

REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

SYDNEY STADIUMS

The Hon Keith Mason AC QC

22 May 2018

The claims of privilege

On 15 March 2018 the Legislative Council called for seven categories of documents in the possession, custody or control of the Department of Premier and Cabinet (“DPC”), Infrastructure NSW, the Office of Sport, Sydney Olympic Park Authority, Sydney Cricket and Sports Ground Trust (“the Trust”), Venues NSW, the Minister for Sport, and the Minister for Transport and Infrastructure.

In response, several boxes and bundles of documents were lodged with the Clerk of the Parliaments accompanied by indexes and submissions. Privilege was claimed over some documents on grounds that were developed in subsequent submissions. The validity of some of the claims was disputed by the Hon Adam Searle MLC in a series of letters on grounds that were also developed in subsequent submissions. Annexed to this Report is a list of the various submissions and the submissions themselves.

In accordance with Standing Order 52, the President of the Legislative Council appointed me as the independent legal arbiter to evaluate the claims.

At my request, Mr Searle’s letters were provided to DPC with the invitation to make any submissions in response and to consider whether the claims were still pressed in full. This established process has limited the matters in dispute to a degree. In some areas this has produced belated consensus on key issues. In others, differences of principle have emerged or sharpened, not that it will be necessary for all of them to be “resolved” in this Report.

At the end of this Report I offer some procedural suggestions that may hopefully assist for the future.

I have examined the documents still in contention.

The assistance of the Clerk, the Deputy Clerk, Christine Thai, Monica Loftus and Liz Clark is gratefully acknowledged.

The role of the independent arbiter and “privilege” under the Standing Order

Mr Searle’s letter of 23 April 2018 and Annexure C to the letter from Infrastructure NSW dated 4 May 2018 discuss the leading cases concerning the power of the House to enforce its call for documents and to regulate what is done with them. I commend them to the consideration of the House.

My role is narrower and it is confined to “evaluation and report” as to the “validity” of “privilege” claims in the context of a return of documents. As indicated previously (*WorkCover Report*, p 3; *WestConnex Report*, pp 5-6), the task proceeds on the basis that the Executive arm of government has, by submitting to the call for papers, accepted (however unwillingly) that they represent or at least include information reasonably necessary for the proper exercise of the Parliamentary arm’s functions. It is not my role to endorse or dis-endorse that situation.

This said, “privilege” is a difficult concept to grasp in the present context. Understanding the collective mind of the House in drafting the Standing Order presents more than the usual difficulties when it is recognised that the precursors of the Standing Order were framed **before** the decision in *Egan v Chadwick* (1999) 46 NSWLR 563 (“*Chadwick*”). Briefly, *Chadwick* holds that public interest immunity and legal professional privilege offer no basis for the Executive to resist a call for papers that are “reasonably necessary for the proper exercise by the Legislative Council of its functions” as expounded in *Egan v Willis* (1998) 195 CLR 424 esp at 451-3. Documents that reveal the internal deliberations of Cabinet are in a different category, but they are rarely sighted in the disputes presented to independent legal arbiters under the Standing Order.

Whatever the true meaning of “privilege” under the Standing Order, the consequence of the House accepting the arbiter’s reported evaluation that privilege should be afforded to a document will be that the Executive’s claim of privilege over tabled documents precludes Members from wider dissemination, for example by showing the documents to non-Members or from referring to their contents in debate, unless the House gives specific permission to do so. Recognising this as the likely endpoint of the arbiter’s role hopefully focuses everyone’s attention and it offers a purpose for the whole exercise. But it does not in itself identify what makes a “valid” claim of privilege with respect to documents already in the control of the House.

My current understanding of the role assigned to the independent arbiter under the Standing Order and of the meaning of “privilege” in the context of that Order is set out the *WestConnex Report* and the *Greyhound Welfare Report*. I have, on occasion, discerned a public interest in restricting the public dissemination of particular information in tabled documents and have reported accordingly. I have placed the onus of persuasion on those arguing for privileged status.

This exercise has not involved me acting as a delegate who purports to exercise the constitutional functions of the House, because my evaluation has no immediately operative effect and it is presented to the House for it to accept or reject. Nor has my role directly involved me in determining whether the House really needs unrestricted access to disputed documents. That would be to confuse a factor relevant to my evaluation with the narrower task I have been set.

According to the Office of Sport and Infrastructure NSW, in very helpful supplementary submissions that endeavour to engage with the central issue of principle, the independent arbiter should ask in effect:

Is disclosure or release (beyond Members) of the information, over which privilege has been claimed and disputed, reasonably necessary for the proper exercise of the Legislative Council’s functions?

This, with respect, might be a workable solution. It may even be what the House had in its collective contemplation when crafting the Standing Order. But, until persuaded otherwise, or directed by the House otherwise, it does not represent the meaning that I discern in this (frankly) difficult provision. Reporting an opinion as to the “validity” of the Executive’s persisting yet disputed claim of privilege is not the same as reporting an opinion on whether dissemination beyond Members is reasonably necessary for the House’s proper functioning. The House should be taken to have decided its need for the papers when calling for them and, as indicated, it is not my role to endorse or dis-endorse this situation. Nor do I consider myself any more entitled than the Executive to require Members to show their hands in advance as to their several, intended uses of the information in the disputed documents (see *WestConnex Report*, p 9). Rather, consistently with the language and context of the Standing Order and with the principles stated in *Egan* and *Chadwick*, I am directed to address the narrower question of whether some legal basis for privilege does apply to which the processes of the House should conform as a matter of obligation, albeit that the House is ultimately judge in its own cause given that it has secured control of the documents.

I am aware of no case law that is directly on point. But *Egan* and *Chadwick* throw very helpful light on the reasons why the House has a legitimate need for access to a wide range of information; and why “traditional” applications of the common law rules of privilege in the areas of public interest immunity and legal professional privilege do not justify refusing a call for papers. In my view, these principles also inform (but do not control) the arbiter’s task. As I read the various submissions and the practice of past arbiters, no one contends (post-*Chadwick*) that claims invoking public interest immunity or legal professional privilege are to be rejected summarily by the independent arbiter. Nor are they to be accepted summarily either. As submitted by Infrastructure NSW (letter 4 May 2018, Annexure C, p 17), the Standing Order “appears to recognise that at least *some* form of ‘privilege’ may be validly asserted by the executive”.

I agree with the Office of Sport and Infrastructure submissions that “constitutional” principles inform questions as to the “validity” of disputed privilege claims that are still pressed notwithstanding the delivery of the papers into the control of the House. These principles help explain why the House should remain sensitive to privilege issues but they also explain why what I have dubbed a “latitudinal approach” to unrestricted access is apposite. I recognised these factors in my *WestConnex Report* (see pp 8-9). Both “sides” in these matters urge differing conceptions of the gravitational pull of (a) “traditional” privilege principles operating in a non-parliamentary context; and (b) “traditional” models of unrestrained parliamentary access to information in its control.

The Office of Sport has drawn my attention to the types of factors that have influenced the Australian Senate in its informal approach to similar issues (letter 4 May 2018, pp 22-23). It also propounds some working tests (letter 17 May 2018, pp 4-5). Other agencies have taken a similar approach (see Infrastructure NSW 4 May 2018 and Annexure C, pp17-18). Mr Searle points to aspects of the “public interest” that need to be borne in mind and balanced both as supporting and limiting the scope of any enduring privilege. He has suggested that there are some difficulties with the abovementioned working tests (see letters dated 14 May 2018 re Office of Sport and Infrastructure NSW). Mr Searle also suggests (and this I readily accept) that *some* assistance can be drawn from the small-“c” constitutional principles discussed in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52.

I am grateful for such guidance, noting that the various submissions attempt to address the core issue at different levels of generality. None of these approaches offer a truly bright line or yardstick. Even allowing for the difference between a curial and a parliamentary context, Mr Searle is, with respect, in good company in pointing to harm to the public interest as an ultimate touchstone (see *Sankey v Whitlam* (1978) 142 CLR 1 at 38 per Gibbs ACJ, 56 per Stephen J). But the High Court judges also recognised that any appeal to “public interest” draws in a number of competing factors and that any decision-maker should pay attention to past experience and analogous cases.

Given that everyone in the present context is working in a field with no directly applicable case law for guidance, I am more than usually anxious to avoid stating definitive tests as an academic exercise in constitutional law. The House is free to accept or reject any arbiter’s evaluation as to the “validity” of any disputed privilege claim without necessarily endorsing his or her reasoning. I would expect any arbiter to remain open to persuasion and to have regard to such “jurisprudence” as emerges from earlier reports and the manner in which they were received by the House.

The House has undoubted power to take *additional* measures to prevent disclosure of confidential information where that is not in the public interest. I have occasionally made recommendations about such matters, while at pains to distinguish them from what is reported on the topic of privilege *per se*.

The present dispute arises in the context of the government’s decision to fully redevelop Allianz Stadium and refurbish ANZ Stadium announced in March 2018. That announcement included reasons and information about likely costs. A DPC document published on 29 March 2018 (“ANZ refurbishment to save taxpayers \$500 million”) outlines some of the key drivers of the proposal and directs readers to the Infrastructure NSW website for summaries of both business cases. Questions about the need for and cost of these very substantial projects have already been raised in and out of Parliament.

Claims of privilege based on public interest immunity and “commercial-in-confidence”

Most of the still disputed documents fall under these overlapping rubrics. Some of the submissions about them appear to rehash matters resolved in the two leading cases (*Egan* and *Chadwick*) and/or discussed in sections of my earlier Reports that have not been challenged.

Subject to the matters highlighted below, I would reject these claims for the reasons that follow. Those reasons should be read against the background of the fuller discussion in the *WestConnex Report*, esp pp 10-13.

- (i) *Memorandum of Understanding between government and (national) rugby league entities and documents summarising its financial terms*

Because of the massive attention given to this in the submissions I shall separately address the claims touching the Memorandum of Understanding dated 24 November 2017.

Privilege was claimed by the Minister for Sport, the Office of Sport (pp 5-6) and Venues NSW (letter 19 April, attachment A; later Submission 5.7-5.15; and Supplementary Submission under cover of DPC letter of 15 May 2018). There are supporting letters from National Rugby League Ltd and various law firms. Mr Searle addressed some of the later iterations of these claims in his letter to the Clerk dated 11 May 2018.

It is asserted that disclosure of the documents would have the potential to harm the Rugby League by enabling its competitors to discover the value it places in negotiating like venues. Disclosure is also said to have the potential to harm Government in its own negotiations with other “content providers” or venue operators, thereby distorting the “venues market”. The bases of the claim and of Mr Searle’s objections to it have undergone substantial elaboration and refinement. This in itself is not a criticism. But it has delayed this Report.

The Supplementary Submission from Venues NSW received on 15 May 2018 added a lot of new material and threatened to set off another round of countering submissions from Mr Searle. A more fortunate consequence was that it revealed (to me at least) that there is more than one version of the critical document before the House. The versions returned by the Minister and other agencies except for Venues NSW have Schedule 2 blank (or possibly redacted). I am not implying criticism, but merely explaining why the vigorous passage of arms from all agencies and Mr Searle about the privileged status of the MOU made little sense to me until I came upon the complete version tabled by Venues NSW.

Schedule 2 is designed to contain the “ALRC Minimum Contracting Terms” which are described as the “key commercial terms” (cl 5.3 (a) (iv)). Only the Venues NSW version (0087) and a handful of documents prepared by Paul Doorn dated 21 November 2107 (00076, 00077, 00078, 00079, 00080) set out the specific details of proposed hiring terms extending well into the future.

In my evaluation, the information in the (incomplete) MOU is not relevantly privileged. The MOU records the level of proposed government investment in nominated stadiums; the Rugby League’s intentions regarding ticketing, stadium membership, merchandise etc; and the Rugby League’s commitment to hosting particular events. The arrangements which are documented, subject to contract, have been largely disclosed in the Premier’s announcements which refer readers to other documents outlining the business case. The feasibility and desirability of the projects and the “business models” they are said to embody are likely to be debated in Parliament, if this has not already occurred. The provenance and costing of the proposals are key elements for parliamentary oversight. The “commerciality” of the broad arrangements (to government at least) appears to me to be at the heart of the matters of interest to parliament. The scope of intended expenditure is very large.

I would refer the House to the approach that I adopted with reference to similar claims in the *WestConnex Report*, pp 10-13. I there recognised (see pp 11, 12) that specific information could attract privilege where its disclosure could compromise the financial interests of taxpayers, including where it might impact adversely upon “ongoing commercial negotiations”. But general concerns about “methodology”, options, and approaches to costing were seen by me to fall into a different category. Of course, every claim has to be evaluated on its individual merits. Merely because commercial matters are involved does not exclude consideration of public interest immunity factors. But I remind myself and the House that procurement and tendering processes are repeated over and

over again in government. Oversight of their effectiveness, in general and in the specific context, is at the heart of fiscal oversight of government expenditure.

I have not overlooked submissions that suggest that **future** tendering processes and contract negotiations are anticipated. Even though it would have been possible for submissions to be provided on a confidential basis, there remains an absence of specificity in the alleged harms that “may arise” as regards the MOU without Schedule 2. I am unpersuaded that the suggested disadvantage in unspecified future negotiations outweighs the disadvantage to the House stemming from upholding the privilege. If there were to be any specific part of the document(s) beyond the Schedule 2 information that attracted peculiar sensitivity, it remains open to the House to protect its confidentiality appropriately.

When, however, it belatedly emerged that one version of the MOU contains the complete Schedule 2 and that Mr Doorn’s documents relate to that fuller version I determined to take a direct route rather than have my endeavours further delayed by inviting Mr Searle to respond to Venues NSW’s revamped submission received on 15 May. In the presence of the Clerk, and without disclosing my tentative conclusions about the incomplete MOU as set out above, I asked Mr Searle whether he still pressed his dispute over privilege relating to the complete version (Venues NSW document 0087) and the Doorn documents (Venues NSW documents 00076, 00077, 00078, 00079, 00080). By letter to the Clerk dated 17 May 2018 he indicated that he no longer did so.

This is a satisfactory outcome that I gratefully endorse especially in light of time constraints. In doing so, I make it clear that I have not had to determine the privileged status of the Schedule 2 information. Mr Searle may or may not concede it, but he is prepared to work with the information redacted.

- (ii) *Other documents disclosing the benefits of current arrangements, the possible roles of various entities in the proposed developments; the “NSW Stadia Strategy” and tendering processes and strategies*

The bulk of the remaining dispute relates to these types of documents although lack of specificity in some of the claims leaves me uncertain as to what documents are being seriously addressed beyond the un-redacted MOU and the information it contains. (I should record that I read the submissions of Venues NSW attached to DPC’s letter of 15 May 2018 as directed at this material. To put it another way, nothing in that letter has persuaded me that a valid basis of privilege extends beyond the information in the Second Schedule to the unredacted/unrestricted MOU.)

The arguments for privilege touching this material are advanced by Venues NSW, the Office of Sport and the Trust. In various ways identified in several submissions, disclosure of the documents is said to entail detrimental commercial risks touching negotiations affecting the interests of both Government and third parties. In the case of the Stadium Network Implementation Group, “governance models” relating to procurement decisions are said to be at risk of disclosure with likely detrimental consequences.

Mr Searle responds to these submissions, especially in his letter dated 17 May 2018 re Venues NSW. He demonstrates that some of the documents do not contain the type of information asserted in the

Venues NSW submission. In its submission of 18 May 2018, Venues NSW withdrew its assertion of privilege over several documents, adding by way of Parthian shot some final submissions justifying the claims still advanced.

I note that Mr Searle, in his letter of 17 May 2018 agrees to the redaction of a table in Venues NSW documents 00570-00575.

I am not persuaded that these remaining disputed documents are privileged. In my view, appropriate Parliamentary oversight requires unrestricted access to the documents. Some of the information they contain has already been shared with stakeholders and consultants in and outside government. While some of the documents may relate to the investment decisions of others, these have been obtained by government for its assessment of the project and it is therefore hard to show that parliament should be kept out of the picture. Details of existing contracts, the impact of the development work on sporting events, proposals, costings, timings, “relevant drivers”, revenue streams, unsolicited expressions of interest from third parties, governance models, anticipated returns and analyses of media coverage (to pick up some of the concepts specified by Venues NSW) strike me as the very sorts of information to which the House has a legitimate interest in retaining unhampered access. Ditto the communications in which the Trust responds to SCG members’ concerns about the impact of the redevelopment itself. Nothing specific has been put before me to persuade me that any harm to the public interest would flow from the unrestricted access to these documents within the parameters of parliamentary privilege.

On my evaluation, these principles also extend to information about the hourly rates of consultants. They are integers going to the “bottom line” of the price being paid by government. I note, however, that Mr Searle is content for this information to be redacted.

Claims asserting legal professional privilege

The Office of Sport, Venues NSW and the Trust invoke this head of privilege with respect to nominated documents. Mr Searle disputes these claims: see esp his letters of 14 May 2018 re the Office of Sport and 17 May 2018 re Venues NSW.

The Office of Sport accepts that both *Chadwick* and the analogy of Australian Senate practice show that the House may have a legitimate interest in accessing such documents. Once again, the debate between the Executive parties and Mr Searle has focussed upon the gravitational pull of the policies underlying the common law principles in the present constitutional context.

Some of the contested documents would not attract legal privilege at common law, for example those numbered 52, 54, 56, 57, 65 and 66 in Annexure B to the Office of Sport letter of 4 May 2018 (without being exhaustive). They contain no more than communications discussing the instructions for advice. Other documents do not reveal the substance of confidential legal advice, for example, document 00078 in the first Venues NSW Index which relevantly provides no more than “advice” as to which entity was intended to be a signatory to the MOU.

Nevertheless, there are some documents that Mr Searle correctly accepts as embodying information in the nature of legal advice stemming from a request from government to lawyer. Although Mr

Searle does not concede this, the same could probably be said about documents that summarise legal advice without identifying the lawyer involved.

The real question is whether this head of common law privilege is to be accepted as regards documents called by Parliament, or at least the documents tabled in the present matter. Mr Searle submits in effect (letter 14 May 2018) that the “validity” of the persisting legal privilege claim should be accepted, and disclosure should be withheld, only if it would be detrimental to the public interest to allow dissemination beyond Members. I do not read this as an argument that “public interest” in access to confidential legal advice would trump legal privilege in a “traditional” situation where such advice has been obtained by a private citizen or by government in some dealing with a private citizen. Rather, it is an invitation to factor into my evaluation the range of “constitutional” principles touching on whether a privilege claim framed by reference to “public interest immunity”, “commercial-in-confidence”, “privacy” etc should continue to be respected by the House in its handling of tabled documents. Assuming that I have understood the submission correctly, I am prepared to approach this particular field of controversy in this manner.

It may be remembered that the Court of Appeal in *Chadwick* ruled that legal professional privilege does not constitute a ground justifying the Executive’s refusal to produce documents to the House in response to an otherwise appropriate call for papers. Spigelman CJ observed (at 578 [86]) that:

“In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act.”

See also my *WestConnex Report*, pp 5-9 where I discuss how this conclusion might work itself out in the context of the independent legal arbiter’s consideration of “privilege” under the Standing Order.

The submissions presented to me on behalf of the government agencies accept that legal professional privilege does not apply directly and that the instant claim has to be addressed through the prism of “constitutional” principles: see eg Office of Sport letter 4 May 2018, Annexure C, pp 22-25. It is, however, suggested that the policy reasons supporting the privilege at common law should apply with similar force here, given that Government is entitled to the privilege in its dealings with litigants. For reasons previously indicated by me in the *WestConnex Report* and developed further below, I do not agree.

The context of the presently disputed claims is the accountability of the Executive arm of government to the Legislative arm. These two arms of what used to be conceived as “the Crown” are both concerned with serving the public interest. They were not in dispute with one another when the presently relevant legal opinions were sought. In the words of Priestley JA in *Chadwick* (at [135]):

“Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes.”

The truly legal advice embodied in the documents over which privilege is disputed before me address entirely appropriate and highly relevant matters including the Minister’s power to take administrative action under statute, avenues for legal challenge, “planning approval pathway” options and their several consequences, the impact of development upon the existing rights of Allianz and SCG members. In my evaluation, the House and its Members have obvious interest in

unhampered access to this information (subject to confines of Parliamentary privilege) unless some genuine risk of harm were demonstrated. Members may need to check the correctness of the advice. If, speaking hypothetically, there was to be some suggestion in Parliament that the advice was wrong, or disregarded, then Parliament would need access to it for that oversight purpose. In any event, absent information suggesting that there is any live contest between government and some member of the public about the legitimacy of the action proposed to be taken, I find it difficult to envisage a situation where the public policies underpinning legal professional privilege have significant application to the dispute before me. It might be otherwise if there was some threatened or pending challenge to the validity of the action taken in response to the advice concerned or if some allegedly tortious injury resulted from it **and** there was information that premature disclosure to the public might prejudice government.

It has certainly not been demonstrated to my satisfaction that rejecting the “validity” of these particular claims might inhibit candour between the government agencies and their lawyers, as suggested by the Trust (*ibid*, para 27). In addressing this presumably hypothetical submission, I am not inferring that this is the only factor relevant to my evaluation. In the public sector at least, one would expect all such communications to be candid. And one would not be shocked if Parliament wished to satisfy itself both as to the instructions given and the advice received concerning administrative action to be carried out at public expense.

I have carefully read the documents that do contain the substance of legal advice to government that have been tabled. The subject matter(s) of the advices appear to cover matters apparently of concern to the House in its call for papers. They show the steps prudently being taken by government to assess the likely consequences of proceeding with the two developments. On my evaluation, with two exceptions, none of the documents are relevantly privileged

Privilege should, however, be afforded to the following documents tabled by the Trust which relate to fairly imminent matters that concern the impact of redevelopment on third parties and discuss legal strategies for addressing them in the near future: SCG.002.001.0072, SCG.002.001.0068.

Claims based upon the privacy of individuals working for government or making submissions to government: personal and private information such as email and home addresses, passwords, “Dropbox” URLs and internal departmental file pathways, banking details, social media monitoring strategy

Certain agencies claimed privilege as to parts of documents that disclose private information of this nature (Office of Sport pp 3-5, 6-7; Infrastructure NSW pp 2-3; the Trust pp 45-47). Some of the agencies assisted the process by providing folders with proposed redactions that clearly identify what is to be withheld from public dissemination.

Before the consensus recorded below was reached I had to work my way through several documents, tagging with red stickers those which should be regarded as privileged but only in relation to the personal email and home addresses of constituents. I will leave the stickers but advise the officers to check whether all relevant documents have been identified. For both the agencies and myself this has been a fiddly and costly exercise and I make a recommendation on the subject below.

Redactions to cover these matters are appropriate to protect the public and private interests asserted and they will not impede the House in its endeavours. Redaction should also remove any discouragement stemming from privacy concerns that might inhibit members of the public from making representations to government. Public access to URLs and related “Dropbox” folders could damage the security of governmental information going well beyond the subject matter of the present dispute. I would have been prepared to report that, on my evaluation, these matters were covered by a relevantly valid privilege.

By letter dated 14 May 2018, Mr Searle agreed that personal information of individual members of the public should be redacted and that this would include postal address, residential address, telephone numbers, email address, membership numbers, bank account and/or credit card numbers and any other personal identifiers. For businesses or companies he was similarly content to see redacted bank account and/or credit card details.

Briefings supporting anticipated Parliamentary questions to Ministers

Venues NSW claims this basis of privilege with respect to various documents. Disclosure of the drafts is said to be contrary to the public interest because it “would potentially undermine the responsibility of the Minister to the House”. With respect, I fail to understand this and I do not accept it. See further *WestConnex Report*, p 13.

Three suggestions

As indicated, some aspects of the present exercise have been unsatisfactory, for me. This, despite ultimately brokering some level of consensus in the areas of personal privacy and the vigorously contested aspects of the MOU privilege. I appreciate that my appointed role does not extend to serving as a mediator. But I perceive that the “players” have not themselves always understood the limits of my role or the time pressures nominally imposed by the Standing Order. It has not really assisted me to receive lengthy, overlapping and repetitive submissions, especially those which address the function of the House as distinct from that of the independent arbiter or which rely directly upon agreements to preserve confidentiality or categories from the table to s 14 of the *GIPA Act*.

It is not always practicable for the independent arbiter to meet the time frame of seven days for reporting contemplated under the Standing Order. My decision (in the present instance) to invite the agencies to advance further submissions in light of Mr Searle’s initial letter of dispute contributed to the delay in the present matter. It was ultimately productive of assistance to me and, hopefully to Mr Searle. It cannot be assumed that this aspect of the process will be followed in future, although I would be open to suggestions from the stakeholders.

I raise for the consideration of the President and the House the following suggestions. In doing so, I am not presuming that I would be offered appointment in a future matter.

First, I would suggest that (circumstances permitting) the President might think to withhold appointing the independent arbiter until satisfied that the Member(s) disputing the claims of privilege identified in the Index and any accompanying submissions from Government have themselves identified and formulated **all** of the bases of their objections to the privilege(s) claimed and the supporting arguments. Perhaps this could be addressed in an amended Standing Order or a Sessional Order. Subject to any such Order, my preferred course would remain that, forthwith upon appointment, I would request the Clerk to forward to DPC the single submission from the Member with a request for any submissions that are **truly in reply** could be provided by DPC within a matter of days thereafter. This would not be an inflexible regime, but hopefully some of the stresses and costs of the current exercise could be avoided.

Secondly, resolving disputed claims of privilege relating to **Personal** "Private" information as identified earlier in this Report has generated a substantial waste of time and public money. The principle was addressed in the earlier *WestConnex Report*, p 12 and, to my knowledge, no one has directly challenged it since. It strikes me as inconceivable that there is any public interest in the dissemination of such information and there is a real risk of harm stemming from unrestricted disclosure of it. Members will always have access to un-redacted versions of the documents and the capacity to access such information if it is really needed.

Is it not possible for the House to frame its resolution, or the government to frame its response, so as to address this matter in a practical way? Because there is unlikely to be any serious doubt about the nature of the redacted information, might not a redacted version stand as an appropriate return (in the first instance) as regards this recurring issue? Alternatively, could the resolution calling for papers provide for the tabling of two bundles, un-redacted and redacted, that differ only as regards the non-disclosure of this truly private information?

Thirdly, might the President consider convening a meeting that included the recurring stakeholders, including myself especially if I am to continue to be offered appointment as the independent arbiter, so as to discuss any procedural matters of interest in a context separate from a particular call for papers?

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The Hon Keith Mason AC QC

ANNEXURE: LIST OF SUBMISSIONS TENDERED TO INDEPENDENT ARBITER

[C: Claimant

S: The Hon Adam Searle MLC]

Minister for Sport

C 5 April 2018; 4 May 2018; 15 May 2018

S 23 April 2018; 11 May 2018; 17 May 2018

Office of Sport

C 5 April 2018; 4 May 2018; 17 May 2018

S 23 April 2018; 14 May 2018

Venues NSW

C 5 April 2018; 19 April 2018; 4 May 2018; 15 May 2018; 18 May 2018

S 23 April 2018; 14 May 2018; 17 May 2018

Infrastructure NSW

C 5 April 2018; 4 May 2018

S 23 April 2018; 14 May 2018

Department of Premier and Cabinet

C 5 April 2018

S 23 April 2018; 4 May 2018; 17 May 2018, 18 May 2018

Sydney Cricket and Sports Ground Trust

C 5 April 2018; 6 April 2018; 4 May 2018; 15 May 2018; 17 May 2018; 18 May 2018

S 23 April 2018; 15 May 2018; 17 May 2018

SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE

ORDER FOR PAPERS – SYDNEY STADIUMS

Australian Rugby League Commission

'The Memorandum of understanding – NSW Stadia Investment and Content' (MoU) listed in the privilege schedule was entered into with the Government on the basis that the MoU, and all material arising out of those documents, were, and would continue to remain commercial-in-confidence. Clause 9.6 of the MoU provides:

"Other than expressly provided in this MoU, each party must keep confidential:

- (a) The terms of this MoU; and
- (b) All information provided by the other party, or otherwise acquired by a party, in connection with this MoU, including during any negotiation of this MoU, and must not disclose any matter referred to in clause 9.6(a) or 9.6(b) to any football code, sporting club or potential hirer."

The office of the Minister for Sport has consulted with the National Rugby League in respect of the identified document. The National Rugby League considers that the document contains commercially sensitive information which would be highly prejudicial to their interests if it were to be disclosed, they have also provided the attached letter seeking a claim for privilege to protect the confidential information.

Safety and Security Information

The other documents listed in the privilege schedule relate to safety and security information and could be misused either intentionally or unintentionally.

Reasons for privilege

It is submitted, in relation to the documents identified and indexed as privileged, that they are documents which contain commercial-in-confidence information and information in relation to security, and that the public interest in their non-disclosure outweighs the interest in their disclosure.

In support of this claim, it is submitted that such information would ordinarily be protected from public disclosure under common law or pursuant to the *Government Information (Public Access) Act 2009* (the GIPA Act).

Public interest considerations against disclosure are detailed in the table to s. 14 of the GIPA Act. That table relevantly includes the following:

1. Responsible and effective government

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- prejudice the supply to an agency of confidential information that facilitates the effective exercise of that agency's functions,
- prejudice the effective exercise by an agency of the agency's functions.

2. Law enforcement and security

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism),
- endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person, endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,
- facilitate the commission of a criminal act (including a terrorist act within the meaning of the Terrorism (Police Powers) Act 2002).

3. Business interests of agencies and other persons

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market,
- diminish the competitive commercial value of any information to any person,
- prejudice any person's legitimate business, commercial, professional or financial interests.

It is submitted that these considerations against disclosure would have application in relation to the documents which have been identified as containing commercial in confidence information and safety and security information.

It is therefore submitted that these documents should not be made public as the following detriment may arise:

1. Breach of confidentiality.
2. Prejudice current or future contractual or other relationships between Government and the private sector.
3. Discourage future dealings with Government.
4. Cause loss of commercial advantage and competitiveness within the private sector.
5. Cause detriment to private sector participants.
6. Reduce Government's ability to deliver the maximum public benefit.
7. Facilitate the commission of a criminal act.
8. Compromise the security of Allianz Stadium.



The Greatest Game of All

The Hon Stuart Ayres MP
Minister for Sport, Westconnex and Western Sydney
By email: Meghan.Senior@minister.nsw.gov.au

Dear Minister

Standing Order 52 – Legislative Council – claim for privilege

We refer to the resolution of the NSW Legislative Council passed on 16 March 2018 which requires the production of papers regarding the NSW Government's stadia policy pursuant to standing order 52 (**Order**).

We note that one of the terms of the Order seeks the production of "any agreement between the Government and the National Rugby League regarding fixtures".

The National Rugby League (**NRL**) has signed a Memorandum of Understanding (**MOU**) with the NSW Government (represented by the Minister for Sport), Venues NSW and Sydney Cricket and Sports Ground Trust which relates to the provision of NRL Grand Finals and State of Origin matches to support the NSW Government's stadia investment strategy. The MOU contains confidential commercial terms which, if disclosed, would prejudice the NRL's commercial position as a major venue hirer and would place it at a disadvantage with respect to other sports and/or hirers. Disclosure of the MoU may also impact our commercial negotiations with other venues.

We respectfully request that a claim of privilege is made in respect of the contents of the MoU in order to protect the confidential commercial information of the NRL and avoid adverse commercial consequences for our sport.

We are happy to provide further information or assistance as required in support of our request that the MoU be covered by privilege.

Yours sincerely

Eleni North
General Counsel

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NSW OFFICE OF SPORT**ORDER FOR PAPERS - SYDNEY STADIUMS****ATTACHMENT - BASIS OF CLAIMS FOR PRIVILEGE**

This submission supports the claims for privilege made on behalf of NSW Office of Sport in respect of documents which it has produced pursuant to the resolution of the Legislative Council under Standing Order 52, passed on 15 March 2018 (**Resolution**).

Legal Professional Privilege

Each document in this category falls into one or both of the following classes:

- it is a confidential document which was prepared by NSW Office of Sport or its lawyers (internal and external) or another person, or contains or records a confidential communication between NSW Office of Sport (or another person) and its lawyers, that was made for the dominant purpose of its lawyers providing legal advice to NSW Office of Sport. (This category may include documents which have been provided in confidence to a third party on the basis of a common interest, such that any claim for privilege has been maintained and not waived);
- it is a confidential document which was prepared, or which contains or records a confidential communication between NSW Office of Sport's lawyers (internal and external) and NSW Office of Sport or another person which was made, for the dominant purpose of NSW Office of Sport being provided with professional legal services relating to existing and/or anticipated legal proceedings involving NSW Office of Sport.

Public Interest Immunity

Each document in this category contains information, the disclosure of which would be contrary to the public interest, and which is therefore subject to public interest immunity as defined at common law (from time-to-time). The public interest in disclosure of the information in these documents does not outweigh the public interest in preserving the confidentiality of the information and release of the information would prejudice the proper functioning of NSW Office of Sport. A claim for public interest immunity in this category does not include a claim that a document is cabinet in confidence.

In relation to this privilege, NSW Office of Sport has considered a number of factors, including whether documents fall within the following categories:

1. the documents contain links to "Dropbox" accounts where documents are held externally to NSW Office of Sport's IT systems to allow NSW Office of Sport employees to access or share large documents to/from external consultants and colleagues. The Dropbox links are still active and can be accessed by anyone who types the address into a web browser, leaving NSW Office of Sport vulnerable to security breaches;
2. the documents contain "links" which reveal the folder pathways of NSW Office of Sport's internal IT folder structures, leaving it vulnerable to security breaches; and/or
3. the documents contain material that is protected by parliamentary privilege.

Commercial-in-Confidence

Each document in this category contains information relating to issues of commercial sensitivity, whose value would be (or could reasonably be expected to be) destroyed or diminished if the information were disclosed to the public. In relation to this privilege, NSW Office of Sport has considered a number of factors, including whether documents fall within the following categories:

1. obligations of NSW Office of Sport to preserve the commercial-in-confidence nature of material disclosed to NSW Office of Sport by the private sector including, in particular, intellectual property rights. NSW Office of Sport is conscious that publication of this information will place the providers and owners of the information at a substantial commercial disadvantage with their competitors, including in relation to existing and future contracts with NSW Office of Sport and others;
2. the relevant requirements of Government policy documents relating to procurement and tendering, including the following:

- (a) the terms of Memorandum No. 2007-01 - Disclosure on Information on Government Contracts with the Private Sector issued by the Premier's Department (Memorandum).

The Memorandum provides guidelines which are designed to clarify what information relating to the Government's contractual arrangements with the private sector should, and should not, be made public. For example, Schedule 3 of the Memorandum identifies commercial-in-confidence information which is not to be disclosed for any contract, namely:

"The contractor's financing arrangements;

The contractor's cost structure or profit margins;

The contractor's full base case financial model;

Any intellectual property in which the contractor has an interest

Any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future"

- (b) the terms of the *Code of Practice NSW Government Procurement 2005* which provides, among other things, that parties must not disclose commercial-in-confidence or proprietary information.
3. the potential for disclosure of a document, including for reasons contemplated in paragraphs 1 and 2 above, to prejudice the ability of NSW Office of Sport and/or the Government to obtain competitive tenders and prices for future projects, and/or comprehensive information in support of any tenders submitted;
4. the potential for disclosure of a document to reveal analysis, evaluation and advice relating to key issues concerning existing and proposed contractual and commercial arrangements, where such disclosure would have a significant adverse effect on the ability of the Government, and/or NSW Office of Sport, to:
 - (a) evaluate proposals received in connection with current and future competitive tenders;

- (b) negotiate contracts with tenderers in respect of those tenders; or
- (c) obtain favourable commercial terms or prices in relation to a particular contractual or commercial negotiation.

NSW Office of Sport considers that the documents which are commercial-in-confidence fall within the following categories:

1. documents evidencing the terms on which consultants were/are retained to prepare cost/benefit analyses (including business case models) in relation to the NSW Government Stadia strategy, including:
 - (a) contractor briefs;
 - (b) scopes of work;
 - (c) approvals to award contracts; and
 - (d) asset management plans.
2. documents tending to reveal the charge out rates, financial position, budgetary allocations and/or other sensitive financial information of NSW Office of Sport and/or its contractors (e.g invoices, fee estimates);
3. documents relating to the review and assessment of tender proposals received by NSW Office of Sport (such as RFQs and responses etc.);
4. documents relating to NSW Office of Sport's review and evaluation of contractor performance;
5. documents containing the proposed strategies and plans to be followed in relation to communications and announcements regarding NSW Government Stadia matters.

Privacy

Each document in this category contains documents which, if disclosed, would involve the disclosure of personal information of any identifiable private individual (including a deceased person).

Personal information subject to this category includes, but is not limited to individuals':

- postal address;
- residential address;
- telephone number;
- email address;
- membership number;
- bank account; and/or
- credit card details.

NSW Office of Sport has not made a claim for privilege on the basis of privacy in circumstances where a public servant's personal information is included in a document as a consequence of their performance of their duties or responsibilities, and no other basis for a claim for privilege exists.

ATTACHMENT - BASIS OF CLAIMS FOR PRIVILEGE

This submission supports the claims for privilege made on behalf of Venues NSW in respect of documents which it has produced pursuant to the resolution of the Legislative Council passed on 15 March 2018 (**Resolution**).

Legal professional privilege

Legal professional privilege applies where there is:

- a confidential document which was prepared by Venues NSW or its lawyers (internal and external) or another person, or contains or records a confidential communication between Venues NSW (or another person) and its lawyers, that was made for the dominant purpose of its lawyers providing legal advice to Venues NSW. (This category may include documents which have been provided in confidence to a third party on the basis of a common interest, such that any claim for privilege has been maintained and not waived);
- a confidential document which was prepared, or which contains or records a confidential communication between Venues NSW's lawyers (internal and external) and Venues NSW or another person which was made, for the dominant purpose of Venues NSW being provided with professional legal services relating to existing and anticipated legal proceedings involving Venues NSW.

Documents subject to legal professional privilege include:

- board minutes of Venues NSW to which advice from Venues NSW's solicitors is attached, and which advice was discussed at the relevant meeting; and
- documents in which the conclusions of legal advice given to Venues NSW is referred to.

These documents were created for the dominant purpose of Venues NSW being provided with legal advice and recording the substance of that advice.

Public Interest Immunity

Each document in this category contains information the disclosure of which would be contrary to the public interest, and which is therefore subject to public interest immunity. In regard to this privilege, Venues NSW has considered a number of factors, including whether documents fall within two broad categories:

1. Obligations of Venues NSW to preserve the commercial-in-confidence nature of material disclosed to Venues NSW by the private sector including, in particular, intellectual property rights and information concerning the commercial position of third parties. These obligations are supported by various Government policy documents, including in relation to tendering and procurement. Venues NSW is conscious that publication of this information will place the providers and owners of the information at a substantial commercial disadvantage with their competitors, including in relation to existing and future contracts with Venues NSW and others.
2. The potential for disclosure of a document to prejudice the ability of Venues NSW and the Government to obtain competitive tenders and prices for future projects and comprehensive information in support of any tenders submitted because:
 - (a) the document discloses the commercial position of Government;
 - (b) the document discloses the commercial or other drivers which Government considers to be significant;

- (c) the document discloses matters that might be relevant to the Government's consideration and evaluation of tenders or other procurement decisions;
- (d) the document could reveal analysis, evaluation and advice relating to key issues concerning existing and proposed contractual and commercial arrangements, where such disclosure would have a significant adverse effect on the ability of the Government and Venues NSW to:
 - (i) evaluate proposals received in connection with current and future competitive tenders;
 - (ii) negotiate contracts with tenderers in respect of those tenders; or
 - (iii) obtain favourable commercial terms or prices in relation to a particular contractual or commercial negotiation; or
- (e) the document discloses commercial policy positions of Government.

In each of these cases, disclosure of the document would prejudice Government in its present and future dealings with the private sector.

Category 1

The key example of a document in the first category is the Memorandum of Understanding between various Government entities including Venues NSW and the Australian Rugby League Commission and National Rugby League dated 24 November 2017 (MOU). Disclosure of the MOU would reveal the terms on which the ARLC/NRL had secured various rights and obligations in respect of fixtures and other key matters. The disclosure of these would place the ARLC/NRL at a serious competitive disadvantage vis-à-vis its competitors. In this regard, attached to this submission is a letter from the NRL outlining the commercial prejudice that would be suffered by the disclosure of the MOU.

Disclosure of the MOU would also significantly prejudice the Government in its negotiation with other sporting bodies regarding fixtures and place the Government at a competitive disadvantage.

Category 2

The majority of documents the subject of a claim for public interest immunity fall within category 2 above. These documents include Board minutes, submissions or other documents in which:

1. the commercial position of the Government is discussed, and the commercial objectives of the Government in relation to the NSW Stadia Strategy and the redevelopment of ANZ Stadium are made clear; or
2. financial costs or expected benefits are discussed, with a view to consideration of the proposed redevelopment of ANZ Stadium, or the NSW Stadia Strategy as a whole.

Disclosure of these documents would prejudice the ability of the Government to achieve favourable commercial terms in connection with the delivery of the NSW Stadia Strategy.

Personal Information

There are also a number of documents whose disclosure would reveal the identity of private individuals. These predominantly relate to individuals that have made a submission or other constituent communication with Ministers or other officials and the relevant responses. There is a public interest against the disclosure of such personal information. The documents in this category will be relatively easily identified.



The Greatest Game of All

Mr Paul Doorn
Chief Executive Officer
Venues NSW
By email: paul.doorn@sport.nsw.gov.au

Dear Mr Doorn

Standing Order 52 – Legislative Council – claim for privilege

We refer to the resolution of the NSW Legislative Council passed on 16 March 2018 which requires the production of papers regarding the NSW Government's stadia policy pursuant to standing order 52 (**Order**).

We note that one of the terms of the Order seeks the production of "any agreement between the Government and the National Rugby League regarding fixtures".

The National Rugby League (**NRL**) has signed a Memorandum of Understanding (**MOU**) with the NSW Government (represented by the Minister for Sport), Venues NSW and Sydney Cricket and Sports Ground Trust which relates to the provision of NRL Grand Finals and State of Origin matches to support the NSW Government's stadia investment strategy. The MOU contains confidential commercial terms which, if disclosed, would prejudice the NRL's commercial position as a major venue hirer and would place it at a disadvantage with respect to other sports and/or hirers. Disclosure of the MoU may also impact our commercial negotiations with other venues.

We respectfully request that a claim of privilege is made in respect of the contents of the MoU in order to protect the confidential commercial information of the NRL and avoid adverse commercial consequences for our sport.

We are happy to provide further information or assistance as required in support of our request that the MoU be covered by privilege.

Yours sincerely

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INFRASTRUCTURE NSW**ORDER FOR PAPERS - SYDNEY STADIUMS****ATTACHMENT - BASIS OF CLAIMS FOR PRIVILEGE**

This submission supports the claims for privilege made on behalf of Infrastructure NSW in respect of documents which it has produced pursuant to the resolution of the Legislative Council under Standing Order 52, passed on 15 March 2018 (**Resolution**).

Legal Professional Privilege

Each document in this category falls into one or both of the following classes:

- it is a confidential document which was prepared by Infrastructure NSW or its lawyers (internal and external) or another person, or contains or records a confidential communication between Infrastructure NSW (or another person) and its lawyers, that was made for the dominant purpose of its lawyers providing legal advice to Infrastructure NSW (this category may include documents which have been provided in confidence to a third party on the basis of a common interest, such that any claim for privilege has been maintained and not waived);
- it is a confidential document which was prepared, or which contains or records a confidential communication between Infrastructure NSW's lawyers (internal and external) and Infrastructure NSW or another person which was made, for the dominant purpose of Infrastructure NSW being provided with professional legal services relating to existing and/or anticipated legal proceedings involving Infrastructure NSW.

