director general?

CHAIR: Yes.

Mr ECCLES: I am in that situation routinely.

CHAIR: I accept that.

Mr ECCLES: So I am not going to necessarily damn myself out of my own mouth.

CHAIR: It might make you a little more cautious.

Mr ECCLES: Other than to say we have to apply the practicalities of what is being asked of directors general here. I mean I am often presented with the product, sometimes within hours before the deadline expires,

with no detailed knowledge of the subject matter content and with an assurance from a range of professional public servants as to the adequacy of the response and the accuracy of the response. I think it is entirely reasonable, speaking for myself, to take those assurances on face value without seeking to reinterrogate the material because I am in no position to do so.

CHAIR: Then what is the value of the certification?

Mr ECCLES: Well somebody has to aggregate the product of the more specific certification from those who have direct knowledge of the content otherwise within my agency you might be asking for 15 independent certifications from those who have more direct exposure to the product.

CHAIR: Would there not be somebody beneath you, in a sense a GIPA officer, who actually collates it before it comes to you? Mr Miller?

Mr MILLER: Yes.

Mr ECCLES: I rely upon general counsel.

CHAIR: You rely upon Mr Miller.

Mr ECCLES: Absolutely and his office.

Mr MILLER: We receive a physical certification from the relevant branches.

The Hon. JOHN AJAKA: Which you accept?

Mr MILLER: Which we accept.

The Hon. JOHN AJAKA: That is what I mentioned earlier: In reality your certificate does no more than, "I am informed and I believe that these are the documents."

Mr MILLER: With one exception, and I do not want to damn my director general either.

The Hon. JOHN AJAKA: I am not trying to do that.

Mr MILLER: There is the possibility that the director general himself will hold documents personally and he is required to search his own documents.

Mr ECCLES: And my office routinely does that.

CHAIR: Dealing with documents within your department, you would not be the person who brings the documents together. Somebody, maybe Mr Miller, is the one who actually in a sense applies his or her mind to the task of the collation of those documents. Would that be correct?

Mr MILLER: Collation yes but it is the individual branches and the heads of those branches that pull together their documents. So from my office's perspective we pull together any documents we might have and we collate the documents that have been provided by all of the other branches.

Reverend the Hon. FRED NILE: So each of the branches should really have a certification.

Mr MILLER: They do. In the Department of Premier and Cabinet they do.

CHAIR: Mr Miller, my last question is directed to you and it goes to an earlier line of questioning. Where the Department of Premier and Cabinet holds documents from a former Minister's office and there is a call for papers are you able to tell the Committee whether you would include those in a call for papers?

Mr MILLER: I think I have answered that question.

CHAIR: You got close but you did not quite get there.

Mr MILLER: The answer is no. We would not routinely search backup electronic material relating to former Ministers' offices on a call for papers that was directed to the Department of Premier and Cabinet.

CHAIR: Putting aside electronic records, what do you say you would do with regards to hard copy documents?

Mr MILLER: If the department held hard copy documents, for example, that a former Premier had returned to us they become departmental records so they will be produced in response to a Standing Order 52. We will treat them like any other record of the department.

CHAIR: And of a former Minister?

Mr MILLER: Well those records would go back to that former Minister's department not to the Department of Premier and Cabinet. Unless that department were subject to the order they would not be produced by the Department of Premier and Cabinet because they are not records of the Department of Premier and Cabinet.

CHAIR: I will again go back to that point. When you look at the wording of Standing Order 52, like a subpoena it talks about documents in the possession, custody or control—it does not talk about anything else but that. It is talking about, in a sense, a physical presence. I am inviting you to flesh out why you draw the distinction that you do. If you have the document does that not fall within Standing Order 52?

Mr MILLER: The point I was making was that the Department of Premier and Cabinet would not have the document. In the latter example that you gave of a Minister leaving office and a hard copy document being provided to his or her department, the Department of Premier and Cabinet would not hold that document; that department would hold the document. The department that received that document should produce that document if subject to a Standing Order 52.

The Hon. JEREMY BUCKINGHAM: But what an electronic record that is held by, say, the State Records Authority? Who has the care, custody and control of that record?

Mr MILLER: State Records for one. It depends—do you mean an electronic document of a former Minister?

The Hon. JEREMY BUCKINGHAM: Yes, like an email—the ones that you said were backed up. From your previous answer it seems that the Department of Premier and Cabinet had care, custody and control when it came to a section 22 but who has care, custody and control of former Ministers' emails when they are backed up to State Records?

Mr MILLER: It is the same point that I made earlier really: The practice has always been to interpret Standing Order 52 as directed to the particular agencies in relation to the agencies' documents rather than to former Ministers' documents or Ministers' documents. It is the same reason why even under a subpoena a subpoena directed to the Premier would capture Department of Premier and Cabinet documents; a Standing Order 52 directed to the Premier does not capture Department of Premier and Cabinet documents. If the Legislative Council wants to capture Department of Premier and Cabinet documents the Legislative Council directs it also to the Department of Premier and Cabinet.

The Hon. JEREMY BUCKINGHAM: But at the time the House resolved Standing Order 52 the Minister was Macdonald.

Mr MILLER: That is correct.

The Hon. JEREMY BUCKINGHAM: Surely his office would have been caught at that time by the Standing Order 52.

Mr MILLER: That is correct.

The Hon. JEREMY BUCKINGHAM: Who was responsible for his records?

Mr MILLER: It is the same answer that I have previously given: I do not know what consideration particularly was given to that question at the time. It is a difficult question and I do not know how I would answer it today.

The Hon. JEREMY BUCKINGHAM: You said that a new Minister comes in and receives a brief. Effectively that is an overview of all the matters that the department thinks the Minister should be aware of and are current. One would have expected new Minister Primrose to have received a brief that there was a Standing Order 52 current at the time?

Mr MILLER: The initial briefing from his department—the first briefing would probably deal with the most important and urgent matters. I mean Minister Primrose may well have become aware of the Standing Order 52 from receipt of the memo from the Department of Premier and Cabinet. I just do not know how he first became aware of that.

The Hon. JEREMY BUCKINGHAM: One would think that maybe how he first became aware but surely that would have been a pretty urgent issue—the Minister had something like six days to comply. One would expect the department to brief the Minister that they were not responding to the Standing Order 52 and to at least confirm that he was aware of the Standing Order 52?

Mr ECCLES: If I was in that position and was providing a brief to an incoming Minister there would be within the great ream of briefing material provided some reference to outstanding matters related to Standing Order 52 and GIPA requests. That would be amongst the suite of documentation that you would be providing to the Minister. I personally would be bringing his office and the Minister's attention to the fact that there was an outstanding Standing Order 52.

The Hon. JEREMY BUCKINGHAM: If that was the case that document would have been caught by the Standing Order 52 itself—

Mr ECCLES: The briefing document?

The Hon. JEREMY BUCKINGHAM: Yes.

Mr ECCLES: Yes.

CHAIR: Thank you for coming along and giving your evidence today. It has been very useful and I hope not too traumatic for you. The transcript of your evidence will be sent to you within a day or so. Highlighted in that transcript will be any questions that you have taken on notice. Indeed, if you have any suggestions as to how the process might be made more effective from your side please let the Committee know. I cannot promise that the Committee will necessarily adopt your suggestions but they will certainly be given due and weighty consideration.

(The witnesses withdrew)

(Luncheon adjournment)

JAMIE LEE GIBSON, former Deputy Chief of Staff to the Minister for Primary Industries, affirmed examined:

CHAIR: Welcome.

Mr GIBSON: Thank you.

CHAIR: This is the second day of the Privileges Committee inquiry into the 2009 Mount Penny return to order. As you are aware, my name is Trevor Khan and I am the chairman of the Committee. Before we commence, there are a couple of procedural matters that it is appropriate for me to deal with. The Committee is holding this part of the hearing in public, which means that the media or members of the public will be in the room. The transcript of your evidence today will also be made public.

Mr GIBSON: Sure.

CHAIR: Witnesses who appear before parliamentary committees, and I think you are aware of this, are protected by parliamentary privilege. That means that what is said cannot be used against you for any purposes later in court proceedings. Our terms of reference require the Committee to inquire into and report on the failure to provide documents in the return to order, tabled in the Legislative Council on 26 November 2009 concerning the Mount Penny mining exploration licence and tender process. This includes documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the Legislative Council on 14 March 2013. That document is on the parliamentary website for the Privileges Committee, and it forms the first document in folder one of the documents that have been tendered.

Mr GIBSON: Certainly.

CHAIR: You may have seen it.

Mr GIBSON: Yes, I have.

CHAIR: I should address broadcasting guidelines. The Committee has previously resolved to authorise the media to broadcast sound and video excerpts of its proceedings. Copies of the guidelines governing broadcasts of the proceedings are available from the table by the door. In accordance with the guidelines, a member of the Committee and witnesses may be filmed or recorded. However, people in the public gallery should not be the primary focus of any filming or photographs. In reporting the proceedings of this Committee, the media must take responsibility for what they publish or what interpretation is placed on anything that is said before the Committee. Delivery of messages: witnesses, members and their staff are advised that any messages should be delivered through the Committee clerks. I do not need to go any further on that.

At the commencement of your evidence, I will be inviting you to make a short opening statement, should you wish. If you have copies of it that you could provide to members of the Committee, that would be appreciated although it is not compulsory. Members of the Committee will then ask you questions. From the procedure that no doubt you have observed on a number of occasions with budget estimates, we will be less rigorous with time frames, and I think you will probably see a slightly more collaborative approach in respect of the questioning.

Mr GIBSON: Certainly.

CHAIR: Hopefully the reduced degree of formality will be less threatening to you, amongst other things.

Mr GIBSON: That would be terrific.

CHAIR: Mobile phones: if you have one, would you turn it off.

Mr GIBSON: It is.

CHAIR: There may be some questions that you take on notice or, subsequent to this, the Committee members may seek from you. The Committee has resolved that any answers to questions taken on notice during the hearing must be provided within 21 days of receipt of the questions by you.

Mr GIBSON: Certainly.

CHAIR: I am going to ask you to make an opening statement, but I note that you have come here having made a submission. You are here voluntarily, and we appreciate you have taken the time to come and have a chat. Have you got an opening statement that you would like to make?

Mr GIBSON: I have not prepared an opening statement, but if I would be able to say a few remarks, I would appreciate it. Thank you for inviting me. You may not know all of my background, but I was a public servant for the better part of 16 years. I have always held the processes and policies of Parliament in the highest regard. There would be no doubt if you were to ask me to an inquiry such as this that I would be happy to comply to the best of my ability that is possible today.

CHAIR: We will start with crossbenches. Mr Buckingham is going to go forth first. Good luck.

The Hon. JEREMY BUCKINGHAM: How would you describe Mr Macdonald's attitude and relationship with the former Premier Nathan Rees?

Mr GIBSON: Do you mean in a specific period of time or generally?

The Hon. JEREMY BUCKINGHAM: In the time that you worked for Mr Macdonald?

Mr GIBSON: In the time, and I will clarify this for the Committee, I worked for Mr Macdonald for approximately seven years. During part of that time Mr Rees was the primary industries adviser for Premier Carr. Certainly during the earlier stages of Mr Macdonald's ministerial tenure the relationship with Mr Rees was quite amicable, quite good. He would attend our office. Certainly as time went on and by the time that Mr Rees was Premier, it was, I guess, apparent to me that Mr Macdonald and Mr Rees did not see eye to eye on several matters. I guess their relationship reflected that.