Public Interest Immunity

Each document in this category contains information, the disclosure of which would be contrary to the public interest, and which is therefore subject to public interest immunity as defined at common law (from time-to-time). The public interest in disclosure of the information in these documents does not outweigh the public interest in preserving the confidentiality of the information and release of the information would prejudice the proper functioning of Infrastructure NSW. A claim for public interest immunity in this category does not include a claim that a document is cabinet in confidence.

In relation to this privilege, Infrastructure NSW notes that the documents contain links to "Dropbox" accounts where documents are held externally to Infrastructure NSW's IT systems to allow Infrastructure NSW employees to access or share large documents to/from external consultants and colleagues. The Dropbox links are still active and can be accessed by anyone who types the address into a web browser, leaving Infrastructure NSW vulnerable to security breaches.

Commercial-in-Confidence

Each document in this category contains information relating to issues of commercial sensitivity, whose value would be (or could reasonably be expected to be) destroyed or diminished if the information were disclosed to the public. In relation to this privilege, Infrastructure NSW has considered a number of factors, including the following:

1. obligations of Infrastructure NSW to preserve the commercial-in-confidence nature of material disclosed to Infrastructure NSW by the private sector including, in particular, intellectual property rights. Infrastructure NSW is conscious that publication of this information will place the providers and owners of the information at a substantial commercial disadvantage with their competitors, including in relation to existing and future contracts with Infrastructure NSW and others;
2. the relevant requirements of Government policy documents relating to procurement and tendering, including the following:
 - (a) the terms of Memorandum No. 2007-01 - Disclosure on Information on Government Contracts with the Private Sector issued by the Premier's Department (Memorandum).

 The Memorandum provides guidelines which are designed to clarify what information relating to the Government's contractual arrangements with the private sector should, and should not, be made public. For example, Schedule 3 of the Memorandum identifies commercial-in-confidence information which is not to be disclosed for any contract, namely:

"The contractor's financing arrangements;

The contractor's cost structure or profit margins;

The contractor's full base case financial model;

Any intellectual property in which the contractor has an interest

Any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future "
 - (b) the terms of the Code of Practice NSW Government Procurement 2005 which provides, among other things, that parties must not disclose commercial-in-confidence or proprietary information.
3. the potential for disclosure of a document, including for reasons contemplated in paragraphs 1 and 2 above, to prejudice the ability of Infrastructure NSW and/or the Government to obtain competitive tenders and prices for future projects, and/or comprehensive information in support of any tenders submitted;
4. the potential for disclosure of a document to reveal analysis, evaluation and advice relating to key issues concerning existing and proposed contractual and commercial arrangements, where such disclosure would have a significant adverse effect on the ability of the Government, and/or Infrastructure NSW, to:
 - (a) evaluate proposals received in connection with current and future competitive tenders;
 - (b) negotiate contracts with tenderers in respect of those tenders; or
 - (c) obtain favourable commercial terms or prices in relation to a particular contractual or commercial negotiation.

Infrastructure NSW considers that the documents which are commercial-in-confidence fall within the following categories:

1. documents evidencing the terms on which consultants were/are retained to prepare cost/benefit analyses (including business case models) in relation to NSW Government Stadia strategy, including:
 - (a) contractor briefs;
 - (b) scopes of work;
 - (c) approvals to award contracts; and
 - (d) asset management plans.
2. documents tending to reveal the charge out rates, financial position, budgetary allocations and/or other sensitive financial information of Infrastructure NSW and/or its contractors (e.g invoices, fee estimates);
3. documents relating to the review and assessment of tender proposals received by Infrastructure NSW (such as RFQs and responses etc.);
4. documents relating to Infrastructure NSW's review and evaluation of contractor performance.

Privacy

Each document in this category contains documents which, if disclosed, would involve the disclosure of personal information of any identifiable private individual (including a deceased person).

Personal information subject to this category includes, but is not limited to individuals':

- postal address;
- residential address;
- telephone number;
- email address;
- membership number;
- bank account; and/or
- credit card details.

Infrastructure NSW has not made a claim for privilege on the basis of privacy in circumstances where a public servant's personal information is included in a document as a consequence of their performance of their duties or responsibilities, and no other basis for a claim for privilege exists.

**SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE
BY THE DEPARTMENT OF PREMIER AND CABINET**

In accordance with the terms of the resolution agreed to by the Legislative Council on 15 March 2018, and the terms of Standing Order 52, documents have been identified for production by the Department of Premier and Cabinet and the potential application of privilege to those documents has been considered. This submission has been prepared in support of the claims for privilege made by the Department.

It is to be noted that these claims for privilege are not raised as a basis to resist production of documents that are within scope of the resolution. Rather, these claims are made, pursuant to Standing Order 52(5), to identify those documents over which privilege may be claimed, in order to allow the Legislative Council to consider the claims and in support of an application that it is in the public interest that the documents should not be made publicly available.

Personal information

It is submitted that certain of the documents identified and indexed as privileged contain personal information and that the public interest in the non-disclosure of that information outweighs the interest in its disclosure.

In support of this claim, it is submitted that such information would ordinarily be protected from public disclosure under common law or pursuant to the *Government Information (Public Access) Act 2009* (the GIPA Act) or the *Privacy and Personal Information Protection Act 1998*.

The GIPA Act is most relevant to a consideration of whether or not a claim of privilege should be made in respect of information identified as personal information in the identified documents, as that Act enables people other than the individual concerned to access information held by Government.

The GIPA Act establishes a presumption in favour of disclosing government information. However, it also identifies specified public interest considerations against disclosure and acknowledges that certain information should not be disclosed. Section 9(1) provides that "A person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 (Access applications) unless there is an overriding public interest against disclosure of the information". Section 13 provides that there is an overriding public interest against disclosure of government information for the purposes of the Act "if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure".

Public interest considerations against disclosure are detailed in the table to section 14 of the GIPA Act. That table relevantly includes the following:

"3. Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- (a) reveal an individual's personal information,
- (b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*,
..."

It is submitted that these considerations against disclosure would have application in relation to the documents which have been identified as containing personal information.

Clause 4(1) of Schedule 4 to the GIPA Act defines personal information as "information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion". Clause 4(3)(b) of Schedule 4 excludes from the definition of personal information "information about an individual (comprising the individual's

name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions".

With regard to the above considerations, the Department has redacted from certain documents personal information which might cause the identity of an individual to be ascertainable. This includes names and contact information (including addresses, email addresses and phone numbers) and other identifying information. The Department considers that the disclosure of this information could reasonably be expected to reveal personal information of the individuals in question. Given the time constraints and the volume of information in question, the Department has not had an opportunity to consult with any of the affected individuals.

There may be public interest considerations in favour of release of the relevant documents as a whole. However, the Department does not consider that any particular considerations in favour attach in particular to the release of personal information in those documents. The public interest 'value' of the documents concerned is not diminished in any real way because personal information has been redacted. In weighing up the public interest considerations for and against the disclosure of personal information contained in these documents, the Department considers that on balance, the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.

In addition to the above reasoning based on the provisions of the GIPA Act, the Department considers that it would be prejudicial to the public interest and to the system of representative and responsible government in NSW for interactions between individuals and their elected representatives to be made public, in circumstances where the communication may originally have been made without any expectation that it would be published. It would be reasonable to assume that the candour of such communications may be impeded if individuals were aware that, with no notice and without consultation, not only might their correspondence be released, but also their personal information in connection with that correspondence.

The Department notes that a redacted version of each of the documents containing personal information (redacted to exclude the information identified as personal information) has been produced in the non-privileged bundle.

Legal professional privilege

It is submitted that certain of the documents identified and indexed as privileged are privileged and should not be made public on one or more of the available grounds of legal professional privilege or client legal privilege at common law or under the *Evidence Act 1995*.

In particular, it is submitted that the above documents are privileged because:

1. they were brought into existence for the purpose of:
 - a. enabling the client to obtain, or its legal advisers to give, legal advice; or
 - b. for use in actual litigation or litigation reasonably contemplated by the client and in respect of which privilege has not been waived;

and/or

2. they are confidential communications between the client or its legal advisers and persons with whom the client shares or shared a common interest in relation to the subject matter of the advice received by one of them.

The documents in respect of which legal privilege are claimed are email chains containing legal advice on certain matters, including emails concerning the operation of the *Sydney Cricket and Sports Ground Act 1978* and the application of the GIPA Act to certain documents.

It is relevant to note that legal professional privilege is a ground upon which there is a conclusive presumption of public interest against disclosure in the GIPA Act (see section 14(1) and clause 5 of Schedule 1 to the GIPA Act).

It is submitted that legal professional privilege in these documents should be upheld because the protection of legally privileged Crown documents is in the public interest.

Public interest immunity

It is submitted that certain of the documents identified and indexed as privileged contain information in relation to security matters, and that the public interest in their non-disclosure outweighs the interest in their disclosure.

In support of this claim, it is submitted that such information would ordinarily be protected from public disclosure under common law or pursuant to the GIPA Act.

As noted above, public interest considerations against disclosure are detailed in the table to section 14 of the GIPA Act. That table relevantly includes the following:

"2. Law enforcement and security

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- (c) increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism)
- (d) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person
- (e) endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,
- (f) facilitate the commission of a criminal act (including a terrorist act within the meaning of the Terrorism (Police Powers) Act 2002)"

It is submitted that these considerations against disclosure would have application in relation to certain of the documents which have been identified as privileged.

Jamie Barkley

CEO for the Sydney Cricket and Sports Ground Trust

Partial Response to Resolution made pursuant to Standing Order 52 made on 15 March 2018

Submissions on Claims of Privilege and Public Interest Immunity

1. These are the submissions of the Sydney Cricket and Sports Ground Trust (the **Trust**) in support of a claim of client legal privilege and public interest immunity in relation to certain documents returned under the resolution made by the Legislative Council on 15 March 2018.

Preliminary matters

2. The return of the Trust excludes Cabinet material and does not refer to Cabinet material.
3. As required, a return under the resolution includes an index of all documents produced which are non-privileged.
4. A separate index has been prepared for the return of documents in relation to which a claim for privilege is made. In that index, the following markers are used in relation to privilege and public interest immunity:
 - (a) 'Yes - CLP' for client legal privilege claims; and
 - (b) 'Yes - PII - CIC' for public interest immunity claims on the basis of commercial confidentiality.
5. These submissions relate to that index.
6. Where a claim for privilege is made by use of one of the markers set out above, it is intended that the submissions set out in more detail below they be incorporated in to the claim for privilege or public interest immunity.

Context

7. The Trust is charged with the care, management and control of the scheduled lands, including Allianz Stadium and the surrounding areas at Moore Park, as set out under the Sydney Cricket & Sports Ground Trust Act 1978 (NSW) (the **Act**).
8. The Trust may, pursuant to section 14 of the Act, allow the scheduled lands to be used by such persons, clubs, associations, leagues or unions on such terms and conditions as the Trust may think fit and proper for cricket, football or tennis or any other game, or for athletic sports, public amusement, or any other purpose which the Minister approves.
9. In authorising parts of the scheduled lands and Allianz Stadium to be used by parties and to deliver premier sporting content, one aspect of the Trust's responsibilities includes entering into and negotiating the terms and conditions of contractual arrangements and negotiations with sporting codes and other venue hire partners.
10. The claims for public interest immunity arise primarily from these aspects of the Trust's role.

Client legal privilege

11. The Trust obtained legal advice in relation to aspects of its care, management and control of the scheduled lands and the redevelopment of Allianz Stadium. The advice was provided by lawyers from Henry Davis York, now known as Norton Rose Fulbright, or other external lawyers.
12. It is submitted that the documents in the return of the Trust which are marked 'YES - CLP' attract client legal privilege.
13. It is submitted the documents marked 'YES - CLP' should not be made public on one or more of the available grounds of privilege pursuant to both common law doctrines and statutory regime in that they contain information referring to:
 - (a) communications to and from lawyers for the Trust and other lawyers or internal staff of the Trust for the dominant purpose of providing the Trust with legal advice; and/or
 - (b) other confidential communications prepared for the dominant purpose of the Trust being provided with legal advice.

Public interest immunity

14. The Trust submits that certain classes of documents, while relevant ought not be disclosed beyond the House on the basis that to disclose the documents would be injurious to the public.
15. The principles in relation to a claim of public interest immunity are well settled.
16. A claim for public interest immunity is determined by a balancing of competing public interests. The specific public interest that would be served by non-disclosure needs to be identified along with the risk of overriding harm to the proper functioning of the Trust. Public Interest Immunity needs to be assessed on whether public interest in disclosure outweighs harm.
17. The categories of public interest immunity that are recognised by the Court are not a closed group: *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 591; *D v National Society for the Prevention of Cruelty to Children* [1987] AC 171 at 230, section 130(4). While not a closed group, the recognised categories include:
 - (a) national security: section 130(4)(a) of the Act; *R v Khazaal (No 1)* [2006] NSWSC 1061;
 - (b) diplomatic relations: section 130(4)(b); *Commonwealth of Australia v John Fairfax & Sons Ltd (Defence Papers Case)* (1980) 147 CLR 39;
 - (c) State papers (including Cabinet documents): section 130(4)(f); *Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Egan v Chadwick* (1999) 46 NSWLR 563 and *Conway Rimmer* [1968] AC 910; *Re OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142; freedom of information and open government legislation;
 - (d) law enforcement and the safeguarding of effective policing: Section 130(4)(c); *Young v Quin* (1985) 4 FCR 483; *Attorney General for NSW v Stuart* (1994) 34 NSWLR 667. This can further divided into the categories of:

- (i) the protection of the identity of present and former undercover operatives;
 - (ii) the protection of the confidentiality of sources of information and assistance to the police and the protection of the identity of police informers (*Sankey v Whittam* (1978) 142 CLR 1 at 61, 65-66; *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 232-233 per Kirby P, at 247 per McHugh JA; and
 - (iii) the protection of the confidentiality of police methodology: *Young v Quin* (1985) 4 FCR 483 at 494 per Beaumont J.
18. In general terms, the categories of documents which the Trust submits ought not to be disclosed is confidential and specific commercial information of a third party which if released would give competitors of the third party an unfair commercial advantage and prejudice the Government's ability to negotiate terms and conditions with third parties in relation to the use of the Trust's scheduled lands.
19. This is discussed in more detail below.

Public interest immunity – confidential commercial information

20. While the Trust recognises that commercial in confidence is not a ground of privilege itself, the Trust does submit that it would be against the public interest for certain types of commercially confidential documents to be disclosed beyond the House.
21. The *New South Wales Legislative Council Practice* (at page 512) recognises that a proper basis for claims of commercial in confidence material if that disclosure may cause damage to commercial activity.
22. Some documents produced by the Trust contain confidential and specific information of a third party which if released would give competitors of the third party an unfair commercial advantage.
23. The Trust submits that it would not be in the public interest to disclose the documents marked "Yes-PII-CIC" and that public interest immunity should apply to them.
24. The Trust submits that disclosure of those documents would:
- (a) cause loss of commercial advantage and competitiveness within the private sector;
 - (b) cause detriment to private sector participants and give competitors of the consultants or parties to the agreement or contracts an unfair commercial advantage;
 - (c) give parties who gain access to the material an unfair commercial advantage compared to those who do not; and
 - (d) prejudice current or future contractual or other relationships and negotiations of those agreement between the Government and the private sector which would reduce the ability of the Trust to provide sporting content for the benefit of the public.
25. The confidential commercial information of these third parties and others is dispersed throughout numerous documents in the privileged index. Given the time constraints and the number of third parties involved, it has not been possible for the Trust to consult with all

the various third parties in respect of their confidential commercial information. The above reasons support the claim for public interest immunity against disclosure and, if further information is required, those third parties be consulted before their commercial information is proposed to be released.

26. Alternatively, the Trust submits that it would be necessary for those documents to be masked in such a way as to remove the references to any part of those documents which, if released, would cause damage to commercial activity.

Jamie Barkley

CEO for the Sydney Cricket and Sports Ground Trust

Completion of Response to Resolution made pursuant to Standing Order 52 made on 15 March 2018

Submissions on Claims of Privilege and Public Interest Immunity

1. These are the submissions of the Sydney Cricket and Sports Ground Trust (the **Trust**) to accompany the Trust's letter dated 6 April 2018 and are made in support of a claim of client legal privilege and public interest immunity in relation to certain documents returned under the resolution made by the Legislative Council on 15 March 2018.

Preliminary matters

2. The return of the Trust excludes Cabinet material and does not refer to Cabinet material.
3. As required, a return under the resolution includes an index of all documents produced which are non-privileged.
4. A separate index has been prepared for the return of documents in relation to which a claim for privilege is made. In that index, the following markers are used in relation to privilege and public interest immunity:
 - (a) 'Yes - CLP' for client legal privilege claims; and
 - (b) 'Yes - PII - CIC' for public interest immunity claims on the basis of commercial confidentiality; and
 - (c) 'Yes - PII' for public interest immunity claims on the basis of personal information.
5. These submissions relate to that index.
6. Where a claim for privilege is made by use of one of the markers set out above, it is intended that the submissions set out in more detail below they be incorporated in to the claim for privilege or public interest immunity.

Context

7. The Trust is charged with the care, management and control of the scheduled lands, including Allianz Stadium and the surrounding areas at Moore Park, as set out under the Sydney Cricket & Sports Ground Trust Act 1978 (NSW) (the **Act**).
8. The Trust may, pursuant to section 14 of the Act, allow the scheduled lands to be used by such persons, clubs, associations, leagues or unions on such terms and conditions as the Trust may think fit and proper for cricket, football or tennis or any other game, or for athletic sports, public amusement, or any other purpose which the Minister approves.
9. In authorising parts of the scheduled lands and Allianz Stadium to be used by parties and to deliver premier sporting content, one aspect of the Trust's responsibilities includes entering into and negotiating the terms and conditions of contractual arrangements and negotiations with sporting codes and other venue hire partners.

10. Another aspect of the Trust's care, management and control includes engaging with the community and other individuals on matters of public concern, including responding to queries or feedback from individuals which facilitates public scrutiny of the Trust's actions and ultimately enables the Trust to better perform its functions.
11. The claims for public interest immunity arise primarily from these aspects of the Trust's role.

Client legal privilege

12. The Trust obtained legal advice in relation to aspects of its care, management and control of the scheduled lands and the redevelopment of Allianz Stadium. The advice was provided by lawyers from Henry Davis York, now known as Norton Rose Fulbright, or other external lawyers.
13. It is submitted that the documents in the return of the Trust which are marked 'CLP' attract client legal privilege. An example of a document containing client legal privilege information is found at item (a) document no. SCG.002.001.0072.
14. It is submitted the documents marked 'CLP' should not be made public on one or more of the available grounds of privilege pursuant to both common law doctrines and statutory regime in that they are (or contain references to):
 - (a) communications to and from lawyers for the Trust and other lawyers or internal staff of the Trust for the dominant purpose of providing the Trust with legal advice; and/or
 - (b) other confidential communications prepared for the dominant purpose of the Trust being provided with legal advice.

Public interest immunity

15. The Trust submits that certain classes of documents, while relevant ought not be disclosed beyond the House on the basis that to disclose the documents would be injurious to the public.
16. The principles in relation to a claim of public interest immunity are well settled.
17. A claim for public interest immunity is determined by a balancing of competing public interests. The specific public interest that would be served by non-disclosure needs to be identified along with the risk of overriding harm to the proper functioning of the Trust. Public interest immunity needs to be assessed on whether public interest in disclosure outweighs harm.
18. The categories of public interest immunity that are recognised by the Court are not a closed group: *Australian National Airlines Commission v The Commonwealth* (1975) 132 CLR 582 at 591; *D v National Society for the Prevention of Cruelty to Children* [1987] AC 171 at 230, section 130(4). While not a closed group, the recognised categories include:
 - (a) national security: section 130(4)(a) of the Act; *R v Khazaal (No 1)* [2006] NSWSC 1061;
 - (b) diplomatic relations: section 130(4)(b); *Commonwealth of Australia v John Fairfax & Sons Ltd* (Defence Papers Case) (1980) 147 CLR 39;

- (c) State papers (including Cabinet documents): section 130(4)(f); *Commonwealth v Northern Land Council* (1993) 176 CLR 604; *Egan v Chadwick* (1999) 46 NSWLR 563 and *Conway Rimmer* [1968] AC 910; *Re OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142; freedom of information and open government legislation;
 - (d) law enforcement and the safeguarding of effective policing: Section 130(4)(c); *Young v Quin* (1985) 4 FCR 483; *Attorney General for NSW v Stuart* (1994) 34 NSWLR 667. This can further divided into the categories of:
 - (i) the protection of the identity of present and former undercover operatives;
 - (ii) the protection of the confidentiality of sources of information and assistance to the police and the protection of the identity of police informers (*Sankey v Whitlam* (1978) 142 CLR 1 at 61, 65-66; *Cain v Glass (No 2)* (1985) 3 NSWLR 230 at 232-233 per Kirby P, at 247 per McHugh JA; and
 - (iii) the protection of the confidentiality of police methodology: *Young v Quin* (1985) 4 FCR 483 at 494 per Beaumont J.
2. In general terms, the categories of documents which the Trust submits ought not to be disclosed:
- (a) confidential and specific commercial information of a third party which if released would give competitors of the third party an unfair commercial advantage and prejudice the Government's ability to negotiate terms and conditions with third parties in relation to the use of the Trust's scheduled lands; and
 - (b) confidential and specific personal information of individuals who have corresponded with the Trust which if released would disclose their private information to the public and discourage individuals from performing the important civil function of providing open feedback and scrutiny of the Trust.
3. These are discussed in more detail below.

Public Interest Immunity – confidential commercial information

- 19. While the Trust recognises that commercial in confidence is not a ground of privilege itself, the Trust does submit that it would be against the public interest for certain types of commercially confidential documents to be disclosed beyond the House.
- 20. The *New South Wales Legislative Council Practice* (at page 512) recognises that a proper basis for claims of commercial in confidence material if that disclosure may cause damage to commercial activity.
- 21. Some documents produced by the Trust confidential and specific information of a third party which if released would give competitors of the third party an unfair commercial advantage. An example of a document containing confidential commercial material is found at item (e) document no. 1.
- 22. The Trust submits that it would not be in the public interest to disclose the documents marked "Yes-PII-CIC" and that public interest immunity should apply to them.
- 23. The Trust submits that disclosure of those documents would:

- (a) cause loss of commercial advantage and competitiveness within the private sector;
 - (b) cause detriment to private sector participants and give competitors of the consultants or parties to the agreement or contracts an unfair commercial advantage;
 - (c) give parties who gain access to the material an unfair commercial advantage compared to those who do not; and
 - (d) prejudice current or future contractual or other relationships and negotiations of those agreement between the Government and the private sector which would reduce the ability of the Trust to provide sporting content for the benefit of the public.
24. We enclose with these submissions a letter from the National Rugby League received by the Trust on 4 April 2018 supporting a claim of privilege in order to protect the confidential commercial information of the NRL and avoid adverse consequences of such a disclosure.
25. The Trust engages various consultants to audit Allianz Stadium, such as MI Associates, ARUP, Reliance Risk, iAccess Consultants, and Blackett Maguire + Goldsmith. The Trust also negotiates and enters into agreements with key sporting partners and major content providers for Allianz Stadium such as the Sydney Roosters, Sydney FC, NSW Waratahs, Australian Rugby Union, Australian Rugby League, and the Football Federation Australia.
26. The confidential commercial information of these third parties and others is dispersed throughout numerous documents in the privileged index. Unlike the case of the NRL, who are particularly named in the Standing Order and therefore can anticipate that their commercial information would be captured by a response to the resolution, the commercial information of these other third parties has only come to light during the secondary review stage of the Trust's documents for privilege claims (the first stage being for relevance).
27. Given the time constraints and the number of third parties involved, it has not been possible for the Trust to consult with all the various third parties in respect of their confidential commercial information. The above reasons support the claim for public interest immunity against disclosure and, if further information is required, those third parties be consulted before their commercial information is proposed to be released.
28. Alternatively, the Trust submits that it would be necessary for those documents to be masked in such a way as to remove the references to any part of those documents which, if released, would cause damage to commercial activity.

Public interest immunity – personal information

29. Part of the Trust's role is engaging with the community and responding to queries and feedback from the public in relation to matters including the rebuild of Allianz Stadium. As a result, the Trust receives letters from interested members of the public which contains an individual's personal information.
30. The Trust is subject to privacy obligations in relation to the collection, management and protection of personal information. Personal information can be information or an opinion about an individual whose identity is apparent or can reasonably be ascertained from the information or opinion.
31. Some documents covered by the resolution identify persons who have corresponded with the Trust in relation to the rebuild and contain the personal information of those individuals,

such as their names, addresses, email addresses, and phone numbers. An example of a document containing personal information is found at item (a) document no. SCG.003.001.4965.

32. Disclosure of these types of documents are likely to:
- (a) release personal information of individuals to the public contrary to privacy obligations and schemes of the Trust;
 - (b) expose persons to risk of unwanted contact by persons who access released material;
 - (c) discourage individuals from performing the important civil function of providing open feedback and scrutiny to Trust for reason that their personal information is at risk of being publicly released; and
 - (d) prejudice community engagement and the supply of feedback from members of the public to the Trust which facilitates the public scrutiny of the Trust's actions in performing its functions and enables the Trust to better respond to community concerns.
33. The Trust submits that it would not be in the public interest to disclose the documents marked "Yes-PII" and that public interest immunity should apply to them.
34. Alternatively, the Trust submits that it would be necessary for those documents to be masked in such a way as to remove the references to any personal information.



The Greatest Game of All

Mr Jamie Barkley
CEO
Sydney Cricket and Sports Ground Trust
By email: JBarkley@scgt.nsw.gov.au

Dear Mr Barkley

Standing Order 52 – Legislative Council – claim for privilege

We refer to the resolution of the NSW Legislative Council passed on 16 March 2018 which requires the production of papers regarding the NSW Government's stadia policy pursuant to standing order 52 (Order).

We note that one of the terms of the Order seeks the production of "any agreement between the Government and the National Rugby League regarding fixtures".

The National Rugby League (NRL) has signed a Memorandum of Understanding (MOU) with the NSW Government (represented by the Minister for Sport), Venues NSW and Sydney Cricket and Sports Ground Trust which relates to the provision of NRL Grand Finals and State of Origin matches to support the NSW Government's stadia investment strategy. The MOU contains confidential commercial terms which, if disclosed, would prejudice the NRL's commercial position as a major venue hirer and would place it at a disadvantage with respect to other sports and/or hirers. Disclosure of the MoU may also impact our commercial negotiations with other venues.

We respectfully request that a claim of privilege is made in respect of the contents of the MoU in order to protect the confidential commercial information of the NRL and avoid adverse commercial consequences for our sport.

We are happy to provide further information or assistance as required in support of our request that the MoU be covered by privilege.

Yours sincerely

Eleni North
General Counsel

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**SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE
BY THE DEPARTMENT OF PREMIER AND CABINET**

In accordance with the terms of the resolution agreed to by the Legislative Council on 15 March 2018, and the terms of Standing Order 52, documents have been identified for production by the Department of Premier and Cabinet and the potential application of privilege to those documents has been considered. This submission has been prepared in support of the claims for privilege made by the Department.

It is to be noted that these claims for privilege are not raised as a basis to resist production of documents that are within scope of the resolution. Rather, these claims are made, pursuant to Standing Order 52(5), to identify those documents over which privilege may be claimed, in order to allow the Legislative Council to consider the claims and in support of an application that it is in the public interest that the documents should not be made publicly available.

Personal information

It is submitted that certain of the documents identified and indexed as privileged contain personal information and that the public interest in the non-disclosure of that information outweighs the interest in its disclosure.

In support of this claim, it is submitted that such information would ordinarily be protected from public disclosure under common law or pursuant to the *Government Information (Public Access) Act 2009* (the GIPA Act) or the *Privacy and Personal Information Protection Act 1998*.

The GIPA Act is most relevant to a consideration of whether or not a claim of privilege should be made in respect of information identified as personal information in the identified documents, as that Act enables people other than the individual concerned to access information held by Government.

The GIPA Act establishes a presumption in favour of disclosing government information. However, it also identifies specified public interest considerations against disclosure and acknowledges that certain information should not be disclosed. Section 9(1) provides that "A person who makes an access application for government information has a legally enforceable right to be provided with access to the information in accordance with Part 4 (Access applications) unless there is an overriding public interest against disclosure of the information". Section 13 provides that there is an overriding public interest against disclosure of government information for the purposes of the Act "if (and only if) there are public interest considerations against disclosure and, on balance, those considerations outweigh the public interest considerations in favour of disclosure".

Public interest considerations against disclosure are detailed in the table to section 14 of the GIPA Act. That table relevantly includes the following:

"3. Individual rights, judicial processes and natural justice

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects:

- (a) reveal an individual's personal information,
- (b) contravene an information protection principle under the *Privacy and Personal Information Protection Act 1998* or a Health Privacy Principle under the *Health Records and Information Privacy Act 2002*,
..."

It is submitted that these considerations against disclosure would have application in relation to the documents which have been identified as containing personal information.

Clause 4(1) of Schedule 4 to the GIPA Act defines personal information as "information or an opinion (including information or an opinion forming part of a database and whether or not recorded in a material form) about an individual (whether living or dead) whose identity is apparent or can reasonably be ascertained from the information or opinion". Clause 4(3)(b) of Schedule 4 excludes from the definition of personal information "information about an individual (comprising the individual's

name and non-personal contact details) that reveals nothing more than the fact that the person was engaged in the exercise of public functions".

With regard to the above considerations, the Department has redacted from certain documents personal information which might cause the identity of an individual to be ascertainable. This includes names and contact information (including addresses, email addresses and phone numbers) and other identifying information. The Department considers that the disclosure of this information could reasonably be expected to reveal personal information of the individuals in question. Given the time constraints and the volume of information in question, the Department has not had an opportunity to consult with any of the affected individuals.

There may be public interest considerations in favour of release of the relevant documents as a whole. However, the Department does not consider that any particular considerations in favour attach in particular to the release of personal information in those documents. The public interest 'value' of the documents concerned is not diminished in any real way because personal information has been redacted. In weighing up the public interest considerations for and against the disclosure of personal information contained in these documents, the Department considers that on balance, the public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure.

In addition to the above reasoning based on the provisions of the GIPA Act, the Department considers that it would be prejudicial to the public interest and to the system of representative and responsible government in NSW for interactions between individuals and their elected representatives to be made public, in circumstances where the communication may originally have been made without any expectation that it would be published. It would be reasonable to assume that the candour of such communications may be impeded if individuals were aware that, with no notice and without consultation, not only might their correspondence be released, but also their personal information in connection with that correspondence.

The Department notes that a redacted version of each of the documents containing personal information (redacted to exclude the information identified as personal information) has been produced in the non-privileged bundle.

Legal professional privilege

It is submitted that certain of the documents identified and indexed as privileged are privileged and should not be made public on one or more of the available grounds of legal professional privilege or client legal privilege at common law or under the *Evidence Act 1995*.

In particular, it is submitted that the above documents are privileged because:

1. they were brought into existence for the purpose of:
 - a. enabling the client to obtain, or its legal advisers to give, legal advice; or
 - b. for use in actual litigation or litigation reasonably contemplated by the client and in respect of which privilege has not been waived;
- and/or
2. they are confidential communications between the client or its legal advisers and persons with whom the client shares or shared a common interest in relation to the subject matter of the advice received by one of them.

The documents in respect of which legal privilege are claimed are email chains containing legal advice on certain matters, including emails concerning the operation of the *Sydney Cricket and Sports Ground Act 1978* and the application of the GIPA Act to certain documents.

It is relevant to note that legal professional privilege is a ground upon which there is a conclusive presumption of public interest against disclosure in the GIPA Act (see section 14(1) and clause 5 of Schedule 1 to the GIPA Act).

It is submitted that legal professional privilege in these documents should be upheld because the protection of legally privileged Crown documents is in the public interest.

Public interest immunity

It is submitted that certain of the documents identified and indexed as privileged contain information in relation to safety and security matters.

In particular:

- the documents identified as category (c) documents in the table of privileged documents contain information relating to safety and security issues, and
- the documents identified as category (f) documents in the table of privileged documents contain information relating to a protected report created by the NSW Police Force which concerns certain safety and security issues.

The Department considers that the release of this information could give rise to safety and security risks and that the public interest in its non-disclosure outweighs the public interest in its disclosure.

In support of this claim, it is submitted that such information would ordinarily be protected from public disclosure under common law or pursuant to the GIPA Act.

As noted above, public interest considerations against disclosure are detailed in the table to section 14 of the GIPA Act. That table relevantly includes the following:

"2. Law enforcement and security

There is a public interest consideration against disclosure of information if disclosure of the information could reasonably be expected to have one or more of the following effects (whether in a particular case or generally):

- (c) increase the likelihood of, or prejudice the prevention of, preparedness against, response to, or recovery from, a public emergency (including any natural disaster, major accident, civil disturbance or act of terrorism)
- (d) endanger, or prejudice any system or procedure for protecting, the life, health or safety of any person
- (e) endanger the security of, or prejudice any system or procedure for protecting, any place, property or vehicle,
- (f) facilitate the commission of a criminal act (including a terrorist act within the meaning of the *Terrorism (Police Powers) Act 2002*)"

It is submitted that these considerations against disclosure would have application in relation to certain of the documents which have been identified as privileged.

It is noted that the documents relating to category (f) of the resolution for which a claim of privilege has been made on the above basis are considered to be privileged because of the information they contain relating to a protected report created by the NSW Police Force. That report itself would be the subject of a conclusive presumption of an overriding public interest against disclosure pursuant to clause 7 of Schedule 1 to the GIPA Act. The documents referring to that report that have been produced on a privileged basis reveal the existence of the report and aspects of and recommendations made in the report. It is submitted that the sensitivity of the report which informs those documents provides a strong basis for the argument that release of the documents in question could give rise to any of the above effects relating to law enforcement and security, as enumerated in clause 2 in the table to section 14 of the GIPA Act.



LEGISLATIVE COUNCIL



Leader of the Opposition in the Legislative Council
Shadow Minister for Industry, Resources and Energy
Shadow Minister for Industrial Relations

The Honourable Adam Searle MLC

23 April 2018

Mr David Blunt

Clerk of the Parliaments

Parliament House

Macquarie Street

SYDNEY NSW 2000

**DISPUTE OF PRIVILEGE CLAIMS MADE IN RELATION TO THE RETURN TO ORDER ON
SYDNEY STADIUMS**

Dear Mr Clerk,

On 15 March 2018, the House agreed to an order for papers relating to Sydney Stadiums.

On 5 April, 6 April and 19 April, documents have been received by you in response to the order for papers relating to Sydney Stadiums agreed to by the House, in answer to the order made.

In relation to a significant number of those documents produced to the House, claims of privilege on one or more grounds have been advanced by agencies to have those documents kept from the public domain.

I found by reference to the indexes provided that a number of documents within the scope of the order of the House were not in fact produced to it by the Office of Sport. I understand that as a result of my raising this with you, your office conducted a further review and found that other agencies had also not produced documents identified in their provided indexes. I further understand that the Department of Premier and Cabinet have, subsequently, produced to your office the documents it had not produced and which were itemised on its index. I ask for you to provide to me, an update as to where this matter is up to in relation to the production of the outstanding documents by the other agencies.

*David to the
Refer to the
Independent Legal
Arbitrator for
Reference & determination*
*John Ayoko
President
26/4/18*

Having now had opportunity to review the significant number documents that have been returned to the House, I seek to dispute the privilege claims made in relation to a number of those documents, and ask that the House appoint an independent legal arbiter to determine the matters in dispute. I understand that on the appointment of an independent legal arbiter, the arbiter will set a timetable for reviewing the disputed materials and inviting submissions from each party wishing to be heard on the issues.

Attached to this letter is an index identifying the documents where the privilege claim is disputed by highlighting them in yellow. I have not included any from the DPC return to order, which I am still considering and this highlighted index also does not contain any documents which, while included in the indexes has not yet been produced to the House.

As has been determined previously, in such a dispute process the onus is on the party claiming it to establish that a relevant privilege exists and should be upheld. I note that each public body returning documents in accordance with the order has already supplied a short document identifying the grounds upon which privilege is claimed.

I will address the matters set out by each agency in their claims for privilege in a further communication to you shortly.

In addition, although canvassed extensively by the Hon. Keith Mason Q.C. in his report on the *Disputed Claim of Privilege – WestConnex Business Case*, the role and function of the independent legal arbiter is a matter that I also wish to make submissions on. Each of the parties to the *WestConnex* dispute were invited to and made submissions on this matter, including myself.

In addition, you in your role as the Clerk of the Parliaments prepared a useful analysis of 44 of the previous 48 reports of the various arbiters, dated 21 July 2014, from which you concluded (correctly in my view):

An analysis of the explicit comments of previous arbiters about their role, approach or methodology illustrates the importance they have attached not only evaluating the technical validity of claims of privilege but also evaluating whether technically valid claims are accompanied by sufficient justification to outweigh the competing (and perhaps over-riding) public interest in disclosure. Over time, the public interest in facilitating both informed public debate (through public access to documents) and effective scrutiny of the executive government in Parliament (though removing restrictions which would inhibit the information contained in the documents from being the subject of full debate during parliamentary proceedings).

.....

While accepting there will be instances where the justification for ongoing confidentiality prevails, the approach of previous arbiters, going beyond a technical legal evaluation of claims of privilege and emphasising the balancing of competing interests, together with the high value they have ascribed to the public interest in disclosure, has facilitated to the maximum possible extent full parliamentary debate about important matters of public policy."

In Mr Mason's report of 8 August 2014, he states, at p 6:

"... the arbiter's role ... is to determine where the law points as regards the documents examined and the claims made ... This may require the application of balancing tests if that is the measure of the legal rule in question, but the evaluative role of the independent legal arbiter does not include some discretion to override the applicable rule of privilege by reference to what may be thought wise in the circumstances."

In this, some may discern a shift in the conception of the role of the independent legal arbiter by Mr Mason from that of earlier arbiters, each of whom made consistently clear in their various reports that their findings were the result of balancing the competing public interests of confidentiality and accountability/transparency in evaluating claims of privilege. However, while each arbiter has expressed himself in different language, I think the outcome and approach has remained consistent, including Mr Mason's work as arbiter.

At p8 of his report of 8 August 2014, Mr Mason states further that:

"The arbiter's primary task, as I see it, is to report whether legally recognised privileges as claimed apply to the disputed documents notwithstanding their production to the House and the restricted access adhering to them pending and order of the House for their publishing or copying."

This raises the question as to what the relevant "legally claimed privileges" are in this context. The answer is, I think, found in Mr Mason's earlier report on the *Disputed Claim of Privilege – Actions of former WorkCover NSW employee* dated 25 February 2014, at p2:

"The relevant privilege is what, as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament. In context and scope, it is not the privilege or public interest immunity that a litigant or third party to curial proceedings might raise in answer to an order for discovery or a subpoena in litigation. So much was made clear in Chadwick v Egan (1999) 46 NSWLR 563 when the Court of Appeal ruled that neither public interest immunity nor legal professional privilege provided a basis for withholding documents the production of which were 'reasonably necessary for the proper exercise by the Legislative Council of its functions' according to the principles expounded in Egan v Willis."

If public interest immunity and legal professional privilege do not work in preventing the production to the House of State documents, why then should they have operation in preventing unrestricted access to those same documents determined by the House to be 'reasonably necessary for the proper exercise by the Legislative Council of its functions'? What is the 'relevant privilege [that], as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament'? On this subject, I refer to my submissions to the independent legal arbiter on the WestConnex privilege dispute at pages 6-8, although I note the arbiter in that matter did not need to refer to them to determine the issues in dispute.

What seems reasonably clear in the present context is what does **not** constitute a proper claim of privilege. Matters such as the privacy of individuals and the statutory entitlement to anonymity for whistleblowers under the *Public Disclosures Act* have been held by the most recent arbiter to not ground a valid claim of privilege, either for a court or for the House: see arbiter's report on

WestConnex Business Case at p8. Similarly, claims of privilege on the basis of “commercial-in-confidence” is similarly also not a recognised head of privilege: see arbiter’s report on *WestConnex Business Case* at p10. Taking the same approach, bases of non-disclosure found in legislation (such as the *Government Information (Public Access) Act*, for example) also do not ground a proper claim for privilege.

An examination of other privilege disputes resolved through this mechanism discloses that the consistent theme in the claims of privilege made (however expressed) and the determination of them is whether or not there is established a relevant harm to the public interest. As the most recent arbiter has noted, at p8 of his report on the *WestConnex Business Case*, that “so long as overriding harm is not done to the ‘proper functioning of the executive arm and of the public service’ (*Sankey v Whitlam* (1978) 142 CLR 1 at 56 per Stephen J) public debate stemming potentially from such sources is of the essence of representative democracy.”

Further, the arbiter also quoted, at p10-11 of his report on the *WestConnex Business Case*, from the observations of Sir Anthony Mason in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52:

“It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

Accordingly, the court will determine the government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.”

In substance, this is the approach taken by legal arbiters in determining claims of privilege to date.

The most recent arbiter was correct when he stated, on this basis, that “*The House’s right of access to State papers and its legitimate power to publish them incillary to its constitutional functions could be no less constrained.*” (report on the *WestConnex Business Case*, p11) (Underlining added)

I note also that the most recent independent legal arbiter also found at p7 of his report on the *WestConnex Business Case* that there “*may be an additional complication when one translates these principles to a parliamentary context and it is one on which there is presently no guidance from the courts so far as I am aware. ... It is at least conceivable that some adjustment of these rules [regarding public interest immunity and legal professional privilege] may be called for in law in a context where the House is reviewing the conduct of the Executive. For example, the House may be concerned to explore whether a government whose conduct it is scrutinising has sought and followed legal advice in a particular matter. ... there may be circumstances in which the House has a constitutionally-derived legal right to more unrestricted access than the strict application of the common law rules of legal professional privilege may suggest. I am not indicating that public interest immunity balancing factors necessarily intrude into this constitutional setting, although they might. And I am not proposing that the arbiter has some discretionary power to override a privilege determined to exist (cf Twomey, op cit, p265). If this issue surfaces in a later matter, I would anticipate further assistance through the exchange of submissions.*”

What I derive from this passage is, if *legal professional privilege* has application to privilege disputes of the present kind, its content may not be the same as in the context of litigation and that the PII and LPP grounds may, in this Parliamentary context (as opposed to *inter partes* litigation) be resolved by reference to the same, or a very similar, approach. In my submission, it is unnecessary and misleading to talk of whether the arbiter has any *discretionary power to override a privilege found* – the test is whether a ground of Executive-Parliament privilege is established, and this is to be determined by reference to whether ‘*disclosure is likely to injure the public interest*’.

Support for this view is, I think, also to be found in *Egan v Chadwick*. Chief Justice Spiegelman stated, at [54], 574, that “*Performance of these [high constitutional] functions may require access to information the disclosure of which may harm the public interest. Access to such information may, accordingly, be reasonably necessary for the performance of the functions of the Legislative Council.*” Priestly JA, having concluded that legal professional privilege could not be relied upon by the Executive to prevent the production of documents to the House, at [139] 593-594 also found that, “*Possession of the power to compel production does not mean that the power will be exercised unless the House is convinced the exercise is necessary; if exercised, it does not follow that the House will do anything detrimental to the public interest; the House can take steps to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed.*” (Underlining added)

These passages show two things. First, the Court of Appeal was live to the distinction between the power of the Legislative Council to compel the production of State papers, even where that information if disclosed could injure the public interest, and the degree to which the House could decide to allow unrestricted access to that material. Secondly, that in determining the degree to which the information obtained from the Executive would be accessible to the wider community, the House should be guided by what is *thought necessary in the public interest*. In my submission this is a different formulation of the proposition that where there is a claim by the Executive for confidentiality, that claim is to be determined by whether disclosure would harm the public interest. They are two ways of expressing the same approach.

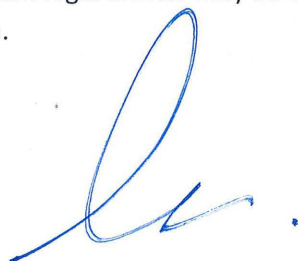
If you can pass these observations by myself as to how I think the present privilege claims should be undertaken to the person engaged as independent legal arbiter, and any relevant party, I would be grateful.

As indicated in the outset, I will soon provide you with the specified grounds upon which I challenge the various claims of privilege advanced by the different agencies. This communication is provided to you in advance so the process of engaging an independent legal arbiter may be commenced and the relevant documents able to be reviewed by that person.

Regards,

The Hon. Adam Searle MLC

Leader of the Opposition in the Legislative Council |



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ORDER FOR PAPERS – PRIVILEGE

Document No.	Item	Document	Date of Creation	Author	Privilege Claim
(c)1	Any safety, security or compliance audit reports for Allianz Stadium	Allianz Stadium Safety, Security and Compliance Summary Report	14 October 2016	MI Associates	Yes
(c)2	Any safety, security or compliance audit reports for Allianz Stadium	Building Code of Australia Site Audit Report	20 October 2016	Blackett Maguire + Goldsmith	Yes
(c)3	Any safety, security or compliance audit reports for Allianz Stadium	Risk Workshop Report – Allianz Stadium Safety, Security and Compliance Project	20 January 2017	Sydney Cricket and Sports Ground Trust/Reliance Risk	Yes
(e)1	Any agreement between the Government and the National Rugby League regarding fixtures	Memorandum of understanding – NSW Stadia Investment and Content	24 November 2017	Australian Rugby League Commission	Yes

NSW OFFICE OF SPORT
ORDER FOR PAPERS - SYDNEY STADIUMS
PRIVILEGED DOCUMENTS

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
OOS.0001.0027	Item (b)	Email	Invitation to submit proposal	19/10/2015 19:06	Commercial in Confidence
OOS.0001.0028	Item (b)	Document	Western Sydney Stadium Final Business Case Scope of Works.pdf	5/07/2016 12:47	Commercial in Confidence
OOS.0001.0045	Item (a)	Document	ARU_MOU.pdf	14/04/2016 16:17	Commercial in Confidence
OOS.0001.0155	Item (a); Item (e)	Document	NRL MOU with NSW Gov.pdf	23/06/2016 18:15	Commercial in Confidence
OOS.0001.0161	Item (a); Item (b)	Document	INSW comments on draft letter.pdf	7/07/2016 9:39	Commercial in Confidence
OOS.0001.0185	Item (a); Item (b)	Email	RE: ANZ redevelopment funding	22/09/2016 15:41	Commercial in Confidence
OOS.0001.0186	Item (a); Item (b)	Document	ANZ redevelopment funding release of funds.docx	22/09/2016 15:41	Commercial in Confidence
OOS.0001.0295	Item (a); Item (b)	Email	Attention Ursula - Office of Sport - Addendum No.1 for OOSIG1617010	16/02/2017 14:32	Commercial in Confidence; Privacy
OOS.0001.0296	Item (a);	Email	Attention Oliver and Craig - Office of Sport - Addendum No.1 for	16/02/2017 14:38	Commercial in Confidence;

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
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OOS.0001.0302	Item (a)	Email	Attention Ursula - Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:17	Commercial in Confidence; Privacy
OOS.0001.0303	Item (a)	Email	Attention Paul: Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:19	Commercial in Confidence; Privacy
OOS.0001.0304	Item (a)	Email	Attention Oliver and Craig - Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:21	Commercial in Confidence; Privacy
OOS.0001.0305	Item (a)	Email	Attention Frances - Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:22	Commercial in Confidence; Privacy
OOS.0001.0306	Item (a)	Email	Attention Peter: Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:28	Commercial in Confidence; Privacy
OOS.0001.0322	Item (a); Item (b)	Email	SIGNED_RE: Confidential: Endorse the Evaluation Plan for OOSIG1617010 -	27/02/2017 15:03	Commercial in Confidence
OOS.0001.0323	Item (a); Item (b)	Document	TS_Endorsement by Tender Evalaution Team.pdf	27/02/2017 15:03	Commercial in Confidence; Privacy
OOS.0001.0324	Item (a); Item (b)	Document	TS_Code of Conduct.pdf	27/02/2017 15:03	Commercial in Confidence; Privacy

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OOS.0001.0325	Item (a); Item (b)	Document	TENDER OPENING REPORT (SIGNED).pdf	28/02/2017 15:54	Commercial in Confidence
OOS.0001.0361	Item (a)	Document	Schedule 2 - Clarification OOSIG1617010.pdf	8/03/2017 16:14	Commercial in Confidence
OOS.0001.0470	Item (a)	Document	NSW Gov Commitments to Codes - 5 April 2017.docx	5/04/2017 14:05	Commercial in Confidence
OOS.0001.0471	Item (a)	Document	NSW Gov Commitments to Codes - 5 April 2017 (sent to KPMG).pdf	5/04/2017 15:16	Commercial in Confidence
OOS.0001.0474	Item (a)	Email	Re: Allianz Stadium	6/04/2017 9:41	Commercial in Confidence
OOS.0001.0475	Item (a)	Image	imagefe0f37.JPG	6/04/2017 9:41	Commercial in Confidence
OOS.0001.0478	Item (a); Item (b)	Email	FW: ANZ Progress Report and Invoice #1	6/04/2017 11:34	Commercial in Confidence
OOS.0001.0479	Item (a); Item (b)	Document	Inv 821027682 20.03.2017_29082673_1(Client-Job).pdf	6/04/2017 11:34	Commercial in Confidence
OOS.0001.0546	Item (a)	Document	NSW Gov Commitments to Codes - 5 April 2017 (sent to KPMG).docx	19/04/2017 13:14	Commercial in Confidence
OOS.0001.0565	Item (a); Item (b)	Email	Fwd: FW: Stadium Australia - next steps	24/04/2017 10:07	Commercial in Confidence
OOS.0001.0592	Item (a)	Email	RE: INSW Design PCG meeting	1/05/2017 9:14	Commercial in Confidence
OOS.0001.0593	Item (a)	Email	RE: INSW Design PCG meeting	1/05/2017 11:04	Commercial in Confidence

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
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OOS.0001.0598	Item (a); Item (b)	Document	170501_ANZ Stadium Redevelopment Functional Brief_Invoice01.pdf	2/05/2017 8:31	Commercial in Confidence
OOS.0001.0722	Item (a)	Email	RE: Request for Proposal - Probity Advice - ANZ Stadium Redevelopment Project	26/05/2017 11:50	Legal Professional Privilege
OOS.0001.0736	Item (a)	Email	RE: RE: Probity advisor engagement - ANZ Stadium Redevelopment	29/05/2017 8:27	Commercial in Confidence
OOS.0001.0737	Item (a)	Document	Insurance Certificates NSW.PDF	29/05/2017 8:26	Commercial in Confidence
OOS.0001.0738	Item (a)	Document	OCM Quotation_General Probity Advice_17May2017.pdf	24/10/2017 14:00	Commercial in Confidence
OOS.0001.0739	Item (a)	Email	RE: Request for Proposal - Probity Advice - ANZ Stadium Redevelopment Project	25/05/2017 10:00	Commercial in Confidence
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OOS.0001.0743	Item (a)	Document	XXXXX_XXXXX_Authority to procure and funding approval - Probity - ANZS -.....docx	30/05/2017 9:33	Commercial in Confidence
OOS.0001.0749	Item (a)	Email	RE: RE: Probity Advisor Engagement Briefing Note - for your review	30/05/2017 20:06	Commercial in Confidence
OOS.0001.0756	Item (a); Item (b)	Document	DRAFT - ANZ Stadium Redevelopment - Probity Advisor Engagement Eval Plan and Report - XX May 2017.docx	1/06/2017 8:04	Commercial in Confidence
OOS.0001.0758	Item (a); Item (b)	Document	DRAFT - ANZ Stadium Redevelopment - Probity Advisor Engagement Eval Plan.....docx	1/06/2017 13:16	Commercial in Confidence

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OOS.0001.0783	Item (a); Item (b)	Email	Fwd: RE: INSW ANZ Stadium Redevelopment Invoice and Estimates for May 2017 and June 2017	23/06/2017 11:43	Commercial in Confidence
OOS.0001.0904	Item (a)	Email	FW: ANZS Redevelopment: Updated fee estimate	18/08/2017 7:58	Commercial in Confidence
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OOS.0001.1020	Item (a)	Document	01g Allianz Stadium - SCGT_MT comments.DOCX	28/08/2017 15:22	Public Interest Immunity
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OOS.0001.1051	Item (a)	Document	01g Allianz Stadium - SCGT.docx	29/08/2017 16:26	Public Interest Immunity
OOS.0001.1131	Item (a)	Email	RE: July 2017 - INSW invoice - ANZ Stadium Redevelopment Project	4/09/2017 17:20	Commercial in Confidence
OOS.0001.1449	Item (a)	Email	INSW Invoice - ANZ Stadium Redevelopment Project	21/09/2017 15:50	Commercial in Confidence
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OOS.0001.1451	Item (a)	Document	Tracey Brunstrom & Hammond 729.pdf	21/09/2017 15:47	Commercial in Confidence
OOS.0001.1452	Item (a)	Document	COX Architecture 21-4.pdf	21/09/2017 15:47	Commercial in Confidence
OOS.0001.1453	Item (a)	Document	WT Partnership 27-3.pdf	21/09/2017 15:47	Commercial in Confidence
OOS.0001.1454	Item (a)	Document	SASOP_Invoice No 22000376_Jul Aug 17.pdf	21/09/2017 14:35	Commercial in Confidence
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OOS.0001.2156	Item (a)	Email	RE: Feedback RE: CRML17/319 - EMAIL REQUEST TO SIG & SDG	18/10/2017 15:06	Privacy
OOS.0001.2157	Item (a)	Document	FINAL_CRML17-17_236 Mr Taffa response_ED signed.pdf	18/10/2017 15:06	Privacy
OOS.0001.2158	Item (a)	Document	Letter from Mr Taffa for MO response.pdf	18/10/2017 15:05	Privacy
OOS.0001.2164	Item (a)	Email	Allianz Stadium - Preliminary Assessment Invoice	20/10/2017 10:29	Commercial in Confidence
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OOS.0001.2339	Item (a)	Document	Summary of costs_Oct 17 (A93317).pdf	13/11/2017 14:42	Commercial in Confidence
OOS.0001.2340	Item (a)	Document	Cox Architecture_Oct 17.pdf	17/11/2017 15:57	Commercial in Confidence
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OOS.0001.2778	Item (a)	Email	RE: Legal Advice concerning Allianz Stadium	6/12/2017 15:07	Legal Professional Privilege
OOS.0001.2779	Item (a)	Email	RE: Legal Advice concerning Allianz Stadium	6/12/2017 15:30	Legal Professional Privilege
OOS.0001.2902	Item (a); Item (b)	Email	RE: ANZS Redevelopment - SC Presentation	12/12/2017 9:15	Public Interest Immunity
OOS.0001.2905	Item (a); Item (b)	Email	Re: ANZS Redevelopment - SC Presentation	12/12/2017 9:41	Public Interest Immunity
OOS.0001.2907	Item (a); Item (b)	Email	Re: ANZS Redevelopment - SC Presentation	12/12/2017 10:48	Public Interest Immunity
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OOS.0001.2953	Item (a)	Document	KPMG_SocialMediaSnapshot_NSWGovernment_Stadia_December2017.pdf	13/12/2017 19:22	Commercial in Confidence
OOS.0001.2957	Item (a)	Email	FW: Social media opposing Sydney stadia development	13/12/2017 20:29	Commercial in Confidence
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OOS.0001.2963	Item (a)	Email	RE: request for legal advice - planning issues for Allianz Stadium	14/12/2017 8:36	Legal Professional Privilege
OOS.0001.3031	Item (a); Item (b)	Email	Allianz Commissioning Invoice	18/12/2017 18:13	Commercial in Confidence

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OOS.0001.3049	Item (a); Item (b)	Document	Briefing note - Planning Approval.docx	19/12/2017 15:08	Legal Professional Privilege
OOS.0001.3117	Item (a); Item (b)	Email	Outstanding invoices	20/12/2017 10:07	Commercial in Confidence
OOS.0001.3118	Item (a); Item (b)	Document	Inv 821072922 19.10.2017_31094502_1(Client-Job).pdf	19/12/2017 15:12	Commercial in Confidence
OOS.0001.3133	Item (a)	Document	SFS Legal Advice Summary.docx	20/12/2017 14:22	Legal Professional Privilege
OOS.0001.3250	Item (a)	Email	FW: Stadiums Standard responses	9/01/2018 8:57	Public Interest Immunity
OOS.0001.3251	Item (a)	Document	Letter for MP's docx.docx	1/12/2017 11:12	Public Interest Immunity
OOS.0001.3260	Item (a)	Document	Legal advice on SFS approvals.docx	9/01/2018 12:57	Legal Professional Privilege
OOS.0001.3264	Item (a)	Email	Legal Advice Summary	9/01/2018 13:47	Legal Professional Privilege
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Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
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OOS.0001.3271	Item (a)	Document	Legal advice on SFS approvals.docx	9/01/2018 14:07	Legal Professional Privilege
OOS.0001.3323	Item (a)	Email	FW: Case In Progress - 00006461 - CMT17/421	12/01/2018 10:47	Privacy
OOS.0001.3607	Item (a)	Email	RE: SFS SSDA	24/01/2018 16:51	Legal Professional Privilege
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OOS.0001.3721	Item (a)	Document	SFS Planning Consultant Contacts.docx	30/01/2018 11:31	Commercial in Confidence

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
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OOS.0001.3740	Item (a)	Document	Mallesons advice Jan 2018.pdf	31/01/2018 11:55	Legal Professional Privilege
OOS.0001.3764	Item (a)	Email	FW: request for legal advice - planning issues for Allianz Stadium	31/01/2018 14:16	Legal Professional Privilege
OOS.0001.3981	Item (b)	Email	SFS Strategic Business Case	7/02/2018 17:33	Commercial in Confidence
OOS.0001.3982	Item (b)	Document	Inv 821094336 07.02.2018_31958324_1(Client-Job).pdf	7/02/2018 17:13	Commercial in Confidence
OOS.0001.4196	Item (a)	Email	FW: Stadium Spend Snapshot as at today	23/02/2018 13:38	Commercial in Confidence
OOS.0001.4198	Item (a)	Email	FW: Business Cases for Stadium Australia and Allianz Stadium	23/02/2018 14:31	Commercial in Confidence
OOS.0001.4578	Item (a); Item (b)	Email	FW: Statutory declaration from Tracy Southern	13/03/2018 9:44	Privacy
OOS.0001.4579	Item (a); Item (b)	Document	13032018093048-0001.pdf	13/03/2018 9:44	Privacy
OOS.0002.6115	Item (a)	Email	RE: ANZ Stadium Development	13/01/2017 11:58	Privacy
OOS.0004.0001	Item (e)	Document	24112017084234-0001.pdf	19/12/2017 10:29	Commercial in Confidence

SYDNEY CRICKET + SPORTS
GROUND TRUST.

Index of privileged documents – Category C

Item	No.	Document	Date of Creation	Author	Privilege Claim Y/N?
Category C					
Item (c)	1.	2018-03-06 Sydney Football Stadium Development History	6 March 2018	SC&SG Trust	Yes – PII - CIC
Item (c)	2.	161021 Allianz Stadium Safety and Compliance Summary Report	14 October 2016	Hugh Taylor & Deirdre O'Neill, MI Associates	Yes – CIC; Yes – CLP
Item (c)	3.	161215 SCGT Allianz Risk Report v3 0 incl risk register	15 December 2016	Matt Smith, Reliance Risk	Yes – CLP
Item (c)	4.	Allianz Feasibility History_161013 to Trust	13 October 2016	MI Associates	Yes – PII - CIC
Item (c)	5.	Trust Master Plan Development History_171010 to Trust	17 October 2016	MI Associates	Yes – PII - CIC
Item (c)	6.	03 Results Report – Issue	6 May 2016	Sarah Higginson, Manuel Lawrence & Alistair Morrison Arup Pty Ltd	Yes – CIC
Item (c)	7.	006 Letter_Internal Egress Desktop Review Summary-Rev A	9 October 2016	Alistair Morrison, Arup Pty Ltd	Yes – CIC
Item (c)	8.	06 Results Report Rev.B External Egress	19 August 2016	Sarah Higginson & Alistair Morrison, Arup Pty Ltd	Yes – CIC
Item (c)	9.	061018 IAC-515 SCG Trust Allianz Access Audit [A]	18 October 2016	Richard Seidman, iAccess Consultants	Yes – CIC
Item (c)	10.	161020 Allianz (Sydney Football) Stadium_Structural	20 October 2016	David Blackett & Adam Durnford, Blackett Maguire + Goldsmith	Yes – CIC
Item (c)	11.	Final BCA Site Audit Report R3	20 October 2016	David Blackett &	Yes – CIC

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Index of privileged documents – Category A

Number	Item	Document Number	Date of Creation	Document	Author	Privilege claim
Category A						
1	(a)	SCG.003.001.4649	27/10/2015 9:40	Meeting with Brian Canavan	Phil Martin	Yes - PII - CIC
2	(a)	SCG.003.001.5534	27/10/2015 9:42	Fwd: Meeting with Brian Canavan	SUE CHANNELLS	Yes - PII - CIC
3	(a)	SCG.003.001.4334	3/03/2016 16:04	Nick Politis.docx	Phillip Heads	Yes - PII - CIC
4	(a)	SCG.003.001.4335	3/03/2016 16:04	Nick Politis.docx	Phillip Heads	Yes - PII - CIC
5	(a)	SCG.003.001.4214	7/03/2016 15:44	Meeting 2 Task List 070316	SUE CHANNELLS	Yes - PII - CIC
6	(a)	SCG.003.001.4215	7/03/2016 15:44	Meeting 2 Task List 070316.docx	schannells	Yes - PII - CIC
7	(a)	SCG.003.001.4212	8/03/2016 19:09	Meeting 2 Task List 070316	SUE CHANNELLS	Yes - PII - CIC
8	(a)	SCG.003.001.4213	8/03/2016 19:05	Meeting 2 Task List 070316.docx	schannells	Yes - PII - CIC
9	(a)	SCG.003.001.4206	9/03/2016 18:48	Stakeholder Engagement	SUE CHANNELLS	Yes - PII - CIC
10	(a)	SCG.003.001.4207	9/03/2016 17:42	CP&MPT areas.pdf		Yes - PII - CIC
11	(a)	SCG.003.001.4208	9/03/2016 18:36	NFS One Pager for Trustees.docx	cdrayton	Yes - PII - CIC
12	(a)	SCG.003.001.4196	20/03/2016 16:52	National Football Stadium	SUE CHANNELLS	Yes - PII - CIC
13	(a)	SCG.003.001.4197	20/03/2016 16:40	NFS Brief for Trustees.docx	cdrayton	Yes - PII - CIC
14	(a)	SCG.003.001.3495	13/04/2016 12:06	ANZ events to be relocated.docx	CARON LEFEVER	Yes - PII - CIC
15	(a)	SCG.003.001.3496	13/04/2016 12:06	ANZ events to be relocated.docx	clefever	Yes - PII - CIC
16	(a)	SCG.003.001.6844	20/04/2016 12:18	FW: Allianz Stadium Upgrade Cost Plan (Draft 1)	Johnny Naofal	Yes - PII - CIC
17	(a)	SCG.003.001.6845	19/04/2016 16:22	SC&SGT-Allianz-Stadium-Upgrade-Cost-Plan-D1.pdf	Asset Technologies Pacific	Yes - PII - CIC
18	(a)	SCG.003.001.2113	10/05/2016 18:18	RE: Miller - Allianz Stadium	Deborah Kelly	Yes - PII - CIC
19	(a)	SCG.003.001.2114	10/05/2016 11:20	SCSGT-Cost-Plan-V1.pdf	Asset Technologies Pacific	Yes - PII - CIC
20	(a)	SCG.003.001.1969	19/01/2017 17:07	<no subject>	Richard Breslin	Yes - PII - CIC

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21	(a)	SCG.003.001.1970	28/01/2016 15:16	160128_Commentary on ANZ Stadium Proposal.docx	Richard Breslin	Yes - PII - CIC
22	(a)	SCG.003.001.1854	22/03/2017 14:22	ANZ Stadium	Chris Paterson	Yes - PII - CIC
23	(a)	SCG.003.001.1855	22/03/2017 14:18	160128_Commentary on ANZ Stadium Proposal_commercial in confidence.docx	Richard Breslin	Yes - PII - CIC
24	(a)	SCG.003.001.2771	8/08/2017 22:04	50,000 seat SFS Cost Plan summary	Deborah Kelly	Yes - PII - CIC
25	(a)	SCG.003.001.2772	4/08/2017 15:37	SFS Cost Plan_Key Points_final.pdf	WinTest	Yes - PII - CIC
26	(a)	SCG.003.001.2773	8/08/2017 22:04	ATT00001.htm		Yes - PII - CIC
27	(a)	SCG.003.001.1452	24/08/2017 16:44	SFS new build construction - 1 pager	Hugh Taylor	Yes - PII - CIC
28	(a)	SCG.003.001.1453	24/08/2017 16:36	20170824_SFS High Level Programme Summary_ht.docx	HughTaylor MI Assoc	Yes - PII - CIC
29	(a)	SCG.003.001.1799	11/09/2017 10:54	FW: Letter Allianz Stadium Redevelopment	JAMIE BARKLEY	Yes - PII - CIC
30	(a)	SCG.003.001.1800	11/09/2017 8:26	3 Entity letter to Minister 8.9.17.pdf	Andrew Hore	Yes - PII - CIC
31	(a)	SCG.003.001.7682	11/09/2017 13:21	Letter Allianz Stadium Rebuild	SUE CHANNELLS	Yes - PII - CIC
32	(a)	SCG.003.001.7683	11/09/2017 8:26	3 Entity letter to Minister 8.9.17.pdf	Andrew Hore	Yes - PII - CIC
33	(a)	SCG.003.001.0766	11/09/2017 16:58	RE: Letter Allianz Stadium Rebuild	Anthony Shepherd	Yes - PII - CIC
34	(a)	SCG.003.001.0762	11/09/2017 17:36	Emailing: 20170911 Simplified Schedule	Deirdre O'Neill	Yes - PII - CIC
35	(a)	SCG.003.001.0763	11/09/2017 17:35	20170911 Simplified Schedule.pptx	Elly Chapman	Yes - PII - CIC
36	(a)	SCG.003.001.2723	11/09/2017 17:41	Template_stress test.pptx	Deborah Kelly	Yes - PII - CIC
37	(a)	SCG.003.001.2724	11/09/2017 17:41	Template_stress test.pptx	Deirdre O'Neill	Yes - PII - CIC
38	(a)	SCG.003.001.1438	12/09/2017 12:36	Procurement information	Deirdre O'Neill	Yes - PII - CIC
39	(a)	SCG.003.001.1439	12/09/2017 12:33	20170912-MI AllianzProcDiscussPaper_final.docx	HughTaylor MI Assoc	Yes - PII - CIC
40	(a)	SCG.003.001.1440	12/09/2017 12:35	20170912-MI AllianzProcDiscussPaper_final.pdf	HughTaylor MI Assoc	Yes - PII - CIC
41	(a)	SCG.003.001.2711	21/09/2017 13:52	1709 Construction Time Frames for Refurbishment Options	Deborah Kelly	Yes - PII - CIC

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42	(a)	SCG.003.001.2712	21/09/2017 13:17	1709 Construction Time Frames for Refurbishment Options.docx	HughTaylor MI Assoc	Yes - PII - CIC
43	(a)	SCG.003.001.6660	11/10/2017 16:55	FW: Letter Allianz Stadium Redevelopment	Phillip Heads	Yes - PII - CIC
44	(a)	SCG.003.001.6661	11/09/2017 8:26	3 Entity letter to Minister 8.9.17.pdf	Andrew Hore	Yes - PII - CIC
45	(a)	SCG.003.001.0632	21/11/2017 20:06	Emailing: 20171117-MI Allianz Procurement SCG comp, 20171117-MI Allianz Procurement SCG comp	Deirdre O'Neill	Yes - PII - CIC
46	(a)	SCG.003.001.0633	21/11/2017 20:05	20171117-MI Allianz Procurement SCG comp.pdf	HughTaylor MI Assoc	Yes - PII - CIC
47	(a)	SCG.003.001.0634	21/11/2017 20:05	20171117-MI Allianz Procurement SCG comp.docx	HughTaylor MI Assoc	Yes - PII - CIC
48	(a)	SCG.003.001.0635	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC
49	(a)	SCG.003.001.0636	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC
50	(a)	SCG.003.001.0637	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC
51	(a)	SCG.003.001.0623	22/11/2017 15:18	Comms documents	Phillip Heads	Yes - PII - CIC
52	(a)	SCG.003.001.0624	22/11/2017 15:16	Speech notes draft.docx	chall@Primary.local	Yes - PII - CIC
53	(a)	SCG.003.001.0625	22/11/2017 15:16	Staff Q&A.docx	ngauci	Yes - PII - CIC
54	(a)	SCG.003.001.0626	22/11/2017 15:15	Member Q&A.docx	ngauci	Yes - PII - CIC
55	(a)	SCG.003.001.0627	22/11/2017 15:15	Community Q&A.docx	ngauci	Yes - PII - CIC
56	(a)	SCG.003.001.0628	22/11/2017 15:15	MR announcement.docx	chall@Primary.local	Yes - PII - CIC
57	(a)	SCG.003.001.0629	22/11/2017 15:15	Members statement.docx	cdrayton	Yes - PII - CIC
58	(a)	SCG.003.001.0630	22/11/2017 15:15	Contribution – ANZ Stadium and Allianz Stadium host 200 major men's and women's fixtures across all five codes every year.docx	Phillip Heads	Yes - PII - CIC
59	(a)	SCG.003.001.0631	22/11/2017 15:14	JB Master stakeholder letter.docx	chall@Primary.local	Yes - PII - CIC

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60	(a)	SCG.003.001.0617	22/11/2017 15:44	Emailing: 20171117-MI Allianz Procurement SCG comp_update, Summary diagram	Deirdre O'Neill	Yes - PII - CIC
61	(a)	SCG.003.001.0618	22/11/2017 14:55	20171117-MI Allianz Procurement SCG comp_update.docx	HughTaylor MI Assoc	Yes - PII - CIC
62	(a)	SCG.003.001.0619	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC
63	(a)	SCG.003.001.0620	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC
64	(a)	SCG.003.001.0621	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC
65	(a)	SCG.003.001.0622	22/11/2017 15:43	Summary diagram.pptx	Deirdre O'Neill	Yes - PII - CIC
66	(a)	SCG.003.001.2588	23/11/2017 16:16	20171117-MI Allianz Procurement SCG comp_update	Deborah Kelly	Yes - PII - CIC
67	(a)	SCG.003.001.2589	22/11/2017 14:55	20171117-MI Allianz Procurement SCG comp_update.docx	HughTaylor MI Assoc	Yes - PII - CIC
68	(a)	SCG.003.001.2590	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC
69	(a)	SCG.003.001.2591	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC
70	(a)	SCG.003.001.2592	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC
71	(a)	SCG.003.001.7554	23/11/2017 16:43	FW: 20171117-MI Allianz Procurement SCG comp_update	SUE CHANNELLS	Yes - PII - CIC
72	(a)	SCG.003.001.7555	22/11/2017 14:55	20171117-MI Allianz Procurement SCG comp_update.docx	HughTaylor MI Assoc	Yes - PII - CIC
73	(a)	SCG.003.001.7556	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC
74	(a)	SCG.003.001.7557	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC
75	(a)	SCG.003.001.7558	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC
76	(a)	SCG.003.001.2573	24/11/2017 14:09	RE: Trust Act planning provisions vs SDA	Deborah Kelly	Yes - CLP
77	(a)	SCG.003.001.0577	24/11/2017 14:19	RE: Trust Act planning provisions vs SDA	Nicholas Brunton	Yes - CLP
78	(a)	SCG.003.001.2571	24/11/2017 14:54	Emailing: 2017-11-24 Minister Ayres Delivery and Procurement recommendation	Deborah Kelly	Yes - PII - CIC

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79	(a)	SCG.003.001.2572	24/11/2017 8:55	2017-11-24 Minister Ayres Delivery and Procurement recommendation.docx	Deborah Kelly	Yes - PII - CIC
80	(a)	SCG.003.001.2566	24/11/2017 17:39	Emailing: 2017-11-24 Minister Ayres Delivery and Procurement recommendation	Deborah Kelly	Yes - PII - CIC
81	(a)	SCG.003.001.2567	24/11/2017 15:31	2017-11-24 Minister Ayres Delivery and Procurement recommendation.docx	Deborah Kelly	Yes - PII - CIC
82	(a)	SCG.002.001.0284	30/11/2017 11:33	Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	Stephen Gorry	Yes - CLP
83	(a)	SCG.002.001.1935	30/11/2017 11:48	FW: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	BERNIE LAMERTON	Yes - CLP
84	(a)	SCG.003.001.2006	30/11/2017 11:48	FW: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	BERNIE LAMERTON	Yes - CLP
85	(a)	SCG.002.001.1934	30/11/2017 11:49	RE: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	BERNIE LAMERTON	Yes - CLP
86	(a)	SCG.003.001.2550	30/11/2017 22:32	Re: Trust Act planning provisions - initial thoughts on litigation risks [HDY-Production1.FID612089]	Deborah Kelly	Yes - CLP
87	(a)	SCG.003.001.0530	1/12/2017 8:32	Re: Trust Act planning provisions - initial thoughts on litigation risks [HDY-Production1.FID612089]	Stephen Gorry	Yes - CLP
88	(a)	SCG.003.001.1755	5/12/2017 22:16	Letter to Minister	Andrew Hore	Yes - PII - CIC
89	(a)	SCG.003.001.1756	11/09/2017 8:26	3 Entity letter to Minister 8.9.17.pdf	Andrew Hore	Yes - PII - CIC
90	(a)	SCG.003.001.0501	6/12/2017 19:43	List of likely requirements in an EIS	Deirdre O'Neill	Yes - PII - CIC
91	(a)	SCG.003.001.0502	6/12/2017 19:40	List of likely planning considerations for EIS.PDF	HughTaylor MI Assoc	Yes - PII - CIC

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92	(a)	SCG.002.001.0269	8/12/2017 12:03	RE: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089] [NRF-APAC.FID200711118]	Gorry, Stephen	Yes - CLP
93	(a)	SCG.002.001.0268	8/12/2017 12:27	Re: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089] [NRF-APAC.FID200711118]	Gorry, Stephen	Yes - CLP
94	(a)	SCG.002.001.1926	8/12/2017 12:32	RE: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089] [NRF-APAC.FID200711118]	BERNIE LAMERTON	Yes - CLP
95	(a)	SCG.003.001.5113	11/12/2017 10:46	RE: Media query - Allianz Stadium naming rights	Phillip Heads	Yes - PII - CIC
96	(a)	SCG.003.001.5110	11/12/2017 14:23	RE: Media query - Allianz Stadium naming rights	Phillip Heads	Yes - PII - CIC
97	(a)	SCG.002.001.1878	15/12/2017 18:58	FW: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089] [NRF-APAC.FID200711118]	BERNIE LAMERTON	Yes - CLP
98	(a)	SCG.003.001.7424	18/12/2017 14:33	FW: Shepherd Letter	SUE CHANNELLS	Yes - PII
99	(a)	SCG.003.001.7425	18/12/2017 14:20	SSheridan117121813200.pdf		Yes - PII
100	(a)	SCG.003.001.3884	18/12/2017 22:53	Fwd: Memo from Mark Tonga	Mark Tonga	Yes - PII
101	(a)	SCG.003.001.3885	18/12/2017 14:51	MarkTonga-AllianzRebuild-Memo-Drayton-181217.pdf		Yes - PII
102	(a)	SCG.003.001.5070	19/12/2017 12:05	RE: Alliance Stadium- Centennial Park	Phillip Heads	Yes - PII
103	(a)	SCG.003.001.5071	19/12/2017 12:04	PH-JSINGH 191217.pdf	MADELEINE LINDSELL	Yes - PII
104	(a)	SCG.002.001.0253	19/12/2017 12:48	RE: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089] [NRF-APAC.FID200711118]	JASON HILL	Yes - CLP

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105	(a)	SCG.002.001.1877	19/12/2017 13:08	RE: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089] [NRF-APAC.FID200711118]	BERNIE LAMERTON	Yes - CLP
106	(a)	SCG.002.001.1876	19/12/2017 15:53	Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	BERNIE LAMERTON	Yes - CLP
107	(a)	SCG.003.001.6559	19/12/2017 15:53	Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	BERNIE LAMERTON	Yes - CLP; Yes - PII - CIC
108	(a)	SCG.002.001.0252	20/12/2017 11:24	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	Jonathan Greig	Yes - CLP; Yes - PII - CIC
109	(a)	SCG.002.001.1873	20/12/2017 13:04	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	BERNIE LAMERTON	Yes - CLP
110	(a)	SCG.002.001.0251	20/12/2017 13:06	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	Jonathan Greig	Yes - CLP; Yes - PII - CIC
111	(a)	SCG.002.001.1872	20/12/2017 13:23	Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP
112	(a)	SCG.002.001.1871	20/12/2017 13:24	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP
113	(a)	SCG.003.001.0406	20/12/2017 13:24	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP
114	(a)	SCG.002.001.0250	20/12/2017 13:37	RE: Allianz Stadium Redevelopment - Amendment to Trust By-laws	Marc Landrigan	Yes - CLP
115	(a)	SCG.002.001.1869	20/12/2017 14:15	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP
116	(a)	SCG.002.001.1870	20/12/2017 14:15	RE: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP
117	(a)	SCG.003.001.1725	20/12/2017 14:15	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP; Yes - PII - CIC
118	(a)	SCG.003.001.1720	21/12/2017 15:45	RE: Allianz Stadium	Deirdre O'Neill	Yes - PII - CIC
119	(a)	SCG.003.001.1721	1/02/2010 9:25	SFS - Sections - Nth & Sth Terraces.pdf	Abby	Yes - PII - CIC

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120	(a)	SCG.003.001.1722	1/02/2010 9:22	SFS - Sections - West Terraces.pdf	Abby	Yes - PII - CIC
121	(a)	SCG.003.001.1723	1/02/2010 9:21	SFS - Sections.pdf	Abby	Yes - PII - CIC
122	(a)	SCG.003.001.1724	1/02/2010 9:23	SFS - Sections - East Terraces.pdf	Abby	Yes - PII - CIC
123	(a)	SCG.003.001.3958	21/12/2017 21:43	Allianz stadium redevelopment	simon greenberg	Yes - PII
124	(a)	SCG.003.001.2460	21/12/2017 22:01	RE: Project Brief	Deborah Kelly	Yes - PII - CIC
125	(a)	SCG.003.001.5057	26/12/2017 11:56	RE: Allianz stadium redevelopment	Phillip Heads	Yes - PII
126	(a)	SCG.003.001.5058	26/12/2017 11:54	Community Q&A.pdf	ngauci	Yes - PII
127	(a)	SCG.003.001.5059	26/12/2017 11:56	PH-SGreenberg 261217.pdf	MADELEINE LINDSELL	Yes - PII
128	(a)	SCG.003.001.6525	27/12/2017 16:24	'— Untitled Document —	srvscanning@scgt.nsw.gov.au	Yes - PII
129	(a)	SCG.003.001.6526	27/12/2017 16:24	scan.pdf		Yes - PII
130	(a)	SCG.003.001.7419	27/12/2017 16:26	Member letter re Stadium	SUE CHANNELLS	Yes - PII
131	(a)	SCG.003.001.7420	27/12/2017 16:26	scan.pdf		Yes - PII
132	(a)	SCG.003.001.7992	23/01/2018 18:21	'— Untitled Document —	srvscanning@scgt.nsw.gov.au	Yes - CLP
133	(a)	SCG.003.001.7993	23/01/2018 18:22	scan.pdf		Yes - CLP
134	(a)	SCG.003.001.1682	25/01/2018 12:05	FW: SFS demolition	Hugh Taylor	Yes - PII - CIC
135	(a)	SCG.003.001.4995	25/01/2018 12:18	TAG Minutes 4 Dec 2017	Phillip Heads	Yes - PII - CIC
136	(a)	SCG.003.001.4996	24/01/2018 11:13	TAG Minutes 4 Dec 2017.docx	kharvey	Yes - PII - CIC
137	(a)	SCG.003.001.1680	25/01/2018 13:26	FW: SFS demolition	Hugh Taylor	Yes - PII - CIC
138	(a)	SCG.003.001.1681	8/12/2017 13:03	SSheridan217120812030.pdf		Yes - PII - CIC
139	(a)	SCG.001.001.0714	28/01/2018 16:10	Barry Richardson 2401.docx	SUE CHANNELLS	Yes - PII
140	(a)	SCG.003.001.3849	29/01/2018 14:30	RE: New Gold & Platinum Member sales [NRF-APAC.FID200711118]	Gorry, Stephen	Yes - CLP
141	(a)	SCG.003.001.2007	29/01/2018 14:44	FW: New Gold & Platinum Member sales [NRF-APAC.FID200711118]	JANE COLES	Yes - CLP

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Number	Item	Document Number	Date of Creation	Document	Author	Privilege claim
142	(a)	SCG.003.001.3555	30/01/2018 10:34	RE: New Gold & Platinum Member sales [NRF-APAC.FID200711118]	Charlie Drayton	Yes - CLP
143	(a)	SCG.003.001.3551	5/02/2018 14:10	Members	Charlie Drayton	Yes - PII
144	(a)	SCG.003.001.3552	5/02/2018 14:09	Feedback.docx	Charlie Drayton	Yes - PII
145	(a)	SCG.003.001.4964	5/02/2018 14:37	Feedback	Phillip Heads	Yes - PII
146	(a)	SCG.003.001.4965	5/02/2018 14:09	Feedback.docx	Charlie Drayton	Yes - PII
147	(a)	SCG.003.001.3549	5/02/2018 14:50	Member responses	Charlie Drayton	Yes - PII
148	(a)	SCG.003.001.3550	5/02/2018 14:45	Member feedback 5.2.18.docx	Charlie Drayton	Yes - PII
149	(a)	SCG.003.001.1654	7/02/2018 14:56	RE: Playbill at SCG during Allianz Stadium rebuild	Katie Burgess	Yes - PII - CIC
150	(a)	SCG.003.001.3542	8/02/2018 15:17	Member responses	Charlie Drayton	Yes - PII
151	(a)	SCG.003.001.3543	8/02/2018 15:14	180208_Member Q&A.docx	Kiara Neasy	Yes - PII
152	(a)	SCG.003.001.3544	8/02/2018 14:53	180208_Member feedback.docx	Charlie Drayton	Yes - PII
153	(a)	SCG.002.001.1816	8/02/2018 15:34	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP
154	(a)	SCG.003.001.3826	9/02/2018 9:38	RE: Moral rights [NRF-APAC.FID2158499]	Gorry, Stephen	Yes - CLP
155	(a)	SCG.003.001.4947	9/02/2018 9:53	RE: Moral rights [NRF-APAC.FID2158499]	Phillip Heads	Yes - CLP
156	(a)	SCG.003.001.0229	9/02/2018 14:45	FW: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII
157	(a)	SCG.003.001.0223	11/02/2018 21:01	Fwd: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII
158	(a)	SCG.003.001.4937	12/02/2018 9:42	RE: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	Phillip Heads	Yes - PII
159	(a)	SCG.003.001.0214	13/02/2018 11:12	Trust Advisory Group meeting	CARON LEFEVER	Yes - PII - CIC
160	(a)	SCG.003.001.0215	13/02/2018 11:08	TAG agenda February 2018.docx	sjordan	Yes - PII - CIC

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Number	Item	Document Number	Date of Creation	Document	Author	Privilege claim
161	(a)	SCG.003.001.0216	13/02/2018 11:10	TAG Minutes 4 Dec 2017.docx	kharvey	Yes - PII - CIC
162	(a)	SCG.003.001.3720	13/02/2018 12:41	RE: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII - CIC
163	(a)	SCG.003.001.3823	14/02/2018 12:39	RE: Moral rights [NRF-APAC.FID200711118]	Gorry, Stephen	Yes - CLP
164	(a)	SCG.003.001.3824	13/02/2018 18:21	Letter to Phillip Cox - moral rights notice(63453861_1).docx		Yes - CLP
165	(a)	SCG.003.001.0212	14/02/2018 14:11	Letter to Phillip Cox - moral rights notice(63453861_1).docx	Phillip Heads	Yes - CLP
166	(a)	SCG.003.001.0213	14/02/2018 13:53	Letter to Phillip Cox - moral rights notice(63453861_1).docx	Phillip Heads	Yes - CLP
167	(a)	SCG.003.001.4928	14/02/2018 14:51	FW: Trust Advisory Group meeting	Phillip Heads	Yes - PII - CIC
168	(a)	SCG.003.001.4929	13/02/2018 11:08	TAG agenda February 2018.docx	sjordan	Yes - PII - CIC
169	(a)	SCG.003.001.4930	13/02/2018 11:10	TAG Minutes 4 Dec 2017.docx	kharvey	Yes - PII - CIC
170	(a)	SCG.003.001.0207	15/02/2018 9:22	Sydney Football Stadium FF&E Proposal	Deirdre O'Neill	Yes - PII - CIC
171	(a)	SCG.003.001.0208	14/02/2018 13:20	180213_RGC_FeeProposal_SCGT_Ver01.pdf	Ross.Wilson	Yes - PII - CIC
172	(a)	SCG.003.001.0176	20/02/2018 20:53	FW: Sketches of Individual diversions	Deirdre O'Neill	Yes - PII - CIC
173	(a)	SCG.003.001.0177	20/02/2018 17:35	Individual Diversion Sketches.pdf	Sean.Bowen	Yes - PII - CIC
174	(a)	SCG.003.001.0178	20/02/2018 17:38	Summary of Diversions.docx	Sean Bowen	Yes - PII - CIC
175	(a)	SCG.003.001.0174	21/02/2018 16:11	TAG Minutes 15 Feb 2018	Phillip Heads	Yes - PII - CIC
176	(a)	SCG.003.001.0175	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII - CIC
177	(a)	SCG.003.001.4902	21/02/2018 16:11	TAG Minutes 15 Feb 2018	Phillip Heads	Yes - PII - CIC
178	(a)	SCG.003.001.4903	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII - CIC
179	(a)	SCG.003.001.0155	21/02/2018 18:28	Fwd: TAG Minutes 15 Feb 2018	Jim Betts	Yes - PII - CIC
180	(a)	SCG.003.001.0156	21/02/2018 18:28	image001.jpg		Yes - PII - CIC
181	(a)	SCG.003.001.0157	21/02/2018 18:28	ATT00001.htm		Yes - PII - CIC
182	(a)	SCG.003.001.0158	21/02/2018 18:28	imaged79dd5.PNG		Yes - PII - CIC

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Number	Item	Document Number	Date of Creation	Document	Author	Privilege claim
183	(a)	SCG.003.001.0159	21/02/2018 18:28	ATT00002.htm		Yes - PII - CIC
184	(a)	SCG.003.001.0160	21/02/2018 18:28	imagea9d707.JPG		Yes - PII - CIC
185	(a)	SCG.003.001.0161	21/02/2018 18:28	ATT00003.htm		Yes - PII - CIC
186	(a)	SCG.003.001.0162	21/02/2018 18:28	imaged79dd5.PNG		Yes - PII - CIC
187	(a)	SCG.003.001.0163	21/02/2018 18:28	ATT00004.htm		Yes - PII - CIC
188	(a)	SCG.003.001.0164	21/02/2018 18:28	imagea9d707.JPG		Yes - PII - CIC
189	(a)	SCG.003.001.0165	21/02/2018 18:28	ATT00005.htm		Yes - PII - CIC
190	(a)	SCG.003.001.0166	21/02/2018 18:28	imaged79dd5.PNG		Yes - PII - CIC
191	(a)	SCG.003.001.0167	21/02/2018 18:28	ATT00006.htm		Yes - PII - CIC
192	(a)	SCG.003.001.0168	21/02/2018 18:28	imagea9d707.JPG		Yes - PII - CIC
193	(a)	SCG.003.001.0169	21/02/2018 18:28	ATT00007.htm		Yes - PII - CIC
194	(a)	SCG.003.001.0170	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII - CIC
195	(a)	SCG.003.001.0171	21/02/2018 18:28	ATT00008.htm		Yes - PII - CIC
196	(a)	SCG.003.001.6391	22/02/2018 10:50	FW: TAG Minutes 15 Feb 2018	CARON LEFEVER	Yes - PII - CIC
197	(a)	SCG.003.001.6392	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII - CIC
198	(a)	SCG.002.001.0082	23/02/2018 13:55	FW: Waratahs VHA Redevelopment Issues [NRF-APAC.FID2161591]	JASON HILL	Yes - CLP
199	(a)	SCG.002.001.1771	23/02/2018 16:47	RE: Waratahs VHA Redevelopment Issues [NRF-APAC.FID2161591]	BERNIE LAMERTON	Yes - CLP
200	(a)	SCG.002.001.0081	24/02/2018 16:59	RE: Waratahs VHA Redevelopment Issues [NRF-APAC.FID2161591]	Stephen Saunders	Yes - CLP
201	(a)	SCG.002.001.0080	26/02/2018 17:00	FW: Waratahs VHA Redevelopment Issues [NRF-APAC.FID2161591]	JASON HILL	Yes - CLP
202	(a)	SCG.003.001.0143	26/02/2018 18:39	Fwd: Alianza Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII

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203	(a)	SCG.002.001.0072	28/02/2018 12:43	FW: Waratahs VHA Redevelopment Issues (3141427)[NRF-APAC.FID2161591]	Mulligan, Peter	Yes - CLP
204	(a)	SCG.002.001.0068	2/03/2018 11:09	FW: VHA Breaches/Damages (3141427)[NRF-APAC.FID2161591]	JASON HILL	Yes - CLP
205	(a)	SCG.003.001.0079	5/03/2018 11:52	FW: MAG meeting	JANE COLES	Yes - PII
206	(a)	SCG.003.001.1578	9/03/2018 13:31	Fwd: Allianz GPR Survey - Add Jeff Ramos	Tom Kennedy	Yes - PII - CIC
207	(a)	SCG.003.001.1579	9/03/2018 13:30	Allianz Stadium GPR Report.pdf		Yes - PII - CIC
208	(a)	SCG.002.001.0042	14/03/2018 8:02	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	Jonathan Greig	Yes - CLP
209	(a)	SCG.002.001.1734	14/03/2018 11:48	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	BERNIE LAMERTON	Yes - CLP
210	(a)	SCG.002.001.1735	14/03/2018 11:47	Venue Allocation of Events 2018 - 2022.docx	BERNIE LAMERTON	Yes - CLP
211	(a)	SCG.003.001.5433	15/03/2018 14:49	FW: Stadium redevelopment assurances		Yes - PII
212	(a)	SCG.003.001.5434	14/03/2018 16:34	To PH 14318.pdf	Michael Waterhouse	Yes - PII

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Index of privileged documents – Category E

Item	No.	Document	Date of Creation	Author	Privilege Claim Y/N?
Category E					
Item (e)	1.	Memorandum of Understanding, NSW Stadia Investment and Content – ARLC and NSW Government	24 November 2017	Australian Rugby League Commission	Yes – PII - CIC

Jamie Barkley

CEO for the Sydney Cricket and Sports Ground Trust

Completion of Response to Resolution made pursuant to Standing Order 52 made on 15 March 2018

Submissions on Claims of Privilege and Public Interest Immunity

1. These are the submissions of the Sydney Cricket and Sports Ground Trust (the **Trust**) to accompany the Trust's letter dated 6 April 2018 and are made in support of a claim of client legal privilege and public interest immunity in relation to certain documents returned under the resolution made by the Legislative Council on 15 March 2018.