The Hon. JEREMY BUCKINGHAM: When was Mr Macdonald's office approached by staff of Premier Nathan Rees about the Mount Penny tender process?

Mr GIBSON: Do you mean generally asking about it or in relation to this particular order for papers?

The Hon. JEREMY BUCKINGHAM: Generally asking about it.

Mr GIBSON: From memory, what we used to do in respect of the ministerial office was give the Premier's office updates on policy issues that may be contentious or policy issues that were rolling forward. Mining at that time, generally, was contentious for a whole range of reasons, both environmental and otherwise. We generally made sure that the relevant policy adviser in the Premier's office was aware of whatever we were proposing or whatever the Minister was suggesting. I think it would have been sometime in early 2009.

The Hon. JEREMY BUCKINGHAM: You were briefing the Premier on the Mount Penny issue specifically?

Mr GIBSON: Not the Premier directly, but an adviser from his office.

The Hon. JEREMY BUCKINGHAM: At any stage do you remember who that adviser was?

Mr GIBSON: I think at that stage it may have been Mrs Lauren Solomon who had responsibility for that. I am sure I recall having a conversation with her about this and a whole range of mining things that we were working on.

The Hon. JEREMY BUCKINGHAM: My original question was when did representatives of the Premier approach Mr Macdonald's office—your office—seeking information specifically about Mount Penny?

Mr GIBSON: This would have occurred essentially when Mr Rees became Premier. We would have given his advisers a portfolio update, so it would have happened from the very early part of the premiership, I would expect.

The Hon. JEREMY BUCKINGHAM: At any stage did they approach your office with concerns about the Mount Penny tender process?

Mr GIBSON: Not specifically on that issue that I recall.

The Hon. JEREMY BUCKINGHAM: On the Mount Penny tender process?

Mr GIBSON: Not specifically, no.

The Hon. JEREMY BUCKINGHAM: When did the former director general of the Department of Premier and Cabinet, Mr John Lee, approach Mr Macdonald's office seeking information about Mount Penny?

Mr GIBSON: In respect of the call for papers or generally?

The Hon. JEREMY BUCKINGHAM: Just generally.

Mr GIBSON: I was unaware that he did.

The Hon. JEREMY BUCKINGHAM: On 28 October 2009, the *Australian Financial Review* ran an article about the Mount Penny coal deposit being under a property owned by Mr Eddie Obeid. Were you aware of this article at the time?

Mr GIBSON: Yes, I was.

The Hon. JEREMY BUCKINGHAM: What was your reaction to the article?

Mr GIBSON: When that article appeared, I spoke to Mr Macdonald—I asked him. I said, "Is there any truth in this particular article", because, of course, we would need to prepare a House note for question time, if that was the case. Mr Macdonald said that was the first he had heard of this issue, and that there was nothing in it, were his words to me, I think.

The Hon. JEREMY BUCKINGHAM: What action did the office take in that regard? Did they prepare a briefing note?

Mr GIBSON: I think there was potentially a House note prepared, yes, but not anything more than that.

The Hon. JEREMY BUCKINGHAM: So there may have been a briefing note prepared, but no other documentation?

Mr GIBSON: Not that I am aware. As I say, when I spoke to Mr Macdonald about it, his advice to me was that there was nothing in it, that he would be comfortable answering a question on the floor, but we would have a House note in the folder for reference.

CHAIR: That means there was a House note in the folder that was prepared with regards to Mount Penny?

Mr GIBSON: I seem to recall there was, Mr Chairman, yes.

The Hon. JEREMY BUCKINGHAM: Was there any representation to the Minister's office from other members of the Government in relation to that issue?

Mr GIBSON: No, not that I am aware of.

The Hon. JEREMY BUCKINGHAM: No-one from the Premier's office or the Department of Premier and Cabinet or Department of Primary Industries contacted the office?

Mr GIBSON: No, not that I can recall.

The Hon. JEREMY BUCKINGHAM: In preparation for the call for papers, who requested that the speech opposing the Standing Order 52 be prepared?

Mr GIBSON: That was in 2009. By that stage I was the chief of staff. We had a mining adviser operating in the office, and I suspected it may have been him. It was a gentleman by the name of Mr Damian Jeffery, I think.

The Hon. JEREMY BUCKINGHAM: He initiated the request to the department to prepare a speech?

Mr GIBSON: Yes. I suspect he would have, yes.

The Hon. JEREMY BUCKINGHAM: Did he brief the Minister or yourself on that?

Mr GIBSON: Not that I recall. It would be more a process matter. I guess when a call for papers comes up like this, it was general—it was then general government policy to have these orders voted down.

The Hon. JEREMY BUCKINGHAM: But he took that decision upon himself? He did not confer with the Minister that that was the preferred course of action?

Mr GIBSON: It is possible that he would have spoken to the Minister directly about it. That is how such a request would have been facilitated.

CHAIR: Can I show you a document?

Mr GIBSON: Yes, certainly.

CHAIR: This is obviously not the original, but it is a copy that formed part of the call for papers. Would it be the case that that speech having been prepared you will have approved it before it was put into the House folder?

Mr GIBSON: Yes, it would have been approved at ministerial level. Nothing from the department was just placed straight in without some kind of adviser at least having a look over it.

CHAIR: Mr Mullard prepares it, does he?

Mr GIBSON: Yes.

CHAIR: It is then passed by Mr Sheldrake?

Mr GIBSON: If Mr Sheldrake has time. Sometimes the director general has an extraordinary workload. Sometimes it may come directly to us, depending on timing. Certainly someone from the Minister's office would have seen this before it arrived in any of the folders.

CHAIR: You would have seen it as chief of staff.

Mr GIBSON: Yes. I would have had a cursory look at all the documents in the folder.

The Hon. JEREMY BUCKINGHAM: Do you recall briefing the Minister on the speech and the position that was going to be taken to oppose the call for papers?

Mr GIBSON: No, not specifically. Sometimes the Minister is not the person in the chair when the call for papers comes up. It depended on the business of the day and what other commitments the Minister had. The minister would not always be there to talk to it, particularly if the Parliamentary Secretary or someone else was representing the Minister in the House, as happened on occasions.

The Hon. JEREMY BUCKINGHAM: So there was no discussion between the Minister's office and other members of the Government about the strategy regarding the call for papers?

Mr GIBSON: There most certainly would have been discussions with the whip's office or the leader's office to see whether we had the numbers to stop the motion going forward. That was a matter of course generally on issues like this.

The Hon. JEREMY BUCKINGHAM: How would those discussions have occurred?

Mr GIBSON: The adviser or I would go into the Chamber and seek out a staff member from the leader's office and have a discussion with them about whether the motion would succeed.

The Hon. JEREMY BUCKINGHAM: Why did the Government ultimately decide not to oppose the call for papers?

Mr GIBSON: I do not recall the specific actions of the evening of this going through. If the Government decided not to—

CHAIR: It was a Thursday morning.

Mr GIBSON: I do not recall the specific details or the count on the vote. But if it has gone through then it has gone through.

The Hon. JEREMY BUCKINGHAM: So there was no discussion between your office and departmental staff about the call for papers and the strategy around that?

Mr GIBSON: Not necessarily. When a request is made to the department they are generally factual like this. Any political overlay is placed on it by political staff, which is their role. We might ask the department for more technical advice if we felt the answer needed it. We certainly did not discuss tactics with departmental officers in terms of political strategy.

The Hon. JEREMY BUCKINGHAM: Was the Minister briefed after the House had resolved to support Mr Gay's motion?

Mr GIBSON: Not specifically. I think the Minister would have been notified that a call for papers had been approved and we would take the necessary steps to comply.

CHAIR: Are you saying that you would not have spoken to the Minister before or after with regard to the Standing Order 52 motion?

Mr GIBSON: I absolutely would have. I would have said that a Standing Order 52 motion had been moved and that if we could knock it down we obviously would but if not we would deal with it.

CHAIR: But it would strain credulity, would it not, that after having decided that it was going to be passed that you would not say, "Ian, that call for papers got up"?

Mr GIBSON: I definitely would have. I simply cannot specifically remember calling him to tell him that that had happened. I would definitely have told him that it got up. Obviously that would mean that we would have had to comply with the order.

The Hon. JEREMY BUCKINGHAM: In all likelihood you would have briefed him that it was likely to get up and therefore he should not oppose it in a speech.

Mr GIBSON: Yes. Depending on the advice coming out of the leader's office, if it was likely that the Government could not win the vote I would have told the Minister that that would happen and that we would be ready to prepare the information post the order.

The Hon. JEREMY BUCKINGHAM: So there would have been discussions between the Minister's office and the Leader of the Government in the House about the tactics and the likely numbers.

Mr GIBSON: Yes.

The Hon. JEREMY BUCKINGHAM: Upon it passing, did you or anyone else in Mr Macdonald's office contact departmental staff to discuss how to respond to the call for papers?

Mr GIBSON: No, not that I recall.

The Hon. JEREMY BUCKINGHAM: Did you or anyone in your office talk to Mr William Hughes about the call for papers?

Mr GIBSON: It is possible that I did. I would like to elaborate. This obviously came through on Thursday morning, as the chairman said. The next day was Friday and I think I was in the office for only half the day because it was my birthday. The next day was a Saturday and Mr Macdonald resigned on the Sunday. It is likely that my memory is that the order went through and we would be required to comply, but Mr Macdonald and the rest of his office were no longer employed by the following Monday.

The Hon. JEREMY BUCKINGHAM: But you may have talked to Mr William Hughes about it?

Mr GIBSON: Absolutely, and if I did it would have been along the lines of, "Yes, the order has gone through and we need to initiate the appropriate steps to get these documents together."

The Hon. JEREMY BUCKINGHAM: But you just said that you had not contacted any departmental staff to discuss how to respond to this call for papers.

Mr GIBSON: I cannot specifically recall and I do not want to say that I did. It is most likely that if I did I would have talked to someone in the department about how to coordinate it. That is how we used to do it. The department would nominate an officer and that officer would prepare documents from their side. Someone in the Department of Premier and Cabinet would contact the Minister's office to prepare the documents from our side and they would usually be collated by the department and be returned once the closing date was up.

The Hon. JEREMY BUCKINGHAM: To be clear, you did contact departmental staff.

Mr GIBSON: I have no specific recollection of that. What I am saying is that if that happened then it is quite possible that I could have. I do not recall calling or emailing him.

The Hon. JEREMY BUCKINGHAM: But you might have.

Mr GIBSON: But I might have.

The Hon. JEREMY BUCKINGHAM: At any stage did you delete, destroy or dispose of any records that you believe could have been caught by this call for papers?

Mr GIBSON: Not willingly, no. Again, I will elaborate. As I said, my Minister effectively resigned on the Sunday. I recall speaking to, I think, Mr Fitzmaurice at the Department of Premier and Cabinet to get advice about what needed to happen in terms of the office, the staff and the pack-up in accordance with the State Records Act and all those sorts of things. Emails in ministerial offices are public records and the advice that has always been given to me is that they exist on servers whether or not they are deleted. The power to retrieve those records is there and always has been there.

The Hon. JEREMY BUCKINGHAM: When you and Mr Macdonald were reinstated to the office how did you retrieve the documents?

Mr GIBSON: The advice we received from the Department of Premier and Cabinet was that because they were public records they were held in stasis. They simply rebooted the system and our emails reappeared as they were before we left. That is my memory of it.

The Hon. JEREMY BUCKINGHAM: How long did that take?

Mr GIBSON: It was over the course of a few days, I think. We were operating out of an office here on level 11 to begin with before we went back to Governor Macquarie Tower. The technology was there and, from memory, the records were largely the way we left them.