Preliminary matters

2. The return of the Trust excludes Cabinet material and does not refer to Cabinet material.
3. As required, a return under the resolution includes an index of all documents produced which are non-privileged.
4. A separate index has been prepared for the return of documents in relation to which a claim for privilege is made. In that index, the following markers are used in relation to privilege and public interest immunity:
 - (a) 'Yes - CLP' for client legal privilege claims; and
 - (b) 'Yes - PII - CIC' for public interest immunity claims on the basis of commercial confidentiality; and
 - (c) 'Yes - PII' for public interest immunity claims on the basis of personal information.
5. These submissions relate to that index.
6. Where a claim for privilege is made by use of one of the markers set out above, it is intended that the submissions set out in more detail below they be incorporated in to the claim for privilege or public interest immunity.

Context

7. The Trust is charged with the care, management and control of the scheduled lands, including Allianz Stadium and the surrounding areas at Moore Park, as set out under the Sydney Cricket & Sports Ground Trust Act 1978 (NSW) (the **Act**).
8. The Trust may, pursuant to section 14 of the Act, allow the scheduled lands to be used by such persons, clubs, associations, leagues or unions on such terms and conditions as the Trust may think fit and proper for cricket, football or tennis or any other game, or for athletic sports, public amusement, or any other purpose which the Minister approves.
9. In authorising parts of the scheduled lands and Allianz Stadium to be used by parties and to deliver premier sporting content, one aspect of the Trust's responsibilities includes entering into and negotiating the terms and conditions of contractual arrangements and negotiations with sporting codes and other venue hire partners.

INFRASTRUCTURE NSW
ORDER FOR PAPERS - SYDNEY STADIUMS
PRIVILEGED DOCUMENTS

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0014.0567	Item (a)	Email	FW: ANZ Stadium Development	13/01/2017 12:00	Privacy
INSW.0014.0570	Item (a)	Email	RE: ANZ Stadium Development	13/01/2017 12:54	Privacy
INSW.0001.1842	Item (a)	Document	Attachment A - Stadium Australia Redevelopment - Key Contacts.pdf	9/03/2017 16:44	Privacy
INSW.0001.3060	Item (a)	Document	SASOP Contractor Performance Report - Cox.docx	2/08/2017 15:23	Commercial in Confidence
INSW.0001.3063	Item (a)	Document	Performance Report Cox.pdf	2/08/2017 15:52	Commercial in Confidence
INSW.0001.3066	Item (a)	Document	Contracts Disclosure - Class 2 Cox.docx	3/08/2017 9:33	Commercial in Confidence
INSW.0001.3693	Item (a)	Document	11. Contracts Disclosure - Class 2 (if over 150k inc GST).docx	19/10/2017 10:04	Commercial in Confidence
INSW.0001.3696	Item (a)	Document	Contracts Disclosure - Class 2 Cox.docx	19/10/2017 15:14	Commercial in Confidence
INSW.0001.3697	Item (a)	Document	Cox Contracts Disclosure - Class 2 V2.docx	19/10/2017 15:22	Commercial in Confidence
INSW.0001.3789	Item (a)	Document	Attachment C - RFQ Evaluation Report - E3 Advisory.docx	30/11/2017 16:16	Commercial in

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
					Confidence
INSW.0001.3826	Item (a)	Document	Attachment C - RFQ Evaluation Report - RLB.docx	11/12/2017 7:52	Commercial in Confidence
INSW.0001.3832	Item (a)	Document	Attachment C - RFQ Evaluation Report - RLB.DOCX	11/12/2017 13:46	Commercial in Confidence
INSW.0001.3836	Item (a)	Document	Attachment C - RFQ Evaluation Report - Savills.docx	12/12/2017 15:34	Commercial in Confidence
INSW.0001.3840	Item (a)	Document	Attachment C - RFQ Evaluation Report - KPMG MPS.docx	12/12/2017 16:56	Commercial in Confidence
INSW.0001.3842	Item (a)	Document	Attachment C - RFQ Evaluation Report - Savills.docx	12/12/2017 17:20	Commercial in Confidence
INSW.0001.3848	Item (a)	Document	Attachment C - RFQ Evaluation Report - KPMG SASOP.docx	13/12/2017 7:59	Commercial in Confidence
INSW.0001.3875	Item (a)	Document	5. RFQ Evaluation Report Template.docx	15/12/2017 8:55	Commercial in Confidence
INSW.0001.4066	Item (a)	Document	Attachment C - Evaluation Report - construction program.docx	4/01/2018 14:58	Commercial in Confidence
INSW.0001.4077	Item (a)	Document	Attachment C - RFQ evaluation report template.docx	5/01/2018 9:52	Commercial in Confidence
INSW.0001.4078	Item (a)	Document	Attachment C - RFQ Evaluation Report.docx	5/01/2018 11:46	Commercial in Confidence
INSW.0001.4081	Item (a)	Document	Attachment C - RFQ evaluation report template.docx	5/01/2018 14:40	Commercial in Confidence

Document ID	Relevant Item	Document type	Title	Date of document	Privilege claim
INSW.0001.4085	Item (a)	Document	Attachment C - RFQ Evaluation Report Noise and Vibration.docx	5/01/2018 16:51	Commercial in Confidence
INSW.0001.4086	Item (a)	Document	Attachment C - RFQ Evaluation Report - Contamination & Geotech.docx	8/01/2018 7:44	Commercial in Confidence
INSW.0001.4106	Item (a)	Document	Attachment C - RFQ Evaluation Report ESD Strategy.docx	10/01/2018 8:24	Commercial in Confidence
INSW.0001.4109	Item (a)	Document	Attachment C - RFQ Evaluation Report - Legal Advisor.docx	10/01/2018 8:55	Commercial in Confidence
INSW.0001.4114	Item (a)	Document	Attachment C - RFQ Evaluation Report stormwater and flooding.docx	10/01/2018 9:26	Commercial in Confidence
INSW.0001.4246	Item (a)	Document	Attachment C - RFQ Evaluation Report Project Manager.docx	23/01/2018 14:51	Commercial in Confidence
INSW.0001.4249	Item (a)	Document	Attachment C - RFQ Evaluation Report Project Manager.docx	23/01/2018 15:08	Commercial in Confidence
INSW.0001.4257	Item (a)	Document	Attachment C - RFQ Evaluation Report - planing advisory services.docx	24/01/2018 13:05	Commercial in Confidence
INSW.0016.3747	Item (a)	Email	RE: Legal advice - stadia MOU	30/01/2018 11:45	Legal Professional Privilege; Privacy
INSW.0016.3748	Item (a)	Email	RE: Legal advice - stadia MOU	30/01/2018 11:49	Legal Professional Privilege; Privacy
INSW.0001.4300	Item (a)	Spreadsheet	SFSR Planning Consultants.xlsx	9/02/2018 10:42	Commercial in Confidence
INSW.0001.4369	Item (a); Item (b)	Document	Attachment C - RFQ Evaluation Report template RFQ 1012.docx	15/02/2018 11:08	Commercial in Confidence

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0001.4372	Item (a)	Document	Attachment C - RFQ Evaluation Report template RFQ 1013.docx	15/02/2018 11:09	Commercial in Confidence
INSW.0013.1314	Item (a)	Email	RE: Additional project/enquiry form integration quote	16/02/2018 18:22	Public Interest Immunity
INSW.0013.1315	Item (a)	Document	INSW web text.docx	16/02/2018 17:25	Public Interest Immunity
INSW.0001.4456	Item (a)	Document	Attachment C - RFQ Evaluation Report template.docx	2/03/2018 9:52	Commercial in Confidence
INSW.0013.2828	Item (a)	Email	FW: Member Question about Allianz stadium redevelopment	5/03/2018 10:36	Privacy
INSW.0013.3059	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:16	Privacy
INSW.0013.3060	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:19	Privacy
INSW.0016.6011	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:19	Privacy
INSW.0013.3063	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:26	Privacy
INSW.0013.3065	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:27	Privacy
INSW.0013.3101	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 14:40	Privacy
INSW.0013.3107	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 15:09	Privacy
INSW.0016.6019	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 15:09	Privacy
INSW.0001.4502	Item (a)	Document	SFSR Transaction Manager-evaluation-report-template.docx	8/03/2018 10:44	Commercial in Confidence
INSW.0013.3953	Item (a)	Email	Ministerial Correspondence - please review	8/03/2018 16:22	Privacy

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0013.3954	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
INSW.0013.3955	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
INSW.0013.3959	Item (a)	Email	FW: Ministerial Correspondence - please review	8/03/2018 16:24	Privacy
INSW.0013.3960	Item (a)	Image	image001.jpg	8/03/2018 16:22	Privacy
INSW.0013.3961	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
INSW.0013.3962	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
INSW.0016.6280	Item (a)	Email	FW: Ministerial Correspondence - please review	8/03/2018 16:25	Privacy
INSW.0016.6281	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
INSW.0016.6282	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
INSW.0001.4525	Item (a)	Document	Attachment C - RFQ Evaluation Report Social & Economic.docx	9/03/2018 13:38	Commercial in Confidence
INSW.0016.6359	Item (a)	Email	FW: Ministerial Correspondence - please review	9/03/2018 14:47	Privacy
INSW.0016.6360	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
INSW.0016.6361	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
INSW.0013.4152	Item (a)	Email	FW: Ministerial Correspondence - please review	9/03/2018 14:47	Privacy
INSW.0013.4153	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0013.4154	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
INSW.0001.4545	Item (a)	Document	Attachment C - RFQ Evaluation Report Design Reveiw Panel.docx	12/03/2018 10:21	Commercial in Confidence
INSW.0001.4548	Item (a)	Document	Attachment C - RFQ Evaluation Report Design Reveiw Panel.docx	12/03/2018 11:57	Commercial in Confidence
INSW.0013.5082	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 14:40	Privacy
INSW.0013.5086	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:26	Privacy
INSW.0013.5303	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:27	Privacy
INSW.0013.5304	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:16	Privacy
INSW.0013.5318	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:27	Privacy
INSW.0013.5319	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:16	Privacy
INSW.0001.4571	Item (a)	Document	180314 Issues Paper for Award.docx	14/03/2018 12:33	Commercial in Confidence
INSW.0016.7110	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 12:42	Privacy
INSW.0016.7111	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadiu....docx	15/03/2018 11:50	Privacy
INSW.0016.7112	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 11:50	Privacy
INSW.0013.6157	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 13:50	Privacy

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0013.6158	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadiu....docx	15/03/2018 11:50	Privacy
INSW.0013.6159	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 11:50	Privacy
INSW.0016.7115	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 13:50	Privacy
INSW.0016.7116	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadiu....docx	15/03/2018 13:50	Privacy
INSW.0016.7117	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 13:50	Privacy
INSW.0013.6231	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 17:28	Privacy
INSW.0013.6232	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadiu....docx	15/03/2018 11:50	Privacy
INSW.0013.6233	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 11:50	Privacy
INSW.0001.4674	Item (a)	Document	180316 Completed Disclosure Form.docx	16/03/2018 15:50	Commercial in Confidence
INSW.0001.4701	Item (a)	Document	Attachment C - RFQ Evaluation Report - Landscape Architect.docx	19/03/2018 15:54	Commercial in Confidence
INSW.0002.0384	Item (a)	Document	Attachment C - RFQ Evaluation Report - E3 Advisory.docx	22/03/2018 16:45	Commercial in Confidence
INSW.0002.0385	Item (a)	Document	Attachment C - RFQ Evaluation Report - KPMG MPS.DOCX	22/03/2018 16:45	Commercial in Confidence
INSW.0002.0387	Item (a)	Document	Attachment C - Evaluation Report - construction program.docx	22/03/2018 16:46	Commercial in Confidence

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0002.0404	Item (a)	Document	Attachment C - RFQ evaluation report Biodiversity Consultant.docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0405	Item (a)	Document	Attachment C - RFQ Evaluation Report.docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0406	Item (a)	Document	Attachment C - RFQ evaluation report (2).docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0407	Item (a)	Document	Attachment C - RFQ Evaluation Report - Contamination & Geotech.docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0408	Item (a)	Document	Attachment C - RFQ Evaluation Report Planning Consultant.docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0409	Item (a)	Document	Attachment C - RFQ Evaluation Report - Legal Advisor.docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0410	Item (a)	Document	Attachment C - RFQ Evaluation Report - RLB.DOCX	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0411	Item (a)	Document	Attachment C - RFQ Evaluation Report - Savills.docx	22/03/2018 16:47	Commercial in Confidence
INSW.0002.0412	Item (a)	Document	Attachment C - RFQ Evaluation Report Community Consultation.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0413	Item (a)	Document	Attachment C - RFQ Evaluation Report Community Consultation (2).docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0414	Item (a)	Document	Attachment C - RFQ Evaluation Report Design Review Panel.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0415	Item (a)	Document	Attachment C - RFQ Evaluation Report ESD Strategy.docx	22/03/2018 16:48	Commercial in Confidence

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0002.0416	Item (a)	Document	Attachment C - RFQ Evaluation Report Infrastructure Management Plan.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0417	Item (a)	Document	Attachment C - RFQ Evaluation Report Noise and Vibration.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0418	Item (a)	Document	Attachment C - RFQ Evaluation Report Project Manager.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0419	Item (a)	Document	Attachment C - RFQ Evaluation Report Social & Economic.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0420	Item (a)	Document	Attachment C - RFQ Evaluation Report stormwater and flooding.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0421	Item (a)	Document	Attachment C - rfq evaluation report Surveyor.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0422	Item (a)	Document	Attachment C - RFQ Evaluation Report template.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0423	Item (a)	Document	Attachment C - RFQ evaluation report template (2).docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0424	Item (a)	Document	Attachment C - RFQ Evaluation Report Template - OCM.DOCX	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0425	Item (a)	Document	Attachment C - RFQ Evaluation Report template RFQ 1012.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0426	Item (a)	Document	Attachment C - RFQ Evaluation Report template RFQ 1013.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0427	Item (a)	Document	Attachment C - RFQ Evaluation Report Traffic & Transport.docx	22/03/2018 16:48	Commercial in Confidence

Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
INSW.0002.0428	Item (a)	Document	Attachment C - RFQ Evaluation Report Visual Impact Assessment.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0430	Item (a)	Document	Attachment D - contracts-disclosure RFT970.docx	22/03/2018 16:48	Commercial in Confidence
INSW.0002.0663	Item (a)	Document	2. SC&SGT Asset Management Plan SC&SGT-ProposedTAM-2018-19-V1.pdf	22/03/2018 17:18	Commercial in Confidence
INSW.0002.0666	Item (a)	Document	3. Condition Report for SFS (Appendix 3 only) SC&SGT-ProposedTAM-2018-19-V1.pdf	22/03/2018 17:23	Commercial in Confidence
INSW.0002.0772	Item (a)	Document	TAM 2017.pdf	22/03/2018 17:45	Commercial in Confidence

LEGISLATIVE COUNCIL STANDING ORDER No 52

VENUES NSW

INDEXED OF PRIVILEGED DOCUMENTS

This documents lists the documents produced by Venues NSW in respect of the Legislative Council Resolution dated 15 March 2018 (**Resolution**), in respect of which a claim for privilege is made.

The documents are indexed according to the paragraph of the Resolution to which they relate. Each document produced has a unique production number. The index specifies the basis upon which privilege is claimed - either public interest immunity (PII) or legal professional privilege (LPP).

Production Number	Document	Date	Author	Basis of Privilege
Paragraph (a) - any document prepared in relation to the demolition, reconfiguration or rebuild of Allianz Stadium or ANZ Stadium				
00061	Summary of TAM priority projects	25/11/2015	Office of Sport	Y (PII)
00063	Letter from Minister Ayres to submitter	16/3/2017	Minister Ayres	Y (PII)
00064	Letter from Minister Ayres to submitter	20/3/2017	Minister Ayres	Y (PII)
00068	Email from submitter to Minister Ayres	23/6/2017	Submitter	Y (PII)
00069	Email from submitter to Minister Ayres	23/6/2017	Submitter	Y (PII)
00070	Email from submitter to Minister Ayres	23/6/2017	Submitter	Y (PII)
00071	Letter from Minister Ayres to submitter	12/7/2017	Minister Ayres	Y (PII)
00072	Email from submitter to Minister Ayres	23/6/2017	Submitter	Y (PII)
00073	Letter from Minister Ayres to submitter	14/7/2017	Minister Ayres	Y (PII)

Document ID	Document	Date	Owner	Classification
00074	ANZ Stadium redevelopment update	1/9/2017	Venues NSW	Y (PII)
00075	Venues NSW Board papers	28/9/2017	Venues NSW	Y (LPP and PII)
00076	Redevelopment of ANZ Stadium	November 2017	Venues NSW	Y (PII)
00077	Redevelopment of ANZ Stadium	November 2017	Venues NSW	Y (PII)
00078	Redevelopment of ANZ Stadium	November 2017	Venues NSW	Y (LPP and PII)
00079	Redevelopment of ANZ Stadium	November 2017	Venues NSW	Y (LPP and PII)
00080	Redevelopment of ANZ Stadium	November 2017	Venues NSW	Y (LPP and PII)
00081	Event brief	30/11/2017	Venues NSW	Y (PII)
00082	Stadium Redevelopment	2/2/2018	Venues NSW	Y (PII)
00083	Letter from Venues NSW to INSW	6/2/2018	Venues NSW	Y (PII)
00084	Letter from Venues NSW to INSW	6/2/2018	Venues NSW	Y (PII)
00085	Board minutes	28/2/2018	Venues NSW	Y (PII)
00086	Board minutes	28/2/2018	Venues NSW	Y (PII)
Paragraph (b) - any document relating to cost benefit analysis for any projects under the NSW Government Stadium strategy				
00062	Venues NSW Board Papers	11/11/2015	Venues NSW	Y (PII)

Number	Description	Date	Author	Classification
00065	Letter from Minister Ayres to MP on behalf of submitter	4/4/2017	Minister Ayres	Y (PII)
00066	Letter from Minister Ayres to MP on behalf of submitter	4/4/2017	Minister Ayres	Y (PII)
00067	Western Sydney Stadium briefing	10/5/2017	Venues NSW	Y (PII)
Paragraph (e) - any agreement between the Government and the National Rugby League regarding fixtures				
00087	Memorandum of Understanding	24/11/2017	Venues NSW	Y (PII)

19 April

00567	25/07/2016 8:58	Email	RE: ANZ Stadium	Para (a)	PII
00568	15/08/2016 21:19	Email	Estimates	Para (a); Para (b)	PII
00569	27/09/2016 17:01	Email	Allianz Workshop	Para (a)	PII
00570	4/06/2017 17:19	Document	ANZ Stadium - Redevelopment Paper 21 10 16F.pdf	Para (a)	PII
00571	4/06/2017 15:43	Document	4.4 ANZ Stadium - Redevelopment Paper 21 10 16F.PDF	Para (a)	PII
00572	4/06/2017 15:43	Document	4.4 ANZ Stadium - Redevelopment Paper 21 10 16F.PDF	Para (a)	PII
00573	8/11/2016 11:54	Document	MIN Draft Letter to Tony ShepherdNOV16.docx	Para (a)	PII
00574	8/11/2016 16:36	Document	MIN Draft Letter to Tony ShepherdNOV16.docx	Para (a)	PII
00575	4/06/2017 17:21	Document	ANZ Stadium - Redevelopment Paper 21 10 16F.pdf	Para (a); Para (b)	PII
00576	22/01/2017 20:52	Email	Trust campaign underway to influence Stadium funding	Para (a)	PII
00577	24/01/2017 16:49	Email	Stadium Australia	Para (a)	PII
00578	25/01/2017 7:52	Email	RE: Stadium Australia	Para (a)	PII
00579	28/02/2017 18:30	Email	RE: WSS - Populous Activate - Thought Starters	Para (a)	PII
00580	28/02/2017 19:47	Email	Re: WSS - Populous Activate - Thought Starters	Para (a)	PII
00581	28/02/2017 20:39	Email	Re: WSS - Populous Activate - Thought Starters	Para (a)	PII
00582	28/02/2017 21:44	Email	Re: WSS - Populous Activate - Thought Starters	Para (a)	PII
00583	1/03/2017 9:15	Email	Re. Populous Activate	Para (a)	PII
00584	1/03/2017 9:24	Email	Re: Re. Populous Activate	Para (a)	PII
00585	1/03/2017 9:42	Email	RE: Re. Populous Activate	Para (a)	PII
00586	1/03/2017 10:48	Email	Re: Re. Populous Activate	Para (a)	PII

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19 April 2018

Appendix C

Document No.	Document Date	Document Type	Title	Relevant Item	Privileged
00545	16/02/2015 18:59	Email	Fwd: Incoming Minister brief	Para (a)	PII
00546	10/03/2015 0:40	Document	Paul Doorn Notes 1410.docx	Para (a)	PII
00547	14/10/2015 16:46	Document	CMT15229 - APPROVED RESPONSE - CE.PDF	Para (b)	PII
00548	16/10/2015 9:58	Document	Additional QON 1433 & 1437.docx	Para (b)	PII
00549	27/10/2015 14:37	Document	SNIP_ToR_27OCT2015.docx	Para (a)	PII
00550	4/06/2017 15:35	Document	Update_21NOV2015.docx	Para (a)	PII
00551	24/11/2015 12:35	Document	CDOC15 45842 Tab A Stadium Network Implementation Report_V2.doc	Para (b)	PII
00552	27/11/2015 15:24	Document	SNIP_@26112015_print_A3.pdf	Para (b)	PII
00553	27/11/2015 15:39	Document	SNIP_@26112015_print_A3.pdf	Para (b)	PII
00554	27/11/2015 15:40	Document	SNIP_@26112015_print_A3.pdf	Para (b)	PII
00555	30/11/2015 11:47	Document	SNIP_@26112015_print_A3.pdf	Para (b)	PII
00556	1/12/2015 16:48	Email	RE: Rebuilding update	Para (a); Para (b)	PII
00557	3/12/2015 10:25	Document	INSW_HPHR_Report_Parramatta_Stadium.pdf	Para (b)	PII
00558	7/12/2015 11:28	Document	SNIP_@26112015_print_A3.pdf	Para (a)	PII
00559	4/06/2017 15:35	Spreadsheet	December 2015.xlsx	Para (a); Para (b)	PII
00560	1/02/2016 11:06	Email	Stadia Network Implementation Meeting Papers	Para (a)	PII
00561	5/02/2016 12:54	Document	4.2 WSS Project Timeline 20160205 - Master Program.pdf	Para (b)	PII
00562	5/02/2016 12:54	Document	4.2 WSS Project Timeline 20160205 - Master Program.pdf	Para (b)	PII
00563	12/07/2016 16:36	Document	BN_SC&SGT Letter 2.06.16 - BN for Minister 12 July TRIM No.docx	Para (a)	PII
00564	12/07/2016 19:11	Document	SCG_Shepherd_12July2016.docx	Para (a)	PII
00565	22/07/2016 14:12	Email	Fwd: ANZ Stadium	Para (a)	PII
00566	23/07/2016 14:30	Email	Re: ANZ Stadium	Para (a)	PII

00587	1/03/2017 11:45	Email	RE: Re. Populous Activate	Para (a)	PII
00588	1/03/2017 14:20	Email	RE: Re. Populous Activate	Para (a)	PII
00589	7/03/2017 11:27	Email	ANZ Stadium	Para (a)	PII
00590	7/03/2017 12:14	Email	RE: ANZ Stadium	Para (a)	PII
00591	7/03/2017 12:26	Email	RE: ANZ Stadium	Para (a)	PII
00592	7/03/2017 12:29	Email	Re: ANZ Stadium	Para (a)	PII
00593	7/03/2017 13:10	Email	Next steps_RE: ANZ Stadium	Para (a)	PII
00594	7/03/2017 22:38	Email	RE: Next steps_RE: ANZ Stadium	Para (a)	PII
00595	19/03/2017 14:57	Email	RE: Next steps_RE: ANZ Stadium	Para (a)	PII
00596	11/07/2017 12:50	Document	29062017152507-0001.pdf	Para (a)	PII
00597	28/06/2017 16:47	Document	28062017164727-0001.pdf	Para (a)	PII
00598	11/07/2017 12:51	Document	28062017164727-0001.pdf	Para (a)	PII
00599	12/07/2017 13:14	Document	28062017164727-0001.pdf	Para (a)	PII
00600	12/07/2017 13:14	Document	Draft response - CRML17-194 ANZ Stadium (Redevelopment).dotx	Para (a)	PII
00601	14/07/2017 15:10	Document	28062017164727-0001.pdf	Para (a)	PII
00602	14/07/2017 15:12	Document	29062017152507-0001.pdf	Para (a)	PII
00603	14/07/2017 13:59	Document	Final - CRML17-194 ANZ Stadium (Redevelopment).docx	Para (a)	PII
00604	4/08/2017 17:20	Email	RE: Discussion paper on the redevelopment of ANZ Stadium	Para (a); Para (b)	PII
00605	4/08/2017 17:19	Document	ANZS Investment White Paper BT comments v4.docx	Para (a); Para (b)	PII
00606	15/08/2017 6:01	Email	Tele campaigns for Trust; Labor message confusing	Para (a)	PII
00607	16/08/2017 6:22	Email	Do it all, just get on with it - Andrew Clennell on stadiums	Para (a)	PII
00608	22/08/2017 20:52	Document	Stadia investment priority order.docx	Para (a); Para (b)	PII
00609	23/08/2017 17:48	Email	Western Sydney & ANZ Stadium	Para (b)	PII
00610	23/08/2017 17:50	Email	RE: Western Sydney & ANZ Stadium	Para (b)	PII
00611	23/08/2017 18:30	Email	FW: Western Sydney & ANZ Stadium	Para (b)	PII

00612	31/08/2017 18:52	Email	RE: SAC Board meeting - Letter to Premier re Grand Final announcement	Para (b)	PII
00613	4/09/2017 16:52	Email	Club board minutes and letters regarding redevelopment	Para (a)	PII
00614	4/09/2017 17:37	Email	RE: Club board minutes and letters regarding redevelopment	Para (a)	PII
00615	4/09/2017 18:18	Email	RE: Stadium Australia Club board meeting on 31 August 2017 - draft minutes	Para (b)	PII
00616	4/09/2017 18:21	Email	RE: Club board minutes and letters regarding redevelopment	Para (a)	PII
00617	20/09/2017 12:21	Email	ANZ	Para (a); Para (b)	PII
00618	20/09/2017 12:21	Email	ANZ	Para (a); Para (b)	PII
00619	27/09/2017 13:42	Email	Draft message to Members re Redevelopment	Para (a)	PII
00620	27/09/2017 16:01	Email	RE: Email sent on behalf of Christine McLoughlin for your attention	Para (a); Para (b)	PII
00621	27/09/2017 16:10	Email	Re: Email sent on behalf of Christine McLoughlin for your attention	Para (a)	PII
00622	27/09/2017 22:14	Email	FW: Draft message to Members re Redevelopment	Para (a)	PII
00623	28/09/2017 6:00	Email	Re: Draft message to Members re Redevelopment	Para (a)	PII
00624	28/09/2017 11:58	Email	RE: Draft message to Members re Redevelopment	Para (a)	PII
00625	28/09/2017 11:57	Document	Dear Members.docx	Para (a)	PII
00626	28/09/2017 12:50	Document	Dear Members.docx	Para (a)	PII
00627	3/10/2017 12:45	Document	Draft min corro 031017.docx	Para (a)	PII
00628	3/10/2017 13:07	Document	Draft min corro 031017.docx	Para (a)	PII
00629	3/10/2017 14:08	Document	Draft min corro 031017 (003).docx	Para (a)	PII
00630	3/10/2017 16:16	Document	Draft min corro 031017 (003).docx	Para (a)	PII

00631	3/10/2017 17:05	Document	Draft min corro 031017 (003).docx v2.docx	Para (a)	PII
00632	4/10/2017 15:52	Email	Draft email to ANZS Members	Para (a)	PII
00633	4/10/2017 15:54	Email	Re: Draft email to ANZS Members	Para (a)	PII
00634	4/10/2017 16:04	Email	Re: Draft email to ANZS Members	Para (a)	PII
00635	5/10/2017 11:41	Email	RE: Draft email to ANZS Members	Para (a)	PII
00636	5/10/2017 12:10	Email	(next) Letter to the Minister	Para (a)	PII
00637	5/10/2017 12:10	Email	(next) Letter to the Minister	Para (a)	PII
00638	5/10/2017 12:11	Email	RE: Draft email to ANZS Members	Para (a)	PII
00639	5/10/2017 12:12	Email	Re: (next) Letter to the Minister	Para (a)	PII
00640	5/10/2017 12:13	Email	RE: (next) Letter to the Minister	Para (a)	PII
00641	5/10/2017 12:23	Email	RE: Draft email to ANZS Members	Para (a)	PII
00642	5/10/2017 21:08	Document	ANZ STADIUM FACT SHEET.docx	Para (a)	PII
00643	6/10/2017 10:28	Email	RE: DoI Weekly Hot Issues Meeting Monday	Para (a)	PII
00644	6/10/2017 10:33	Email	RE: DoI Weekly Hot Issues Meeting Monday	Para (a)	PII
00645	11/10/2017 19:05	Document	ANZ STADIUM FACT SHEET 2.docx	Para (a)	PII
00646	25/10/2017 9:08	Email	Stadiums media - AFL & cricket	Para (a)	PII
00647	31/10/2017 16:07	Document	Gold Standard letter.docx - PD_update_V2.docx	Para (a)	PII
00648	31/10/2017 16:39	Document	Gold Standard letter.docx - PD_update_V2.docx	Para (a)	PII
00649	6/11/2017 6:32	Email	The Australian re Cabinet submission on stadiums	Para (a)	PII
00650	7/11/2017 8:53	Email	Fwd: Simple Q&A	Para (a)	PII
00651	7/11/2017 8:53	Email	Fwd: Simple Q&A	Para (a)	PII
00652	7/11/2017 17:01	Email	Overseas visitors	Para (a)	PII
00653	7/11/2017 18:42	Email	Overseas visitors	Para (a)	PII
00654	30/11/2017 10:42	Document	Stadia Q and A for MPs.docx	Para (a)	PII
00655	30/11/2017 10:42	Document	Stadia Q and A for MPs.docx	Para (a)	PII

00656	2/12/2017 8:57	Document	Stadia Q and A for MPs.docx	Para (a)	PII
00657	3/12/2017 18:47	Email	Media issues - stadia investment	Para (a)	PII
00658	3/12/2017 18:53	Email	Re: Media issues - stadia investment	Para (a)	PII
00659	3/12/2017 18:54	Email	FW: Media issues - stadia investment	Para (a)	PII
00660	3/12/2017 18:55	Email	FW: Media issues - stadia investment	Para (a)	PII
00661	3/12/2017 19:36	Email	Re: Media issues - stadia investment	Para (a)	PII
00662	3/12/2017 19:37	Email	Re: Media issues - stadia investment	Para (a)	PII
00663	3/12/2017 20:00	Email	Re: Media issues - stadia investment	Para (a)	PII
00664	3/12/2017 21:47	Email	Fwd: Media issues - stadia investment	Para (a)	PII
00665	3/12/2017 21:50	Email	RE: Media issues - stadia investment	Para (a)	PII
00666	4/12/2017 9:55	Email	FW: Media issues - stadia investment	Para (a)	PII
00667	7/12/2017 8:02	Email	FW: 2015 Brogden Report	Para (a)	PII
00668	7/12/2017 8:06	Email	Re: 2015 Brogden Report	Para (a)	PII
00669	13/12/2017 6:48	Email	ANZS focus in Tele news stories; SMH on case for Allianz	Para (a)	PII
00670	14/12/2017 12:28	Document	Key Msgs VNSW Dec2017.docx	Para (a)	PII
00671	15/12/2017 6:47	Email	Perrottet falls into line; Foley warns NRL on ANZS	Para (a)	PII
00672	23/11/2017 15:11	Document	Key Msgs - ANZ announcement 241117.docx	Para (a)	PII
00673	23/11/2017 17:21	Document	QA ANZS announcement 24112017.docx	Para (a)	PII
00674	4/01/2018 14:04	Document	Key Msgs - ANZ announcement 241117.docx	Para (a)	PII
00675	5/12/2017 14:32	Document	Talking Points 051217.docx	Para (a)	PII
00676	4/01/2018 14:04	Document	QA ANZS announcement 24112017.docx	Para (a)	PII
00677	4/01/2018 14:04	Document	Talking Points 051217.docx	Para (a)	PII
00678	11/01/2018 9:38	Email	FW: REMINDER: Parliamentary Brief (HFN) updates due 15/1/18	Para (a)	PII

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Order for Papers – Sydney Stadiums

Dear Mr Blunt

I refer to the resolution of the Legislative Council under Standing Order 52 made on 15 March 2018. I also refer to your email of 27 April 2018 advising that a disputed claim of privilege has been lodged by the Honourable Adam Searle MLC in relation to certain documents in the relevant return to order and that the Hon. Keith Mason AC QC has been appointed as an independent legal arbiter to evaluate and report on the disputed claim.

In your email, you conveyed a request from Mr Mason that the Department obtain from the various offices and agencies whose documents are the subject of the disputed claim:

- advice as to any of the documents in dispute for which privilege claims are no longer pressed;
- any qualifications to the existing claims of privilege; and
- and further submissions in support of those claims of privilege.

You requested that this advice be provided to Mr Mason via correspondence to you by **2pm on Friday, 4 May**.

In accordance with your request, I enclose at **Annexure A** to this letter advice from the following Minister's office and agencies:

- Office of the Minister for Sport
- Office of Sport
- Sydney Cricket and Sports Ground Trust
- Infrastructure NSW, and
- Venues NSW.

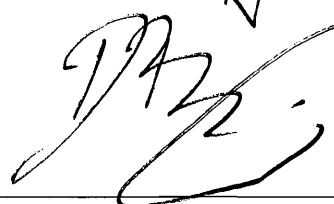
This letter also encloses documents which are provided as an enclosure to the letter from Infrastructure NSW. We are informed that the Office of Sport will be providing further documents later this afternoon.

Should you require any clarification or further assistance, please contact me on telephone (02) 9228 4514.

Yours sincerely



Karen Smith
Deputy Secretary, Cabinet and Legal
4 May 2018

*Received at 2:00 pm
Friday 4 May 2018*


**FURTHER SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE
BY THE OFFICE OF THE MINISTER FOR SPORT**

ORDER FOR PAPERS – SYDNEY STADIUMS

On 15 March 2018, the Legislative Council passed a resolution seeking the production of documents relating to the Sydney Stadiums under Standing Order 52.

On 5 April 2018, the Department of Premier and Cabinet delivered to Parliament a number of documents provided by the Office of the Minister for Sport, among others, in response to that resolution. That response included both non-privileged and privileged documents. A submission in support of the claim for privilege was provided by the Office of the Minister for Sport in conjunction with the privileged documents returned.

On 27 April 2018, the Office of the Minister for Sport was advised by the Department of Premier and Cabinet that:

- a) a disputed claim of privilege had been lodged by the Hon Adam Searle MLC in relation to certain documents in the Sydney Stadiums return to order, including one privileged document provided by the Office of the Minister for Sport, identified as document (e)1 and described as 'Memorandum of Understanding – NSW Stadium Investment and Content' (the **Document**)
- b) the President of the Legislative Council, the Hon John Ajaka MLC, authorised the appointment of an independent legal arbiter under Standing Order 52 to evaluate and report on the disputed claim of privilege
- c) the Hon Keith Mason AC QC had been appointed as independent legal arbiter and had commenced his evaluation
- d) Mr Mason had requested that, by 2pm on Friday, 4 May, each of the affected offices and agencies provide advice as to:
 - a. any of the documents in dispute for which privilege claims are no longer pressed;
 - b. any qualifications to the existing claims of privilege; and
 - c. and further submissions in support of those claims of privilege.

In response to Mr Mason's request, the Office of the Minister for Sport confirms that the original claim for privilege in respect of the Document is maintained, without qualification, and reiterates the original submission made in support of that claim. The Office of the Minister for Sport also makes this further submission in support of the claim for privilege.

We note that a copy of the Document was provided by a number of other agencies on a privileged basis, including Venues NSW. We have been provided with a copy of the further submission made by Venues NSW in support of its claims for privilege. That submission sets out detailed reasons for the privilege claim made in relation to the Document and related documents. The Office of the Minister for Sport adopts Venues NSW's further submission in so far as it relates to the Document. For the reasons stated in our original submission and in Venues NSW's further submission, the Office of the Minister for Sport maintains its claim of privilege in respect of the Document.

In his letter advising of his dispute of the claim for privilege made in relation to a number of documents returned in response to the resolution of 15 March 2018, Mr Searle indicated that he would soon provide 'the specified grounds upon which I challenge the various claims of privilege advanced by the different agencies'. We request that, when this further information is provided by Mr Searle, the Office of the Minister for Sport be given the opportunity to make further submissions in response to Mr Searle's challenge to the privilege claim made in respect of the Document.

Sydney Cricket and Sports Ground Trust

Further Submissions – Response to Resolution made pursuant to Standing Order 52 made on 15 March 2018

1. These are the further submissions of the Sydney Cricket and Sports Ground Trust (the **Trust**) made in support of a claim of client legal privilege and public interest immunity in relation to documents returned by the Trust under the resolution made by the Legislative Council on 15 March 2018.
2. In response to the resolution, the Trust reviewed a significant number of documents. On 5 April 2018 the Trust provided a substantial response to the resolution and on 6 April 2018 the Trust provided the remaining documents in response to the resolution. A total of 898 documents were provided by the Trust in response to the resolution and a privilege claim was made in respect of 226 of those documents.
3. Both the responses provided by the Trust on 5 April 2018 and 6 April 2018 were accompanied by short submissions setting out the basis for the privilege claims made in respect of the 226 privileged documents. The Trust continues to rely on those submissions and supplements them by these submissions.

Dispute over privilege claims

4. Later in the afternoon of 27 April 2018, the Trust was advised by the Department of Premier and Cabinet (**DPC**) that the President of the Legislative Council authorised the appointment of an independent legal arbiter under Standing Order 52 to evaluate and report on a disputed claim of privilege lodged by the Hon Adam Searle MLC in relation to certain documents in the Sydney Stadiums return to order. The DPC further advised that the Hon. Keith Mason AC QC had been appointed to commence an evaluation of the disputed documents.
5. In addition, the DPC provided the Trust a copy of Mr Searle's letter to the Clerk of the Parliaments dated 23 April 2018 and indicated that privilege claims are only being disputed in relation to the documents highlighted in yellow on the attachment to that letter.
6. The DPC also confirmed that the independent legal arbiter had requested that DPC provide the following information from affected offices and agencies:
 - (a) advice as to any of the documents in dispute for which privilege claims are no longer pressed;
 - (b) any qualifications to the existing claims of privilege; and
 - (c) further submissions in support of those claims of privilege.
7. We set out below the Trust's response in respect of (a), (b), and (c).

A. Claims no longer pressed

8. The Trust no longer presses privilege claims in relation the following documents:

SCG.003.001.4649	SCG.003.001.5534	SCG.003.001.6844	SCG.003.001.6845
SCG.003.001.2113	SCG.003.001.2114	SCG.003.001.2771	SCG.003.001.2772
SCG.003.001.2773	SCG.003.001.2711	SCG.003.001.2712	SCG.003.001.0623

SCG.003.001.0624	SCG.003.001.0625	SCG.003.001.0626	SCG.003.001.0627
SCG.003.001.0628	SCG.003.001.0629	SCG.003.001.0630	SCG.003.001.0631
SCG.003.001.2566	SCG.003.001.2567	SCG.003.001.0501	SCG.003.001.0502
SCG.003.001.5113	SCG.003.001.5110	SCG.003.001.1720	SCG.003.001.1721
SCG.003.001.1722	SCG.003.001.1723	SCG.003.001.1724	SCG.003.001.1682
SCG.003.001.4995	SCG.003.001.4996	SCG.003.001.0214	SCG.003.001.0215
SCG.003.001.0216	SCG.003.001.4928	SCG.003.001.4929	SCG.003.001.4930
SCG.003.001.4902	SCG.003.001.4903	SCG.003.001.0155	SCG.003.001.0156
SCG.003.001.0157	SCG.003.001.0158	SCG.003.001.0159	SCG.003.001.0160
SCG.003.001.0161	SCG.003.001.0162	SCG.003.001.0163	SCG.003.001.0164
SCG.003.001.0165	SCG.003.001.0166	SCG.003.001.0167	SCG.003.001.0168
SCG.003.001.0169	SCG.003.001.0170	SCG.003.001.0171	SCG.003.001.6391
SCG.003.001.6392	SCG.003.001.1578	SCG.003.001.1579	SCG.003.001.5433
SCG.003.001.5434	1(c)		

9. While the Trust no longer presses its claim in respect of these documents, it does not waive any privilege claim over these 66 documents.

B. Qualifications to existing claims

10. The privilege claim for document number SCG.003.001.3720 should be marked 'Yes – PII' for a public interest immunity claim on the basis of personal information, not 'Yes – PII - CIC' for commercial confidentiality as originally marked.

C. Further submissions in support

11. As set out in the Trust's previous submissions, a separate index had been prepared for the return of documents in relation to which a claim for privilege is made. In that index, the following markers were used in relation to privilege and public interest immunity:

- (a) 'Yes - CLP' for legal professional privilege or 'client legal privilege' claims;
- (b) 'Yes – PII - CIC' for public interest immunity claims on the basis of commercial confidentiality; and
- (c) 'Yes – PII' for public interest immunity claims on the basis of personal information.

Treatment of 'family' documents

12. In providing the documents in response to the resolution, to avoid providing incomplete documents or splitting sections of documents apart, the Trust grouped 'families' of email documents and their attachments together. For example, the following documents subject to a privilege claim are grouped in a family:

- (a) SCG.003.001.5057: is a 'host' email that has two attachments;
- (b) SCG.003.001.5058: is the first attachment to the host SCG.003.001.5057; and
- (c) SCG.003.001.5059: is the second attachment to the host SCG.003.001.5057.

13. Personal information of an individual is contained in SCG.003.001.5057 and SCG.003.001.5059, however, there is no personal information contained in SCG.003.001.5058. To avoid any confusion, rather than splitting the family of document into parts, a privilege claim was applied across the family of documents. As a result, there are a number of documents in the Trust's privileged list which, while they may not contain privileged information, form part of a family of documents which do.

Schedule A

14. At Schedule A to these submissions, the Trust lists certain documents which are subject to a privilege claim. The documents highlighted in yellow in 'Schedule A' are those documents which have been highlighted in yellow (as disputed) in Mr Searle's letter.
15. The list at Schedule A shows the original numbering of those documents in the Trust's privileged lists (see the 'List no.' column), the details of each document (document no., date of creation, document description, author, privilege claim), and adds a separate 'comments' column to indicate whether a privilege claim is pressed. The rows coloured green in Schedule A are those documents over which the Trust no longer presses a claim.
16. Schedule A also includes the 'family' documents which, although were not highlighted as disputed, are part of a family of documents which had been highlighted in yellow as disputed. These documents are those which are not highlighted in yellow in Schedule A. We explain the reasons for including these documents in Schedule A below.
17. For some documents, only part of the family of documents has been highlighted in yellow as disputed in Mr Searle's letter. As a result, it is unclear whether, in the event that part of a family of documents is ordered to be released, whether the entire family of documents must also to be released.
18. To provide an example, document number SCG.003.001.4334 is a 'host' email and has been highlighted in yellow as disputed. The attachment to this email (document number SCG.003.001.4335), however, has not been highlighted as disputed. In the event that document number SCG.003.001.4334 is ordered to be released, it is unclear whether that means that document number SCG.003.001.4335 must also be released.
19. Therefore, while the Trust understands that only those documents which are highlighted in yellow are disputed, for completeness the Trust has listed in Schedule A the complete family to the documents highlighted as disputed. This is to make clear that a privilege claim made by the trust is maintained by the Trust over the family of documents.

Claim for legal professional privilege

20. The Trust obtained legal advice in relation to aspects of its care, management and control of the scheduled lands and the redevelopment of Allianz Stadium. The advice was provided lawyers from Henry Davis York, now known as Norton Rose Fulbright, or other external lawyers. In making these and other submissions, the Trust does not waive privilege over the documents subject to claim for legal professional privilege.
21. It is submitted that the documents in the return of the Trust which are marked 'Yes - CLP' attract client legal privilege and should not be made public on one or more of the available grounds of privilege pursuant to both common law doctrines and statutory regime in that they are (or substantially reproduce):
 - (a) communications to and from lawyers for the Trust and other lawyers or internal staff of the Trust for the dominant purpose of providing the Trust with legal advice; and/or
 - (b) other confidential communications prepared for the dominant purpose of the Trust being provided with legal advice.

22. The following documents record communications to and from lawyers for the Trust and other lawyers or internal staff of the Trust for the dominant purpose of providing the Trust with legal advice; and/or other confidential communications prepared for the dominant purpose of the Trust being provided with legal advice:

SCG.003.001.2573	SCG.003.001.0577	SCG.002.001.0284	SCG.002.001.1935
SCG.003.001.2006	SCG.002.001.1934	SCG.003.001.2550	SCG.003.001.7992
SCG.003.001.7993	SCG.003.001.3849	SCG.003.001.2007	SCG.003.001.3555
SCG.003.001.3823	SCG.003.001.3824	SCG.003.001.0212	SCG.003.001.0213
SCG.002.001.0072	SCG.002.001.0068		

23. The following documents substantially reproduce communications to and from lawyers for the Trust and other lawyers or internal staff of the Trust for the dominant purpose of providing the Trust with legal advice; and/or other confidential communications prepared for the dominant purpose of the Trust being provided with legal advice:

SCG.002.001.1872	SCG.002.001.1871	SCG.003.001.0406	SCG.002.001.0250
SCG.002.001.1869	SCG.002.001.1870	SCG.003.001.1725	SCG.002.001.1816
SCG.002.001.0042	SCG.002.001.1734	SCG.002.001.1735	

24. To the extent that legal professional privileged communications with the Trust have been provided to persons external to the Trust, and or alternatively may appear in the privileged lists of other agencies, the Trust maintains that privilege has not been waived in respect of those documents and presses for those documents not to be released.

Reasons to protect legal professional privilege

25. The established rationale for legal professional privilege is to promote the public interest by preserving the confidentiality of communications between lawyer and client, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the legal adviser.
26. As the majority of the Australian High Court noted in *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 at 64 the 'privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers'. Relevantly, as set out at paragraph 72 of *Egan v Chadwick & Ors* [1999] NSWCA 176 (10 June 1999):

Legal professional privilege is more than a mere rule of evidence. The privilege is substantive general principle of the common law which plays an important role in the effective and efficient administration of justice...

27. Following this rationale, it is submitted the documents marked 'Yes - CLP' should not be made public because, if released, this would undermine the confidential relationship between the Trust and its legal advisers, and discourage the Trust (or any other government entities subject to a Call for Papers) from making full and frank disclosure to their legal advisers.
28. If valid claims in respect of legal professional privilege are not upheld in the Standing Order 52 process, this would create uncertainty as to whether any communications between the Trust and its legal advisers may later be released to the public. The Trust submits that this privilege should be protected as it is in the public interest for the Trust (and other government entities) to know that when seeking legal advice, their communications are

confidential basis, and that they are confident to make full and frank disclosure to their legal advisors as required in order to properly perform the Trust's functions.

29. In the *Report under Standing Order 52 on Disputed Claim of Privilege – WestConnex Business Case* dated 8 August 2014, the Hon. Keith Mason AC QC wrote at page 7 in relation to legal professional privilege:

But there may be an additional complication when one translates these principles to a parliamentary context and it is one on which there is presently no guidance from the courts so far as I am aware. I simply flag it in this report given my ability to dispose of the solitary claim of legal professional privilege on an alternative ground (see below). It is at least conceivable that some adjustment of these rules may be called for in law in a context where the House is reviewing the conduct of the Executive. For example, the House may be concerned to explore whether a government whose conduct it is scrutinising has sought and followed legal advice in a particular matter. Recognising that legal professional privilege is a right personal to the client, capable of waiver, there may conceivably be circumstances in which the House has a constitutionally-derived legal right to more unrestricted access than the strict application of the common law rules of legal professional privilege may suggest. I am not indicating that public interest immunity balancing factors necessarily intrude into this constitutional setting, although they might. And I am not proposing that the arbiter has some discretionary power to override a privilege determined to exist...

30. The Trust submits that the documents subject to a claim for legal professional privilege should not be released because, in addition to there being a valid privilege claim in respect of those documents, the respective documents do not relate to a concern of the House of whether, as referred to in the extract above, a 'government whose conduct it is scrutinising has sought and followed legal advice in a particular matter'.
31. While the documents concerned were captured in response to the Standing Order resolution, the legal advice contained within those documents marked 'Yes – CLP' do not relate to the terms of reference as provided by the NSW Legislative Council's Public Works Committee (such as the process by which the government developed the Sydney stadiums strategy). Instead, the documents concerned relate to legal advice on separate matters concerning the care, management and control of the scheduled lands and legal advice given in respect of matters resulting from the decision to rebuild Allianz Stadium.
32. For these reasons, the Trust submits that the balance of public interest falls in favour of non-disclosure of the documents marked 'Yes-CLP'.

Public interest immunity – confidential commercial information

33. While the Trust recognises that commercial in confidence is not a ground of privilege itself, the Trust submits that it would be against the public interest for certain types of commercially confidential documents to be disclosed beyond the House.
34. The *New South Wales Legislative Council Practice* (at page 512) recognises that a proper basis for claims of commercial in confidence material if that disclosure may cause damage to commercial activity.
35. Some documents produced by the Trust contain confidential and specific information of a third party which if released would give competitors of the third party an unfair commercial advantage. The Trust submits that it would not be in the public interest to disclose the documents marked 'Yes-PII-CIC' and that public interest immunity should apply to them.

Trust's commercial functions

36. The Trust is charged with the care, management and control of the scheduled lands, including Allianz Stadium and the surrounding areas at Moore Park, as set out under the Sydney Cricket & Sports Ground Trust Act 1978 (NSW) (the **Act**).
37. The Trust may, pursuant to section 14 of the Act, allow the scheduled lands to be used by such persons, clubs, associations, leagues or unions on such terms and conditions as the Trust may think fit and proper for cricket, football or tennis or any other game, or for athletic sports, public amusement, or any other purpose which the Minister approves.
38. In authorising parts of the scheduled lands and Allianz Stadium to be used by parties and to deliver premier sporting content, one aspect of the Trust's responsibilities includes entering into and negotiating the terms and conditions of contractual arrangements with sporting codes, other venue hire partners and consultants to the Trust.
39. In respect of these functions, the Trust acts as a commercial enterprise and must remain competitive in the modern stadium venues market to ensure that the public is delivered premium sporting content in world-class venues. To remain competitive, it is important that in negotiating the terms and conditions of contractual arrangements with respect to Allianz Stadium the Trust is able to keep commercially sensitive information confidential.
40. If confidential communications with third parties and sensitive commercial information is released to the public, this may disadvantage the position of the Trust in contractual negotiations or negatively impact its relationship with sporting codes, other venue hire partners and consultants engaged by the Trust. In order to continue to provide a first-class experience for members of the public who visit the Trust's venues and to maintain its standard as a leader in venue management, it is crucial that any commercially sensitive information is maintained as confidential by the Trust.
41. If this information is released, the Trust submits it would be detrimental to the public interest for the reasons, as set out in previous submissions, that disclosure of those documents would:
 - (a) cause loss of commercial advantage and competitiveness within the private sector;
 - (b) cause detriment to private sector participants and give competitors of the consultants or parties to the agreement or contracts an unfair commercial advantage;
 - (c) give parties who gain access to the material an unfair commercial advantage compared to those who do not; and
 - (d) prejudice current or future contractual or other relationships and negotiations of those agreement between government and the private sector which would reduce the ability of the Trust to provide sporting content for the benefit of the public.
42. In submissions provided 6 April 2018, we enclosed a letter from the National Rugby League received by the Trust on 4 April 2018 supporting a claim of privilege in order to protect the confidential commercial information of the NRL. Further, in relation to document number 1(e) being the MOU, the Trust has read and adopts the submissions of Venues NSW in relation to the MOU. The Trust agrees for the reasons set out in the submissions of Venues NSW that disclosure of document 1(e) is contrary to the public interest and should not be disclosed.

43. The Trust's previous submissions also outlined the difficulty, given the time constraints and the number of third parties involved, to consult with all the various parties in respect of their confidential commercial information. The above reasons support the claim for public interest immunity against disclosure and, if further information is required, those third parties be consulted before their commercial information is proposed to be released.
44. Alternatively, the Trust submits that it would be necessary for those documents to be masked in such a way as to remove the references to any part of those documents which, if released, would cause damage to commercial activity.

Public interest immunity – personal information

45. As set out in previous submissions, some documents covered by the resolution identify persons who have corresponded with the Trust in relation to the rebuild and contain the personal information of those individuals, such as their names, addresses, email addresses, and phone numbers. Disclosure of these types of documents are likely to:
- (a) release personal information of individuals to the public contrary to privacy obligations and schemes of the Trust;
 - (b) expose persons to risk of unwanted contact by persons who access released material;
 - (c) discourage individuals from performing the important civil function of providing open feedback and scrutiny to Trust for reason that their personal information is at risk of being publicly released; and
 - (d) prejudice community engagement and the supply of feedback from members of the public to the Trust which facilitates the public scrutiny of the Trust's actions in performing its functions and enables the Trust to better respond to community concerns.
46. Given these reasons, the Trust submits that it would not be in the public interest to disclose the documents marked 'Yes-PII' and that public interest immunity should apply to them.
47. If these documents are proposed to be released, the Trust submits that it would be necessary for those documents to be masked in such a way as to remove the references to any personal information.

SCHEDULE A to Further Submissions dated 4 May 2018

Sydney Cricket and Sports Ground Trust

No.	List No.	Item	Document No.	Date of Creation	Document	Author	Privilege claim	Comments
Category A								
1.	1	(a)	SCG.003.001.4649	27/10/2015 9:40	Meeting with Brian Canavan	Phil Martin	Yes - PII - CIC	Privilege claim not pressed.
2.	2	(a)	SCG.003.001.5534	27/10/2015 9:42	Fwd: Meeting with Brian Canavan	SUE CHANNELLS	Yes - PII - CIC	Privilege claim not pressed.
3.	3	(a)	SCG.003.001.4334	3/03/2016 16:04	Nick Politis.docx	Phillip Heads	Yes - PII - CIC	Pressed.
4.	4	(a)	SCG.003.001.4335	3/03/2016 16:04	Nick Politis.docx	Phillip Heads	Yes - PII - CIC	Pressed.
5.	7	(a)	SCG.003.001.4212	8/03/2016 19:09	Meeting 2 Task List 070316	SUE CHANNELLS	Yes - PII - CIC	Pressed.
6.	8	(a)	SCG.003.001.4213	8/03/2016 19:05	Meeting 2 Task List 070316.docx	schannells	Yes - PII - CIC	Pressed.
7.	9	(a)	SCG.003.001.4206	9/03/2016 18:48	Stakeholder Engagement	SUE CHANNELLS	Yes - PII - CIC	Pressed.
8.	10	(a)	SCG.003.001.4207	9/03/2016 17:42	CP&MPT areas.pdf		Yes - PII - CIC	Pressed.
9.	11	(a)	SCG.003.001.4208	9/03/2016 18:36	NFS One Pager for Trustees.docx	cdrayton	Yes - PII - CIC	Pressed.
10.	12	(a)	SCG.003.001.4196	20/03/2016 16:52	National Football Stadium	SUE CHANNELLS	Yes - PII - CIC	Pressed.
11.	13	(a)	SCG.003.001.4197	20/03/2016 16:40	NFS Brief for Trustees.docx	cdrayton	Yes - PII - CIC	Pressed.
12.	14	(a)	SCG.003.001.3495	13/04/2016 12:06	ANZ events to be relocated.docx	CARON LEFEVER	Yes - PII - CIC	Pressed.
13.	15	(a)	SCG.003.001.3496	13/04/2016 12:06	ANZ events to be relocated.docx	clefever	Yes - PII - CIC	Pressed.
14.	16	(a)	SCG.003.001.6844	20/04/2016 12:18	FW: Allianz Stadium Upgrade Cost Plan (Draft 1)	Johnny Naofal	Yes - PII - CIC	Privilege claim not pressed.
15.	17	(a)	SCG.003.001.6845	19/04/2016 16:22	SC&SGT-Allianz-Stadium-Upgrade-Cost-Plan-D1.pdf	Asset Technologies Pacific	Yes - PII - CIC	Privilege claim not pressed.
16.	18	(a)	SCG.003.001.2113	10/05/2016 18:18	RE: Miller - Allianz Stadium	Deborah Kelly	Yes - PII - CIC	Privilege claim not pressed.
17.	19	(a)	SCG.003.001.2114	10/05/2016 11:20	SCSGT-Cost-Plan-V1.pdf	Asset Technologies Pacific	Yes - PII - CIC	Privilege claim not pressed.
18.	20	(a)	SCG.003.001.1969	19/01/2017 17:07	<no subject>	Richard Breslin	Yes - PII - CIC	Pressed.
19.	21	(a)	SCG.003.001.1970	28/01/2016 15:16	160128_Commentary on ANZ Stadium Proposal.docx	Richard Breslin	Yes - PII - CIC	Pressed.
20.	22	(a)	SCG.003.001.1854	22/03/2017 14:22	ANZ Stadium	Chris Paterson	Yes - PII - CIC	Pressed.
21.	23	(a)	SCG.003.001.1855	22/03/2017 14:18	160128_Commentary on ANZ Stadium	Richard Breslin	Yes - PII - CIC	Pressed.

SCHEDULE A to Further Submissions dated 4 May 2018

Sydney Cricket and Sports Ground Trust

No.	List No.	Item	Document No.	Date of Creation	Document	Author	Privilege claim	Comments
					Proposal_commercial in confidence.docx			
22.	24	(a)	SCG.003.001.2771	8/08/2017 22:04	50,000 seat SFS Cost Plan summary	Deborah Kelly	Yes - PII - CIC	Privilege claim not pressed.
23.	25	(a)	SCG.003.001.2772	4/08/2017 15:37	SFS Cost Plan_Key Points_final.pdf	WinTest	Yes - PII - CIC	Privilege claim not pressed.
24.	26	(a)	SCG.003.001.2773	8/08/2017 22:04	ATT00001.htm		Yes - PII - CIC	Privilege claim not pressed.
25.	41	(a)	SCG.003.001.2711	21/09/2017 13:52	1709 Construction Time Frames for Refurbishment Options	Deborah Kelly	Yes - PII - CIC	Privilege claim not pressed.
26.	42	(a)	SCG.003.001.2712	21/09/2017 13:17	1709 Construction Time Frames for Refurbishment Options.docx	HughTaylor MI Assoc	Yes - PII - CIC	Privilege claim not pressed.
27.	43	(a)	SCG.003.001.6660	11/10/2017 16:55	FW: Letter Allianz Stadium Redevelopment	Phillip Heads	Yes - PII - CIC	Pressed.
28.	44	(a)	SCG.003.001.6661	11/09/2017 8:26	3 Entity letter to Minister 8.9.17.pdf	Andrew Hore	Yes - PII - CIC	Pressed.
29.	45	(a)	SCG.003.001.0632	21/11/2017 20:06	Emailing: 20171117-MI Allianz Procurement SCG comp, 20171117-MI Allianz Procurement SCG comp	Deirdre O'Neill	Yes - PII - CIC	Pressed.
30.	46	(a)	SCG.003.001.0633	21/11/2017 20:05	20171117-MI Allianz Procurement SCG comp.pdf	HughTaylor MI Assoc	Yes - PII - CIC	Pressed.
31.	47	(a)	SCG.003.001.0634	21/11/2017 20:05	20171117-MI Allianz Procurement SCG comp.docx	HughTaylor MI Assoc	Yes - PII - CIC	Pressed.
32.	48	(a)	SCG.003.001.0635	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
33.	49	(a)	SCG.003.001.0636	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
34.	50	(a)	SCG.003.001.0637	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
35.	51	(a)	SCG.003.001.0623	22/11/2017 15:18	Comms documents	Phillip Heads	Yes - PII - CIC	Privilege claim not pressed.
36.	52	(a)	SCG.003.001.0624	22/11/2017 15:16	Speech notes draft.docx	chall@Primary.l ocal	Yes - PII - CIC	Privilege claim not pressed.
37.	53	(a)	SCG.003.001.0625	22/11/2017 15:16	Staff Q&A.docx	ngauci	Yes - PII - CIC	Privilege claim not pressed.

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No.	List No.	Item	Document No.	Date of Creation	Document	Author	Privilege claim	Comments
38.	54	(a)	SCG.003.001.0626	22/11/2017 15:15	Member Q&A.docx	ngauci	Yes - PII – CIC	Privilege claim not pressed.
39.	55	(a)	SCG.003.001.0627	22/11/2017 15:15	Community Q&A.docx	ngauci	Yes - PII – CIC	Privilege claim not pressed.
40.	56	(a)	SCG.003.001.0628	22/11/2017 15:15	MR announcement.docx	chall@Primary.l ocal	Yes - PII – CIC	Privilege claim not pressed.
41.	57	(a)	SCG.003.001.0629	22/11/2017 15:15	Members statement.docx	cdrayton	Yes - PII – CIC	Privilege claim not pressed.
42.	58	(a)	SCG.003.001.0630	22/11/2017 15:15	Contribution – ANZ Stadium and Allianz Stadium host 200 major men's and women's fixtures across all five codes every year.docx	Phillip Heads	Yes - PII – CIC	Privilege claim not pressed.
43.	59	(a)	SCG.003.001.0631	22/11/2017 15:14	JB Master stakeholder letter.docx	chall@Primary.l ocal	Yes - PII – CIC	Privilege claim not pressed.
44.	60	(a)	SCG.003.001.0617	22/11/2017 15:44	Emailing: 20171117-MI Allianz Procurement SCG comp_update, Summary diagram	Deirdre O'Neill	Yes - PII - CIC	Pressed.
45.	61	(a)	SCG.003.001.0618	22/11/2017 14:55	20171117-MI Allianz Procurement SCG comp_update.docx	HughTaylor MI Assoc	Yes - PII – CIC	Pressed.
46.	62	(a)	SCG.003.001.0619	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
47.	63	(a)	SCG.003.001.0620	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
48.	64	(a)	SCG.003.001.0621	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
49.	65	(a)	SCG.003.001.0622	22/11/2017 15:43	Summary diagram.pptx	Deirdre O'Neill	Yes - PII – CIC	Pressed.
50.	66	(a)	SCG.003.001.2588	23/11/2017 16:16	20171117-MI Allianz Procurement SCG comp_update	Deborah Kelly	Yes - PII - CIC	Pressed.
51.	67	(a)	SCG.003.001.2589	22/11/2017 14:55	20171117-MI Allianz Procurement SCG comp_update.docx	HughTaylor MI Assoc	Yes - PII – CIC	Pressed.
52.	68	(a)	SCG.003.001.2590	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII – CIC	Pressed.

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53.	69	(a)	SCG.003.001.2591	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII – CIC	Pressed.
54.	70	(a)	SCG.003.001.2592	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII – CIC	Pressed.
55.	71	(a)	SCG.003.001.7554	23/11/2017 16:43	FW: 20171117-MI Allianz Procurement SCG comp_update	SUE CHANNELLS	Yes - PII - CIC	Pressed.
56.	72	(a)	SCG.003.001.7555	22/11/2017 14:55	20171117-MI Allianz Procurement SCG comp_update.docx	HughTaylor MI Assoc	Yes - PII - CIC	Pressed.
57.	73	(a)	SCG.003.001.7556	21/11/2017 17:25	Microsoft_Visio_Drawing2.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
58.	74	(a)	SCG.003.001.7557	21/11/2017 17:26	Microsoft_Visio_Drawing1.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
59.	75	(a)	SCG.003.001.7558	21/11/2017 16:51	Microsoft_Visio_Drawing.vsd	Deirdre O'Neill	Yes - PII - CIC	Pressed.
60.	76	(a)	SCG.003.001.2573	24/11/2017 14:09	RE: Trust Act planning provisions vs SSDA	Deborah Kelly	Yes - CLP	Pressed.
61.	77	(a)	SCG.003.001.0577	24/11/2017 14:19	RE: Trust Act planning provisions vs SSDA	Nicholas Brunton	Yes - CLP	Pressed.
62.	80	(a)	SCG.003.001.2566	24/11/2017 17:39	Emailing: 2017-11-24 Minister Ayres Delivery and Procurement recommendation	Deborah Kelly	Yes - PII - CIC	Privilege claim not pressed.
63.	81	(a)	SCG.003.001.2567	24/11/2017 15:31	2017-11-24 Minister Ayres Delivery and Procurement recommendation.docx	Deborah Kelly	Yes - PII – CIC	Privilege claim not pressed.
64.	82	(a)	SCG.002.001.0284	30/11/2017 11:33	Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	Stephen Gorry	Yes - CLP	Pressed.
65.	83	(a)	SCG.002.001.1935	30/11/2017 11:48	FW: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	BERNIE LAMERTON	Yes - CLP	Pressed.
66.	84	(a)	SCG.003.001.2006	30/11/2017 11:48	FW: Allianz redevelopment - member issues, By-Laws etc [HDY-Production1.FID612089]	BERNIE LAMERTON	Yes - CLP	Pressed.
67.	85	(a)	SCG.002.001.1934	30/11/2017 11:49	RE: Allianz redevelopment - member issues, By-Laws etc [HDY-	BERNIE LAMERTON	Yes - CLP	Pressed.

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					Production1.FID612089]			
68.	86	(a)	SCG.003.001.2550	30/11/2017 22:32	Re: Trust Act planning provisions - initial thoughts on litigation risks [HDY-Production1.FID612089]	Deborah Kelly	Yes - CLP	Pressed.
69.	88	(a)	SCG.003.001.1755	5/12/2017 22:16	Letter to Minister	Andrew Hore	Yes - PII - CIC	Pressed.
70.	89	(a)	SCG.003.001.1756	11/09/2017 8:26	3 Entity letter to Minister 8.9.17.pdf	Andrew Hore	Yes - PII – CIC	Pressed.
71.	90	(a)	SCG.003.001.0501	6/12/2017 19:43	List of likely requirements in an EIS	Deirdre O'Neill	Yes - PII - CIC	Privilege claim not pressed.
72.	91	(a)	SCG.003.001.0502	6/12/2017 19:40	List of likely planning considerations for EIS.PDF	HughTaylor MI Assoc	Yes - PII – CIC	Privilege claim not pressed.
73.	95	(a)	SCG.003.001.5113	11/12/2017 10:46	RE: Media query - Allianz Stadium naming rights	Phillip Heads	Yes - PII – CIC	Privilege claim not pressed.
74.	96	(a)	SCG.003.001.5110	11/12/2017 14:23	RE: Media query - Allianz Stadium naming rights	Phillip Heads	Yes - PII - CIC	Privilege claim not pressed.
75.	98	(a)	SCG.003.001.7424	18/12/2017 14:33	FW: Shepherd Letter	SUE CHANNELLS	Yes - PII	Pressed.
76.	99	(a)	SCG.003.001.7425	18/12/2017 14:20	SSheridan117121813200.pdf		Yes - PII	Pressed.
77.	100	(a)	SCG.003.001.3884	18/12/2017 22:53	Fwd: Memo from Mark Tonga	Mark Tonga	Yes - PII	Pressed.
78.	101	(a)	SCG.003.001.3885	18/12/2017 14:51	MarkTonga-AllianzRebuild-Memo-Drayton-181217.pdf		Yes - PII	Pressed.
79.	102	(a)	SCG.003.001.5070	19/12/2017 12:05	RE: Alliance Stadium- Centennial Park	Phillip Heads	Yes - PII	Pressed.
80.	103	(a)	SCG.003.001.5071	19/12/2017 12:04	PH-JSINGH 191217.pdf	MADELEINE LINDSELL	Yes - PII	Pressed.
81.	111	(a)	SCG.002.001.1872	20/12/2017 13:23	Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.
82.	112	(a)	SCG.002.001.1871	20/12/2017 13:24	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.
83.	113	(a)	SCG.003.001.0406	20/12/2017 13:24	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.

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84.	114	(a)	SCG.002.001.0250	20/12/2017 13:37	RE: Allianz Stadium Redevelopment - Amendment to Trust By-laws	Marc Landrigan	Yes - CLP	Pressed. Substantially reproduces legal advice.
85.	115	(a)	SCG.002.001.1869	20/12/2017 14:15	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.
86.	116	(a)	SCG.002.001.1870	20/12/2017 14:15	RE: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.
87.	117	(a)	SCG.003.001.1725	20/12/2017 14:15	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP; Yes - PII - CIC	Pressed. Substantially reproduces legal advice.
88.	118	(a)	SCG.003.001.1720	21/12/2017 15:45	RE: Allianz Stadium	Deirdre O'Neill	Yes - PII - CIC	Privilege claim not pressed.
89.	119	(a)	SCG.003.001.1721	1/02/2010 9:25	SFS - Sections - Nth & Sth Terraces.pdf	Abby	Yes - PII - CIC	Privilege claim not pressed.
90.	120	(a)	SCG.003.001.1722	1/02/2010 9:22	SFS - Sections - West Terraces.pdf	Abby	Yes - PII - CIC	Privilege claim not pressed.
91.	121	(a)	SCG.003.001.1723	1/02/2010 9:21	SFS - Sections.pdf	Abby	Yes - PII - CIC	Privilege claim not pressed.
92.	122	(a)	SCG.003.001.1724	1/02/2010 9:23	SFS - Sections - East Terraces.pdf	Abby	Yes - PII - CIC	Privilege claim not pressed.
93.	123	(a)	SCG.003.001.3958	21/12/2017 21:43	Allianz stadium redevelopment	simon greenberg	Yes - PII	Pressed.
94.	124	(a)	SCG.003.001.2460	21/12/2017 22:01	RE: Project Brief	Deborah Kelly	Yes - PII - CIC	Pressed.
95.	125	(a)	SCG.003.001.5057	26/12/2017 11:56	RE: Allianz stadium redevelopment	Phillip Heads	Yes - PII	Pressed.
96.	126	(a)	SCG.003.001.5058	26/12/2017 11:54	Community Q&A.pdf	ngauci	Yes - PII	Pressed.
97.	127	(a)	SCG.003.001.5059	26/12/2017 11:56	PH-SGreenberg 261217.pdf	MADELEINE LINDSELL	Yes - PII	Pressed.
98.	128	(a)	SCG.003.001.6525	27/12/2017 16:24	'--- Untitled Document ---	srvscanning@scgt.nsw.gov.au	Yes - PII	Pressed.
99.	129	(a)	SCG.003.001.6526	27/12/2017 16:24	scan.pdf		Yes - PII	Pressed.
100.	130	(a)	SCG.003.001.7419	27/12/2017 16:26	Member letter re Stadium	SUE CHANNELLS	Yes - PII	Pressed.
101.	131	(a)	SCG.003.001.7420	27/12/2017 16:26	scan.pdf		Yes - PII	Pressed.

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102.	132	(a)	SCG.003.001.7992	23/01/2018 18:21	'--- Untitled Document ---	srvscanning@scgt.nsw.gov.au	Yes - CLP	Press CLP claim
103.	133	(a)	SCG.003.001.7993	23/01/2018 18:22	scan.pdf		Yes - CLP	Press CLP claim
104.	134	(a)	SCG.003.001.1682	25/01/2018 12:05	FW: SFS demolition	Hugh Taylor	Yes - PII - CIC	Privilege claim not pressed.
105.	135	(a)	SCG.003.001.4995	25/01/2018 12:18	TAG Minutes 4 Dec 2017	Phillip Heads	Yes - PII - CIC	Privilege claim not pressed.
106.	136	(a)	SCG.003.001.4996	24/01/2018 11:13	TAG Minutes 4 Dec 2017.docx	kharvey	Yes - PII - CIC	Privilege claim not pressed.
107.	137	(a)	SCG.003.001.1680	25/01/2018 13:26	FW: SFS demolition	Hugh Taylor	Yes - PII - CIC	Pressed.
108.	138	(a)	SCG.003.001.1681	8/12/2017 13:03	SSheridan217120812030.pdf		Yes - PII - CIC	Pressed.
109.	139	(a)	SCG.001.001.0714	28/01/2018 16:10	Barry Richardson 2401.docx	SUE CHANNELLS	Yes - PII	Pressed.
110.	140	(a)	SCG.003.001.3849	29/01/2018 14:30	RE: New Gold & Platinum Member sales [NRF-APAC.FID200711118]	Gorry, Stephen	Yes - CLP	Pressed.
111.	141	(a)	SCG.003.001.2007	29/01/2018 14:44	FW: New Gold & Platinum Member sales [NRF-APAC.FID200711118]	JANE COLES	Yes - CLP	Pressed.
112.	142	(a)	SCG.003.001.3555	30/01/2018 10:34	RE: New Gold & Platinum Member sales [NRF-APAC.FID200711118]	Charlie Drayton	Yes - CLP	Pressed.
113.	143	(a)	SCG.003.001.3551	5/02/2018 14:10	Members	Charlie Drayton	Yes - PII	Pressed.
114.	144	(a)	SCG.003.001.3552	5/02/2018 14:09	Feedback.docx	Charlie Drayton	Yes - PII	Pressed.
115.	145	(a)	SCG.003.001.4964	5/02/2018 14:37	Feedback	Phillip Heads	Yes - PII	Pressed.
116.	146	(a)	SCG.003.001.4965	5/02/2018 14:09	Feedback.docx	Charlie Drayton	Yes - PII	Pressed.
117.	147	(a)	SCG.003.001.3549	5/02/2018 14:50	Member responses	Charlie Drayton	Yes - PII	Pressed.
118.	148	(a)	SCG.003.001.3550	5/02/2018 14:45	Member feedback 5.2.18.docx	Charlie Drayton	Yes - PII	Pressed.
119.	149	(a)	SCG.003.001.1654	7/02/2018 14:56	RE: Playbill at SCG during Allianz Stadium rebuild	Katie Burgess	Yes - PII - CIC	Pressed.
120.	150	(a)	SCG.003.001.3542	8/02/2018 15:17	Member responses	Charlie Drayton	Yes - PII	Pressed.
121.	151	(a)	SCG.003.001.3543	8/02/2018 15:14	180208_Member Q&A.docx	Kiara Neasy	Yes - PII	Pressed.
122.	152	(a)	SCG.003.001.3544	8/02/2018 14:53	180208_Member feedback.docx	Charlie Drayton	Yes - PII	Pressed.

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123.	153	(a)	SCG.002.001.1816	8/02/2018 15:34	FW: Allianz Stadium Redevelopment - Amendment to Trust By-laws	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.
124.	156	(a)	SCG.003.001.0229	9/02/2018 14:45	FW: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII	Pressed.
125.	157	(a)	SCG.003.001.0223	11/02/2018 21:01	Fwd: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII	Pressed.
126.	158	(a)	SCG.003.001.4937	12/02/2018 9:42	RE: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	Phillip Heads	Yes - PII	Pressed.
127.	159	(a)	SCG.003.001.0214	13/02/2018 11:12	Trust Advisory Group meeting	CARON LEFEVER	Yes - PII – CIC	Privilege claim not pressed.
128.	160	(a)	SCG.003.001.0215	13/02/2018 11:08	TAG agenda February 2018.docx	sjordan	Yes - PII – CIC	Privilege claim not pressed.
129.	161	(a)	SCG.003.001.0216	13/02/2018 11:10	TAG Minutes 4 Dec 2017.docx	kharvey	Yes - PII – CIC	Privilege claim not pressed.
130.	162	(a)	SCG.003.001.3720	13/02/2018 12:41	RE: Allianz Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII	Pressed. Changed to PII (personal information) claim not CIC (commercial in confidence) claim.
131.	163	(a)	SCG.003.001.3823	14/02/2018 12:39	RE: Moral rights [NRF-APAC.FID200711118]	Gorry, Stephen	Yes - CLP	Pressed.
132.	164	(a)	SCG.003.001.3824	13/02/2018 18:21	Letter to Phillip Cox - moral rights notice(63453861_1).docx		Yes - CLP	Pressed.
133.	165	(a)	SCG.003.001.0212	14/02/2018 14:11	Letter to Phillip Cox - moral rights notice(63453861_1).	Phillip Heads	Yes - CLP	Pressed.
134.	166	(a)	SCG.003.001.0213	14/02/2018 13:53	Letter to Phillip Cox - moral rights notice(63453861_1).docx	Phillip Heads	Yes - CLP	Pressed.
135.	167	(a)	SCG.003.001.4928	14/02/2018 14:51	FW: Trust Advisory Group meeting	Phillip Heads	Yes - PII - CIC	Privilege claim not pressed.
136.	168	(a)	SCG.003.001.4929	13/02/2018 11:08	TAG agenda February 2018.docx	sjordan	Yes - PII – CIC	Privilege claim not pressed.
137.	169	(a)	SCG.003.001.4930	13/02/2018 11:10	TAG Minutes 4 Dec 2017.docx	kharvey	Yes - PII – CIC	Privilege claim not pressed.
138.	170	(a)	SCG.003.001.0207	15/02/2018 9:22	Sydney Football Stadium_FF&E Proposal	Deirdre O'Neill	Yes - PII – CIC	Pressed.

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139.	171	(a)	SCG.003.001.0208	14/02/2018 13:20	180213_RGC_FeeProposal_SCGT_Ver01.pdf	Ross.Wilson	Yes - PII - CIC	Pressed.
140.	172	(a)	SCG.003.001.0176	20/02/2018 20:53	FW: Sketches of Individual diversions	Deirdre O'Neill	Yes - PII - CIC	Pressed.
141.	173	(a)	SCG.003.001.0177	20/02/2018 17:35	Individual Diversion Sketches.pdf	Sean.Bowen	Yes - PII – CIC	Pressed.
142.	174	(a)	SCG.003.001.0178	20/02/2018 17:38	Summary of Diversions.docx	Sean Bowen	Yes - PII – CIC	Pressed.
143.	177	(a)	SCG.003.001.4902	21/02/2018 16:11	TAG Minutes 15 Feb 2018	Phillip Heads	Yes - PII - CIC	Privilege claim not pressed.
144.	178	(a)	SCG.003.001.4903	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII – CIC	Privilege claim not pressed.
145.	179	(a)	SCG.003.001.0155	21/02/2018 18:28	Fwd: TAG Minutes 15 Feb 2018	Jim Betts	Yes - PII - CIC	Privilege claim not pressed.
146.	180	(a)	SCG.003.001.0156	21/02/2018 18:28	image001.jpg		Yes - PII – CIC	Privilege claim not pressed.
147.	181	(a)	SCG.003.001.0157	21/02/2018 18:28	ATT00001.htm		Yes - PII – CIC	Privilege claim not pressed.
148.	182	(a)	SCG.003.001.0158	21/02/2018 18:28	imaged79dd5.PNG		Yes - PII – CIC	Privilege claim not pressed.
149.	183	(a)	SCG.003.001.0159	21/02/2018 18:28	ATT00002.htm		Yes - PII – CIC	Privilege claim not pressed.
150.	184	(a)	SCG.003.001.0160	21/02/2018 18:28	imagea9d707.JPG		Yes - PII – CIC	Privilege claim not pressed.
151.	185	(a)	SCG.003.001.0161	21/02/2018 18:28	ATT00003.htm		Yes - PII – CIC	Privilege claim not pressed.
152.	186	(a)	SCG.003.001.0162	21/02/2018 18:28	imaged79dd5.PNG		Yes - PII – CIC	Privilege claim not pressed.
153.	187	(a)	SCG.003.001.0163	21/02/2018 18:28	ATT00004.htm		Yes - PII – CIC	Privilege claim not pressed.
154.	188	(a)	SCG.003.001.0164	21/02/2018 18:28	imagea9d707.JPG		Yes - PII – CIC	Privilege claim not pressed.
155.	189	(a)	SCG.003.001.0165	21/02/2018 18:28	ATT00005.htm		Yes - PII – CIC	Privilege claim not pressed.
156.	190	(a)	SCG.003.001.0166	21/02/2018 18:28	imaged79dd5.PNG		Yes - PII – CIC	Privilege claim not pressed.
157.	191	(a)	SCG.003.001.0167	21/02/2018 18:28	ATT00006.htm		Yes - PII – CIC	Privilege claim not pressed.
158.	192	(a)	SCG.003.001.0168	21/02/2018 18:28	imagea9d707.JPG		Yes - PII – CIC	Privilege claim not pressed.
159.	193	(a)	SCG.003.001.0169	21/02/2018 18:28	ATT00007.htm		Yes - PII – CIC	Privilege claim not pressed.
160.	194	(a)	SCG.003.001.0170	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII - CIC	Privilege claim not pressed.
161.	195	(a)	SCG.003.001.0171	21/02/2018 18:28	ATT00008.htm		Yes - PII – CIC	Privilege claim not pressed.
162.	196	(a)	SCG.003.001.6391	22/02/2018 10:50	FW: TAG Minutes 15 Feb 2018	CARON LEFEVER	Yes - PII – CIC	Privilege claim not pressed.

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163.	197	(a)	SCG.003.001.6392	21/02/2018 16:09	TAG Minutes 15 Feb 2018.docx	kharvey	Yes - PII – CIC	Privilege claim not pressed.
164.	202	(a)	SCG.003.001.0143	26/02/2018 18:39	Fwd: Alianza Stadium rebuild - query regarding sporting facilities for SCG Trust members	JANE COLES	Yes - PII	Pressed.
165.	203	(a)	SCG.002.001.0072	28/02/2018 12:43	FW: Waratahs VHA Redevelopment Issues (3141427)[NRF-APAC.FID2161591]	Mulligan, Peter	Yes - CLP	Pressed.
166.	204	(a)	SCG.002.001.0068	2/03/2018 11:09	FW: VHA Breaches/Damages (3141427)[NRF-APAC.FID2161591]	JASON HILL	Yes - CLP	Pressed.
167.	205	(a)	SCG.003.001.0079	5/03/2018 11:52	FW: MAG meeting	JANE COLES	Yes - PII	Pressed.
168.	206	(a)	SCG.003.001.1578	9/03/2018 13:31	Fwd: Allianz GPR Survey - Add Jeff Ramos	Tom Kennedy	Yes - PII – CIC	Privilege claim not pressed.
169.	207	(a)	SCG.003.001.1579	9/03/2018 13:30	Allianz Stadium GPR Report.pdf		Yes - PII – CIC	Privilege claim not pressed.
170.	208	(a)	SCG.002.001.0042	14/03/2018 8:02	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	Jonathan Greig	Yes - CLP	Pressed. Substantially reproduces legal advice.
171.	209	(a)	SCG.002.001.1734	14/03/2018 11:48	RE: Construction of new Allianz Stadium - Amendment to SCG By-Law (DRAFT)	BERNIE LAMERTON	Yes - CLP	Pressed. Substantially reproduces legal advice.
172.	210	(a)	SCG.002.001.1735	14/03/2018 11:47	Venue Allocation of Events 2018 - 2022.docx	BERNIE LAMERTON	Yes – CLP	Pressed. Substantially reproduces legal advice.
173.	211	(a)	SCG.003.001.5433	15/03/2018 14:49	FW: Stadium redevelopment assurances		Yes - PII	Privilege claim not pressed.
174.	212	(a)	SCG.003.001.5434	14/03/2018 16:34	To PH 14318.pdf	Michael Waterhouse	Yes - PII	Privilege claim not pressed.
Category C								
175.	1	(c)	1(c)	06/03/2018	2018-03-06 Sydney Football Stadium Development History	SC&SG Trust	Yes – PII – CIC	Privilege claim not pressed.
Category E								
176.	1	(e)	1(e)	24/11/2017	Memorandum of Understanding, NSW Stadia Investment and Content – ARLC and NSW Government	Australian Rugby League Commission	Yes – PII – CIC	Pressed.