The Hon. JEREMY BUCKINGHAM: Within days you had full access to all the documents, emails, drafts and so on.

Mr GIBSON: Yes, I think so.

The Hon. JEREMY BUCKINGHAM: That is interesting. Do you think Ian Macdonald was corrupt?

CHAIR: I do not believe that is appropriate. Without a fuller expansion—

The Hon. JEREMY BUCKINGHAM: Do you believe that Mr Ian Macdonald had any role in corrupting this Standing Order 52 call for papers process?

Mr GIBSON: This particular process—no.

The Hon. JEREMY BUCKINGHAM: Are there other processes he may have corrupted?

Mr GIBSON: You are asking me about a specific process. I do not believe he did with regard to this Standing Order 52 call for papers. In terms of the previous question—and I appreciate your intervention, Mr Chairman—I will say that I have cooperated fully with the Independent Commission Against Corruption wherever possible. I really do not want to give opinions that might prejudice anything that it is doing or anything that this Committee is doing.

CHAIR: Somehow I do not think that anything you say will persuade Mr Ipp one way or the other.

Reverend the Hon. FRED NILE: Thank you for appearing before the Committee today. As you know, a significant number of the documents not provided in the original return to order are emails of which you are either the recipient or the sender. Do you have any general explanation for what occurred in 2009 and why those documents were not produced?

Mr GIBSON: I do and I would like to elaborate on my earlier statements. I think it is more a case of unfortunate timing than deliberate action. I preface that by saying that we can now retrospectively look at all the allegations that are on the table. However, you must remember that when we were packing up the office in 2009 none of these issues now raised publicly was in the arena. These documents were just like every other public record we had. We followed the appropriate process for packing up a ministerial office. Having done it twice, I know that it is a pretty stressful situation.

You have to look after staff and deal with a range of issues in closing it down properly and doing an appropriate handover to the incoming Minister so that the Government can continue on. It was always my understanding that the Department of Premier and Cabinet would have access to our records well beyond us leaving the ministry and that they would be able to search through the documents for the call for papers in our absence. There was certainly no direction to destroy any particular type of document or otherwise. As I said, I think it was unfortunate timing in that we were dismissed as the call went through and there was a lag or some access issues in the preparation of the return.

Reverend the Hon. FRED NILE: One document identified by the Independent Commission Against Corruption as falling within the terms of the House's order was an email from you to Graham Hawkes of the Department of Primary Industries asking for a Mount Penny brief for the "boss". Why was that document not provided in the response to the House's order?

Mr GIBSON: I again suspect that when we signed off and left the premises—I think we were out of Governor Macquarie Tower by 16 or 17 November and the return was not due until about 26 November—the call for papers was handed over to the incoming ministry and some of the documents were not picked up in the search. It was not of my volition and it was certainly not deliberate withholding. I often referred to the Minister as the "boss" to departmental staff. I liked them to know where the request was coming from but not particularly to name the Minister. It is a carrot-and-stick situation. You want to say it is for the Minister but you do not want to do that too much. I also liked the departmental officers and had a respectful relationship with them. I wanted them to know when things were more urgent.

CHAIR: But this was urgent.

Mr GIBSON: The email was, yes. That is why I referred to him as the "boss"—Mr Macdonald was asking for this document from me quickly. I certainly did not withhold it from the call for papers for any other reason. I suspect it went into my email account but did not get picked up in the search that was done after we left the ministry.

Reverend the Hon. FRED NILE: You were in a very difficult position and there is probably no precedent. One Minister was going and another was coming and you were in the middle. Can you describe what was done with documents and email accounts in the Minister's office when Mr Macdonald lost his portfolio?

Mr GIBSON: All the privilege documents, cabinet documents and so on were returned to the Department of Premier and Cabinet as required. Any other departmental briefings that fell within the State Records Act were returned to the department or the relevant government agencies. Any older briefing notes, draft information and files that some advisers kept were disposed of in security bins. You collect a lot of information over a number of years. In terms of email accounts and things like that specifically, the shutdown and closure was managed by the Department of Premier and Cabinet. Staff were advised that if they had any personal information or anything else they wanted to take with them they could do so. But essentially the email system would be shut off and it would be kept in stasis as a public record should it be needed in the future.

Reverend the Hon. FRED NILE: Were you surprised when you saw that article in the newspapers and mentioned it to Mr Macdonald that he said there was nothing in it?

Mr GIBSON: Yes, I was.

Reverend the Hon. FRED NILE: Was that clear and genuine?

Mr GIBSON: I guess I have the benefit of hindsight. At that time it was one of a number of issues that we were working on. Parliament is a terrific place to hear all kinds of stories. I did ask him and I was surprised when he said he did not know anything about it and did not seem to be concerned about it.

Reverend the Hon. FRED NILE: Do you believe he would not be embarrassed by any documents produced under the Standing Order 52 call for papers?

Mr GIBSON: That was certainly the impression he gave.

Reverend the Hon. FRED NILE: Did he take any action to interfere in it in any way? Did he tell you not to include any documents?

Mr GIBSON: No. To be honest, in terms of his role in this, as far as I remember I am sure I told him that the order had been passed. I think that is probably the only role he had. The Australian Labor Party State conference was held on the Saturday and he resigned on the Sunday and we were in pack-up mode.

Reverend the Hon. FRED NILE: Did you discuss the order of the House with the director general of any other officer in the Department of Primary Industries? If so, what advice was provided?

Mr GIBSON: I do not specifically recall doing it but it may be that I might have. As I said, the Friday the next business day was my birthday and I do recall taking a half day. If the paperwork for the order came through, it is likely that I had seen it for the sum total of about three or four hours and then after that the next time I was in the office was to close it down.

Reverend the Hon. FRED NILE: Even though you were chief of staff you had no knowledge of anything to do with the Mount Penny article? Was it a surprise to you as well?

Mr GIBSON: It certainly was. I would say, feel free to read through my transcripts that the commission has made available.

CHAIR: We have.

Mr GIBSON: I have been thoroughly looked at, every which way, and certainly I am not the subject of allegations. I have been happy to cooperate with the commission wherever possible, and this was missed by a lot of people that they actually thanked me, at the opening statement of the last inquiry, for assisting them.

Reverend the Hon. FRED NILE: Have you had a chance to consider the documents that were not included? Do you have a general idea of what they were?

Mr GIBSON: I did have a look actually. I must admit I was quite surprised at such a gap of information.

Reverend the Hon. FRED NILE: How would you evaluate that information? Was it dramatic, critical or just general office conversations?

Mr GIBSON: Certainly some of it was, in terms of the mapping and some of the information request on Mount Penny, yes, certainly, and it needed to be provided so that an understanding of the timeline of alleged events could be put together. I do understand the seriousness of what was missing, and hence I am very happy to appear today and tell you what I can to help you look into it as well.

Reverend the Hon. FRED NILE: Do you agree those documents being included was misleading to the House?

Mr GIBSON: Yes, most certainly.

Reverend the Hon. FRED NILE: But you are not sure whether there was any deliberate intention to remove those documents or not include them?

Mr GIBSON: Certainly not on my part, not on the part of any officer that worked under me, would be my assessment. Certainly departmental officers I have ultimate respect for. As I say, you may know some of my background; I came from the department. I had a pretty good relationship with a lot of those officers and they were first-class public servants. I could never imagine them doing anything that would constitute anything like this. I guess I may refer to this again. At that time none of these allegations were public so nobody would think that any requests for mining documents might have any other sinister or ulterior motive.

CHAIR: I am concerned. On 12 November, the day when the call for papers was made, Mr Macdonald answered a question asked by Lee Rhiannon. Did you listen to question time? Is that right?

Mr GIBSON: Yes, most certainly.

CHAIR: That was part of your job?

Mr GIBSON: Yes.

CHAIR: Mr Macdonald was asked a question with regards to Mount Penny. Do you remember that?

Mr GIBSON: Yes.

CHAIR: Part of his answer was: "This particular resource exploration licence was part of a number of small to medium-resource licences that were put out for expression of interest. The process was done entirely by the department. I had no role in it." I put it to you that the documents that were missed indeed demonstrate that he did have a role in it, did they not?

Mr GIBSON: Yes.

CHAIR: Indeed, the first documents that are missing, emails of 9 May, show that you and others in the Minister's office were initiating inquiries about the Mount Penny exploration licence?

Mr GIBSON: Yes, we were.

CHAIR: All right. When you say, in a sense, it all comes as a complete surprise when Mr Macdonald gave his answer on 9 November that he had no role in it, surely an alarm bell rang that he was lying to the House?

Mr GIBSON: If may elaborate, and again this would be a question for Mr Macdonald—

CHAIR: I am sure but I am asking about your alarm bells ringing.

Mr GIBSON: I suspect why he said that was it was a delegated authority. He delegated the authority for the approvals, or which companies would be successful to the department. I suspect that is what he is articulating there but again that would be a question for him.

CHAIR: Another part of his answer was, "I had no role in it." He told you, did he not, to go and find out about Mount Penny?

Mr GIBSON: Yes, he did.

CHAIR: You did not know Mount Penny, from Mount Bulla, or anywhere else at that stage, did you?

Mr GIBSON: No, that is correct.

CHAIR: The first you knew of a description of a place called Mount Penny came out of the mouth of Ian Macdonald?

Mr GIBSON: Yes, that is correct.

CHAIR: Consistent with your responsibility as chief of staff you then went off to the department to get him a briefing?

Mr GIBSON: Yes, that is right.

CHAIR: As a result of that briefing, Mount Penny was added to the locations that were to be included for the granting of exploration licences?

Mr GIBSON: Yes, that is correct.

CHAIR: How in heaven's name could anyone logically say, "I had no role in it"? It can only mean that he was misleading the House?

Mr GIBSON: I understand the point you are making. Again I would suggest that is a question for Mr Macdonald.

CHAIR: It will be.

Mr GIBSON: I know what I think he is trying to articulate there but again I certainly take the point.

CHAIR: When he answered the question on 12 November did he have a briefing note in his folder to assist him in answering questions about Mount Penny?

Mr GIBSON: Yes, that is my recollection.

CHAIR: Am I right in saying he had a document handed to him on that day when he answered the question?

Mr GIBSON: Look, I do not specifically recall that but I will say Mr Macdonald quite often did not use the notes that we prepared.

CHAIR: We knew that. It was always quite interesting.

Mr GIBSON: Yes.

CHAIR: But the reality was that there was a pre-planned answer?

Mr GIBSON: Yes.

CHAIR: And that pre-planned answer was designed to absolve him of his role in the granting of the exploration licence?

Mr GIBSON: Again, I think what he was articulating was it was a delegated authority and that it had been assessed by a probity assessor. I am just trying to think of the time frame. Again I do not want to speak for him in what he may say for that, but I take the point that you are making.

The Hon. GREG DONNELLY: Did the office of Minister Macdonald have a specific document that outlined the correct process or procedure to be followed in relation to responses to Standing Order 52 of the Legislative Council?

Mr GIBSON: We most certainly would have. It would have been in a handbook or kept by our parliamentary liaison officer.

The Hon. GREG DONNELLY: There was, to the best of your recollection, a set of steps that were outlined in some document which departments took into account when dealing with Standing Order 52?

Mr GIBSON: Oh yes, we treated these things very seriously. We had been subject to quite a few over the years.

The Hon. GREG DONNELLY: Will you cast your mind back? Do you recall where that procedure was to be found? Was it in a particular document or manual?

Mr GIBSON: I am trying to think whether it was in a Department of Premier and Cabinet handbook or in a procedural document that the Parliament provided. But again we would know how to do these things. I cannot specifically cite the document but certainly we had advice on how to prepare one.

The Hon. GREG DONNELLY: Were other departments also expected to follow a particular procedure?

Mr GIBSON: Yes. In fact, what would happen usually when a Standing Order 52 would go through, was your line agency or department would begin preparing the information that they had. Generally they had more information than the ministry because they were preparing the technical advice. They had a lot of internal drafts between their own staff who were working on this. They generally would submit the return. So certainly there was a procedure that the department had.

The Hon. GREG DONNELLY: Earlier you used the phrase "not willingly" in answer to a question from the Hon. Jeremy Buckingham about the destruction of documents or records. Will you explain what you meant by that?

Mr GIBSON: When I was leaving the ministry I had a number of emails that were work related and over the years I gathered some that are personal. To ensure that none of the personal information that was irrelevant to my role, and all of those sorts of things, remained, at least at first level of access, I deleted some of my personal emails. So certainly any of the Government or otherwise, as I say, are public records and can be accessed, as I have been advised many times, from servers, whether or not they have been deleted. So none of those things that may have related to this I would have willingly destroyed.

The Hon. GREG DONNELLY: Please cast your mind back again. To the best of your recollection when did you go back to review which personal emails to delete?

Mr GIBSON: The whole time that I was employed there. As I say, I worked for Mr Macdonald from 2003 to 2010. I had retained continuity of service so I had emails there that were very old and related to a whole range of periods of my public life, I suppose.

The Hon. GREG DONNELLY: Were those emails interspersed amongst, I will use the term, business emails or were they emails associated with your work as a director general?

Mr GIBSON: Yes, most certainly. They were all over the place. Again, the volume of emails you get, and I am sure you would appreciate this as would the other members at the table, do not give you a lot of time to

catalogue or maybe file them as you would like, particularly as a chief of staff or even as a deputy chief of staff. There are several dozen emails you receive each day.

CHAIR: More than that.

Mr GIBSON: Several hundred.

CHAIR: That would be more like it.

Mr GIBSON: And I would think maybe three of them might be important.

The Hon. GREG DONNELLY: In relation to deleting emails, is it not the case you would have had to go through many hundreds, if not thousands of emails to determine which ones to delete and which ones to leave?

Mr GIBSON: Yes, absolutely.

The Hon. GREG DONNELLY: Did you do that at a single sitting? Did you go through all these emails going back over that long period and delete the ones that were appropriate?

Mr GIBSON: I think I did. I think I went into the office, it may have been the Monday evening or the Tuesday after we had effectively been out, before they were to close us down. I wanted to obviously keep some information going forward, some of my professional developments and resume information and things like that. I do recall doing that, I think. I remember being quite sad about it, to be honest, as I say it was the end of almost 15 or 16 years in public life for me.

The Hon. GREG DONNELLY: You only deleted emails that were of a personal nature and none associated with your professional role with the Minister?

Mr GIBSON: It is possible that I did but the professional role emails I would have deleted would have been low level information-type emails. The department would send you things, "Hey, we are going to do this. Hey, we are going to do that" and that type of stuff. I cannot delineate. I most certainly would have but in terms of doing anything that would jeopardise the call for papers, I do not recall doing that and I certainly would not.

The Hon. GREG DONNELLY: I recall from an earlier answer that the general understanding was that emails per se were not caught by Standing Order 52 responses from the Legislative Council. Was that your understanding that with respect to the call for papers that emails had a status of, in fact, not being generally caught?

Mr GIBSON: No, my assumption was that they were. It was basically, I guess, for want of a better term, an all-in—anything that was created electronically or even otherwise would be captured by the call.

The Hon. GREG DONNELLY: That was your clear understanding?

Mr GIBSON: Yes.

The Hon. GREG DONNELLY: Do you have any recollection of having a discussion with Mr Paul Miller over the question of this call for papers?

Mr GIBSON: Not specifically, no. That is not to say that I did not and I know the Department of Premier and Cabinet used to provide legal advices to us through these but during that time, as I say, if it happened it would have been maybe late Thursday or the part of the Friday that I was there. But I do not specifically recall it, no.

The Hon. JENNIFER GARDINER: Mr Gibson, in reflecting on making responses to Standing Order 52 you said earlier that in the Minister's office these calls for papers were taken seriously. Do you have any reason to believe that there might have been any other case where a Standing Order 52 was not complied with whilst Mr Macdonald was a Minister?

Mr GIBSON: I say this obviously because we are under privilege, I think at various times when departmental agencies and ministries are compiling these there is a reasonable margin for error. The reason I say that is if there are a certain number of terms that you can use—Mount Penny, mining, things like that—to search across the breadth of electronic information. As Mr Chair pointed out, I think at some point I had more than 3,000 emails active in my in-box. If you are searching through information of that depth I think it is very easy that maybe something that related to it could be missed because the wrong or incorrect terminology was used in the search.

The Hon. JENNIFER GARDINER: Despite the fact the Mr Egan used to rail against the Legislative Council calling for papers, do you say there was no culture that would diminish the import of a call for papers?

Mr GIBSON: Certainly not a cultural thing. This would be a technical error and I guess in terms of the cultural question, again if I may refer to comments earlier, at this time we had no inkling that anything was wrong with any of these. We were under lawful direction from the Minister: Agree with the policy personally, not as a different matter, but that was what was happening.

The Hon. JENNIFER GARDINER: Was there any thought given to providing a supplementary return to the House's order by you or any other ministerial staff after Mr Macdonald returned to the office as the Minister in December 2009?

Mr GIBSON: No, my understanding was that the order had been complied with by the incoming mining Minister, and I think the Treasury and whoever else needed to sign off on it. To my knowledge it had been complied with.

CHAIR: But if he had done a supplementary return it would have shown from those earlier emails, would it not, that he had been the initiator of the Mount Penny exploration licence?

Mr GIBSON: Yes, it would have. I suspect, and I say this, we would have picked up some of those documents that we did not because I would have been searching my own email rather than the Department of Premier and Cabinet or whoever did it.

The Hon. MATTHEW MASON-COX: Did you actually review the return to papers document that was lodged on 26 November upon coming back as chief of staff to Mr Macdonald in December?

Mr GIBSON: No, I did not.

The Hon. MATTHEW MASON-COX: You did not look at the return to papers document at all?

Mr GIBSON: No, I did not.

The Hon. JENNIFER GARDINER: Could you also give the Committee a rundown on what records management system the Minister's office had in place at the time of the call for papers in November 2009? For example, did the office use the Trim system?

Mr GIBSON: That is correct. So in terms of our electronic records and data management between the ministry and the department it was the Trim document tracking system, we did use that. Obviously for Cabinet and other privileged documents we had a process where a lot of that was by hand only and obviously those documents were returned to the Department of Premier and Cabinet. But in terms of the back and forth between the department and the Ministry if it wasn't an email, if it was an official briefing it was via the Trim system. Even sometimes an email that may constitute information would be logged on the Trim system as an official document as part of a policy issue.

The CHAIR: What was the email program that you were operating?

Mr GIBSON: I think we had Outlook. Whatever the version of Outlook was for that time—I cannot think of the specific number.

CHAIR: With a search function—for example, if you put Mount Penny in it would pop up Mount Penny emails?

Mr GIBSON: That is right. That is what it was and that is what we would do in these cases.

The Hon. JOHN AJAKA: Following on from the questioning of the Chair, we had a situation where Mr Macdonald was the Minister and the newspaper article came out. It was not a situation of you going to Mr Macdonald and saying, "Look, I think we have a problem here. We need to have a good look at this. There is at least a perception that something has gone wrong. We need to analyse this and go through this."

Mr GIBSON: Yes, definitely. I recall speaking to him about it. He was adamant that there was nothing in it and that we should not pursue this, there was nothing more that needed to be done. I think the process had been—as he said to me—overseen by a probity assessor, that it was a delegated authority to the department and that if that was looked at effectively there would be nothing it. That was his strong advice to me.

The Hon. JOHN AJAKA: Please do not take this as a criticism, but you did not feel as the chief of staff that you should have had your own look and examined this?

Mr GIBSON: I guess this is the benefit of experience or hindsight.

The Hon. JOHN AJAKA: Hindsight is wonderful but I am talking about at the time.

Mr GIBSON: At the time we were in a situation where we did not have a good relationship with the current Premier. We were working on a whole range of policy issues and different things like that. This was just one of many things. To be fair, I guess it was on my radar but not central enough or I did not have enough time to direct to probably look at the issue and, as I say, the Minister had resigned anyway.

CHAIR: He had not resigned; he got it in the neck.

Mr GIBSON: It is a polite way: He had resigned.

The Hon. JOHN AJAKA: Let us use the word "decommissioned".

Mr GIBSON: Yes.

The Hon. JOHN AJAKA: But then he comes back as the Minister and I take it you come back as the chief of staff?

Mr GIBSON: Yes.

The Hon. JOHN AJAKA: You are back in exactly the same offices with the same computers I take it?

Mr GIBSON: We actually ended up in a different office in Governor Macquarie Tower from memory. We started up here on level 11; we were in room 808 prior to that.

The Hon. JOHN AJAKA: Prior to that you were aware of the Standing Order 52 and the work that you had obviously undertaken?

Mr GIBSON: Yes.

The Hon. JOHN AJAKA: Again it did not occur to you to go to Mr Macdonald and say, "This is still out there. We still need to have a good talk about this. We need to have a good look at this. We need to ensure that we have produced all the right documents."

Mr GIBSON: In terms of the order itself it was my understanding upon returning that the order had been complied with and if there were any deficiencies or legal issues that the Department of Premier and Cabinet would advise us of the case. As no advice was forthcoming it was to my mind that the issue had been resolved.

CHAIR: Who at the time—we are talking about mid November 2009—was the person in the department who prepared the department's response to any Standing Order 52?

Mr GIBSON: I am trying to think. It was probably a number of officers. The director general used to sign off on it but I think maybe it might have been—and again I could be wrong—Mr Phil Anketell. He was an executive officer to the director general and I seem to remember that maybe he would compile the folder. But again I do not want to give Phil unfair credit if it wasn't actually his role. I cannot specifically remember.

The Hon. MATTHEW MASON-COX: When did you first hear of Ian Macdonald's decommissioning and from whom?

Mr GIBSON: To be absolutely honest the ALP State Conference was on Saturday the 14th, it had prevailed that the then Premier had been successful in a motion on the conference floor to change the way he picked his Cabinet. I remember attending Mr Macdonald's residence on Sunday. He had asked me and my deputy at the time to come over to see him.

The Hon. MATTHEW MASON-COX: At what time?

Mr GIBSON: It would have been midmorning I suspect. Essentially he said that he been asked to tender his resignation. I made a call to I think it was Mr Brad Fitzmaurice from the Department of Premier and Cabinet to see what needed to be done in terms of that. I think we drafted a letter for the Governor and for the Premier himself where Mr Macdonald tendered his resignation. That would have been around lunchtime on Sunday the 15th.

The Hon. MATTHEW MASON-COX: At that time was there any discussion about how to pack up the office, about whether certain information needed to be destroyed or other documents dealt with?

Mr GIBSON: No, not really. It was more a state of shock. Mr Macdonald was obviously upset at what had happened. I obviously then had to notify relevant staff members that they were getting a "don't come Monday" and that we would be taking appropriate measures to ensure that they received entitlements or that we could place them into other ministries where we were able to. I guess that was my primary—

The Hon. MATTHEW MASON-COX: Did you seek advice from anybody about what to do next in relation to the office?