4 May 2018

Ms Karen Smith
Department of Premier and Cabinet

By email: to Karen.smith@dpc.nsw.gov.au

Dear Ms Smith

Legislative Council standing Order 52 – claim for privilege

We refer to our letter of 4 April 2018 which requested that a claim of privilege be made in respect of a Memorandum of Understanding between the National Rugby League Limited (NRL), NSW Government, Venues NSW and the Sydney Cricket and Sports Ground Trust (MoU) which we understand falls within the scope of an order to produce. A copy of our letter of 4 April 2018 is attached for ease of reference.

The MoU contains sensitive commercial information relating to the NRL's business which, if released to the public, is liable to cause harm to our business. In particular, the NRL may be placed at a disadvantage with respect to other sports or venue hirers if commercial terms relating to our business are made public. Further, the disclosure of the commercial terms contained in the MoU may impact the NRL's negotiations with other venues. As you will appreciate, the NRL is a significant hirer of venues in New South Wales and in other parts of Australia and the commercial terms of our venue hire arrangements have the potential to significantly impact the revenues of our business, and accordingly, the returns which we are able to distribute back into the sport of rugby league in New South Wales and more broadly.

We would be grateful if you would give further consideration to our request that a claim of privilege be made in respect of the MoU.

We are happy to provide further information as required in support of this request and can be contacted at the number below.

Yours sincerely

Eleni North
General Counsel

Telephone: 9359 8564

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The Greatest Game of All

Ms Sandra Scacciotti
Department of Premier and Cabinet
By email: gipa@dpc.nsw.gov.au

Dear Ms Scacciotti

Standing Order 52 – Legislative Council – claim for privilege

We refer to the resolution of the NSW Legislative Council passed on 16 March 2018 which requires the production of papers regarding the NSW Government's stadia policy pursuant to standing order 52 (**Order**).

We note that one of the terms of the Order seeks the production of "any agreement between the Government and the National Rugby League regarding fixtures".

The National Rugby League (**NRL**) has signed a Memorandum of Understanding (**MOU**) with the NSW Government (represented by the Minister for Sport), Venues NSW and Sydney Cricket and Sports Ground Trust which relates to the provision of NRL Grand Finals and State of Origin matches to support the NSW Government's stadia investment strategy. The MOU contains confidential commercial terms which, if disclosed, would prejudice the NRL's commercial position as a major venue hirer and would place it at a disadvantage with respect to other sports and/or hirers. Disclosure of the MoU may also impact our commercial negotiations with other venues.

We respectfully request that a claim of privilege is made in respect of the contents of the MoU in order to protect the confidential commercial information of the NRL and avoid adverse commercial consequences for our sport.

We are happy to provide further information or assistance as required in support of our request that the MoU be covered by privilege.

Yours sincerely

Eleni North
General Counsel

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STANDING ORDER No 52

LEGISLATIVE COUNCIL RESOLUTION DATED 15 MARCH 2018

SUBMISSION IN SUPPORT OF VENUES NSW'S CLAIMS FOR PRIVILEGE

This document supports Venues NSW's claims for privilege in respect of documents which it produced to the Legislative Council in response to the resolution dated 15 March 2018 (**Resolution**).

1. BACKGROUND

- 1.1 Venues NSW produced documents in response to the Resolution in two tranches:
 - (a) the first tranche was produced on 4 April 2018; and
 - (b) the second tranche was produced on 19 April 2018.
- 1.2 Venues NSW made a claim for privilege in respect of each tranche, and accompanied its production on each occasion with a short submission outlining the basis upon which privilege was claimed. Those submissions are repeated and adopted here.
- 1.3 On 23 April 2018, the Hon Adam Searle MLC sought to dispute some of the claims for privilege made by, among other agencies, Venues NSW. As a consequence of the disputed claims for privilege, an Independent Arbiter has been appointed pursuant to Standing Order No 52k in order to determine the claims for privilege.
- 1.4 The Independent Arbiter has requested information as to:
 - (a) which, if any, claims for privilege are no longer pressed;
 - (b) any qualifications to the existing claims for privilege; and
 - (c) further submissions in support of those claims for privilege.
- 1.5 This document responds to the Independent Arbiter's request.

2. GENERAL CONSIDERATIONS

- 2.1 Venues NSW's earlier submissions were made at a necessarily high level to inform the Council of the broad basis upon which Venues NSW asserts privilege.
- 2.2 Mr Searle's letter of 23 April 2018, which has been provided to Venues NSW, outlined some broad considerations which, in Mr Searle's submission, the Independent Arbiter should take into account in determining the claims for privilege.
- 2.3 Now that the basis of the dispute as to privilege is somewhat clearer, it is useful to set out some general principles which underpin the privilege claims.

Legal professional privilege

- 2.4 Venues NSW does not wish to say anything further about its claims for legal professional privilege. The scope of that privilege is well understood, and Venues NSW's earlier submissions deal with the matter sufficiently. There are comparatively few documents where privilege has been claimed on this basis. Each of documents 00075, 00078, 00079 and 00080 either attach, or refer to in a material respect, advice given by Venues NSW's legal advisers and are clearly, in Venues NSW's submission, subject to legal professional privilege.

Public interest immunity

- 2.5 Much of Mr Searle's letter deals with the way in which the concept of the public interest relates to claims for privilege in the context of Parliamentary notices to produce. Mr Searle's argument appears to be threefold:
- (a) the basis on which privilege can be claimed is unclear, given Parliament's role in determining what is reasonably necessary for the proper exercise by the Legislative Council of its functions. In turn, Mr Searle questions the basis for the restriction from publication of any document - it is sufficient answer to this argument to note that Parliament has elected, through its Standing Orders, to recognise that claims for privilege can be made and therefore, Parliament has provided a means by which the privilege may be preserved. While acknowledging, as previous Independent Arbiters have done, that the Standing Order does not itself limit the circumstances in which the Council may elect to publish a document, the Standing Order clearly contemplates that privilege may be asserted, and that the existence or otherwise of a proper claim for privilege is a relevant matter to be considered;
 - (b) that while what grounds a proper claim for privilege is unclear, it is reasonably clear what does not ground such a claim; and
 - (c) that the public interest is properly relevant in determining whether or not a privilege exists, and does not operate as an "override" to provide discretion for overruling an otherwise valid claim for privilege.
- 2.6 Venues NSW does not necessarily agree with this characterisation, but agrees with the general principle that the question of the public interest is highly relevant to a determination of privilege. In this regard, Venues NSW notes the test outlined by Gibbs CJ in **Sankey v. Whitlam** (1978) 21 ALR 505 at 529:
- "The fundamental and governing principle is that documents in the class may be withheld from production only when this is necessary in the public interest. In a particular case the Court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice."*
- 2.7 There are two key observations to be made about this test:
- (a) it was set out in the context of litigation between parties, and in a different context to Parliament exercising its powers to compel production. Of course, and as noted by Mr Searle, Venues NSW does not suggest that the test is binding on the Independent Arbiters, but rather that the test illuminates the calculus which the Independent Arbiters should consider; and
 - (b) the calculus will be different for legal proceedings as opposed to Parliamentary proceedings. However, given that Parliament has provided a means to preserve the privilege, circumstances (including judicial circumstances) in which the content of the privilege has been considered are relevant. It is also important to note that privilege (whether it be public interest immunity (PII) or legal professional privilege) are rights or immunities capable of being asserted outside the context of litigation or other Court processes.
- 2.8 Mr Searle's argument that it is reasonably clear what does not ground a proper claim for privilege is problematic. While it may be true that there is no specific category of privilege concerning privacy protections, commercial-in-confidence documents or the categories set out in the *Government Information (Public Access) Act 2009 (GIPA Act)*, to say that documents in such categories do not ground a proper claim for privilege does not follow.
- 2.9 The general proposition in relation PII is that there are some documents where the public interest requires that they not be disclosed. This necessarily involves identification of the

public interest. However, the public interest is multi-faceted and needs to be considered as a whole.

2.10 Accordingly, and to deal with the specific examples given by Mr Searle:

- (a) the GIPA Act provides a statutory formulation of the way in which the public interest is to be evaluated in the context of requests for information under the GIPA Act. While Venues NSW does not suggest that the terms of the GIPA Act are directly applicable to the Resolution, they are surely relevant to consideration of the way in which the public interest should be considered. For example, while it would not be accurate to suggest that privilege is made out simply because a document falls within a category of documents set out in the table to section 14 of the GIPA Act, it would also not be accurate to suggest that the way in which the GIPA Act would treat a document has no bearing on the public interest. In other words:
 - (i) documents protected by privilege in the context of a Parliamentary notice to produce may overlap with documents that would be exempt under the GIPA Act;
 - (ii) although the GIPA Act may not ground a claim of privilege, considerations that are relevant to the GIPA Act may also be relevant to a claim of privilege;
 - (iii) the terms used in the GIPA Act are a useful way of capturing part of the concept of the public interest;
- (b) there is a powerful public interest in the protection of the privacy of individuals because it facilitates the democratic interaction of individuals with both their elected representatives and with the Executive, in a manner that would be curtailed if such details were made public; and
- (c) "*commercial-in-confidence*" documents again are not privileged merely because of their character as "*commercial-in-confidence*" documents. Rather, the relevant public interest is that, in circumstances where Government enters a market, particularly as a procuring party, there is a public interest in that market remaining robust and functional. This would be undermined by either:
 - (i) the disclosure of information about commercial entities in that market, which would place those entities at a competitive disadvantage; or
 - (ii) the disclosure of information about Government, its drivers, its evaluation processes, which would place Government at a disadvantage in either its current or future procurement process.

In either case, it is the public interest in the robust functioning of markets, and the ability of Government to participate in those markets in a commercially fair manner, which underpins claims for privilege. It may be readily seen how the disclosure of "*commercial-in-confidence*" documents can adversely affect the public interest. It is that element of the public interest which must be considered in light of any other elements of the public interest as part of the evaluative exercise performed by the Independent Arbiter.

2.11 Accordingly, where Venues NSW has made claims for privilege on the basis of privacy protections, or the potential commercial disadvantage of either Government or third parties, it is in effect making a claim that the public interest requires that the document not be disclosed.

2.12 The determination of whether PII will apply and, if so, whether documents should be published in any event, involves a balancing exercise. As noted by previous Independent Arbiters, that balancing exercise involves considering:

- (a) the public interest, noting its multi-faceted nature; and
- (b) the needs of the Council in performing its Constitutional functions, including that of scrutinising the Executive.

2.13 There is some debate regarding whether the Independent Arbiter's role is to discern the particular needs which may be asserted by the Council, although the more recent reports indicate a reluctance on the part of the Independent Arbiter to assume that role. As a consequence, Venues NSW's submission focuses upon the public interest, and whether it is in the public interest for the documents the subject of the PII claim to be disclosed.

2.14 There is also some discussion regarding the relevance of "harm" to the public interest. Mr Searle's letter notes:

An examination of other privilege disputes resolved through this mechanism discloses that the consistent theme in the claims of privilege made (however expressed) and the determination of them is whether or not there is established a relevant harm to the public interest. As the most recent arbiter has noted, at p8 of his report on the WestConnex Business Case, that "so long as overriding harm is not done to the 'proper functioning of the executive arm and of the public service' (Sankey v Whitlam (1978) 142 CLR 1 at 56 per Stephen J) public debate stemming potentially from such sources is of the essence of representative democracy."

2.15 With respect, the WestConnex report dealt with the "overriding harm" test in the context of circumstances where non-privileged documents might nevertheless be released beyond the Parliament, and where Parliament may seek to limit perceived risk from the publication of confidential, but unprivileged, documents. While the report notes that such considerations may form part of the balancing exercise, they will not override a privilege recognised by law.

2.16 Nevertheless, Venues NSW's submissions focus on the prejudice to be suffered by Government in the event of disclosure.

2.17 The remainder of this submission deals with the information requested by the Independent Arbiter.

3. CLAIMS NO LONGER PRESSED

3.1 Subject to section 4 below, Venues NSW maintains each of its claims for privilege.

3.2 However, while it does not intend to waive privilege, Venues NSW does not press its claim in relation to documents 00074, 00612, 00619, 00622, 00623, 00624, 00625 and 00626.

4. QUALIFICATIONS TO EXISTING PRIVILEGE CLAIMS

4.1 A number of Venues NSW's privilege claims were made on the basis of there being a public interest in the personal information of private individuals not being disclosed. Venues NSW maintains these claims. However, Venues NSW would, if those details were redacted, not press the claim for privilege in respect of those documents. The relevant documents in this regard are nos 00063, 00064, 00065, 00066, 00068, 00069, 00070, 00071, 00072, 00073, 00596, 00597, 00598, 00599, 00600, 00601, 00602 and 00603.

5. ADDITIONAL SUBMISSIONS

5.1 Bearing in mind the general principles, Venues NSW sets out further details supporting its claims for privilege, particularly in relation to PII. Venues NSW has set out a number of categories of documents, grouped broadly around subject matter, to provide further detail on the specific basis for the claims of privilege. It is possible that some documents may fall within a number of categories. In these circumstances, Venues NSW has placed them in the category that appears most appropriate.

Documents that contain projected costings or other spending details including the timing of such spending or refer to such documents

- 5.2 Documents in this category include 00061, 00062, 00081, 00082, 00556, 00557, 00559, 00561, 00562, 00604 and 00605.
- 5.3 Disclosure of these documents would be contrary to the public interest because they provide potential tenderers or contractors with information that indicates Government's spending priorities and indeed the amounts that it has budgeted (or that Venues NSW has sought to be budgeted) in particular contexts including tendering. Especially in circumstances where expenditure is projected to occur in the future, the disclosure of this information provides a signal to the market and directly inhibits the ability of Government to obtain value for money in any procurement process.
- 5.4 Venues NSW is advised that document no 00557 was a document prepared for the consideration of the Expenditure Review Committee of Cabinet. Accordingly, there is a powerful public interest against its further disclosure.

Documents that reveal the economic justification for particular projects

- 5.5 Documents in this category include 00067.
- 5.6 Disclosure of this document would reveal the anticipated internal rate of return and specific benefit to cost ratio (**BCR**) to be obtained in relation to components of the NSW Stadiums Strategy. It would be contrary to the public interest to disclose this information because such disclosure would reveal the commercial position of Government in relation to existing and future potential commercial transactions and would prejudice the ability of the Government to obtain value for money in such transactions.

The memorandum of understanding between Government parties and the National Rugby League (NRL) parties (MOU) and documents referring to it

- 5.7 Documents in this category include 00076, 00077, 00078, 00079, 00080 and 00087 (the MOU itself).
- 5.8 The first point to be noted in relation to the MOU is that, by its terms, it is a confidential document (see clause 9.6). This, of course, does not overcome any compulsion of law, but provides important information as to the intention of the parties as to the MOU and its potential disclosure.
- 5.9 The MOU records the terms on which it is proposed that the Government commit to certain investment and the Australian Rugby League Commission (**ARLC**) commit to hosting various marquee sporting events and contemplates the negotiation of a detailed agreement. Schedule 2 sets out the ARLC's minimum contracting terms in respect of this detailed agreement.
- 5.10 Accordingly, the MOU records, among other things:
- (a) the level of investment to which the Government commits;
 - (b) the ARLC's intentions regarding naming rights, supplier rights, corporate hospitality, venue hire fees, ticketing, stadium members, technology, merchandise and other key elements;
 - (c) the ARLC's commitment to hosting particular events, for a particular time, at particular venues.
- 5.11 The harm that would be suffered by the ARLC and NRL in the event of disclosure is that their competitors would know the commitments that the ARLC/NRL had made to secure the relevant Government investment, and would know, at least inferentially, the extent to which the ARLC/NRL valued that investment. Knowledge of these matters on the part of competitors

and the world at large would significantly prejudice the ARLC/NRL in its future negotiations with other venues providers, and would place the ARLC/NRL at a competitive disadvantage vis-à-vis its competitors in those negotiations.

5.12 Prejudice would also be suffered by Government in the event of disclosure of the MOU or documents referring to it. Revealing the nature and substance of the arrangement which the Government has made with the ARLC/NRL will:

- (a) prejudice Government in its negotiations with other content providers and will directly inhibit the Government's ability to obtain value for money in those negotiations; and
- (b) reveal to other interstate and international venue owners or operators the commercial model including pricing underpinning each venue's operations, which would potentially provide those competitors with a commercial advantage in procuring major sporting and entertainment events.

5.13 There is a clear public interest in the third parties being able to treat with Government on the basis that the negotiations and their outcomes will not be disclosed. Similarly, there is a clear public interest in the Government, the owner of a venue, being able to operate in the market of providing that venue on the basis that content providers are not aware of the arrangements which Government has made with other content providers, and other owners are not aware of Venues NSW's commercial and pricing model. Disclosure of the MOU would lead to a distortion of the venues market, which would directly affect the Government's ability to obtain value for its investment of public funding.

5.14 Accordingly, disclosure of the MOU and documents referring to it would be contrary to the public interest.

5.15 In Venues NSW's submission, documents which refer to the MOU fall into the same category as the MOU itself and it would be contrary to the public interest for them to be disclosed.

Documents which reference the role of the ANZ Stadium operator in the redevelopment

5.16 Documents in this category include 00083 and 00084.

5.17 These documents refer to the way in which Venues NSW intends to:

- (a) involve the existing operator of ANZ Stadium in the redevelopment process, in circumstances where there is likely to be a post-redevelopment procurement process; and
- (b) manage potential issues vis-à-vis potential competitors for the ongoing role of operator post-redevelopment.

5.18 Disclosure of these documents would be contrary to the public interest because it would:

- (a) disclose probity advice received by Government; and
- (b) harm the conduct of future potential procurements.

Documents which reveal Government's economic, policy and other drivers in relation to the NSW Stadia Strategy

5.19 Documents in this category include 00085, 00086, 00545, 00550, 00551, 00573, 00574, 00608, 00609, 00610, 00611, 00613, 00614, 00615, 00616, 00617, 00618, 00620, 00621, 00627, 00628, 00629, 00630, 00631, 00632, 00633, 00634, 00635, 00636, 00637, 00638, 00639, 00640, 00641, 00642, 00643, 00644, 00645, 00647, 00648, 00650, 00651 and 00652.

- 5.20 These documents indicate the strategic considerations which underpin Government's analysis of the NSW Stadia Strategy, together with timing of construction, costs of construction, investment and the key inputs and drivers of the business cases and their timings which, in turn, each contribute to the process of development of Government policy.
- 5.21 They also deal with potential commercial consequences to Government, depending on the strategic direction taken by Government and other policy positions of Government in relation to the NSW Stadia Strategy.
- 5.22 Disclosure of these documents would prejudice Government's ability to obtain value for money in any procurement process, because the tenderers would know those matters which Government considered to be important, and the commercial constraints and assumptions under which Government was operating. Such prejudice would be contrary to the public interest.

Documents which reveal third parties' economic and other drivers in relation to the NSW Stadia Strategy

- 5.23 Documents in this category include 00546, 00589, 00590, 00591, 00592, 00593, 00594 and 00595.
- 5.24 These documents set out business investment decisions, anticipated actions and other steps which are proposed to be taken by third parties as part of the NSW Stadia Strategy.
- 5.25 Disclosure of these documents would place those third parties at a competitive disadvantage in any procurement process that they may undertake. This would be contrary to the public interest.
- 5.26 The documents also reveal the requested involvement of third party stakeholders in the redevelopment process, and timing updates provided to those stakeholders in a confidential setting regarding the progress of business case and approval processes.

Briefings supporting answers to Parliamentary questions

- 5.27 Documents in this category include 00547 and 00548.
- 5.28 These documents represent draft answers to Parliamentary questions and the material supporting them. While the answers themselves are clearly not privileged (subject to any Parliamentary privilege which attaches to them), disclosure of the drafts is contrary to the public interest because it would potentially undermine the responsibility of the Minister to the House.

Documents relating to tenders or other procurement processes, including requests for proposals, and documents which underpin them and other tendering documents

- 5.29 Documents in this category include 00549, 00577, 00578, 00579, 00580, 00581, 00582, 00583, 00584, 00585, 00586, 00587 and 00588.
- 5.30 Disclosure of tendering documents, particularly internal documents which disclose the basis upon which tenders will be sought and the reasons for preparing tenders, would reveal policy, economic and other drivers of Government (see paragraph 5.19ff above), and would be contrary to the public interest for those reasons.

Documents relating to the Stadium Network Implementation Group

- 5.31 Documents in this category include 00550, 00551, 00552, 00553, 00554, 00555, 00558 and 00560.
- 5.32 This group was established to carry out a number of key functions, including consideration of governance models. The determination of governance models will have a direct effect on the

way in which procurement decisions are made, and will affect the commercial and strategic relationships between key stakeholders. Disclosure of documents which detail the progress of the review would be contrary to the public interest because such disclosure will prejudice Government in any procurement decisions arising out of the governance review.

- 5.33 Part of the role of the group was also to develop an implementation plan for the Government's stadium investment strategy, which was ultimately to be considered by Cabinet. Disclosure of these documents would reveal policy, economic and other drivers of Government, including the process of development of Government policy, and would be contrary to the public interest for the reasons set out in paragraph 5.19ff.
- 5.34 Some of these documents also detail the expected timing of development and therefore expenditure, which disclosure would be contrary to the public interest for reasons set out above (at 5.02ff and 5.19ff).

Documents which record unsolicited expressions of interest from third parties

- 5.35 Documents in this category include 00565, 00566 and 00567.
- 5.36 These documents relate to third parties' redevelopment proposals that were not formally sought as part of a tender process. Disclosure of these documents would prejudice the ability of Government to conduct any future tenders in relation to the redevelopment, because of a perceived information imbalance. Disclosure of this document may undermine confidence in any tender process and would be contrary to the public interest.

Documents which disclose the terms of existing contracts or benefits arising from the current arrangements

- 5.37 Documents in this category include 000570, 00571, 00572, 00575, 00652 and 00653.
- 5.38 Disclosure of these documents would reveal both the terms of existing Government contracts with third party content providers (and the benefits which flow from these), and an analysis of the implications of the NSW Stadium Strategy on these existing contracts. Disclosure of these documents would be contrary to the public interest because it would reveal Government's assessment of its potential exposures which may affect its negotiating position and may also prejudice its ability to exercise its full suite of legal rights.
- 5.39 Documents 00570, 00571, 00572 and 00575 were prepared as Board papers, in circumstances where the terms of existing contracts were being discussed and considered.

Documents which disclose positions in respect of third parties and/or Government

- 5.40 Documents in this category include 00576, 00606, 00607, 00646, 00649, 00667 and 00668.
- 5.41 These documents include:
- (a) emails where editorial comment is made in relation to the likely conduct of Government (including, for example, the briefing of journalists);
 - (b) emails where editorial comment is made as to the motivations or backgrounds of persons, including journalists,

in circumstances where the effective exercise of Venues NSW's functions would be prejudiced by the disclosure of such documents, particularly in circumstances where the editorial comment is made without basis being provided.

- 5.42 These documents could be taken to impugn the integrity of third parties in the absence of supporting information. Disclosure of these documents would be contrary to the public interest.

5.43 These documents also include correspondence with journalists in circumstances where disclosure would reveal the basis upon which the journalist obtained information, and which was ultimately not published.

6. **ADDITIONAL SUBMISSIONS**

6.1 Venues NSW notes that Mr Searle contemplated providing the specified grounds upon which he challenged the various claims of privilege. Venues NSW has not to date been provided with that document. In the event that such a document is provided, Venues NSW would welcome the opportunity to make further submissions in relation to any additional issues raised by it.

Mr David Blunt
Clerk of the Parliaments
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Dear Mr Blunt

ORDER FOR PAPERS — SYDNEY STADIUMS - DISPUTE OF PRIVILEGE CLAIMS

Infrastructure NSW has been advised by the Department of Premier and Cabinet that the independent arbiter appointed by the Parliament to evaluate and report on a disputed claim of privilege dated 23 April 2018, lodged by the Hon Adam Searle, MLC in relation to certain documents in the Sydney Stadiums return to order in respect of the Order for Papers dated 5 April 2018 in relation to Sydney Stadiums (**Order for Papers**), has requested that the Department of Premier and Cabinet provide by no later than 2pm on Friday 4 May, the following information from affected offices and agencies:

- advice as to any of the documents in dispute for which privilege claims are no longer pressed;
- any qualifications to the existing claims of privilege; and
- and further submissions in support of those claims of privilege.

Infrastructure NSW makes the following submissions in response to this request:

- **Submissions** in relation specific Infrastructure NSW documents are set out below under the heading "Disputed claim of privilege over specific Infrastructure NSW documents".
- **Annexure A** contains a list the documents which, upon further review and consideration, Infrastructure NSW no longer presses a claim of privilege.
- **Annexure B** contains a list the documents over which Infrastructure NSW maintains its claim of privilege (**Disputed Documents**).
- **Annexure C** contains general submissions for consideration by the independent arbiter, including submissions responding to legal issues raised in the Hon Adam Searle MLC's disputed claim of privilege dated 23 April 2018.

Disputed claim of privilege over specific Infrastructure NSW documents

Claim for privilege no longer pressed

Infrastructure NSW has considered Mr Searle MLC's letter and the specific documents where he disputes Infrastructure NSW's claim of privilege. Upon reflection, Infrastructure NSW no longer presses its claim for privilege in relation to a number of the documents disputed by Mr Searle MLC.

A list of the documents over which Infrastructure NSW no longer presses its claim for privilege is contained at **Annexure A**.

Claim for privilege pressed

Annexure B contains a list of documents over which Infrastructure NSW maintains its claim of privilege.

Infrastructure NSW does not maintain a claim of privilege over the entirety of the documents listed in Annexure B. Instead, it maintains a claim of privilege over certain information contained in those documents.

Infrastructure NSW submits that, if its claims for privilege are upheld by the independent arbiter, the relevant information which is privileged should be redacted and the redacted versions of the documents can be released to the public. Enclosed with this letter is a copy of each of the documents listed in **Annexure B** in both redacted and un-redacted form for the independent arbiter's consideration.

Infrastructure NSW's claim of privilege over the documents listed in **Annexure B** can be categorised into the following:

- a) claims relating to privacy and the personal information of members of the public; and
- b) public interest immunity claims relating to the security of Infrastructure NSW's information.

Privacy claims

A number of the documents listed in **Annexure B** contain personal information of members of the public, including:

- a) email addresses;
- b) home addresses; and
- c) telephone numbers.

Infrastructure NSW submits that releasing the personal information of members of the public would make it less likely that members of the public would write to the Government in relation to policy proposals. If members of the public understood that any personal information they provided to the Government for the purpose of participating in policy debates or making general enquiries of members of Parliament or Ministers was released generally to the public, it would reduce the likelihood that the public would write to members of Parliament or Ministers. This would have the effect of reducing the number of people engaging the democratic process. We also note that, in relation to the specific principles of public interest immunity addressed at pages 24 and 25 in Annexure C, a reduction in the number of people engaging in the democratic process would inhibit:

- a) decision-making and policy development;
- b) candour in communication with (and within) the executive; and
- c) confidence in the public service and the "proper functioning" thereof.

At a more general level, releasing the personal information of members of the public and therefore reducing the likelihood that people write to members of Parliament or engage in the democratic process would greatly injure the public interest.

Infrastructure NSW submits that releasing the personal information of members of the public is not, in any way, "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions.

Public interest immunity claims

Only one document listed in **Annexure B** is subject to a public interest immunity claim. The document in question contains three URLs to "Dropbox" folders where documents are stored for general access by those to whom the URL has been shared.

The URLs, at the time of production, were still active and contained Infrastructure NSW documents. Further, any person with access to the URL could type the URL into their internet browser and access the documents.

Any person with access to the URL and the "Dropbox" folders may also be able to access other folders within that "Dropbox" account, including other Infrastructure NSW documents.

Infrastructure NSW submits that the release of the "Dropbox" URLs would constitute a significant security concern for Infrastructure NSW. If any member of the public had access to the URLs, they could access the documents in the "Dropbox" including any future documents that may be placed in the "Dropbox". In relation to the specific principles of public interest immunity outlined at pages 24 and 25 in the general submissions in Annexure C, this could:

- a) reduce confidentiality;
- b) increase premature, ill-informed or misdirected criticism that would otherwise divert the policy-making process from its proper course by allowing the public to access confidential documents (potentially including drafts of documents);
- c) significantly inhibit decision-making and policy development;
- d) reduce candour in communication with (and within) the executive; and
- e) reduce confidence in the public service and the "proper functioning" thereof.

At a more general level, releasing the "Dropbox" URLs and allowing the public to access the "Dropbox" would injure the public interest by inhibiting the public service's ability to work effectively.

Finally, Infrastructure NSW submits that releasing the "Dropbox" URLs is not, in any way, "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions.

Summary of Infrastructure NSW Submissions

In his letter dated 23 April 2018, Mr Searle MLC seeks to dispute a number of the privilege claims made in response to the Order for Papers in relation to various documents listed in the "Privileged Documents" Index provided to the Parliament. In short, the position set out in Mr Searle MLC's letter rests upon the following central propositions, drawn from an analysis of previous decisions of the independent legal arbiter:

- a) in exercising their function, the independent legal arbiter appointed by Parliament should go "beyond a technical legal evaluation of claims of privilege and [emphasise] the balancing of competing interests";
- b) relevant privileges which may be respected by Parliament should be confined to those which "as a matter of law, [exist] between the Executive and the Upper House of the New South Wales Parliament";
- c) those privileges are "not the privilege or public interest immunity that a litigant or third party to curial proceedings might raise in answer to an order for discovery or a subpoena in litigation";
- d) personal privacy, and "commercial-in-confidence" claims are not proper bases on which a claim for privilege may be made; and

- e) the central requirement is "whether or not there is established a relevant harm to the public interest".

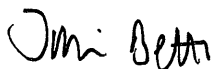
It is not clear on the face of the letter precisely *what* factors Mr Searle MLC asserts should properly be considered as bearing upon the "public interest" and the "balancing" process which is recommended.

For the reasons set out in more detail in Annexure C, Infrastructure NSW submits as follows:

- a) only the Legislative Council can resolve claims of privilege. The independent arbiter does not have the power to do so;
- b) the test to as to whether documents over which a privilege has been claimed should be released is not whether or not, there is established a relevant harm to the public interest, but is whether the release is "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions;
- c) when considering whether the release of documents over which privilege has been claimed is "reasonably necessary", the Legislative Council must balance several factors, including whether disclosure would:
 - A) be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);
 - B) undermine a fundamental "right" or "principle" recognised by the general law;
 - C) "threaten the proper functioning of the executive arm and of the public service"; and/or
 - D) be otherwise inconsistent with the "public interest" (and thus no longer "reasonably necessary" for the "proper exercise" of the Legislative Council's functions); and
- d) further publication of the relevant portions of the Disputed Documents cannot properly be characterised as "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions.

Thank you for the opportunity to provide these submissions.

Yours sincerely



Jim Betts
Chief Executive Officer

4 May 2018

INFRASTRUCTURE NSW

ORDER FOR PAPERS - SYDNEY STADIUMS

PRIVILEGED DOCUMENTS - CLAIM FOR PRIVILEGE NO LONGER PRESSED

Document ID	Relevant item	Document type	Title	Date of document
INSW.0001.3060	Item (a)	Document	SASOP Contractor Performance Report - Cox.docx	2/08/2017 15:23
INSW.0001.3063	Item (a)	Document	Performance Report Cox.pdf	2/08/2017 15:52
INSW.0001.3066	Item (a)	Document	Contracts Disclosure - Class 2 Cox.docx	3/08/2017 9:33
INSW.0001.3693	Item (a)	Document	11. Contracts Disclosure - Class 2 (if over 150k inc GST).docx	19/10/2017 10:04
INSW.0001.3696	Item (a)	Document	Contracts Disclosure - Class 2 Cox.docx	19/10/2017 15:14
INSW.0001.3697	Item (a)	Document	Cox Contracts Disclosure - Class 2 V2.docx	19/10/2017 15:22
INSW.0001.3789	Item (a)	Document	Attachment C - RFQ Evaluation Report - E3 Advisory.docx	30/11/2017 16:16
INSW.0001.3826	Item (a)	Document	Attachment C - RFQ Evaluation Report - RLB.docx	11/12/2017 7:52
INSW.0001.3832	Item (a)	Document	Attachment C - RFQ Evaluation Report - RLB.DOCX	11/12/2017 13:46
INSW.0001.3836	Item (a)	Document	Attachment C - RFQ Evaluation Report - Savills.docx	12/12/2017 15:34
INSW.0001.3840	Item (a)	Document	Attachment C - RFQ Evaluation Report - KPMG MPS.docx	12/12/2017 16:56
INSW.0001.3842	Item (a)	Document	Attachment C - RFQ Evaluation Report - Savills.docx	12/12/2017 17:20
INSW.0001.3848	Item (a)	Document	Attachment C - RFQ Evaluation Report - KPMG SASOP.docx	13/12/2017 7:59

Document ID	Relevant item	Document type	Title	Date of document
INSW.0001.3875	Item (a)	Document	5. RFQ Evaluation Report Template.docx	15/12/2017 8:55
INSW.0001.4066	Item (a)	Document	Attachment C - Evaluation Report - construction program.docx	4/01/2018 14:58
INSW.0001.4077	Item (a)	Document	Attachment C - RFQ evaluation report template.docx	5/01/2018 9:52
INSW.0001.4078	Item (a)	Document	Attachment C - RFQ Evaluation Report.docx	5/01/2018 11:46
INSW.0001.4081	Item (a)	Document	Attachment C - RFQ evaluation report template.docx	5/01/2018 14:40
INSW.0001.4085	Item (a)	Document	Attachment C - RFQ Evaluation Report Noise and Vibration.docx	5/01/2018 16:51
INSW.0001.4086	Item (a)	Document	Attachment C - RFQ Evaluation Report - Contamination & Geotech.docx	8/01/2018 7:44
INSW.0001.4106	Item (a)	Document	Attachment C - RFQ Evaluation Report ESD Strategy.docx	10/01/2018 8:24
INSW.0001.4109	Item (a)	Document	Attachment C - RFQ Evaluation Report - Legal Advisor.docx	10/01/2018 8:55
INSW.0001.4114	Item (a)	Document	Attachment C - RFQ Evaluation Report stormwater and flooding.docx	10/01/2018 9:26
INSW.0001.4246	Item (a)	Document	Attachment C - RFQ Evaluation Report Project Manager.docx	23/01/2018 14:51
INSW.0001.4249	Item (a)	Document	Attachment C - RFQ Evaluation Report Project Manager.docx	23/01/2018 15:08
INSW.0001.4257	Item (a)	Document	Attachment C - RFQ Evaluation Report - planing advisory services.docx	24/01/2018 13:05
INSW.0001.4369	Item (a); Item (b)	Document	Attachment C - RFQ Evaluation Report template RFQ 1012.docx	15/02/2018 11:08
INSW.0001.4372	Item (a)	Document	Attachment C - RFQ Evaluation Report template RFQ 1013.docx	15/02/2018 11:09

Document ID	Relevant item	Document type	Title	Date of document
INSW.0001.4456	Item (a)	Document	Attachment C - RFQ Evaluation Report template.docx	2/03/2018 9:52
INSW.0001.4502	Item (a)	Document	SFSR Transaction Manager-evaluation-report-template.docx	8/03/2018 10:44
INSW.0001.4525	Item (a)	Document	Attachment C - RFQ Evaluation Report Social & Economic.docx	9/03/2018 13:38
INSW.0001.4545	Item (a)	Document	Attachment C - RFQ Evaluation Report Design Reveiw Panel.docx	12/03/2018 10:21
INSW.0001.4548	Item (a)	Document	Attachment C - RFQ Evaluation Report Design Reveiw Panel.docx	12/03/2018 11:57
INSW.0001.4571	Item (a)	Document	180314 Issues Paper for Award.docx	14/03/2018 12:33
INSW.0001.4674	Item (a)	Document	180316 Completed Disclosure Form.docx	16/03/2018 15:50
INSW.0001.4701	Item (a)	Document	Attachment C - RFQ Evaluation Report - Landscape Architect.docx	19/03/2018 15:54
INSW.0002.0384	Item (a)	Document	Attachment C - RFQ Evaluation Report - E3 Advisory.docx	22/03/2018 16:45
INSW.0002.0385	Item (a)	Document	Attachment C - RFQ Evaluation Report - KPMG MPS.DOCX	22/03/2018 16:45
INSW.0002.0387	Item (a)	Document	Attachment C - Evaluation Report - construction program.docx	22/03/2018 16:46
INSW.0002.0404	Item (a)	Document	Attachment C - RFQ evaluation report Biodiversity Consultant.docx	22/03/2018 16:47
INSW.0002.0405	Item (a)	Document	Attachment C - RFQ Evaluation Report.docx	22/03/2018 16:47
INSW.0002.0406	Item (a)	Document	Attachment C - RFQ evaluation report (2).docx	22/03/2018 16:47
INSW.0002.0408	Item (a)	Document	Attachment C - RFQ Evaluation Report Planning Consultant.docx	22/03/2018 16:47

Document ID	Relevant item	Document type	Title	Date of document
INSW.0002.0409	Item (a)	Document	Attachment C - RFQ Evaluation Report - Legal Advisor.docx	22/03/2018 16:47
INSW.0002.0410	Item (a)	Document	Attachment C - RFQ Evaluation Report - RLB.DOCX	22/03/2018 16:47
INSW.0002.0411	Item (a)	Document	Attachment C - RFQ Evaluation Report - Savills.docx	22/03/2018 16:47
INSW.0002.0412	Item (a)	Document	Attachment C - RFQ Evaluation Report Community Consultation.docx	22/03/2018 16:48
INSW.0002.0413	Item (a)	Document	Attachment C - RFQ Evaluation Report Community Consultation (2).docx	22/03/2018 16:48
INSW.0002.0414	Item (a)	Document	Attachment C - RFQ Evaluation Report Design Reveiw Panel.docx	22/03/2018 16:48
INSW.0002.0415	Item (a)	Document	Attachment C - RFQ Evaluation Report ESD Strategy.docx	22/03/2018 16:48
INSW.0002.0416	Item (a)	Document	Attachment C - RFQ Evaluation Report Infrastructure Management Plan.docx	22/03/2018 16:48
INSW.0002.0417	Item (a)	Document	Attachment C - RFQ Evaluation Report Noise and Vibration.docx	22/03/2018 16:48
INSW.0002.0418	Item (a)	Document	Attachment C - RFQ Evaluation Report Project Manager.docx	22/03/2018 16:48
INSW.0002.0419	Item (a)	Document	Attachment C - RFQ Evaluation Report Social & Economic.docx	22/03/2018 16:48
INSW.0002.0420	Item (a)	Document	Attachment C - RFQ Evaluation Report stormwater and flooding.docx	22/03/2018 16:48
INSW.0002.0421	Item (a)	Document	Attachment C - rfq evaluation report Surveyor.docx	22/03/2018 16:48
INSW.0002.0422	Item (a)	Document	Attachment C - RFQ Evaluation Report template.docx	22/03/2018 16:48
INSW.0002.0423	Item (a)	Document	Attachment C - RFQ evaluation report template (2).docx	22/03/2018 16:48

Document ID	Relevant item	Document type	Title	Date of document
INSW.0002.0424	Item (a)	Document	Attachment C - RFQ Evaluation Report Template - OCM.DOCX	22/03/2018 16:48
INSW.0002.0425	Item (a)	Document	Attachment C - RFQ Evaluation Report template RFQ 1012.docx	22/03/2018 16:48
INSW.0002.0426	Item (a)	Document	Attachment C - RFQ Evaluation Report template RFQ 1013.docx	22/03/2018 16:48
INSW.0002.0427	Item (a)	Document	Attachment C - RFQ Evaluation Report Traffic & Transport.docx	22/03/2018 16:48
INSW.0002.0428	Item (a)	Document	Attachment C - RFQ Evaluation Report Visual Impact Assessment.docx	22/03/2018 16:48
INSW.0002.0430	Item (a)	Document	Attachment D - contracts-disclosure RFT970.docx	22/03/2018 16:48

INFRASTRUCTURE NSW
ORDER FOR PAPERS - SYDNEY STADIUMS
PRIVILEGED DOCUMENTS - DISPUTED DOCUMENTS

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
1.	INSW.0013.1314	Item (a)	Email	RE: Additional project/enquiry form integration quote	16/02/2018 18:22	Public Interest Immunity
2.	INSW.0013.2828	Item (a)	Email	FW: Member Question about Allianz stadium redevelopment	5/03/2018 10:36	Privacy
3.	INSW.0013.3059	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:16	Privacy
4.	INSW.0013.3060	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:19	Privacy
5.	INSW.0016.6011	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:19	Privacy
6.	INSW.0013.3063	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:26	Privacy
7.	INSW.0013.3065	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:27	Privacy
8.	INSW.0013.3101	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 14:40	Privacy
9.	INSW.0013.3107	Item (a)	Email	RE: Member Question about	6/03/2018 15:09	Privacy

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
				Allianz stadium redevelopment		
10.	INSW.0016.6019	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 15:09	Privacy
11.	INSW.0013.3953	Item (a)	Email	Ministerial Correspondence - please review	8/03/2018 16:22	Privacy
12.	INSW.0013.3954	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
13.	INSW.0013.3955	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
14.	INSW.0013.3959	Item (a)	Email	FW: Ministerial Correspondence - please review	8/03/2018 16:24	Privacy
15.	INSW.0013.3960	Item (a)	Image	image001.jpg	8/03/2018 16:22	Privacy
16.	INSW.0013.3961	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
17.	INSW.0013.3962	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
18.	INSW.0016.6280	Item (a)	Email	FW: Ministerial Correspondence - please review	8/03/2018 16:25	Privacy
19.	INSW.0016.6281	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
20.	INSW.0016.6282	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
21.	INSW.0016.6359	Item (a)	Email	FW: Ministerial Correspondence - please review	9/03/2018 14:47	Privacy
22.	INSW.0016.6360	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
23.	INSW.0016.6361	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
24.	INSW.0013.4152	Item (a)	Email	FW: Ministerial Correspondence - please review	9/03/2018 14:47	Privacy
25.	INSW.0013.4153	Item (a)	Document	15022018154550-0001.pdf	8/03/2018 16:21	Privacy
26.	INSW.0013.4154	Item (a)	Document	CRML18-53 - VNSW Edwin Cassar ANZ Stadium Memberships (VL input) 28.02.18.docx	8/03/2018 16:13	Privacy
27.	INSW.0013.5082	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 14:40	Privacy
28.	INSW.0013.5086	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:26	Privacy
29.	INSW.0013.5303	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:27	Privacy
30.	INSW.0013.5304	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:16	Privacy
31.	INSW.0013.5318	Item (a)	Email	RE: Member Question about	6/03/2018 13:27	Privacy

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
				Allianz stadium redevelopment		
32.	INSW.0013.5319	Item (a)	Email	RE: Member Question about Allianz stadium redevelopment	6/03/2018 13:16	Privacy
33.	INSW.0016.7110	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 12:42	Privacy
34.	INSW.0016.7111	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium....docx	15/03/2018 11:50	Privacy
35.	INSW.0016.7112	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 11:50	Privacy
36.	INSW.0013.6157	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 13:50	Privacy
37.	INSW.0013.6158	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium....docx	15/03/2018 11:50	Privacy
38.	INSW.0013.6159	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 11:50	Privacy
39.	INSW.0016.7115	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 13:50	Privacy
40.	INSW.0016.7116	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the	15/03/2018 13:50	Privacy

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim
				redevelopment of Allianz Stadiu....docx		
41.	INSW.0016.7117	Item (a)	Document	CRML18_55 Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 13:50	Privacy
42.	INSW.0013.6231	Item (a)	Email	FW: CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadium	15/03/2018 17:28	Privacy
43.	INSW.0013.6232	Item (a)	Document	CRML18_55 Timothy Hirshman regarding the redevelopment of Allianz Stadiu....docx	15/03/2018 11:50	Privacy
44.	INSW.0013.6233	Item (a)	Document	CRML18_55. Timothy Hirshman - gold member query re SFS.PDF	15/03/2018 11:50	Privacy

**GENERAL SUBMISSIONS IN RESPONSE TO
LEGAL ISSUES RAISED DISPUTED CLAIM FOR PRIVILEGE
DATED 23 APRIL 2018 FROM
HON ADAM SEARLE, MLC**

Source of the Legislative Council's Power to Call for Papers

It is well established that NSW Legislative Council's capacity to issue a compulsory order to the Executive, requiring the compulsory production of papers is one of the powers and privileges attaching to that House of Parliament. This was made clear in the comments of Gaudron, Gummow and Hayne JJ in *Egan v Willis* (1998) 195 CLR 424 at 453-4, where their Honour's confirmed that "*the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions.*"

It is in this context that the position set out below must be understood and analysed. In *Egan v Willis* - and, indeed, *Egan v Chadwick* (1999) 46 NSWLR 563 - the basis of Parliament's power (and the exercise thereof) is articulated, namely, that which is "**reasonably necessary** for the proper exercise of its functions" (emphasis added).