Mr GIBSON: Yes. Mr Fitzmaurice from the Department of Premier and Cabinet came. I arranged for him to come and speak to the staff.

The Hon. MATTHEW MASON-COX: When was that?

Mr GIBSON: He did this on Monday morning. So the next day we had a staff meeting where he came in and explained essentially what had happened and what the process was.

The Hon. MATTHEW MASON-COX: Did you go into the office on the Sunday afternoon?

Mr GIBSON: Yes.

The Hon. MATTHEW MASON-COX: What did you do then?

Mr GIBSON: Effectively I spoke to a number of staff—I think the Parliamentary Liaison Officer, my deputy and people like that— and we commenced packing up effectively the office, documents that we would have to return to Cabinet and all of that because you do not get a long time to get out of an office like that. There are quite a few logistical issues that go with tying it up and we effectively were decommissioned, we were gone so there was no point in lingering.

The Hon. JOHN AJAKA: You mentioned earlier that one of the things you had to do was notify the staff not to come in on Monday then you said you got departmental heads to come in on Monday to speak to the staff. I just want to clarify that.

Mr GIBSON: I am sorry that was a colloquial term. I was talking about a DCM. It is an awful thing to have to call your staff and say that we now no longer have a ministry or an office or that they now no longer have a role. Sorry, I was not meaning to be flippant.

The Hon. MATTHEW MASON-COX: But you got them in on the Sunday to start cleaning up straightaway?

Mr GIBSON: Yes, it is quite a big job. The Minister had resigned at lunchtime that day so effectively he is out of the Cabinet and all the processes and authorities that he has stops, so we needed to make arrangements.

The Hon. MATTHEW MASON-COX: I understand that. But on the Monday you got someone in to advise the staff about what to do about packing up the office?

Mr GIBSON: Mr Fitzmaurice from the Department of Premier and Cabinet came down and spoke to all of us, myself included, as to what happens with severance packages and obviously cleaning the office up and getting out of the office.

The Hon. MATTHEW MASON-COX: So you could have done some things on Sunday that perhaps you should not have done because you were advised on Monday about what to do in relation to records, archiving and all that sort of thing?

Mr GIBSON: Possibly but again we were not— put it this way, we were not in their wholesale shredding or anything like that. We were more in a state of shock; it was just starting to actually realise that we were not in the Ministry and this was the end.

The Hon. MATTHEW MASON-COX: Did Mr Macdonald give you any instructions about destroying documents or emails?

Mr GIBSON: No, he did not. He rarely took an interest in the logistical running of the office. In fact, I think in the whole time I worked with him I may be got two emails from him in seven years. He was not a technical person like that.

The Hon. JEREMY BUCKINGHAM: Do you believe the fact that there was a Standing Order 52 supported by the House played any role in the Premier sacking the Minister?

Mr GIBSON: No, I do not believe it did.

Reverend the Hon. FRED NILE: Did he give you any reasons as to why he was being dismissed?

Mr GIBSON: No, he didn't. I would qualify this by saying that Mr Macdonald was very private in the way he conducted his political business. What I mean by that is, in terms of how he dealt with his colleagues was very much a matter for him and that was not communicated to his staff on many occasions. I had worked with Mr Rees when he was an advisor and things like that and I would like to think that my relationship with him was always good but Mr Macdonald's relationship with Mr Rees was a relationship that they had separately.

The Hon. JEREMY BUCKINGHAM: You said in a previous answer in the context of informing him of the *Australian Financial Review* article that there may be some sensitivity there?

Mr GIBSON: Absolutely.

The Hon. JEREMY BUCKINGHAM: In the context of discussing that you also said that he had a poor relationship with the Premier.

Mr GIBSON: Yes, he did at that point.

The Hon. JEREMY BUCKINGHAM: Why was that of relevance to this story breaking in the *Australian Financial Review*?

Mr GIBSON: You were asking me about the relationship with the Premier, I did not volunteer it.

The Hon. JEREMY BUCKINGHAM: That was a different question. What was the significance of him having a poor relationship with the Premier and the fact that there was this *Australian Financial Review* story running about the Bylong Valley?

Mr GIBSON: I am not sure what you mean.

CHAIR: Did you have a feeling that the Premier was looking for a reason to flick Macca?

Mr GIBSON: If he was again that would be a question for Mr Rees. My understanding of it at the time through talking to Mr Macdonald was that they did not have good relations for a number of reasons, not just a Standing Order 52.

CHAIR: They had not had a good relationship for ages. Perhaps they did before but Macca had let down the Left over the electricity privatisation and that was before Premier Rees got the position. It was the whole of the Premiership that they were sour, was it not?

Mr GIBSON: I am not a caucus member and I am not a member of the Left; that would be a question for them.

The Hon. JEREMY BUCKINGHAM: The question you have not answered is how was the fact that they had a poor relationship and an *Australian Financial Review* story raising questions about this mining licence in the Bylong Valley related?

Mr GIBSON: I am sorry did I elaborate that in an answer? Is that what you are asking me?

The Hon. JEREMY BUCKINGHAM: You said that when you were briefing the Minister on the *Australian Financial Review* story you said, "And you have a poor relationship with the Premier".

Mr GIBSON: There is no relationship. I am sorry if it sounded like they were part of the same answer. We generally—when I say "we"—Mr Macdonald had a relationship with the Premier at the time that was not particularly cordial. I would not think it would not be a Standing Order 52 that caused Mr Rees to get rid of Mr Macdonald. I would think again, as I have just said, that would be a caucus issue for Mr Rees and Mr Macdonald and their colleagues to answer that. I was employed as a chief of staff; I was not a caucus member and I do not want to put—

The Hon. JEREMY BUCKINGHAM: So at no stage before the *Australian Financial Review* story broke were you aware of representatives of the Premier or the Department of Premier and Cabinet making inquiries into Mount Penny?

Mr GIBSON: No, as I have previously said I do not specifically recall them doing that.

Reverend the Hon. FRED NILE: Were the preparations for a return to the House of the order commenced between 13 November 2009, when the Department of Premier and Cabinet sought a return from your office, and 17 November 2009 when Mr Macdonald ceased to be the Minister? If so, what were those preparations?

Mr GIBSON: Not to my recollection, and it would be my thinking at the time that because that was an order for the mining Minister, as Mr Macdonald had resigned that would cede to the next Minister and that with DPC's legal adviser and that Minister they would have access to all of the documents on our system that they would need to access. So no, none specifically from Mr Macdonald's office.

Reverend the Hon. FRED NILE: You said earlier in one of your answers that Mr Macdonald said he had nothing to do with the Mt Penny issue, or something like that in his mind because he delegated it to another person. Who did he delegate it to?

Mr GIBSON: I think under the delegation of authority it may have been to the director general of the department Mr Sheldrake, and I do recall the Minister signing an instrument or something to that effect that allowed that to happen, and certainly that was Mr Macdonald's thinking. But again, that is an answer that he could articulate further and I take Mr Chairman's point on that earlier.

Reverend the Hon. FRED NILE: Was that part of his style as a Minister, delegating matters like that? He would have had a lot of issues coming up.

Mr GIBSON: Yes, sometimes, and I guess it was dependent upon the issues. Certainly there were some authorities, as there always are in a ministry, delegated to relevant departmental heads and it is for ease of administration. If the Minister had to sign off on every single thing it would be an extraordinary workload even for somebody at that level.

Reverend the Hon. FRED NILE: Was he comfortable with the workloads, like administration, himself?

Mr GIBSON: He was. He was very active. He was a 24/7 Minister to work for: he would call you late at night, he would call you early in the morning, he would call you on weekends; he was often working.

The Hon. JEREMY BUCKINGHAM: When you resumed your role when the Minister was reinstated were you able to access the documents and files of Minister Primrose? Were you able to access the documents that had been created in his relatively short tenure as Minister?

CHAIR: Eighteen days.

The Hon. JEREMY BUCKINGHAM: Eighteen days. Did you seek to and were you able to access—

Mr GIBSON: No, not that I recall, and I think maybe talking to his chief of staff about a handover or about what had happened and, to be honest, I do not think a lot had happened in that 18 days, there certainly was contact but I do not recall seeking the records or actually seeing any of them. I think maybe the department gave us some documents that he had signed for general information but certainly no formal request was made to see his records, that I recall.

CHAIR: Thank you very much for coming. I reiterate that you come here voluntarily. Thank you for your cooperation in that regard. There will be a transcript of your evidence that will be relatively shortly available—I anticipate some time tomorrow—and that will be sent to you. I do not think you have taken any questions on notice at this stage. If there are any questions on notice they will be sent to you and, as I said to you earlier, you will have 21 days in which to reply to those. Thank you very much for all your help.

Mr GIBSON: Thank you very much, Mr Chairman. I would like to reiterate that at any stage should you require me I am very happy to assist. As I said at the outset, I thoroughly enjoyed my time working in Parliament; I treat it very seriously. These are amazing and highly privileged jobs and if anybody ever gets the chance to be in one I suggest to them to take it with two hands and make everything you can from it. I wish some days that it maybe had not have worked out like this for me necessarily but, by the same token, I have had some amazing experiences and met some amazing people too. I respect the institution and should you need me then you know where to find me.

(The witness withdrew)

(The Committee adjourned at 4.19 p.m.)

**IN-CAMERA TRANSCRIPT PUBLISHED BY RESOLUTION OF THE
COMMITTEE 23 JULY 2013**

PRIVILEGES COMMITTEE

INQUIRY INTO THE 2009 MOUNT PENNY RETURN TO ORDER

At Sydney on Monday 24 June 2013

The Committee met in camera at 4.23 p.m.

PRESENT

The Hon. T. Khan (Chair)

The Hon. J. Ajaka

The Hon. J. Buckingham

The Hon. G. J. Donnelly

The Hon. J. A. Gardiner

The Hon. M. R. Mason-Cox

Reverend the Hon. F. J. Nile

LEIGH RAE SANDERSON, Former Deputy Director General, General Counsel, Department of Premier and Cabinet, affirmed and examined:

CHAIR: Thank you very much for coming; it is greatly appreciated that you made the time to come in. As you are aware, this is in camera and we have chosen that with particular witnesses because we do not think it appropriate that everyone be subject to the glare of the cameras. I think you were watching the proceedings upstairs and you may have seen the presence of the media. That is unfortunate for all but certainly we did not see that it was appropriate in your case.

Welcome to this hearing of the Privileges Committee inquiry into the 2009 Mount Penny return to order. Before we commence the hearing I would like to address some procedural matters. The Committee is holding this session of the hearing in camera, which means that at no time will any media or members of the public be in the room. The transcript of your evidence today will also be confidential. However, after reviewing the transcript the Committee may decide at a later date to make some or all of the evidence public. Normally the Committee would do so in consultation with you. I do not know if you have had the opportunity to review the transcript of the evidence that has already been put on the parliamentary website but that reflects previous in-camera evidence and involved the process of consultation with the witnesses.

As you would be well aware, witnesses who appear before parliamentary committees are protected by parliamentary privilege. This means that what is said cannot be used against you later in court proceedings. Our terms of reference require the Committee to inquire into and report on the failure to provide documents in the return to order tabled in the Legislative Council on 26 November 2009 concerning the Mount Penny mining exploration licence and tender process. This includes documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the Legislative Council on 14 March 2013. If you have not already seen it, that comparison matrix is available on the Privileges Committee's website, which is part of the Parliament's website. It is in folder 1 of the documents that were provided by the ICAC and is the first document within that folder.