As both of those decisions confirm, the Legislative Council's "functions" are those conferred on it by the *Constitution Act 1902* (NSW), and the constitutional principles (including the doctrine of responsible government) encapsulated within it. Chief amongst these is the Legislative Council's "legislative" function to make laws "for the peace, welfare and good government of New South Wales".¹

According to the High Court in *Egan v Willis*, the power for the Legislative Council to call for the production of documents is a "reasonably necessary" incident to the "proper exercise" of this function as there is an:

*"imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment of new laws but, as an anterior matter, to the manner of operation of existing laws."*²

Therefore, the Legislative Council's capacity to order the production of papers fulfils a separate "oversight" function fulfilled by the Council. Specifically, that function involves "examining the conduct of the executive government to determine whether that conduct should be the subject of criticism, control or both",³ in accordance with the well-established conventions of responsible government.

According to the majority of the NSW Court of Appeal in *Egan v Chadwick*, the Legislative Council's powers and privileges do not extend to ordering the production of documents which disclose the "internal deliberation of the Cabinet". This limitation is justified, as Spigelman CJ described, because:

¹ *Constitution Act 1902* (NSW) s 5. See *Egan v Willis* (1998) 195 CLR 424, 454.

² *Egan v Willis* (1998) 195 CLR 424, 454, 476.

³ *Egan v Willis* (1998) 195 CLR 424, 467, 502.

*"it is not reasonably necessary for the proper exercise of the functions of the Legislative Council to call for documents the production of which would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension. The power is itself, in significant degree, derived from that doctrine. The existence of an inconsistency or conflict constitutes a qualification on the power itself."*⁴

This limitation aside, it appears that the Legislative Council's power to order the production of documents is otherwise absolute and extends to documents which, in administrative or judicial proceedings, would not be produced (due to a claim of legal professional privilege or public interest immunity).

So much so is recognised by the "process" for the dealing with privilege claims set out in Standing Order 52, which relevantly contains the following terms:

- "(2) When returned, the documents will be laid on the table by the Clerk.
- ...
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
- (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim."

Once tabled before the Legislative Council, whether in accordance with Standing Order 52 or otherwise, the documents produced under the Order form part of the records of the Legislative Council, and are thereby published as a matter of public record, attracting parliamentary privilege.⁵

The process of disputing the validity of claims of privilege over certain documents in Standing Order 52 is merely one of the "steps" which the Legislative Council may take "to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed".⁶

The Legislative Council therefore undoubtedly has the **power** to permit (or restrict) further publication, beyond its members, of documents produced in response to an order for papers which are the subject of a claim of privilege as an incident of the "occasion and manner" of the exercise of its privilege.⁷

⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, 573-4.

⁵ *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 171.

⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4.

⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 578.

The question becomes whether Parliament *should* properly take steps to prevent publication, where such a privilege has been claimed, and how those claims are resolved.

In the context of the comments in *Egan v Chadwick* and *Egan v Willis* (outlined above) that the basis of Parliament's power (and the exercise thereof) is that which is "reasonably necessary for the proper exercise of its functions", the question whether Parliament should take steps to prevent publication of documents where a privilege has been claimed, should be whether the exercise of the Legislative Council's ancillary power to permit further publication of the produced documents is "reasonably necessary for the proper exercise of its functions".

Although the answer to such a question *may*, as set out below (and as contended by Mr Searle MLC), involve an assessment of whether "*it is thought necessary in the public interest for it not to be publicly disclosed*" or whether "*disclosure is likely to injure the public interest*", such assessments should not be understood as imposing a "stand-alone" test.

Instead, it is submitted that these matters gain their relevance insofar as they bear upon the Legislative Council's decision of whether further publication is "reasonably necessary for the proper exercise" any of its functions.

Those functions are well-established and have been set out above. Although they undoubtedly include an "oversight" or an "accountability" function, notably, it is not amongst any of the Legislative Council's specified "functions" to "encourage public debate", to demand "transparency in government", or any other similar objective.

This is so regardless of the foundational importance of those concepts to the constitutional system upon which the Legislative Council's privileges rest, including the concepts of "representative democracy". Such principles, although constitutional in nature, do not of themselves operate to empower the Council to act in any way.⁸

Indeed, the High Court has established that the particular notion of representative democracy '*does not have any necessary characteristics other than an irreducible minimum requirement that the people be "governed by representatives elected in free elections by those eligible to vote"*'.⁹

In that respect, although the comments of Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 and quoted by Mr Searle MLC may be accepted as highly persuasive as a matter of principle, they are not directed towards the particular question at hand. Instead, their principal relevance, as set out by Priestley JA in *Egan v Chadwick*, is as confirming that the Legislative Council - analogously to a Court - is *required* to prohibit the further disclosure of documents which it has compulsorily obtained where disclosure would be "inimical to the public interest".¹⁰

Infrastructure NSW submits that the suggestion by Mr Searle MLC that the test in relation to claims of privilege over documents produced to Parliament is whether disclosure of the relevant document is in the public interest or is likely to injure the public interest, is incorrect. Instead, drawing upon the authorities above, the proper test is whether disclosure is reasonably necessary for the proper exercise of any of the Legislative Council's functions, including its oversight function. Whilst a consideration of "the public interest" may be an aspect of this inquiry, it is not the only inquiry that may be undertaken. This is the lens through which the independent arbiter must evaluate the relevant documents.

⁸ *McGinty v Western Australia* (1996) 186 CLR 140, 169-70.

⁹ *McGinty v Western Australia* (1996) 186 CLR 140, 182, 199; *Murphy v Electoral Commissioner* [2016] HCA 36 at [177].

¹⁰ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4.

As a general comment, Infrastructure NSW also submits that, documents over which the Executive claims some form of privilege are produced to the Legislative Council in their entirety and may be inspected by Members of the Legislative Council. Once produced to the Legislative Council, the documents may then be used to inform and assist the Members in fulfilling the Council's relevant lawmaking and oversight functions. The documents (and the knowledge obtained from them) may be used to fulfil all relevant functions of the Council under the protection of parliamentary privilege, including voting, drafting of bills, questioning Ministers, referring matters to ICAC, or commencing judicial proceedings (in the event of particular misconduct).

Accordingly, the impediments to the "legislative" and "oversight" functions of the Legislative Council are, in many respects, overcome. It does not appear immediately apparent that the further disclosure of "privileged" documents can properly be characterised as "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions.

Resolving Contested Claims to Privilege

It is submitted that the appropriate forum for the resolution of claims to privilege in the present context is the Legislative Council itself and not the independent arbiter.

As a starting point, it is well established that the question of whether the exercise of a privilege - including the power to call for (and publish) papers - is "reasonably necessary for the proper performance of the functions of a House of Parliament" is not a matter which is appropriate for judicial adjudication.¹¹ In this respect, and as is clearly acknowledged by the independent arbiter's Report in relation to the Standing Order 52 disputed claim of privilege on the "Actions of former WorkCover NSW employee" dated 25 February 2014 (**WorkCover Report**):

*"Disputes as to the legitimacy of a particular order for papers by the House or the adequacy of the Executive's response to it are matters for those bodies to resolve, hopefully by negotiation but ultimately by the House determining what action it will take in response to a return it deems unsatisfactory."*¹²

However, where a claim of privilege is made, Parliament is *duty-bound* to balance the conflicting public interests which may impact the resolution of that question, in a form which is broadly equivalent to the "judicial" resolution of privilege disputes.¹³

The existence of that duty appears to be implicitly acknowledged by the independent arbiter, who acknowledged in his Report in relation to the Standing Order 52 disputed claim of privilege on the "WestConnex Business Case" dated 8 August 2014 (**WestConnex Report**) that neither the Legislative Council, nor the independent arbiter enjoy "liberty" to "disregard" or "override" privilege where such a claim is made.¹⁴

In the event of a dispute as to the validity of a claim of privilege, Standing Order 52(6) merely authorises the release of the documents to an independent arbiter for "evaluation and report ... as to the validity of the claim". The role and function of the independent arbiter is not subject to any further restraint, regulation, proscription or supervision. It is not "formalised" or "official" in any meaningful way.

¹¹ *Egan v Chadwick* (1999) 46 NSWLR 563, 573-4.

¹² *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, 3.

¹³ *Egan v Chadwick* (1999) 46 NSWLR 563, 594.

¹⁴ *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, 5-6.

As explained by Dr Anne Twomey in her article titled "Executive Accountability to the Senate and the NSW Legislative Council", evaluation of the competing public interests in disclosure (beyond those circumstances where a claim might be upheld in the courts), is an exercise of the powers and privileges reserved for the Legislative Council.¹⁵

Accordingly, it is inappropriate for the independent arbiter to be tasked with exercising this power. As set out by Dr Twomey:

"No Act of the New South Wales Parliament delegates any power to the independent legal arbiter. At most, the independent legal arbiter fulfils a function conferred upon him or her by the Legislative Council. Standing Order 52 gives the President the power to appoint an independent legal arbiter and provides that the Clerk is authorised to release disputed documents to an independent legal arbiter 'for evaluation and report within seven calendar days as to the validity of the claim [of privilege]'. It does not delegate the powers of the House to the independent legal arbiter. Nor does it confer any powers on the independent legal arbiter. It merely provides that the independent legal arbiter may view the disputed documents to evaluate and report on (not even 'determine') the validity of the claims for privilege."

Further, there is doubt as to whether a House could, if it so desired, delegate its powers to a person who is not a Member. Certainly the Parliament as a whole may delegate legislative power to a statutory office holder or other non-member by way of an Act of Parliament. Legislation, ... may also permit a parliamentary committee to appoint a person to conduct an inquiry. Further, a House can ask a person to assess documents for it, as has occurred at the Commonwealth level. It is a different thing altogether, however, for a House to purport to delegate its powers to a non-Member or non-officer, or for that person to assert that he or she is exercising the powers of a House in making a decision. This would be a radical and probably unprecedented step, giving rise to all sorts of issues concerning parliamentary privilege."

Accordingly, insofar as Mr Searle MLC appears to contemplate the independent arbiter being tasked with the responsibility for assessing whether publication of the documents is "reasonably necessary for the proper exercise" of the Legislative Council's functions, it is submitted that this proposal should be wholly rejected. The independent arbiter is simply incapable of exercising that function. The only role of the independent arbiter is to provide a recommendation to the Legislative Council in relation to any claims of privilege over documents. The Legislative Council must make the ultimate determination and may accept or reject the recommendation of the independent arbiter.

Judicial resistance to attempts to invoke the jurisdiction of courts to resolve disputes as to the exercise of parliamentary privilege have been roundly refuted on the basis that those tasks are fundamentally questions to be resolved by Parliament.

Further supporting the notion that only the Parliament can consider these questions is that determination of a claim of public interest immunity requires a decision as to whether - notwithstanding that claim - publication of the documents is "reasonably necessary" for the "proper exercise" of Parliament's functions, and involves complex questions as to the resolution of competing values, the allocation of public resources and the respective roles of the Parliament and the Executive.

Not only is Parliament explicitly tasked with the responsibility of resolving those questions, it is uniquely positioned to do so. As is recognised in *Egan v Chadwick*, the Legislative Council

¹⁵ Anne Twomey, "Executive Accountability to the Senate and the NSW Legislative Council", Sydney Law School Legal Studies Research Paper No 07/70 (November 2007)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031602> (accessed 1 May 2018).

alone is the body who is best suited to determine what is "reasonably necessary" for the exercise of its functions.

Furthermore, as the only body elected by - and ultimately responsible to - the citizenry, the Legislative Council carries a legitimacy and authority in resolving such questions, which neither the courts, nor an independent legal arbiter, possess.

Finally, the question of where the public interest may lie in a particular scenario involves complex questions of competing priorities. Inevitably, the resolution of those questions is likely to cause significant consequences.

Requiring the Legislative Council to undertake the "balancing" process by itself thus forces the Council to squarely confront the consequences (both positive and negative) of its decision, and articulate its reasons for striking the particular balance which it does. Such a doctrine is key to the "horizontal" separation of powers which is inherent in the constitutional structure of New South Wales.

As explained by Spigelman CJ in *Egan v Chadwick* (at [52]):

"In the determination of a claim of public interest immunity, a trial judge is called upon to weigh essentially incommensurable factors Where this occurs in the course of the administration of justice, judicial officers have relevant experience for the conduct of the balancing exercise. Specifically, they not only understand, but have a duty to consider and assess, the significance of the information to the particular legal proceedings. Where the public interest to be balanced involves the legislative or accountability functions of a House of Parliament, the courts should be very reluctant to undertake any such balancing. This does not involve a constitutional function appropriate to be undertaken by judicial officers. This is not only because judges do not have relevant experience, a proposition which may be equally true of other public interests which they are called upon to weigh. It is because the court should respect the role of a House of Parliament in determining for itself what it requires and the significance or weight to be given to particular information."

Indeed, these sentiments, which tend towards limiting the independent arbiter's role to assessing whether a privilege claim might be accepted at common law, appear to be echoed by the independent arbiter himself in the WestConnex Report where he stated that:

"I do not accept the Crown Solicitor's Office further submission that the House must identify and the arbiter discern the House's particular reasons for wanting to disseminate documents beyond members lest any objection to the Executive's claim of privilege be imperilled."

Consistent with the Minister's observation, I acknowledge that the arbiter's role, like that of a judge considering a disputed claim of privilege, is to determine where the law points as regards the documents examined and the claims made. This may require the application of balancing tests if that is the measure of the legal rule in question, but the evaluative role of the independent legal arbiter does not include some discretion to override the applicable rules of privilege by reference to what may be thought wise in the circumstances."

What Privilege Is Available?

The extent to which privileges, if any, may operate to limit the capacity of the Legislative Council to release documents produced, has not been the subject of legislation, judicial

decision, or consistent Parliamentary practice.¹⁶ Notwithstanding the lack of clarity surrounding the operation of the role of privilege, Standing Order 52 appears to recognise that at least *some* form of "privilege" may be validly asserted by the executive.

As appears to emerge both from the decision of the NSW Court of Appeal in *Egan v Chadwick*,¹⁷ and the independent arbiter's WorkCover Report and WestConnex Report,¹⁸ the operation of privileges (including legal professional privilege and public interest immunity) at general law is not determinative of the scope of those privileges which may be available in the present context.

Instead, the central justification for the recognition of the existence of any "privilege" from the unconditional release of documents produced by Parliament, or the disclosure of their particular contents, must be sourced from constitutional principles.

Implicitly, however, it appears to have been accepted that general law notions of public interest immunity concepts, and freedom of information legislation, may be instructive and analogous to determining the existence and function privileges in this context.

In light of the established cases to date, it appears that such a constitutional "justification" may be made out by demonstrating that the disclosure of the particular information would:

- a) be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);¹⁹
- b) undermine a fundamental "right" or "principle" recognised by the general law;²⁰
- c) "threaten the proper functioning of the executive arm and of the public service";²¹ and/or
- d) be otherwise inconsistent with the "public interest" (and thus no longer "reasonably necessary" for the "proper exercise" of the Legislative Council's functions).²²

It is not immediately clear what factors should be "balanced" in assessing where the "public interest" lies. It is submitted that the relevant inquiry is not appropriately directed at the "public interest" *simpliciter*.

Instead, the public interest factors which weigh for and against disclosure (including whether a claim of privilege may be established at common law) should bear upon the Legislative Council's assessment of whether the further dissemination or publication of the contents of the documents subject to a claim of privilege is "reasonably necessary for the proper exercise of its functions".

In the Senate, this has led to claims for "privilege" or "public interest immunity" being "recognised" (at least, informally) where:

¹⁶ See *Egan v Willis* (1996) 40 NSWLR 650, 663; *Egan v Chadwick* (1999) 46 NSWLR 563, 568.

¹⁷ (1999) 46 NSWLR 563, 574.

¹⁸ *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, 3; *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, WestConnex Business Case*, 8 August 2014, 6.

¹⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 579.

²⁰ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 587. I note that this is also the approach taken in the United States - see *Quinn v United States* 349 US 155 (1955).

²¹ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4; *Sankey v Whitlam* (1978) 142 CLR 1, 56.

²² *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4.

- a) the information is subject to legal professional privilege;
- b) the information may prejudice a trial by influencing magistrates, jurors or witnesses in their decision-making;
- c) the information may create material which is an "abuse" of parliamentary privilege;
- d) the information would prejudice a law enforcement investigation;
- e) the information would damage the commercial interests of commercial traders in the market place, including the Commonwealth;
- f) the disclosure of the information may unreasonably infringe the privacy of individuals;
- g) the disclosure of the information may prejudice Australia's national security, defence or international relations;
- h) disclosure of the information would prejudice inter-governmental relations.²³

Legal Professional Privilege

Both the NSW Court of Appeal,²⁴ and the Senate,²⁵ have accepted that "legal professional privilege" (or something analogous thereto) does not provide a basis on which a call for papers may be refused because the relationship between the Legislature and the Executive is such that the Council may have a legitimate interest and function in calling for the production of such documents.

As explained by Priestley JA in *Egan v Chadwick*:

*"The entire conduct of the administration of the laws by the Executive is only possible by the use of people employed, in one way or another, by the Executive and by the use of assets of one kind or another, which may be publicly or privately owned but which in the latter case must be paid for. Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes."*²⁶

Nevertheless, it is submitted that the public interest factors weighing against the further publication and disclosure of information which is the subject of legal professional privilege are of such strength that the Legislative Council should recognise that the further disclosure of such documents is not likely to be "reasonably necessary" in all but the most exceptional circumstances.

The doctrine of "legal professional privilege" is a "fundamental common law right" and a "substantive general principle of the common law which plays an important role in the effective and efficient administration of justice".²⁷ Its operation extends beyond judicial proceedings, to

²³ See Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 'Relations with the Executive Government' (14th Ed, 2016), 662-670.

²⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, 578, 592.

²⁵ See Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 'Order for Production of Documents' (14th Ed, 2016), 662-670.

²⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, 592-4.

²⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 576-7, 587.

apply in circumstances where the production of materials is compelled as part of investigative or administrative processes.²⁸

Importantly, this is recognised to be the case regardless of whether or not the court (or other arbiter) was to form the view that the disclosure of the information would not be in the public interest. No such balancing test occurs. This separate treatment is not the result of some "class claim". It is instead, as explained by Spigelman CJ in *Egan v Chadwick*, because "[t]he law has already undertaken the process of balancing in determining the rule".²⁹

The public interest factors upon which the doctrine of legal professional privilege rests, are no less applicable in the Parliamentary context.

Specifically, the basis for the privilege is "to ensure that the client can consult his lawyer with freedom and candour", so as to ensure that clients fully disclose the relevant facts to lawyers, so as to enable them to properly advise and represent their clients.³⁰ The protection of such communications is seen as "fundamental to the due administration of justice", as the lawyer-client relationship is "part of the functioning of the law itself".³¹

However, the "administration of justice" may be equally threatened by the public dissemination of documents subject to legal professional privilege, in three key ways.

Firstly, the existence (and the benefit) of the privilege in the context of judicial proceedings may be adversely impacted by the "antecedent disclosure of the relevant communications" by the Legislative Council.³² Government is entitled to the protection of legal professional privilege as is any other litigant. Denying that privilege poses a real risk of placing the Government at a disadvantage in the event that the relevant matters becomes the subject of litigation.

Secondly, "removal" of the privilege in this context risks establishing a discord between the legislative and judicial branches of government. It may readily be imagined that the public dissemination of documents by Parliament in circumstances where those documents could not have previously been put before a Court would risk perverting the respect and integrity of the judicial system as the proper forum for the recourse of disputes.³³

Thirdly, legal professional privilege serves a more fundamental policy objective which the High Court has recognised "would often be defeated if the privilege were not generally available".³⁴ As set out in *Baker v Campbell*:

"The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy. The individual should be able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared solely for that advice or assistance may be searched or seized under warrant.

...

The perfect administration of justice is not confined to legal proceedings. The object and indeed the result of consulting a solicitor will often be the settlement of a dispute

²⁸ *Baker v Campbell* (1983) 153 CLR 52.

²⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 576-7, 578.

³⁰ *Baker v Campbell* (1983) 153 CLR 52, 66.

³¹ *Baker v Campbell* (1983) 153 CLR 52, 128.

³² *Baker v Campbell* (1983) 153 CLR 52, 77.

³³ Cf *Baker v Campbell* (1983) 153 CLR 52, 116.

³⁴ *Baker v Campbell* (1983) 153 CLR 52, 88.

*which otherwise may have had to be fought out in court. The fostering of a professional relationship which obviates recourse to litigation is very much in the public interest.*³⁵

For those reasons, the courts have determined that:

*"[t]he conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired."*³⁶

None of these policy considerations lose any of their force when transplanted to the present context. Legal professional privilege has, for the reasons set out above, been "woven into" the fabric of the law of NSW by the courts of NSW. In accordance with that fundamental principle, the Government has been encouraged to seek such advice as is necessary on past, present and future exercises of its functions.

The public interest considerations against disclosure appear sufficiently strong that the further dissemination or disclosure of such documents should in all cases be considered as not "in the public interest" and thus not "reasonably necessary" for the proper exercise of the Legislative Council's functions.

To adopt an alternative policy, as appears to have been the case to date, of "balancing" the public interest factors (or public interest) in a particular document "does not appear to [provide] any objective criteria by which such judgments are made".³⁷

Public Interest Immunity

Public interest immunity stands apart from legal professional privilege as it requires the court to balance the conflicting interests, to determine whether it would "injuriously to the public interest to disclose it".³⁸

In this context, we consider that the task of assessing a claim for public interest immunity is immediately reconcilable with the position outlined in Mr Searle MLC's letter (e.g. that a "balancing" process be undertaken to determine whether it would be injurious to disclose a particular document), and the articulation of the test set out above.

The underlying motivation of the recognition of *any* class of public interest immunity is tied directly to the proper exercise of executive power. As variously articulated, public interest immunity rests on:

- a) the need to preserve confidentiality in order that the exchange of differing views may be made within government and, at the same time, the principle of collective responsibility may be maintained;³⁹

³⁵ *Baker v Campbell* (1983) 153 CLR 52, 89, 94-5.

³⁶ *Baker v Campbell* (1983) 153 CLR 52, 89, 130.

³⁷ Anne Twomey, "Executive Accountability to the Australian Senate and the New South Wales Legislative Council", Sydney Law School Legal Studies Research Paper No 07/70 (November 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031602> (accessed 1 May 2018), 7.

³⁸ *Sankey v Whitlam* (1978) 145 CLR 1, 38-9.

³⁹ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615.

- b) the need to prevent premature, ill-informed or misdirected criticism that would otherwise divert the policy-making process from its proper course;⁴⁰
- c) the need to ensure that decision-making and policy development is uninhibited;⁴¹
- d) the need to promote candour in communication with (and within) the Executive;⁴²
- e) the need to maintain confidence in the public service and encourage the "proper functioning" thereof.⁴³

Like legal professional privilege, public interest immunity has been recognised as a separate principle which may be invoked outside the context of judicial proceedings.⁴⁴

As noted above, in the context of the Legislative Council's power to order the production of documents, the inquiry as to whether it would be injurious to disclose a particular document is merely a consideration which forms part of the overarching test as to whether disclosure of the document is reasonably necessary for the proper exercise of any of the Legislative Council's functions.

Commercial-in-Confidence Information

Public interest immunity does not draw any distinction between the "legislative" and the "commercial" functions of government.⁴⁵

Accordingly, and contrary to the position adopted in some decisions, there is no "prima facie" presumption that the commercial affairs of Government are "less central" to the functions of government, and thus more inimical to disclosure.⁴⁶

It is well established that public interest immunity may extend to inhibit the disclosure of documents where such documents may damage the commercial interests of commercial traders in the market place, including the Government. Such an extension is justified on the basis that the "trading" or "commercial" activities of government are inextricably related to its own state economic policy, and its delivery of services (as authorised by law).

Indeed, so much was recognised in two reports by the previous independent arbiter, who upheld claims to privilege on this basis in respect of unsuccessful tenders.⁴⁷

In this respect, a claim that a document is "commercial-in-confidence" may be understood as asserting that one or more of the following adverse impacts could arise as a result of disclosure:

- a) information would be released of a commercial value (e.g. pricing strategies of private contracting partners) that would, or could, reasonably be expected to be destroyed or diminished if the information were disclosed;

⁴⁰ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615.

⁴¹ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 616.

⁴² *Sankey v Whitlam* (1978) 145 CLR 1, 40.

⁴³ *Jacobsen v Rogers* (1995) 182 CLR 572, 590.

⁴⁴ *Jacobsen v Rogers* (1995) 182 CLR 572.

⁴⁵ *Commonwealth v Northern Land Council* (1991) 30 FCR 1.

⁴⁶ Cf *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at [55].

⁴⁷ Report of Sir Laurence Street – Papers on Road Tunnel Filtration, 24 January 2006, 3; Report of Sir Laurence Street – Papers on Sale of PowerCoal Assets, 27 June 2006, 3. See Anne Twomey, "Executive Accountability to the Australian Senate and the New South Wales Legislative Council", Sydney Law School Legal Studies Research Paper No 07/70 (November 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031602> (accessed 1 May 2018), 11.

- b) disclosure could compromise the Government's interest in the efficient expenditure of resources, by disclosing the criteria through which it assesses tenders. This would allow future tenders to "tailor" their processes, and future pitches, to address these criteria;
- c) disclosure could expose the Government's assets, expenditure or revenue-generating activities to threat of harm;
- d) disclosure could adversely impact the willingness of potential contractors or private sector agents to provide information to government, or to participate in tender processes;
- e) disclosure could inhibit the Government's ability to fully consider and pursue other (alternative) commercial decisions;
- f) disclosure could place the Government at a commercial disadvantage vis-à-vis other private companies;

Each of these matters relate closely to the "proper functioning" of the Executive, and thus may properly form the basis of a claim for privilege in the present context.

In the context of the Legislative Council's power to order the production of documents, claims that documents are commercial-in-confidence are treated similarly to claims of public interest immunity. Therefore, the considerations outlined above are merely considerations which form part of the overarching test as to whether disclosure of the document is reasonably necessary for the proper exercise of any of the Legislative Council's functions.

Personal Privacy

Finally, it is considered that the principles of public interest immunity are inherently flexible enough to extend to situations where the information would, if published, result in an unreasonable interference with the privacy of an individual (or expose them to some risk).

Such a position has been accepted by the Senate, who note that "[i]t is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates".⁴⁸

Following the principles of public interest immunity outlined above, it is more than likely that the disclosure of the personal information of members of the public would:

- a) inhibit decision-making and policy development;
- b) reduce candour in communication with (and within) the Executive; and
- c) reduce confidence in the public service and the "proper functioning" thereof.

However, as with the other privileges outlined above, in the context of the Legislative Council's power to order the production of documents, the inquiry above is merely a consideration which forms part of the overarching test as to whether disclosure of the document is reasonably necessary for the proper exercise of any of the Legislative Council's functions.

⁴⁸ See Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 'Order for Production of Documents' (14th Ed, 2016), 663.

4 May 2018

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Mr Blunt

ORDER FOR PAPERS — SYDNEY STADIUMS - DISPUTE OF PRIVILEGE CLAIMS

We refer to the letter from the Hon Adam Searle MLC to yourself dated 23 April 2018, disputing claims of privilege made by agencies, including Infrastructure NSW, in relation to documents produced to the Legislative Council in response to the Order for Papers dated 5 April 2018 in relation to Sydney Stadiums (**Order for Papers**).

NSW Office of Sport has been advised by the Department of Premier and Cabinet that the independent arbiter appointed by the Parliament to evaluate and report on Mr Searle MLC's disputed claim of privilege has requested that the Department of Premier and Cabinet provide the following information from affected offices and agencies:

- advice as to any of the documents in dispute for which privilege claims are no longer pressed;
- any qualifications to the existing claims of privilege; and
- and further submissions in support of those claims of privilege.

NSW Office of Sport makes the following submissions in response to this request:

- **Submissions** in relation to specific NSW Office of Sport documents are set out below under the heading "Disputed claim of privilege over specific NSW Office of Sport documents".
- **Annexure A** contains a list the documents which, upon further review and consideration, NSW Office of Sport no longer presses a claim of privilege.
- **Annexure B** contains a list the documents over which NSW Office of Sport maintains its claim of privilege (**Disputed Documents**).
- **Annexure C** contains general submissions for consideration by the independent arbiter, including submissions responding to legal issues raised in the letter from the Hon Adam Searle MLC disputing the claim of privilege dated 23 April 2018.

We request that the submissions be read in their entirety.

Claim for privilege no longer pressed

NSW Office of Sport has considered Mr Searle MLC's letter and the specific documents where he disputes NSW Office of Sport's claim of privilege. Upon further consideration, NSW Office of Sport no longer presses its claim for privilege in relation to a number of the documents disputed by Mr Searle MLC.

A list of the documents over which NSW Office of Sport no longer presses its claim for privilege is contained at **Annexure A**.

Disputed claim of privilege over specific NSW Office of Sport documents

Annexure B contains a list of documents over which NSW Office of Sport maintains its claim of privilege.

NSW Office of Sport has identified in **Annexure B** where it maintains its claim of privilege over a whole document or over certain information contained in a document. We have also kept all "families" of documents together (i.e. emails and their attachments), including where privilege is claimed over one document in a family but not another. We have noted where there is a "family" document with no claim of privilege in **Annexure B**.

In relation to documents where the NSW Office of Sport maintains its claim of privilege over certain information contained in a document, NSW Office of Sport submits that, if its claims for privilege is upheld by the independent arbiter, the relevant information which is privileged should be redacted and the redacted versions of the documents can be released to the public. Enclosed with this letter is a copy of each of the documents listed in **Annexure B** over which NSW Office of Sport maintains a partial claim of privilege in both redacted and un-redacted form for the independent arbiter's consideration.

NSW Office of Sport's claim of privilege over the documents listed in **Annexure B** can be categorised into the following:

- a) claims relating to legal professional privilege;
- b) claims relating to privacy and the personal information of members of the public;
- c) public interest immunity claims relating to the security of NSW Office of Sports' information; and
- d) commercial in confidence claims.

General submissions

We note **Annexure C** contains general submissions for consideration by the independent arbiter. For the purpose of these submissions, we note our conclusion in **Annexure C** is that the relevant test to determine whether a claim for privilege can be maintained is whether disclosure of the document is "reasonably necessary" for the proper exercise of the Legislative Council's functions.

Public interest factors weighing for and against disclosure (including whether a claim of privilege may be established at common law and whether disclosure would injure the public interest) may impact upon the assessment of whether disclosure of the relevant documents is

"reasonably necessary" for the proper exercise of the Legislative Council's functions but consideration of the "public interest" is not the only inquiry that should be made when considering whether disclosure of the relevant documents is "reasonably necessary" for the proper exercise of the Legislative Council's functions.

The NSW Office of Sport has applied the "reasonably necessary for the proper exercise of the Legislative Council's functions" test to its claim of privilege over the disputed documents in relation to each category, below.

Legal professional privilege claims

These submissions relate to the following documents (with reference to their number in **Annexure B**): 52, 54, 56, 57, 65, 66, 69, 72, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 92 and 93.

At pages 32 to 34 in Annexure C, we provide a summary of the authorities in relation to legal professional privilege and conclude that it is a recognised category of privilege in the context of an order for production of documents by the Legislative Council. We further conclude that the public interest considerations against disclosure appear sufficiently strong that the further dissemination or disclosure of such documents should in all cases be considered as not "in the public interest" and thus not "reasonably necessary" for the proper exercise of the Legislative Council's functions.

In short, disclosure of the documents subject to legal professional privilege would create an odd precedent whereby Government is not entitled to the protection that legal professional privilege affords in relation to its own affairs unlike any other citizen and may be disadvantaged in court proceedings, or generally, where parties have access to documents that may otherwise be withheld.

We also note the submissions made at page 27 of Annexure C that Members of the Legislative Council may still hold the Government to account and fulfil its oversight functions with reference to the documents subject to legal professional privilege, without disclosing them to the public.

This is particularly relevant in circumstances where the entirety of the document can be seen currently by the members of the Legislative Council. Therefore, NSW Office of Sport submits that disclosure of the legally privileged documents is not "reasonably necessary" for the proper exercise of the Legislative Council's functions.

Privacy claims

These submissions relate to the following documents (with reference to their number in **Annexure B**): 21, 25, 31, 35, 36, 84, 87, 89, 91, 97 and 98.

A number of the documents listed in **Annexure B** contain personal information of members of the public or the sensitive information of organisations, including:

- a) email addresses;
- b) home addresses; and
- c) telephone numbers.

NSW Office of Sport submits that releasing this personal or sensitive information would make it less likely that members of the public would engage with the Government in writing to express their views and opinions, such as in relation to policy proposals or seek to do business with the Government. For example, if members of the public understood that any personal or sensitive information they provided to the Government for the purpose of participating in policy debates or making general enquiries of members of Parliament or Ministers was released generally to the public, it would reduce the likelihood that the public would write to members of Parliament or Ministers. This would have the effect of reducing the number of people engaging in the democratic process. We also note that, in relation to the specific principles of public interest immunity addressed at pages 34 and 35 in Annexure C, a reduction in the number of people engaging in the democratic process would inhibit:

- a) decision-making and policy development;
- b) candour in communication with (and within) the executive; and
- c) confidence in the public service and the "proper functioning" thereof.

NSW Office of Sport is not claiming privilege over contact details for persons acting in their professional capacity and using their business contact details (e.g. email addresses of professional advisers or contractors). However, NSW Office of Sport is claiming privilege over information that appears to be private and personal to the individual or an organisation.

At a more general level, releasing such personal or sensitive information reduces the likelihood that people write to members of Parliament, engage with Government, or engage in the democratic process generally would greatly injure the public interest.

The NSW Office of Sport submits that releasing the personal or sensitive information of members of the public to the public at large is not, in any way, "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions. This is particularly relevant in circumstances where the entirety of the document can be seen currently by the members of the Legislative Council.

Public interest immunity claims

These submissions relate to the following documents (with reference to their number in **Annexure B**): 3, 4, 5, 6, 7, 8, 9, 10, 49, 50, 51, 58, 59, 60 and 73.

These documents contain the following types of information:

- a) passwords;
- b) "Dropbox" URLs; and
- c) internal Departmental file pathways.

The "Dropbox" URLs, at the time of production, were still active and contained NSW Office of Sport documents. Further, any person with access to the URL could type the URL into their internet browser and access the documents. Any person with access to the URL and the "Dropbox" folders may also be able to access other folders within that "Dropbox" account, including other NSW Office of Sport documents. This is a serious security concern.

We also note that any release of the passwords and internal Departmental file pathways may create further security concerns. Allowing individuals to obtain passwords to access government websites or obtain knowledge of Departmental file pathways and structures could potentially lead to a significant security breach and the unauthorised release of sensitive Government information.

In relation to the specific principles of public interest immunity outlined at pages 34 and 35 in the general submissions in Annexure C, this could:

- a) reduce confidentiality;
- b) increase premature, ill-informed or misdirected criticism that would otherwise divert the policy-making process from its proper course by allowing the public to access confidential documents (potentially including drafts of documents);
- c) significantly inhibit decision-making and policy development;
- d) reduce candour in communication with (and within) the executive; and
- e) reduce confidence in the public service and the "proper functioning" thereof.

At a more general level, releasing the information in question to the public would injure the public interest by inhibiting the ability of the public service to work effectively.

Finally, the NSW Office of Sport submits that releasing the information in question is not, in any way, "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions in circumstances where the entirety of the document can be seen currently by the members of the Legislative Council.

Commercial in confidence claims - agreements with sporting codes

These submissions relate to the following documents (with reference to their number in **Annexure B**): 1, 2, 11, 12, 15 and 99.

The first point to be noted in relation to the MOUs themselves is that, by their terms, they are confidential documents. This, of course, does not overcome any compulsion of law, but provides important information as to the intention of the parties in relations to the MOUs and their potential disclosure.

The MOUs record the terms on which it is proposed that the Government will commit to embarking on significant stadia infrastructure investment and the terms on which the Australian Rugby League Commission (**ARLC**), National Rugby League (**NRL**) and Australian Rugby Union (**ARU**) respectively will commit to hosting various marquee sporting events and contemplates the negotiation of a detailed agreement at a future time.

Accordingly, the MOUs record, among other things:

- a) the level of investment to which the Government commits;
- b) the ARLC and ARU's intentions regarding naming rights, supplier rights, corporate hospitality, venue hire fees, ticketing, stadium members, technology, merchandise and other key elements;

- c) the ARLC and ARU's commitment to hosting particular events, for a particular time, at particular venues.

The harm that would be suffered by the ARLC, NRL and ARU in the event of disclosure is that their competitors would know the commitments that the ARLC/NRL/ARU had made to secure the relevant Government investment and would know, at least inferentially, the extent to which the ARLC/NRL/ARU valued that investment. Knowledge of these matters on the part of competitors and the world at large would significantly prejudice the ARLC/NRL/ARU in its future negotiations with other venue providers, and would place the ARLC/NRL/ARU at a competitive disadvantage vis-à-vis its competitors in those negotiations. In circumstances where other states compete for the allocation of matches and fixtures, this is likely to significantly disadvantage NSW's residents, and the economy of the State.

Prejudice would also be suffered by Government in the event of disclosure of the MOUs or documents referring to them. Revealing the nature and substance of the arrangements that the Government has made with the ARLC/NRL/ARU will:

- a) prejudice Government in its negotiations with other content providers and will directly inhibit the Government's ability to obtain value for money in those negotiations; and
- b) reveal to other interstate and international venue owners or operators, the commercial terms and framework of the arrangements including pricing underpinning each venue's operations, which would potentially provide those competitors with a commercial advantage in procuring major sporting and entertainment events.

There is a clear public interest in the third parties being able to contract with Government on the basis that the negotiations and their outcomes will not be disclosed. Similarly, there is a clear public interest in the Government, the owner of a venue, being able to operate in the market where it can offer that venue for use on the basis that other content providers are not aware of the arrangements which Government has made with other content providers and other owners are not aware of the Government's commercial and pricing model. Disclosure of the MOUs would lead to a distortion of the venues market, which would directly affect the Government's ability to obtain value for its investment of public funding.

Accordingly, disclosure of the MOUs and documents referring to them would be contrary to the public interest.

This is particularly relevant in circumstances where the entirety of the document can be seen currently by the members of the Legislative Council. Therefore, NSW Office of Sport submits that disclosure of the MOUs and associated documents is not "reasonably necessary" for the proper exercise of the Legislative Council's functions.

Commercial in confidence claims - general

These submissions relate to the following documents (with reference to their number in **Annexure B**): 14, 16, 17, 18, 20, 23, 24, 26, 27, 28, 29, 30, 38, 40, 42, 44, 46, 48, 62, 64, 68, 71 and 95.

These documents contain the following types of information:

- a) banking details (including client codes, bank account numbers and BPAY references);

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- b) commercially sensitive methodology and know-how of private commercial entities;
- c) commercially sensitive pricing data (including hourly rates) of private commercial entities; and
- d) insurance certificates (including public liability, professional indemnity and workers insurance) of private commercial entities.

NSW Office of Sport submits that there are security concerns related to revealing the banking details of both Government agencies and private commercial entities. There is no public interest consideration that would justify releasing the bank details of either Government entities or private commercial entities.

Documents 62 and 64 are documents prepared by KPMG for the purposes of marketing their social media capabilities. The document contains the KPMG's social media monitoring strategy and methodology. Revealing this methodology and know-how publicly to KPMG's competitors would prejudice its operations and place it at a competitive disadvantage.

Similarly, many of the documents contain commercially sensitive pricing data (including hourly rates) of private commercial entities. Revealing such information would significantly prejudice the entities in any future tenders with the Government in relation to similar work and would place the entities at a competitive disadvantage vis-à-vis its competitors in those tenders. Alternatively, disclosure of the pricing data may prejudice the Government in tenders with other providers and inhibit the Government's ability to obtain value for money in those tenders. In order to ensure that only legitimate information that is not privileged (in terms of commercial sensitivity) is released, NSW Office of Sport has redacted the amount of hours and the hourly rates of these private commercial entities. This ensures that the total amount the entities invoiced the NSW Office of Sport is released, but the pricing data of private commercial entities remains confidential.

Therefore, the following principles of claims for commercial in confidence at pages 35 and 36 of Annexure C apply to the documents listed above:

- a) information of a commercial value would be released (e.g. pricing strategies of private contracting partners) that would, or could, reasonably be expected to be destroyed or diminished if the information were disclosed;
- b) disclosure could expose the Government's expenditure to threat of harm;
- c) disclosure could adversely impact the willingness of potential contractors or private sector agents to provide information to government, or to participate in tender processes;
- d) disclosure could inhibit the Government's ability to fully consider and pursue other (alternative) commercial decisions; and
- e) disclosure could place the Government at a commercial disadvantage vis-à-vis other private companies.

This is particularly relevant in circumstances where the entirety of the document can be seen currently by the members of the Legislative Council. Therefore, NSW Office of Sport submits that disclosure of the commercial in confidence information is not "reasonably necessary" for the proper exercise of the Legislative Council's functions

Summary of NSW Office of Sport Submissions

In his letter dated 23 April 2018, Mr Searle MLC seeks to dispute a number of the privilege claims made in response to the Order for Papers in relation to various documents listed in the "Privileged Documents" Index provided to the Parliament. In short, the position set out in Mr Searle MLC's letter rests upon the following central propositions, drawn from an analysis of previous decisions of the independent legal arbiter:

- a) in exercising their function, the independent legal arbiter appointed by Parliament should go "beyond a technical legal evaluation of claims of privilege and [emphasise] the balancing of competing interests";
- b) relevant privileges which may be respected by Parliament should be confined to those which "as a matter of law, [exist] between the Executive and the Upper House of the New South Wales Parliament";
- c) those privileges are "not the privilege or public interest immunity that a litigant or third party to curial proceedings might raise in answer to an order for discovery or a subpoena in litigation";
- d) personal privacy, and "commercial-in-confidence" claims are not proper bases on which a claim for privilege may be made; and
- e) the central requirement is "whether or not there is established a relevant harm to the public interest".

It is not clear on the face of the letter precisely *what* factors Mr Searle MLC asserts should properly be considered as bearing upon the "public interest" and the "balancing" process which is recommended.