At the commencement of your evidence I will invite you to make a short opening statement. If you have copies that you can provide to the members of the Committee that would be appreciated. Members of the Committee will then ask you questions. If you have a mobile phone I would ask you to turn it off. The Committee has resolved that any answers to questions taken on notice during the hearing must be provided within 21 days of you being provided with those questions on notice. If you take them on notice today the secretariat will forward to you a copy of the transcript highlighting the matters that you have taken on notice. If there are other questions they will be sent separately to you. I do not believe they will be particularly onerous at this stage—or I hope that is the case. Would you like to make an opening statement to the Committee?

Ms SANDERSON: Not in a formal sense. I would like to say that I appreciated the invitation to make a written submission but, in the circumstances, I did not have the time to do that so I have not made a written submission. I have had a look at the previous report of the Privileges Committee on this matter that was sent to me with the invitation to make a submission, so I have seen the annexures to that report, and I have had a look at the material that was released on Friday from the in-camera proceedings. So I have some understanding of some of the matters that have been raised before this Committee.

I should also point out, just in relation to your comments about taking matters on notice, I am no longer in the public service, so to the extent I do not know something today I am probably not going to know it in the next 21 days either and I do not have access to documents other than the documents that are in the Committee's published materials.

CHAIR: I think we are all aware of your changed status and I think your preparedness to come here today is even more helpful to us in light of the fact that you have left the public service. I do not know whether you have seen the committees in action before. This is slightly more collaborative than many so that formalities in terms of the timing that individual members have in terms of questioning does not apply, so we will just roll on a little bit. The intention is that Reverend the Hon. Fred Nile will start, we will then move to the Hon. Jeremy Buckingham, then I suspect to the Hon. Greg Donnelly if he so wishes and then, subject to what time is left, to Government members. If you do not understand anything at any stage you are welcome to answer the questions as you see appropriate and if you need further direction please ask.

Reverend the Hon. FRED NILE: Thank you very much for coming in to help us with our inquiry. We appreciate that. Could you explain what your role was in regard to the return to order of the House concerning Mount Penny?

Ms SANDERSON: At the time I was the deputy director general and general counsel in the Department of Premier and Cabinet. The Department of Premier and Cabinet as well as supporting the Premier in Parliament also supported the Leader of the Government in the Legislative Council. It was through that role that the Department of Premier and Cabinet coordinated responses to Standing Order 52 resolutions on a whole-of-government basis. That was a function that was delegated to my division and specifically to legal branch within my division.

Following the usual practice with all Standing Order 52s, it was my legal branch's responsibility to prepare and submit for my signature the memoranda to the departments and Ministers offices advising them of the making of the resolution and their obligations in complying with it. I signed those memoranda. They went out to the various places. The documents came back to my legal branch. They assessed that they were there, that the returns were there, and submitted a brief with a draft letter for my signature advising the Parliament of what had been returned and providing those documents. Sorry, I should say advising the Legislative Council, not the Parliament as a whole.

Reverend the Hon. FRED NILE: Had you done that a number of times on other matters?

Ms SANDERSON: Many.

Reverend the Hon. FRED NILE: Were you concerned that the documents within the terms of the House's SO52 may have been missed when you saw the limited number of documents returned by the Department of Primary Industries? Did that trouble you, or did you notice that? If so, what did you do?

Ms SANDERSON: I do not recall noticing that at all because it was not something that I particularly looked at in most Standing Order 52s. If I can just explain my answer a bit, if the Department of Premier and Cabinet was subject to the call for papers and if I had had some involvement perhaps in advising on the scope of the resolution, then my practice would be to take more interest in the actual content of the returns, but where it was on a matter of which I really had no knowledge and had had no particular involvement in advising on it, then I did not look at the detail of the return because my view was that I would have had no value to add and it would not be apparent to me. Other than if there were a failure to return the correspondence that I had signed to the department, I would not have been in any position to identify whether the material provided was accurate or not.

Reverend the Hon. FRED NILE: Did you provide any advice to Minister Primrose's office concerning the preparation of a return to the House's order? If so, can you inform the Committee of the issue for which advice was sought?

Ms SANDERSON: Can I seek some clarification before I answer that question? I have had a look at the publicly released transcript of the evidence of the person whose identity or name has been suppressed who was Minister Primrose's acting chief of staff. Is it okay if I answer the question in the context of that information? My answer is this. I do not have any specific recollection of the acting chief of staff seeking my advice. I do have a general recollection across the 7½ years that I was Deputy Director General originally in the Cabinet Office and then in the Department of Premier and Cabinet of many occasions on which chiefs of staff and other ministerial staff would seek my advice on Standing Order 52 correspondence from me or the FOI consultation correspondence that I routinely signed to chiefs of staff and to ministerial staffers. So I do not doubt that the conversation happened that the former acting chief of staff has given evidence of, but I have no specific recollection of it myself. I could comment on the advice I would have given based on my usual practice but I cannot claim to recall this particular occasion.

Reverend the Hon. FRED NILE: Were you concerned that no return was provided by Minister Macdonald's office before he left office? If so, what did you do?

Ms SANDERSON: I do not recall noticing that there was no return and I certainly do not recall being concerned about there being no return. I would not have expected the former Minister, as he then was, to have had any documents to return at the time the returns were due but I do not recall.

Reverend the Hon. FRED NILE: Because of the short period of time.

Ms SANDERSON: At that stage he was not a Minister, so any documents that he had had should already have been distributed to other places and if he still had State papers at the date those returns were due that would have caused me more concern had I realised that was the case than him effectively not having any State papers.

Reverend the Hon. FRED NILE: Do you have any opinion on the documents that were not returned? Do you see that as just errors in the office operations or any deliberate intention of concealing those documents from the upper House?

Ms SANDERSON: I have not followed the ICAC proceedings to the extent of reading transcripts. Obviously I have followed media coverage; it would have been difficult not to. And I am not aware of everything that has been given in evidence before this Committee. As I understand it, and I have looked at Bret Walker's opinion and the document matrix, the documents that were not produced on the Standing Order 52, either all of them or at least substantially most of them, should have been held by the department. I do not know why they were not returned by the department. I have no idea.

That they were not returned if they should have been is a problem, very much so, but I do not know why that is and I cannot speculate on it. As I said, I would not have expected the former Minister Macdonald to have any State papers by the time the returns were due and to the extent that the documents that were at some stage within his office were also held by the department, I would have considered, had I thought about it at the time, that he had effectively returned or provided those documents to the department because particularly with emails if departmental officers are either the authors or recipients of emails then they have that document and I would expect that it is their responsibility to put it on the relevant file.

Reverend the Hon. FRED NILE: Would you say that in your time in the department the public servants treated those requests seriously and that what happened in this case is an exception and most likely had not happened previously? I suppose it is hard to know unless there was some deeper inquiry.

Ms SANDERSON: Certainly to the extent I was involved in supervising the provision of documents by the Department of Premier and Cabinet, or the Cabinet Office before it, I am very confident that officers took that seriously. That was certainly my experience in talking to people. It was also my experience when people sought my advice on perhaps construing the scope of the relevant resolution or understanding their obligations that they were doing that sincerely with a view to determining what was required to be produced. I do not know if anything wrong has been done because from what I could see from the evidence on Friday the proposed independent investigation of what steps the department took at the time to prepare the response has not yet been undertaken so it is not clear why documents that on their face should have been found were not found.

CHAIR: One of the things that goes through my mind is that in doing the return, a lot of emphasis being placed upon what we could describe as the missing ministerial emails, and you have rightly pointed out that the vast bulk of those had as either the sender or the receiver somebody within the department. We have two, in a sense, independent bodies that are responsible in some way for the return of those documents, the original and the mirror, if we can describe it that way. One would normally be the ministerial chief of staff; the other would be someone in the department headed by the director general. In this case are we simply to take it as a coincidence that not only was there a failure to produce the ministerial emails but there was a failure to produce, in a sense, those same emails from the department? Is that just a coincidence that that failure would break down in two separate sections of the Government?

Ms SANDERSON: I do not think that is correct, based on my understanding of what happened, having looked at the documents that are available. I say that for this reason. So far as I recall, Minister Macdonald did not make any return at all—

CHAIR: No he did not.

Ms SANDERSON: —and so to that extent it was not that his office attempted to search before he resigned from the Ministry and failed to find these documents. As I understand it, they did not search at all because he had ceased to be a Minister before the return was due. So in that sense there is no failure to find; it is more the absence of a search at all.

CHAIR: That assumes that the responsibility of government with respect to the ministerial emails from the Macdonald office evaporated immediately upon his defenestration, does it not?

Ms SANDERSON: I think the position then focusses attention on what the Minister's responsibility is when leaving the Ministry or when leaving a portfolio, and that is when it is necessary to look at the obligations to return departmental papers to the department, return Cabinet documents to the Cabinet secretariat and any other State papers that do not fall within either of those categories should be sent to State records. So in that sense nothing should cease to be available because all State papers need to be distributed by the outgoing Minister's office to a suitable recipient.

CHAIR: Am I not right that the emails of Minister Macdonald were at all relevant times in the possession, custody and control of DPC?

Ms SANDERSON: I do not know that for sure because I am not specifically aware of what the IT arrangements were between DPC and Ministers' offices. That was not something that was in General Counsel division. I can only say it might have been but I do not know that.

CHAIR: There is a letter that is sent out on 13 November to Minister Macdonald's office that says there is a call for papers. I think on the Tuesday there is a letter that is sent to Minister Primrose's office asking them to attend to a call for papers. You would have known that Minister Macdonald's office has swept up, seeing he has gone. Do you apply your mind to the question of what happens in terms of a response from Minister Macdonald's office with respect to the papers that were in Minister Macdonald's office, including electronic papers?

Ms SANDERSON: I do not believe I did turn my mind to it and I do not believe I was asked to turn my mind to it. Having read the material that was released on Friday afternoon—the in camera proceedings had been made public—and having read that I have now turned my mind to it. What causes me to be quite confident in saying I was not asked and I did not turn my mind to it is that it seems to me there is a threshold issue and I do not know the answer to that issue. The fact I am sitting here today and do not know the answer tells me that I have never asked the question.

The question I am alluding to is at what date does the Standing Order 52 resolution speak when it calls for papers from the Minister for Mineral Resources? Does it mean the Minister at the time of the resolution? Does it mean the Minister at the time the return is due? Does it mean both of them? That is a threshold question I would have had to pursue, both myself and by talking to other relevant people, to come up with an answer before really being able to advise clearly on whether, for example, Minister Macdonald should have been making a return before he departed the Ministry. I am not sure how that could have been brought about and I do not think ultimately it should have made any difference to the documents that were returned because those documents should have been held and it seems to me they were largely held by the department.

Speaking as a lawyer it is an interesting question. One could imagine circumstances where it might be even more pressing if, for example, a Minister was to resign on the day the return was due, such that it might be unlikely that papers were returned to the department, for example, and should be included in the department return. It is not clear to me that in these circumstances, given the time gaps, it would have made much of a difference but it is an interesting question and, as I say, the fact I do not know the answer to it today tells me that I have never asked the question.

The Hon. JEREMY BUCKINGHAM: You may never have asked the question but your testimony is that no-one asked the question of you? You do not recall anyone asking you that question at the time?

Ms SANDERSON: I am confident that they did not, because if they had that is the very first question I would have had to investigate in pursuing the matter. It is certainly not my practice to just not pursue a question like that because it is an important question.

The Hon. JEREMY BUCKINGHAM: The question being whose responsibility it was, if there was a responsibility, to provide documents held by the office of the former Minister?

Ms SANDERSON: I would characterise the question slightly differently because I think each person to whom the resolution is directed has an obligation to return the documents that were in their possession, custody or control within the terms of the resolution. So if the former Minister's office had returned documents

to the department, as it should, it is the department's obligation to return those documents in response to the resolution. The question as I would characterise it is more, is there any ongoing or residual obligation on Minister Macdonald, as the outgoing Minister who is resigning from the ministry before the return is due, to make any return?

The Hon. JEREMY BUCKINGHAM: Is there not any responsibility of the Department of Premier and Cabinet to provide those documents if they have been returned to State Records? Surely the documents should be coming from a number of sources—from the department but also from the Department of Premier and Cabinet if they are under the care, custody and control of the Department of Premier and Cabinet in terms of them being in State Records?

Ms SANDERSON: No, I do not think State Records are under the care or control of the Department of Premier and Cabinet. If the Minister had an obligation to make a return in spite of his departure from the Ministry, that obligation would stand as an obligation of his not as an obligation of the Department of Premier and Cabinet. If the Minister had distributed documents in his office as required then the relevant documents should have been in the department or, if the Minister had decided they were State papers but were not departmental papers, they should have been in State Records.

The Hon. JEREMY BUCKINGHAM: Then who is responsible, therefore, for documents in State Records?

Ms SANDERSON: There is no call for papers from State Records.

The Hon. JEREMY BUCKINGHAM: So that is just a gap? If the documents are sent to State Records the call for papers will not find them if they are stored there?

Ms SANDERSON: If the documents are not in the possession, custody or control of any of the persons who are making returns to orders, they should not be caught and I anticipate that they would not be caught.

The Hon. JEREMY BUCKINGHAM: And your view is that documents held by State Records—it should specify in the call for papers that all documents in the care, custody and control of State Records in relation to a particular matter? It would have to state that for those documents to be retrieved?

Ms SANDERSON: I hesitate because I do not think that would be a very good course. As I understand it, State Records are massive. I would not like to speak for their capacity to respond to the number of Standing Order 52 resolutions in the time available, particularly when they are unlikely to have any sort of subject matter knowledge of the contents documents. The issue it seems to me here, apart from understanding why the department did not return documents seen to be in its possession, custody or control, I think the issue and control about the former Minister Macdonald's papers really only arises if any papers were given to ICAC that were not given to the Legislative Council that were not available to the department. I could not see from looking at the matrix that anything fell into that category but I do not know specifically who the various named individuals are or what positions they held. I am afraid I am making some assumptions in looking at that table.

The Hon. JEREMY BUCKINGHAM: In your role as General Counsel, when there is a return with a cover note from each department, do you play any role in reviewing that, having a look at it to make sure that you believe it to be a complete return? Was that the usual practice?

Ms SANDERSON: I did not do that and I would not do that now even if I was still in the role and even in light of the issues that have been identified here. I say that because in my opinion it would not be possible to identify that things were missing other than copies of my own correspondence that I sent advising of the Standing Order 52 resolution. My recollection is that most people, perhaps all people, did manage to include those in their returns. It is very difficult when they are not your documents. In my position I often had no involvement in the particular subject matter. If I looked through documents I would not know that something was not there that should be there and the only possible view I might form is to say why have they included this document, it is not clear to me that this is within the resolution. In a sense, the course I would be looking at, a finite set of documents that have been produced. My only possible input could have been to question how broad the production was rather than to identify that it was not sufficiently broad.

The Hon. JOHN AJAKA: In other words, remove a document instead of including a document?

Ms SANDERSON: That would be a possibility, and that is not a role I would like to take. If a resolution called for papers on a subject matter, the people from the relevant agency or Minister's office who had carriage of that matter are far more likely than I am to know if the document falls within those terms or it does not. If all I can do is propose that things be excluded, I would have been, and would be now, highly reluctant to play that sort of part.

CHAIR: We had some further material from ICAC beyond the matrix. That shows that the ministerial emails were produced to ICAC by the director general of the Department of Premier and Cabinet on 22 December 2011. It would seem, if we apply the terms possession, custody or control, or similar words, the current director general had the possession of the ministerial emails of Mr Macdonald, and one suspects that at all material times the Department of Premier and Cabinet, after Mr Macdonald was defenestrated, had possession, custody or control of those emails. If that is the case, we do not have to worry about State Records, because Mr Eccles produces them, actually in the control of the Department of Premier and Cabinet?

Ms SANDERSON: I do not know whether that is the case or not and I do not know under what powers or what terms the ICAC obtained material from the Department of Premier and Cabinet. I was long gone by that stage. I do not know.

The Hon. TREVOR KHAN: Sure, I accept that. It is a section 22 order and people would go out of their way to comply with a section 22 order from the ICAC. But I tell you there is evidence before this Committee that the email system operated by the Minister's office was essentially under the stewardship of the Department of Premier and Cabinet. The emails were there. In a sense we are left with this problem. Once his office is shut down—we are just dealing with ministerial emails—the only source of those emails became the Department of Premier and Cabinet?

Ms SANDERSON: That should not be the case because the Minister, the former Minister, is under an obligation to provide any papers that are State papers, either to the department or to State Records or, if they are Cabinet papers, to return them to the Cabinet secretariat.

The Hon. TREVOR KHAN: But why does that absolve the Department of Premier and Cabinet of its obligation under the call for papers? If you got a subpoena from a court, you would well know that if you fail to comply with that because you knew that somebody else in the room next door was going to give up the papers, you would not have a sensible excuse to go before a justice and say, "I knew my friend next door was supplying the documents." You have not complied with the direction you have received from the court to produce documents, have you?"

Ms SANDERSON: I think there is quite a strong distinction between the subpoena process and litigation, compared to Standing Order 52.

The Hon. TREVOR KHAN: I am interested to hear what that is?

Ms SANDERSON: I think when you are talking about litigation, you are talking about a judicial process, and you are talking about the opportunity to challenge the terms of subpoenas, for example, to challenge your obligation to comply with them and to be legally represented to contest the matter and to have the matter determined by an independent judicial officer. Standing Order 52s are obviously something that happens in a political environment. They are, as I think the court has made clear in the Egan and Willis and Egan and Chadwick litigation, part of responsible government in the sense that Houses of Parliament can only hold the Executive to account if they know what the Executive is doing.

Standing Order 52s are a way of obtaining information about what the Executive Government is doing. But they do not happen in a judicial environment. They are not drafted with the same level of precision. They are not open to clarification through a court process or to contest through a court process about whether they are reasonable or burdensome or anything else. Can I say, nor should they be, in my opinion, because, as the courts have made clear, it is a matter for the relevant House of Parliament to decide what is reasonable and that is not justiciable and it should not be justiciable and that is not a matter on which the courts can express an opinion. But it does mean that the two systems operate very differently.

Punishment for failure to comply, while it is contempt in either case potentially, in the case of Standing Order 52s, punishment for contempt of the House is an exercise by the Legislative branch of judicial power but it is not subject to any sort of judicial oversight or judicial scrutiny, appeal or review or anything else. So

Standing Order 52 happens in the political context, not the legal context and that is a distinction between how you deal with subpoenas and how you deal with Standing Order 52s.

To try to return to the point about the Department of Premier and Cabinet's role, as I said, I do not know exactly what the position was. It was not something that was handled in the General Counsel division. I do suspect that, had it been suggested that the Department of Premier and Cabinet had, in a sense, unfettered access to the email accounts of all the Ministers and their ministerial staff, in the sense that the department considered that it had possession, custody and control of those documents and could deal them as it wished, that that would have caused considerable concern for at least some Ministers.

CHAIR: It probably would have caused concern to Mr Macdonald.

Ms SANDERSON: Possibly, I cannot speculate on that. But in terms of ministerial officers and the way they operate, the material that deals with how they handle documents recognises that some of the material in their offices will be party political material, for example, and some of it will be personal. To think that if the department was actually treating that material as though it belonged to the department, rather than to the Minister's office, would probably not be a particularly good thing to do, or at least certainly not without careful consideration and debate. And it is certainly not clear to me that in this situation it should have been necessary for the Department of Premier and Cabinet to go down that path.

CHAIR: Because, in your view, the department should have produced the documents. Is that why?

Ms SANDERSON: I do not understand why they did not but to the extent that the documents were in the department, one would have expected that the department would produce those documents.

The Hon. JOHN AJAKA: Since they were produced subsequently?

Ms SANDERSON: It is difficult to know, in terms of if the department has produced documents to the Independent Commission Against Corruption [ICAC], as I indicated, the terms on which the ICAC sought the documents and the powers that they used might result in a different set of documents being identified, but it certainly raises the question, fairly and squarely, why were they not found the first time?

CHAIR: If you have an email that has "Mount Penny" in its subject line, like the emails of 9 May 2008, for instance, you are hard pressed, are you not, to mount an argument that they are not caught by Standing Order 52. You know, a briefing note on Mount Penny which was prepared at that time, it is almost inconceivable, if they had turned their mind to it, that somebody would not come to the view: That is caught by Standing Order 52. That would be fair, wouldn't it?

Ms SANDERSON: As I understand from Bret Walker's opinion, he has advised that many of the documents should have been produced. He indicated that he was being fairly conservative or generous to the department, if you like, in how he approached the matter in saying that some of them were not, on their face, caught by the resolution. I do not know why the department did not find them but, had they looked at a document with "Mount Penny" in the subject line, it is difficult to understand how you could have reasonably formed a view that that was not caught by the Standing Order 52 resolution.

The Hon. JEREMY BUCKINGHAM: In your time as General Counsel, how many calls for papers did you have to administer or oversee?

Ms SANDERSON: From recollection, I was appointed first as Deputy Director General, including responsibility for Legal Branch, in mid 2002. So I dealt with all Standing Order 52s from then until when I departed at the end of 2009.

The Hon. JEREMY BUCKINGHAM: Scores of them?

Ms SANDERSON: There seemed to be an awful lot of them but I do not have a number.

The Hon. JEREMY BUCKINGHAM: In that time, were there any Standing Order 52s which were resolved that, in effect, captured a ministerial change? Had this issue ever come to light before? Were there any Standing Order 52s that had been resolved by the House which dealt with multiple ministers?

Ms SANDERSON: I do not recall any other occasion where there was a relevant change in a portfolio between the passing of the resolution and the return of papers. Obviously, there were a number of resolutions where the documents sought were historical, in the sense that they predated the current Minister's appointment. That raises different issues.

The Hon. JEREMY BUCKINGHAM: That is the issue I am getting to. In those instances, who retrieved and presented those documents? Was it only the department or was it the Minister?

Ms SANDERSON: That would have to depend, first and foremost, on who the resolution identifies in the call for papers. In those circumstances, if the matter is completely historical, it is perhaps unlikely that any documents will be in the Minister's office because they should all have been returned to the department. If the matter was historical but is continuing to be a live issue, then it may well be that the Minister's office had some papers but the bulk of the papers may be in the department.

It is really, in many respects, arbitrary as to where the papers are because it is a matter of timing. Documents move between departments and Ministers' offices quite a bit for advice and sometimes, if a department is advising on an issue that has been running for some time, there will be all sorts of older material attached to an updated brief. If the resolution happens to arrive at a time where that document is in the Minister's office, that is probably where it will be produced and the department may produce copies, if it has electronic copies, of the same material. If, in fact, at the same time the Minister's office has dealt with the brief and sent it back to the department, it will be the department that produces the document.

The Hon. JEREMY BUCKINGHAM: Should it not be both?

Ms SANDERSON: Not if it is no longer in the possession, custody and control of the Minister's office.

The Hon. JEREMY BUCKINGHAM: But it is conceivable that there would have been Standing Order 52s where the Minister's office and the department were doing searches of historical records, State records, to find documents of relevance and that were caught by the resolution of the House?

Ms SANDERSON: I do not think they should have been searching State Records, because documents, once they are in State Records are no longer in the possession, custody or control of the relevant Minister or the department.

The Hon. JEREMY BUCKINGHAM: Who are they with?

Ms SANDERSON: They are with State Records and they have been archived and indexed and provided to State Records. You would not expect matters of current interest to have been sent to State Records for archiving, from a departmental point of view, because you keep those documents more readily available to you if you are likely to need them.

The Hon. GREG DONNELLY: Casting your mind back in the role you had at the time, if a Standing Order 52 was placed by the House on the Department of Premier and Cabinet—so on the department itself—was there a specific procedure in place which contained the set of steps to be followed to meet that order?

Ms SANDERSON: I do not recall there being anything in the nature of a procedures manual, for example. But all Standing Order 52s were coordinated in Legal Branch, for which I was the relevant responsible Deputy Director General. Legal Branch, from memory, in my time had a maximum of 14 people. The lawyers in Legal Branch were all senior lawyers and they had developed, over the course of handling Standing Order 52s, a series of standard precedents such that there was, in fact, a procedure to be followed in the sense that when the Legislative Council advised of the passing of a resolution, Legal Branch would identify who was named in the resolution and prepare the necessary letters and memoranda, which were in standard form, and send those out. When the returns came in, Legal Branch would check that the returns were there and prepare the briefing up to me with the standard letter of return back to the clerk. The additional step, for which there were again standard instructions that were used is, I think, focusing more on your question when it is in the Department of Premier and Cabinet itself—

The Hon. GREG DONNELLY: I want to distinguish, if I can, two things: One, which I have not come to yet, is the overarching coordinating role, to the extent it existed, of the Department of Premier and Cabinet over Ministers and their officers and departments, over Standing Order 52s that had been applied to

them. That is separate and I want to come to it in a moment. But with respect to standing orders directed to the Department of Premier and Cabinet itself, you are not aware that there was a procedure that had to be followed secreted in a manual, a document or a guideline somewhere?

Ms SANDERSON: There was a procedure that was documented to the extent that there was a standard form memorandum that would be sent to the relevant branches of the Department of Premier and Cabinet in similar terms to that sent to other agencies, explaining that a resolution had been passed and that they need to identify all documents in their branch or division and provide those to Legal Branch.

The Hon. GREG DONNELLY: To clarify that: In what form was that? It was a memorandum that you recall that contained this checklist of items?

Ms SANDERSON: As best I can recall, there was a standard form memorandum that would be completed for a specific Standing Order 52 resolution that was directed at the Department of Premier and Cabinet. So Legal Branch would prepare a memorandum for each division or branch that was considered may hold documents and, as best I recall, that was the procedure that was followed. I do not actually now recall whether those memoranda came to me. They might not have, they might actually have been signed off by the director of Legal Branch, given that they were, in a sense, branch-to-branch communications, rather than from the department to a Minister or from the department to another department.

The Hon. GREG DONNELLY: But presumably, at a quite senior level there would be a signing-off with respect to the request that had been sent out and returned inside the department, that those matters had been addressed before the material was passed back to the House?

Ms SANDERSON: As best I recall, yes.

The Hon. GREG DONNELLY: In regard to, if I could use this phrase, the coordinating role that the Department of Premier and Cabinet played with respect to Standing Order 52s specifically placed on Ministers and their departments, was there a procedure for that, separate from the one that we have been talking about? In other words, a procedure that the department was expected to follow when carrying out this coordinating role, to ensure there was a return back to the department of what was being requested from the standing order?

Ms SANDERSON: There was a procedure that I, probably wrongly, started outlining to you, in answer to the last question when you were more interested in focusing on the process within the Department of Premier and Cabinet. So that was when there were the standard form memoranda and the correspondence to other departments.

The Hon. GREG DONNELLY: So that was an intra-department exercise?

Ms SANDERSON: That is between departments and it is also the memorandum to chiefs of staff and Ministers. That sets out the process and what is required of them. There was no means for Premier and Cabinet to assess the adequacy of any searches, as I outlined earlier.

The Hon. GREG DONNELLY: I understand that.

Ms SANDERSON: But there was the process of the standard form material that had been developed to explain to people what it is they had to do to comply. That was completed when a Standing Order 52 resolution was received from the Parliament. It was completed for each relevant department and Ministers' office and submitted for my signature to get the process underway and to tell them what they needed to do.

The Hon. GREG DONNELLY: Part of what we are endeavouring to do with this inquiry is to look forward and make some recommendations for consideration to hopefully prevent a recurrence of a matter like this. Do you have a view that there is a need to specifically have in place some procedures with quite a high level of specificity that outline what needs to be done, first of all by the Department of Premier and Cabinet and then at the level of the departments, about how to deal with Standing Order 52 claims?

Ms SANDERSON: My view at the time I was deputy director general was that the procedures were adequate. I have not seen anything since then that causes me to think more is needed, but I have to say that the gap at the moment is in understanding why the documents that were not found were not found. In a sense, it is difficult to speculate, without knowing why they were not found, as to whether a different procedure would have

caused them to be found. There is a risk, it seems to me, in being more specific or more prescriptive in that you may end up creating more problems if you are trying to specify a particular procedure that may work for one department but not actually be relevant to how another department keeps its records.

We are dealing with a situation here where Standing Order 52s can be directed to Ministers' offices and departments. There is a range of ability and experience across Ministers' officers I think particularly. I mean, one would expect the departments would have suitable people in place who could handle these things, but there is a range of experience and understanding. You are not necessarily dealing with legally qualified people who are going to understand a sort of court discovery process. As I said earlier in my evidence, I can recall in a general sense many occasions on which ministerial staff have come to me and effectively said, "I have received this memo from you. What does it mean? What do I do?" Making it longer and more complex in a sense is unlikely to avoid any problems.

But I feel I am saying that in a bit of vacuum, because until you actually know why these particular documents were not found it is difficult to know whether that is a general problem or a specific problem here, or whether any steps could or should be taken to avoid it. If it turns out to be something of a one off, as one would hope it is, then my experience of the existing procedure was that it was adequate and was already fairly taxing and demanding on some people in terms of understanding what was required of them.

The Hon. JENNIFER GARDINER: I will put this question on notice in deference to the time. Following up on that last point about when ministerial staff came to you for advice, you indicated earlier to Reverend Nile that you had a standard reply, if I can put it that way. Would you mind providing that to the Committee on notice? What would you normally have said to a ministerial staffer when they came to you in those circumstances?

Ms SANDERSON: If you would prefer that I take that on notice I am happy to.

The Hon. JENNIFER GARDINER: I am just looking at the clock.

The Hon. MATTHEW MASON-COX: You were saying that you do not know which date is the relevant date with a Standing Order 52; the date it is actually passed by the House or the date that the return is lodged in terms of the documents described in that Standing Order 52, if there is not a prescribed period of time in the order. Surely the relevant date must have been a settled issue in relation to Standing Order 52s to be able to advise departments on how to respond?

Ms SANDERSON: The issue that I am saying I am not aware of the answer to is who is the Minister, or if the person who was the Minister at the time the resolution was passed ceases to be the Minister by the time the return is due, what obligation, if any, does that Minister have to make a return? That is the question that I am saying arises on the timing.

The Hon. MATTHEW MASON-COX: You never turned your mind to the answer to that question?

Ms SANDERSON: I do not recall it actually arising in any other case.

The Hon. MATTHEW MASON-COX: When did you or your department send out the memorandum to Mr Macdonald's office after the Standing Order 52 had passed on the Thursday? Do you know when that came through?

CHAIR: They sent it on the Friday.

Ms SANDERSON: I think it is reproduced in the earlier report. The department's procedure was to do it as quickly as possible, obviously, because there is limited time to respond.

The Hon. MATTHEW MASON-COX: That is right. It went on the Friday. The Minister was decommissioned on the Sunday and then you were aware that no return came from the Minister's office. That was the course of events, correct?

Ms SANDERSON: I think I said earlier I am not certain now that I turned my mind to the fact that there was no return. I agree with you that there was no return; I am not sure that I was particularly conscious of it at the time.

The Hon. MATTHEW MASON-COX: Essentially your evidence is that there were no explanations as to how to handle these circumstances in the department at the time?

Ms SANDERSON: I am confident that I did not turn my mind to it and I am confident that I was not asked about it, because if I had turned my mind to it or if I had been asked I would have pursued an answer and I would know that answer now because it seems to me, as a lawyer, that it is an interesting question. The fact that I do not know the answer makes me absolutely certain that it is not a question I have pursued.

The Hon. JEREMY BUCKINGHAM: Why was a memorandum sent to Mr Primrose?

Ms SANDERSON: On my part I do not recall my thinking at the time, but I suspect I signed it because it was sent up to me by legal branch to be signed. The thought that legal branch put into producing it, I do not recall if they asked me if they should or if they initiated it themselves. I do not know now whether in fact Minister Primrose should have been required to make a return, given the questions that have been raised about the timing and which Minister has what obligations.

I do not think the department or the executive in general could be faulted for over-returning on a Standing Order 52, if you like. For the abundance of caution, because the Minister had the same ministerial title, I do not think it could be said that it was somehow a negative in terms of the executive's accountability to the Legislative Council to ask another Minister to make a return. But I must say, sitting here now, I am not sure that that was actually necessary by the terms of the resolution.

The Hon. JEREMY BUCKINGHAM: But it was done?

Ms SANDERSON: It was done, yes.

The Hon. JEREMY BUCKINGHAM: And you would assume that someone in that legal branch must have turned their mind to the fact that Mr Macdonald had gone, been decommissioned. There was no memo sent or no briefing provided to you or anyone else that you had better send another memorandum out because that had occurred?

Ms SANDERSON: No, but I am sure that there would have been a brief come up from legal branch that said that there has been a change in the Minister, there is a Minister for Mineral Resources, there is an outstanding Standing Order 52, we should send it to him as well and I would have signed that. What I am saying is I do not recall, and I am quite confident that it was not raised, as to specifically whether or not that was necessary, whether it was appropriate, whether it had implications for Minister Macdonald's return or the absence of a return.

The Hon. JEREMY BUCKINGHAM: That brief or that email, if it existed, should have been included in the Standing Order 52.

Ms SANDERSON: If there was one it should have been in the Premier and Cabinet return.

CHAIR: Thank you for giving your evidence. As previously indicated, the transcript of your evidence today will be confidential. I think I can say that at this stage. After reviewing the transcript the Committee may decide at a later date to make some or all of your evidence public. Could you please indicate if there is any evidence that you have given today that you would specifically request remain confidential?

Ms SANDERSON: No, there is none.

CHAIR: My understanding was that you were not as concerned about this matter being in public as perhaps some of our other witnesses have been. Nevertheless, we will send you the transcript and give you the opportunity to review it before we make any final decisions.

Ms SANDERSON: I am grateful for the consideration, Mr Chair, but I suspect I do not have the same concerns that perhaps some other people have had.

CHAIR: We will still go through the form of it, just to make certain, in case there is something there that you reflect upon. Thank you very much for coming today.

(The witness withdrew.)

The Committee adjourned at 5.26 p.m.