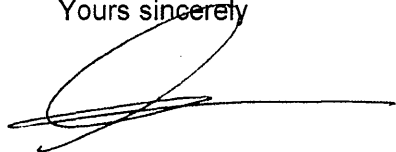
For the reasons set out in more detail in Annexure C, NSW Office of Sport submits as follows:

- a) only the Legislative Council can resolve claims of privilege. The independent arbiter does not have the power to do so;
- b) the test to as to whether documents over which a privilege has been claimed should be released is not whether or not there is established a relevant harm to the public interest, but is whether the release is "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions;
- c) when considering whether the release of documents over which privilege has been claimed is "reasonably necessary", the Legislative Council must balance several factors, including whether disclosure would:
 - I. be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);
 - II. undermine a fundamental "right" or "principle" recognised by the general law;
 - III. "threaten the proper functioning of the executive arm and of the public service"; and/or

- IV. be otherwise inconsistent with the "public interest" (and thus no longer "reasonably necessary" for the "proper exercise" of the Legislative Council's functions); and
- d) further publication of the relevant portions of the Disputed Documents cannot properly be characterised as "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions in circumstances where the entirety of the document can be seen currently by the members of the Legislative Council.

Thank you for the opportunity to provide these submissions.

Yours sincerely



Matt Miller
Chief Executive
Office of Sport

4/5/18

NSW OFFICE OF SPORT

ORDER FOR PAPERS - SYDNEY STADIUMS

PRIVILEGED DOCUMENTS - CLAIM FOR PRIVILEGE NO LONGER PRESSED

Document ID	Relevant item	Document type	Title	Date of document
OOS.0001.0027	Item (b)	Email	Invitation to submit proposal	19/10/2015 19:06
OOS.0001.0028	Item (b)	Document	Western Sydney Stadium Final Business Case Scope of Works.pdf	5/07/2016 12:47
OOS.0001.0161	Item (a); Item (b)	Document	INSW comments on draft letter.pdf	7/07/2016 9:39
OOS.0001.0185	Item (a); Item (b)	Email	RE: ANZ redevelopment funding	22/09/2016 15:41
OOS.0001.0186	Item (a); Item (b)	Document	ANZ redevelopment funding release of funds.docx	22/09/2016 15:41
OOS.0001.0322	Item (a); Item (b)	Email	SIGNED_RE: Confidential: Endorse the Evaluation Plan for OOSIG1617010 -	27/02/2017 15:03
OOS.0001.0323	Item (a); Item (b)	Document	TS_Endorsement by Tender Evalaution Team.pdf	27/02/2017 15:03
OOS.0001.0324	Item (a); Item (b)	Document	TS_Code of Conduct.pdf	27/02/2017 15:03
OOS.0001.0325	Item (a); Item (b)	Document	TENDER OPENING REPORT (SIGNED).pdf	28/02/2017 15:54
OOS.0001.0361	Item (a)	Document	Schedule 2 - Clarification OOSIG1617010.pdf	8/03/2017 16:14
OOS.0001.0474	Item (a)	Email	Re: Allianz Stadium	6/04/2017 9:41
OOS.0001.0475	Item (a)	Image	imagefe0f37.JPG	6/04/2017 9:41
OOS.0001.0743	Item (a)	Document	XXXXX_XXXXX_Authority to procure and funding approval - Probity - ANZS -.....docx	30/05/2017 9:33
OOS.0001.0749	Item (a)	Email	RE: RE: Probity Advisor Engagement Briefing Note - for your review	30/05/2017 20:06

Document ID	Relevant item	Document type	Title	Date of document
OOS.0001.0756	Item (a); Item (b)	Document	DRAFT - ANZ Stadium Redevelopment - Probity Advisor Engagement Eval Plan and Report - XX May 2017.docx	1/06/2017 8:04
OOS.0001.0758	Item (a); Item (b)	Document	DRAFT - ANZ Stadium Redevelopment - Probity Advisor Engagement Eval Plan....docx	1/06/2017 13:16
OOS.0001.0766	Item (a); Item (b)	Document	FINAL - ANZ Stadium Redevelopment - Probity Advisor Engagement Eval Plan - 1 June 2017.pdf	19/06/2017 11:17
OOS.0001.0783	Item (a); Item (b)	Email	Fwd: RE: INSW ANZ Stadium Redevelopment Invoice and Estimates for May 2017 and June 2017	23/06/2017 11:43
OOS.0001.0904	Item (a)	Email	FW: ANZS Redevelopment: Updated fee estimate	18/08/2017 7:58
OOS.0001.1131	Item (a)	Email	RE: July 2017 - INSW invoice - ANZ Stadium Redevelopment Project	4/09/2017 17:20
OOS.0001.1449	Item (a)	Email	INSW Invoice - ANZ Stadium Redevelopment Project	21/09/2017 15:50
OOS.0001.1450	Item (a)	Document	Summary of costs_July Aug 17.pdf	21/09/2017 15:47
OOS.0001.2288	Item (a); Item (b)	Email	Re: ANZ Stadium - Variation invoice attached	9/11/2017 10:45
OOS.0001.3722	Item (a)	Email	RE: Consultant List	30/01/2018 11:50
OOS.0001.4196	Item (a)	Email	FW: Stadium Spend Snapshot as at today	23/02/2018 13:38
OOS.0001.4198	Item (a)	Email	FW: Business Cases for Stadium Australia and Allianz Stadium	23/02/2018 14:31

Annexure B

**NSW OFFICE OF SPORT
ORDER FOR PAPERS - SYDNEY STADIUMS
PRIVILEGED DOCUMENTS - DISPUTED DOCUMENTS**

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
1.	OOS.0001.0045	Item (a)	Document	ARU_MOU.pdf	14/04/2016 16:17	Commercial in Confidence	Full
2.	OOS.0001.0155	Item (a); Item (e)	Document	NRL MOU with NSW Gov.pdf	23/06/2016 18:15	Commercial in Confidence	Full
3.	OOS.0001.0295	Item (a); Item (b)	Email	Attention Ursula - Office of Sport - Addendum No.1 for OOSIG1617010	16/02/2017 14:32	Public Interest Immunity	Part
4.	OOS.0001.0296	Item (a); Item (b)	Email	Attention Oliver and Craig - Office of Sport - Addendum No.1 for OOSIG1617010	16/02/2017 14:38	Public Interest Immunity	Part
5.	OOS.0001.0297	Item (a); Item (b)	Email	Attention Frances - Office of Sport - Addendum No.1 for OOSIG1617010	16/02/2017 14:41	Public Interest Immunity	Part
6.	OOS.0001.0302	Item (a)	Email	Attention Ursula - Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:17	Public Interest Immunity	Part
7.	OOS.0001.0303	Item (a)	Email	Attention Paul: Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:19	Public Interest Immunity	Part

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
8.	OOS.0001.0304	Item (a)	Email	Attention Oliver and Craig - Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:21	Public Interest Immunity	Part
9.	OOS.0001.0305	Item (a)	Email	Attention Frances - Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:22	Public Interest Immunity	Part
10.	OOS.0001.0306	Item (a)	Email	Attention Peter: Office of Sport - Addendum No.2 for OOSIG1617010	17/02/2017 16:28	Public Interest Immunity	Part
11.	OOS.0001.0470	Item (a)	Document	NSW Gov Commitments to Codes - 5 April 2017.docx	5/04/2017 14:05	Commercial in Confidence	Part
12.	OOS.0001.0471	Item (a)	Document	NSW Gov Commitments to Codes - 5 April 2017 (sent to KPMG).pdf	5/04/2017 15:16	Commercial in Confidence	Part
13.	OOS.0001.0478	Item (a); Item (b)	Email	FW: ANZ Progress Report and Invoice #1	6/04/2017 11:34	Commercial in Confidence	n/a - family bundle
14.	OOS.0001.0479	Item (a); Item (b)	Document	Inv 821027682 20.03.2017_29082673_1(Client-Job).pdf	6/04/2017 11:34	Commercial in Confidence	Part
15.	OOS.0001.0546	Item (a)	Document	NSW Gov Commitments to Codes - 5 April 2017 (sent to KPMG).docx	19/04/2017 13:14	Commercial in Confidence	Part
16.	OOS.0001.0565	Item (a); Item (b)	Email	Fwd: FW: Stadium Australia - next steps	24/04/2017 10:07	Commercial in Confidence	Part

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
17.	OOS.0001.0592	Item (a)	Email	RE: INSW Design PCG meeting	1/05/2017 9:14	Commercial in Confidence	Part
18.	OOS.0001.0593	Item (a)	Email	RE: INSW Design PCG meeting	1/05/2017 11:04	Commercial in Confidence	Part
19.	OOS.0001.0597	Item (a); Item (b)	Email	ANZ Stadium Functional Brief Invoice	2/05/2017 8:31	Commercial in Confidence	n/a - family bundle
20.	OOS.0001.0598	Item (a); Item (b)	Document	170501_ANZ Stadium Redevelopment Functional Brief_Invoice01.pdf	2/05/2017 8:31	Commercial in Confidence	Part
21.	OOS.0001.0722	Item (a)	Email	RE: Request for Proposal - Probity Advice - ANZ Stadium Redevelopment Project	26/05/2017 11:50	Privacy	Part
22.	OOS.0001.0736	Item (a)	Email	RE: RE: Probity advisor engagement - ANZ Stadium Redevelopment	29/05/2017 8:27	Commercial in Confidence	n/a - family bundle
23.	OOS.0001.0737	Item (a)	Document	Insurance Certificates NSW.PDF	29/05/2017 8:26	Commercial in Confidence	Full
24.	OOS.0001.0738	Item (a)	Document	OCM Quotation_General Probity Advice_17May2017.pdf	24/10/2017 14:00	Commercial in Confidence	Part

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
25.	OOS.0001.0739	Item (a)	Email	RE: Request for Proposal - Probity Advice - ANZ Stadium Redevelopment Project	25/05/2017 10:00	Commercial in Confidence	n/a - family bundle
26.	OOS.0001.0740	Item (a)	Document	Insurance Certificates NSW.pdf	3/04/2017 14:56	Commercial in Confidence	Full
27.	OOS.0001.1451	Item (a)	Document	Tracey Brunstrom & Hammond 729.pdf	21/09/2017 15:47	Commercial in Confidence	Part
28.	OOS.0001.1452	Item (a)	Document	COX Architecture 21-4.pdf	21/09/2017 15:47	Commercial in Confidence	Part
29.	OOS.0001.1453	Item (a)	Document	WT Partnership 27-3.pdf	21/09/2017 15:47	Commercial in Confidence	Part
30.	OOS.0001.1454	Item (a)	Document	SASOP_Invoice No 22000376_Jul Aug 17.pdf	21/09/2017 14:35	Commercial in Confidence	Part
31.	OOS.0001.1825	Item (a)	Email	Re: Tuesday - ANZ Stadium corro	2/10/2017 18:21	Commercial in Confidence	Part
32.	OOS.0001.2101	Item (a)	Image	image003.png	11/10/2017 15:56	Commercial in Confidence	n/a - family bundle

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
33.	OOS.0001.2102	Item (a)	Image	image001.png	11/10/2017 15:56	Commercial in Confidence	n/a - family bundle
34.	OOS.0001.2156	Item (a)	Email	RE: Feedback RE: CRML17/319 - EMAIL REQUEST TO SIG & SDG	18/10/2017 15:06	Privacy	n/a - family bundle
35.	OOS.0001.2157	Item (a)	Document	FINAL_CRML17-17_236 Mr Taffa response_ED signed.pdf	18/10/2017 15:06	Privacy	Part
36.	OOS.0001.2158	Item (a)	Document	Letter from Mr Taffa for MO response.pdf	18/10/2017 15:05	Privacy	Part
37.	OOS.0001.2164	Item (a)	Email	Allianz Stadium - Preliminary Assessment Invoice	20/10/2017 10:29	Commercial in Confidence	n/a - family bundle
38.	OOS.0001.2165	Item (a)	Document	Inv 821072922 19.10.2017.pdf	20/10/2017 10:29	Commercial in Confidence	Part
39.	OOS.0001.2282	Item (a); Item (b)	Email	ANZ Stadium - Variation invoice attached	9/11/2017 10:39	Commercial in Confidence	n/a - family bundle
40.	OOS.0001.2283	Item (a); Item (b)	Document	Inv 821077517 09.11.2017_31278922_1(Client-Job).pdf	9/11/2017 10:29	Commercial in Confidence	Part

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
41.	OOS.0001.2284	Item (a); Item (b)	Email	FW: ANZ Stadium - Variation invoice attached	9/11/2017 10:41	Commercial in Confidence	n/a - family bundle
42.	OOS.0001.2285	Item (a); Item (b)	Document	Inv 821077517 09.11.2017_31278922_1(Client-Job).pdf	9/11/2017 10:29	Commercial in Confidence	Part
43.	OOS.0001.2286	Item (a); Item (b)	Email	Fwd: ANZ Stadium - Variation invoice attached	9/11/2017 10:44	Commercial in Confidence	n/a - family bundle
44.	OOS.0001.2287	Item (a); Item (b)	Document	Inv 821077517 09.11.2017_31278922_1(Client-Job).pdf	9/11/2017 10:44	Commercial in Confidence	Part
45.	OOS.0001.2337	Item (a)	Email	INSW Invoice for Oct 17 - ANZ Stadium Redevelopment Project	17/11/2017 16:10	Commercial in Confidence	n/a - family bundle
46.	OOS.0001.2338	Item (a)	Document	SASOP_Invoice No 22000408_Oct 17 (A93842).pdf	17/11/2017 14:04	Commercial in Confidence	Part
47.	OOS.0001.2339	Item (a)	Document	Summary of costs_Oct 17 (A93317).pdf	13/11/2017 14:42	Commercial in Confidence	n/a - family bundle
48.	OOS.0001.2340	Item (a)	Document	Cox Architecture_Oct 17.pdf	17/11/2017 15:57	Commercial in Confidence	Part

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
49.	OOS.0001.2605	Item (a); Item (b)	Email	FW: Media release	24/11/2017 10:45	Public Interest Immunity	Part
50.	OOS.0001.2606	Item (a); Item (b)	Document	Media Release.docx	24/11/2017 10:43	Public Interest Immunity	Part
51.	OOS.0001.2683	Item (a)	Email	RE: ANZ Stadium announcement - Sensitive NSW Government	30/11/2017 17:09	Public Interest Immunity	Part
52.	OOS.0001.2752	Item (a)	Email	RE: Legal Advice concerning Allianz Stadium	4/12/2017 20:22	Legal Professional Privilege	Full
53.	OOS.0001.2753	Item (a)	Document	Trust Land Designation.pdf	4/12/2017 20:21	Legal Professional Privilege	n/a - family bundle
54.	OOS.0001.2754	Item (a)	Email	RE: Legal Advice concerning Allianz Stadium	4/12/2017 20:22	Legal Professional Privilege	Full
55.	OOS.0001.2755	Item (a)	Document	Trust Land Designation.pdf	4/12/2017 20:21	Legal Professional Privilege	n/a - family bundle
56.	OOS.0001.2778	Item (a)	Email	RE: Legal Advice concerning Allianz Stadium	6/12/2017 15:07	Legal Professional Privilege	Full

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
57.	OOS.0001.2779	Item (a)	Email	RE: Legal Advice concerning Allianz Stadium	6/12/2017 15:30	Legal Professional Privilege	Full
58.	OOS.0001.2902	Item (a); Item (b)	Email	RE: ANZS Redevelopment - SC Presentation	12/12/2017 9:15	Public Interest Immunity	Part
59.	OOS.0001.2905	Item (a); Item (b)	Email	Re: ANZS Redevelopment - SC Presentation	12/12/2017 9:41	Public Interest Immunity	Part
60.	OOS.0001.2907	Item (a); Item (b)	Email	Re: ANZS Redevelopment - SC Presentation	12/12/2017 10:48	Public Interest Immunity	Part
61.	OOS.0001.2952	Item (a)	Email	Social media opposing Sydney stadia development	13/12/2017 19:19	Commercial in Confidence	n/a - family bundle
62.	OOS.0001.2953	Item (a)	Document	KPMG_SocialMediaSnapshot_NSWGovernment_Stadia_December2017.pdf	13/12/2017 19:22	Commercial in Confidence	Full
63.	OOS.0001.2957	Item (a)	Email	FW: Social media opposing Sydney stadia development	13/12/2017 20:29	Commercial in Confidence	n/a - family bundle
64.	OOS.0001.2958	Item (a)	Document	KPMG_SocialMediaSnapshot_NSWGovernment_Stadia_December2017.pdf	13/12/2017 19:22	Commercial in Confidence	Full

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
65.	OOS.0001.2960	Item (a)	Email	RE: request for legal advice - planning issues for Allianz Stadium	13/12/2017 20:47	Legal Professional Privilege	Full
66.	OOS.0001.2963	Item (a)	Email	RE: request for legal advice - planning issues for Allianz Stadium	14/12/2017 8:36	Legal Professional Privilege	Full
67.	OOS.0001.3031	Item (a); Item (b)	Email	Allianz Commissioning Invoice	18/12/2017 18:13	Commercial in Confidence	n/a - family bundle
68.	OOS.0001.3032	Item (a); Item (b)	Document	Inv 821085611 15.12.2017_31618291_1(Client-Job).pdf	18/12/2017 18:10	Commercial in Confidence	Part
69.	OOS.0001.3049	Item (a); Item (b)	Document	Briefing note - Planning Approval.docx	19/12/2017 15:08	Legal Professional Privilege	Full
70.	OOS.0001.3117	Item (a); Item (b)	Email	Outstanding invoices	20/12/2017 10:07	Commercial in Confidence	n/a - family bundle
71.	OOS.0001.3118	Item (a); Item (b)	Document	Inv 821072922 19.10.2017_31094502_1(Client-Job).pdf	19/12/2017 15:12	Commercial in Confidence	Part

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
72.	OOS.0001.3133	Item (a)	Document	SFS Legal Advice Summary.docx	20/12/2017 14:22	Legal Professional Privilege	Full
73.	OOS.0001.3250	Item (a)	Email	FW: Stadiums Standard responses	9/01/2018 8:57	Public Interest Immunity	Part
74.	OOS.0001.3251	Item (a)	Document	Letter for MP's docx.docx	1/12/2017 11:12	Public Interest Immunity	n/a - family bundle
75.	OOS.0001.3260	Item (a)	Document	Legal advice on SFS approvals.docx	9/01/2018 12:57	Legal Professional Privilege	Full
76.	OOS.0001.3264	Item (a)	Email	Legal Advice Summary	9/01/2018 13:47	Legal Professional Privilege	Full
77.	OOS.0001.3265	Item (a)	Document	SFS Legal Advice Summary.docx	20/12/2017 14:22	Legal Professional Privilege	Full
78.	OOS.0001.3266	Item (a)	Email	RE: Legal Advice	9/01/2018 13:55	Legal Professional Privilege	Full

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
79.	OOS.0001.3267	Item (a)	Document	Legal advice on SFS approvals.docx	9/01/2018 12:57	Legal Professional Privilege	Full
80.	OOS.0001.3268	Item (a)	Document	SFS Legal Advice Summary.docx	9/01/2018 13:54	Legal Professional Privilege	Full
81.	OOS.0001.3269	Item (a)	Email	SFS Planning	9/01/2018 14:07	Legal Professional Privilege	Full
82.	OOS.0001.3270	Item (a)	Document	SFS Legal Advice Summary.docx	9/01/2018 14:07	Legal Professional Privilege	Full
83.	OOS.0001.3271	Item (a)	Document	Legal advice on SFS approvals.docx	9/01/2018 14:07	Legal Professional Privilege	Full
84.	OOS.0001.3323	Item (a)	Email	FW: Case In Progress - 00006461 - CMT17/421	12/01/2018 10:47	Privacy	Part
85.	OOS.0001.3607	Item (a)	Email	RE: SFS SSDA	24/01/2018 16:51	Legal Professional Privilege	Full

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
86.	OOS.0001.3716	Item (a)	Email	Consultant List	30/01/2018 11:31	Commercial in Confidence	n/a - family bundle
87.	OOS.0001.3717	Item (a)	Document	SFS Planning Consultant Contacts.docx	30/01/2018 11:31	Commercial in Confidence	Part
88.	OOS.0001.3718	Item (a)	Email	FW: Consultant List	30/01/2018 11:47	Commercial in Confidence	n/a - family bundle
89.	OOS.0001.3719	Item (a)	Document	SFS Planning Consultant Contacts.docx	30/01/2018 11:31	Commercial in Confidence	Part
90.	OOS.0001.3720	Item (a)	Email	FW: Consultant List	30/01/2018 11:47	Commercial in Confidence	n/a - family bundle
91.	OOS.0001.3721	Item (a)	Document	SFS Planning Consultant Contacts.docx	30/01/2018 11:31	Commercial in Confidence	Part
92.	OOS.0001.3740	Item (a)	Document	Mallesons advice Jan 2018.pdf	31/01/2018 11:55	Legal Professional Privilege	Full
93.	OOS.0001.3764	Item (a)	Email	FW: request for legal advice - planning issues for Allianz Stadium	31/01/2018 14:16	Legal Professional Privilege	Full

Tab	Document ID	Relevant item	Document type	Title	Date of document	Privilege claim	Type of privilege claim
94.	OOS.0001.3981	Item (b)	Email	SFS Strategic Business Case	7/02/2018 17:33	Commercial in Confidence	n/a - family bundle
95.	OOS.0001.3982	Item (b)	Document	Inv 821094336 07.02.2018_31958324_1(Client-Job).pdf	7/02/2018 17:13	Commercial in Confidence	Part
96.	OOS.0001.4578	Item (a); Item (b)	Email	FW: Statutory declaration from Tracy Southern	13/03/2018 9:44	Privacy	n/a - family bundle
97.	OOS.0001.4579	Item (a); Item (b)	Document	13032018093048-0001.pdf	13/03/2018 9:44	Privacy	Part
98.	OOS.0002.6115	Item (a)	Email	RE: ANZ Stadium Development	13/01/2017 11:58	Privacy	Part
99.	OOS.0004.0001	Item (e)	Document	24112017084234-0001.pdf	19/12/2017 10:29	Commercial in Confidence	Full

**GENERAL SUBMISSIONS IN RESPONSE TO THE
LEGAL ISSUES RAISED IN THE DISPUTED CLAIM FOR PRIVILEGE BY
THE HON ADAM SEARLE, MLC IN THE LETTER DATED 23 APRIL 2018**

Source of the Legislative Council's Power to Call for Papers

It is well established that NSW Legislative Council's capacity to issue a compulsory order to the Executive, requiring the compulsory production of papers is one of the powers and privileges attaching to that House of Parliament. This was made clear in the comments of Gaudron, Gummow and Hayne JJ in *Egan v Willis* (1998) 195 CLR 424 at 453-4, where their Honour's confirmed that *"the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions."*

It is in this context that the position set out below must be understood and analysed. In *Egan v Willis* - and, indeed, *Egan v Chadwick* (1999) 46 NSWLR 563 - the basis of Parliament's power (and the exercise thereof) is articulated, namely, that which is **"reasonably necessary"** for the proper exercise of its functions" (emphasis added).

As both of those decisions confirm, the Legislative Council's "functions" are those conferred on it by the *Constitution Act 1902* (NSW), and the constitutional principles (including the doctrine of responsible government) encapsulated within it. Chief amongst these is the Legislative Council's "legislative" function to make laws "for the peace, welfare and good government of New South Wales".¹

According to the High Court in *Egan v Willis*, the power for the Legislative Council to call for the production of documents is a "reasonably necessary" incident to the "proper exercise" of this function as there is an:

*"imperative need for each chamber to have access to material which may be of help to it in considering not only the making of changes to existing laws or the enactment of new laws but, as an anterior matter, to the manner of operation of existing laws."*²

Therefore, the Legislative Council's capacity to order the production of papers fulfils a separate "oversight" function fulfilled by the Council. Specifically, that function involves "examining the conduct of the executive government to determine whether that conduct should be the subject of criticism, control or both",³ in accordance with the well-established conventions of responsible government.

According to the majority of the NSW Court of Appeal in *Egan v Chadwick*, the Legislative Council's powers and privileges do not extend to ordering the production of documents which disclose the "internal deliberation of the Cabinet". This limitation is justified, as Spigelman CJ described, because:

"it is not reasonably necessary for the proper exercise of the functions of the Legislative Council to call for documents the production of which would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension. The power

¹ *Constitution Act 1902* (NSW) s 5. See *Egan v Willis* (1998) 195 CLR 424, 454.

² *Egan v Willis* (1998) 195 CLR 424, 454, 476.

³ *Egan v Willis* (1998) 195 CLR 424, 467, 502.

is itself, in significant degree, derived from that doctrine. The existence of an inconsistency or conflict constitutes a qualification on the power itself."⁴

This limitation aside, it appears that the Legislative Council's power to order the production of documents is otherwise absolute and extends to documents which, in administrative or judicial proceedings, would not be produced (due to a claim of legal professional privilege or public interest immunity).

So much so is recognised by the "process" for the dealing with privilege claims set out in Standing Order 52, which relevantly contains the following terms:

- "(2) When returned, the documents will be laid on the table by the Clerk.
- ...
- (4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to have been presented to the House and published by authority of the House.
- (5) Where a document is considered to be privileged:
 - (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
 - (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
 - (i) made available only to members of the Legislative Council,
 - (ii) not published or copied without an order of the House.
- (6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim."

Once tabled before the Legislative Council, whether in accordance with Standing Order 52 or otherwise, the documents produced under the Order form part of the records of the Legislative Council, and are thereby published as a matter of public record, attracting parliamentary privilege.⁵

The process of disputing the validity of claims of privilege over certain documents in Standing Order 52 is merely one of the "steps" which the Legislative Council may take "to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed".⁶

The Legislative Council therefore undoubtedly has the **power** to permit (or restrict) further publication, beyond its members, of documents produced in response to an order for papers which are the subject of a claim of privilege as an incident of the "occasion and manner" of the exercise of its privilege.⁷

The question becomes whether Parliament *should* properly take steps to prevent publication, where such a privilege has been claimed, and how those claims are resolved.

⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, 573-4.

⁵ *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 171.

⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4.

⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 578.

In the context of the comments in *Egan v Chadwick* and *Egan v Willis* (outlined above) that the basis of Parliament's power (and the exercise thereof) is that which is "reasonably necessary for the proper exercise of its functions", the question whether Parliament should take steps to prevent publication of documents where a privilege has been claimed, should be whether the exercise of the Legislative Council's ancillary power to permit further publication of the produced documents is "reasonably necessary for the proper exercise of its functions".

Although the answer to such a question *may*, as set out below (and as contended by Mr Searle MLC), involve an assessment of whether "*it is thought necessary in the public interest for it not to be publicly disclosed*" or whether "*disclosure is likely to injure the public interest*", such assessments should not be understood as imposing a "stand-alone" test.

Instead, it is submitted that these matters gain their relevance insofar as they bear upon the Legislative Council's decision of whether further publication is "reasonably necessary for the proper exercise" any of its functions.

Those functions are well-established and have been set out above. Although they undoubtedly include an "oversight" or an "accountability" function, notably, it is not amongst any of the Legislative Council's specified "functions" to "encourage public debate", to demand "transparency in government", or any other similar objective.

This is so regardless of the foundational importance of those concepts to the constitutional system upon which the Legislative Council's privileges rest, including the concepts of "representative democracy". Such principles, although constitutional in nature, do not of themselves operate to empower the Council to act in any way.⁸

Indeed, the High Court has established that the particular notion of representative democracy 'does not have any necessary characteristics other than an irreducible minimum requirement that the people be "governed by representatives elected in free elections by those eligible to vote".⁹

In that respect, although the comments of Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52 and quoted by Mr Searle MLC may be accepted as highly persuasive as a matter of principle, they are not directed towards the particular question at hand. Instead, their principal relevance, as set out by Priestley JA in *Egan v Chadwick*, is as confirming that the Legislative Council - analogously to a Court - is *required* to prohibit the further disclosure of documents which it has compulsorily obtained where disclosure would be "inimical to the public interest".¹⁰

NSW Office of Sport submits that the suggestion by Mr Searle MLC that the test in relation to claims of privilege over documents produced to Parliament is whether disclosure of the relevant document is in the public interest or is likely to injure the public interest, is incorrect. Instead, drawing upon the authorities above, the proper test is whether disclosure is reasonably necessary for the proper exercise of any of the Legislative Council's functions, including its oversight function. Whilst a consideration of "the public interest" may be an aspect of this inquiry, it is not the only inquiry that may be undertaken. This is the lens through which the independent arbiter must evaluate the relevant documents.

⁸ *McGinty v Western Australia* (1996) 186 CLR 140, 169-70.

⁹ *McGinty v Western Australia* (1996) 186 CLR 140, 182, 199; *Murphy v Electoral Commissioner* [2016] HCA 36 at [177].

¹⁰ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4.

As a general comment, NSW Office of Sport also submits that, documents over which the Executive claims some form of privilege are produced to the Legislative Council in their entirety and may be inspected by Members of the Legislative Council. Once produced to the Legislative Council, the documents may then be used to inform and assist the Members in fulfilling the Council's relevant lawmaking and oversight functions. The documents (and the knowledge obtained from them) may be used to fulfil all relevant functions of the Council under the protection of parliamentary privilege, including voting, drafting of bills, questioning Ministers, referring matters to ICAC, or commencing judicial proceedings (in the event of particular misconduct).

Accordingly, the impediments to the "legislative" and "oversight" functions of the Legislative Council are, in many respects, overcome. It does not appear immediately apparent that the further disclosure of "privileged" documents can properly be characterised as "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions.

Resolving Contested Claims to Privilege

It is submitted that the appropriate forum for the resolution of claims to privilege in the present context is the Legislative Council itself and not the independent arbiter.

As a starting point, it is well established that the question of whether the exercise of a privilege - including the power to call for (and publish) papers - is "reasonably necessary for the proper performance of the functions of a House of Parliament" is not a matter which is appropriate for judicial adjudication.¹¹ In this respect, and as is clearly acknowledged by the independent arbiter's Report in relation to the Standing Order 52 disputed claim of privilege on the "Actions of former WorkCover NSW employee" dated 25 February 2014 (**WorkCover Report**):

"Disputes as to the legitimacy of a particular order for papers by the House or the adequacy of the Executive's response to it are matters for those bodies to resolve, hopefully by negotiation but ultimately by the House determining what action it will take in response to a return it deems unsatisfactory."¹²

However, where a claim of privilege is made, Parliament is *duty-bound* to balance the conflicting public interests which may impact the resolution of that question, in a form which is broadly equivalent to the "judicial" resolution of privilege disputes.¹³

The existence of that duty appears to be implicitly acknowledged by the independent arbiter, who acknowledged in his Report in relation to the Standing Order 52 disputed claim of privilege on the "WestConnex Business Case" dated 8 August 2014 (**WestConnex Report**) that neither the Legislative Council, nor the independent arbiter enjoy "liberty" to "disregard" or "override" privilege where such a claim is made.¹⁴

In the event of a dispute as to the validity of a claim of privilege, Standing Order 52(6) merely authorises the release of the documents to an independent arbiter for "evaluation and report ... as to the validity of the claim". The role and function of the independent arbiter is not subject to any further restraint, regulation, proscription or supervision. It is not "formalised" or "official" in any meaningful way.

¹¹ *Egan v Chadwick* (1999) 46 NSWLR 563, 573-4.

¹² *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, 3.

¹³ *Egan v Chadwick* (1999) 46 NSWLR 563, 594.

¹⁴ *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, 5-6.

As explained by Dr Anne Twomey in her article titled "Executive Accountability to the Senate and the NSW Legislative Council", evaluation of the competing public interests in disclosure (beyond those circumstances where a claim might be upheld in the courts), is an exercise of the powers and privileges reserved for the Legislative Council.¹⁵

Accordingly, it is inappropriate for the independent arbiter to be tasked with exercising this power. As set out by Dr Twomey:

"No Act of the New South Wales Parliament delegates any power to the independent legal arbiter. At most, the independent legal arbiter fulfils a function conferred upon him or her by the Legislative Council. Standing Order 52 gives the President the power to appoint an independent legal arbiter and provides that the Clerk is authorised to release disputed documents to an independent legal arbiter 'for evaluation and report within seven calendar days as to the validity of the claim [of privilege]'. It does not delegate the powers of the House to the independent legal arbiter. Nor does it confer any powers on the independent legal arbiter. It merely provides that the independent legal arbiter may view the disputed documents to evaluate and report on (not even 'determine') the validity of the claims for privilege.

Further, there is doubt as to whether a House could, if it so desired, delegate its powers to a person who is not a Member. Certainly the Parliament as a whole may delegate legislative power to a statutory office holder or other non-member by way of an Act of Parliament. Legislation, ... may also permit a parliamentary committee to appoint a person to conduct an inquiry. Further, a House can ask a person to assess documents for it, as has occurred at the Commonwealth level. It is a different thing altogether, however, for a House to purport to delegate its powers to a non-Member or non-officer, or for that person to assert that he or she is exercising the powers of a House in making a decision. This would be a radical and probably unprecedented step, giving rise to all sorts of issues concerning parliamentary privilege."

Accordingly, insofar as Mr Searle MLC appears to contemplate the independent arbiter being tasked with the responsibility for assessing whether publication of the documents is "reasonably necessary for the proper exercise" of the Legislative Council's functions, it is submitted that this proposal should be wholly rejected. The independent arbiter is simply incapable of exercising that function. The only role of the independent arbiter is to provide a recommendation to the Legislative Council in relation to any claims of privilege over documents. The Legislative Council must make the ultimate determination and may accept or reject the recommendation of the independent arbiter.

Judicial resistance to attempts to invoke the jurisdiction of courts to resolve disputes as to the exercise of parliamentary privilege have been roundly refuted on the basis that those tasks are fundamentally questions to be resolved by Parliament.

Further supporting the notion that only the Parliament can consider these questions is that determination of a claim of public interest immunity requires a decision as to whether - notwithstanding that claim - publication of the documents is "reasonably necessary" for the "proper exercise" of Parliament's functions, and involves complex questions as to the resolution of competing values, the allocation of public resources and the respective roles of the Parliament and the Executive.

Not only is Parliament explicitly tasked with the responsibility of resolving those questions, it is uniquely positioned to do so. As is recognised in *Egan v Chadwick*, the Legislative Council

¹⁵ Anne Twomey, "Executive Accountability to the Senate and the NSW Legislative Council", Sydney Law School Legal Studies Research Paper No 07/70 (November 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031602> (accessed 1 May 2018).

alone is the body who is best suited to determine what is "reasonably necessary" for the exercise of its functions.

Furthermore, as the only body elected by - and ultimately responsible to - the citizenry, the Legislative Council carries a legitimacy and authority in resolving such questions, which neither the courts, nor an independent legal arbiter, possess.

Finally, the question of where the public interest may lie in a particular scenario involves complex questions of competing priorities. Inevitably, the resolution of those questions is likely to cause significant consequences.

Requiring the Legislative Council to undertake the "balancing" process by itself thus forces the Council to squarely confront the consequences (both positive and negative) of its decision, and articulate its reasons for striking the particular balance which it does. Such a doctrine is key to the "horizontal" separation of powers which is inherent in the constitutional structure of New South Wales.

As explained by Spigelman CJ in *Egan v Chadwick* (at [52]):

"In the determination of a claim of public interest immunity, a trial judge is called upon to weigh essentially incommensurable factors Where this occurs in the course of the administration of justice, judicial officers have relevant experience for the conduct of the balancing exercise. Specifically, they not only understand, but have a duty to consider and assess, the significance of the information to the particular legal proceedings. Where the public interest to be balanced involves the legislative or accountability functions of a House of Parliament, the courts should be very reluctant to undertake any such balancing. This does not involve a constitutional function appropriate to be undertaken by judicial officers. This is not only because judges do not have relevant experience, a proposition which may be equally true of other public interests which they are called upon to weigh. It is because the court should respect the role of a House of Parliament in determining for itself what it requires and the significance or weight to be given to particular information."

Indeed, these sentiments, which tend towards limiting the independent arbiter's role to assessing whether a privilege claim might be accepted at common law, appear to be echoed by the independent arbiter himself in the WestConnex Report where he stated that:

"I do not accept the Crown Solicitor's Office further submission that the House must identify and the arbiter discern the House's particular reasons for wanting to disseminate documents beyond members lest any objection to the Executive's claim of privilege be imperilled."

Consistent with the Minister's observation, I acknowledge that the arbiter's role, like that of a judge considering a disputed claim of privilege, is to determine where the law points as regards the documents examined and the claims made. This may require the application of balancing tests if that is the measure of the legal rule in question, but the evaluative role of the independent legal arbiter does not include some discretion to override the applicable rules of privilege by reference to what may be thought wise in the circumstances."

What Privilege Is Available?

The extent to which privileges, if any, may operate to limit the capacity of the Legislative Council to release documents produced, has not been the subject of legislation, judicial

decision, or consistent Parliamentary practice.¹⁶ Notwithstanding the lack of clarity surrounding the operation of the role of privilege, Standing Order 52 appears to recognise that at least *some* form of "privilege" may be validly asserted by the executive.

As appears to emerge both from the decision of the NSW Court of Appeal in *Egan v Chadwick*,¹⁷ and the independent arbiter's WorkCover Report and WestConnex Report,¹⁸ the operation of privileges (including legal professional privilege and public interest immunity) at general law is not determinative of the scope of those privileges which may be available in the present context.

Instead, the central justification for the recognition of the existence of any "privilege" from the unconditional release of documents produced by Parliament, or the disclosure of their particular contents, must be sourced from constitutional principles.

Implicitly, however, it appears to have been accepted that general law notions of public interest immunity concepts, and freedom of information legislation, may be instructive and analogous to determining the existence and function privileges in this context.

In light of the established cases to date, it appears that such a constitutional "justification" may be made out by demonstrating that the disclosure of the particular information would:

- a) be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);¹⁹
- b) undermine a fundamental "right" or "principle" recognised by the general law;²⁰
- c) "threaten the proper functioning of the executive arm and of the public service";²¹ and/or
- d) be otherwise inconsistent with the "public interest" (and thus no longer "reasonably necessary" for the "proper exercise" of the Legislative Council's functions).²²

It is not immediately clear what factors should be "balanced" in assessing where the "public interest" lies. It is submitted that the relevant inquiry is not appropriately directed at the "public interest" *simpliciter*.

Instead, the public interest factors which weigh for and against disclosure (including whether a claim of privilege may be established at common law) should bear upon the Legislative Council's assessment of whether the further dissemination or publication of the contents of the documents subject to a claim of privilege is "reasonably necessary for the proper exercise of its functions".

In the Senate, this has led to claims for "privilege" or "public interest immunity" being "recognised" (at least, informally) where:

¹⁶ See *Egan v Willis* (1996) 40 NSWLR 650, 663; *Egan v Chadwick* (1999) 46 NSWLR 563, 568.

¹⁷ (1999) 46 NSWLR 563, 574.

¹⁸ *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, 3; *The Hon Keith Mason AC QC, Report Under Standing Order 52 on Disputed Claim of Privilege, WestConnex Business Case*, 8 August 2014, 6.

¹⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 579.

²⁰ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 587. I note that this is also the approach taken in the United States - see *Quinn v United States* 349 US 155 (1955).

²¹ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4; *Sankey v Whitlam* (1978) 142 CLR 1, 56.

²² *Egan v Chadwick* (1999) 46 NSWLR 563, 593-4.

- a) the information is subject to legal professional privilege;
- b) the information may prejudice a trial by influencing magistrates, jurors or witnesses in their decision-making;
- c) the information may create material which is an "abuse" of parliamentary privilege;
- d) the information would prejudice a law enforcement investigation;
- e) the information would damage the commercial interests of commercial traders in the market place, including the Commonwealth;
- f) the disclosure of the information may unreasonably infringe the privacy of individuals;
- g) the disclosure of the information may prejudice Australia's national security, defence or international relations;
- h) disclosure of the information would prejudice inter-governmental relations.²³

Legal Professional Privilege

Both the NSW Court of Appeal,²⁴ and the Senate,²⁵ have accepted that "legal professional privilege" (or something analogous thereto) does not provide a basis on which a call for papers may be refused because the relationship between the Legislature and the Executive is such that the Council may have a legitimate interest and function in calling for the production of such documents.

As explained by Priestley JA in *Egan v Chadwick*:

*"The entire conduct of the administration of the laws by the Executive is only possible by the use of people employed, in one way or another, by the Executive and by the use of assets of one kind or another, which may be publicly or privately owned but which in the latter case must be paid for. Every act of the Executive in carrying out its functions is paid for by public money. Every document for which the Executive claims legal professional privilege or public interest immunity must have come into existence through an outlay of public money, and for public purposes."*²⁶

Nevertheless, it is submitted that the public interest factors weighing against the further publication and disclosure of information which is the subject of legal professional privilege are of such strength that the Legislative Council should recognise that the further disclosure of such documents is not likely to be "reasonably necessary" in all but the most exceptional circumstances.

The doctrine of "legal professional privilege" is a "fundamental common law right" and a "substantive general principle of the common law which plays an important role in the effective and efficient administration of justice".²⁷ Its operation extends beyond judicial proceedings, to

²³ See Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 'Relations with the Executive Government' (14th Ed, 2016), 662-670.

²⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, 578, 592.

²⁵ See Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 'Order for Production of Documents' (14th Ed, 2016), 662-670.

²⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, 592-4.

²⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 576-7, 587.

apply in circumstances where the production of materials is compelled as part of investigative or administrative processes.²⁸

Importantly, this is recognised to be the case regardless of whether or not the court (or other arbiter) was to form the view that the disclosure of the information would not be in the public interest. No such balancing test occurs. This separate treatment is not the result of some "class claim". It is instead, as explained by Spigelman CJ in *Egan v Chadwick*, because "[t]he law has already undertaken the process of balancing in determining the rule".²⁹

The public interest factors upon which the doctrine of legal professional privilege rests, are no less applicable in the Parliamentary context.

Specifically, the basis for the privilege is "to ensure that the client can consult his lawyer with freedom and candour", so as to ensure that clients fully disclose the relevant facts to lawyers, so as to enable them to properly advise and represent their clients.³⁰ The protection of such communications is seen as "fundamental to the due administration of justice", as the lawyer-client relationship is "part of the functioning of the law itself".³¹

However, the "administration of justice" may be equally threatened by the public dissemination of documents subject to legal professional privilege, in three key ways.

Firstly, the existence (and the benefit) of the privilege in the context of judicial proceedings may be adversely impacted by the "antecedent disclosure of the relevant communications" by the Legislative Council.³² Government is entitled to the protection of legal professional privilege as is any other litigant. Denying that privilege poses a real risk of placing the Government at a disadvantage in the event that the relevant matters becomes the subject of litigation.

Secondly, "removal" of the privilege in this context risks establishing a discord between the legislative and judicial branches of government. It may readily be imagined that the public dissemination of documents by Parliament in circumstances where those documents could not have previously been put before a Court would risk perverting the respect and integrity of the judicial system as the proper forum for the recourse of disputes.³³

Thirdly, legal professional privilege serves a more fundamental policy objective which the High Court has recognised "would often be defeated if the privilege were not generally available".³⁴ As set out in *Baker v Campbell*:

"The client's legal privilege is essential for the orderly and dignified conduct of individual affairs in a social atmosphere which is being poisoned by official and unofficial eavesdropping and other invasions of privacy. The individual should be able to seek and obtain legal advice and legal assistance for innocent purposes, without the fear that what has been prepared solely for that advice or assistance may be searched or seized under warrant.

...

The perfect administration of justice is not confined to legal proceedings. The object and indeed the result of consulting a solicitor will often be the settlement of a dispute

²⁸ *Baker v Campbell* (1983) 153 CLR 52.

²⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 576-7, 578.

³⁰ *Baker v Campbell* (1983) 153 CLR 52, 66.

³¹ *Baker v Campbell* (1983) 153 CLR 52, 128.

³² *Baker v Campbell* (1983) 153 CLR 52, 77.

³³ *Cf Baker v Campbell* (1983) 153 CLR 52, 116.

³⁴ *Baker v Campbell* (1983) 153 CLR 52, 88.

*which otherwise may have had to be fought out in court. The fostering of a professional relationship which obviates recourse to litigation is very much in the public interest.*³⁵

For those reasons, the courts have determined that:

*"[t]he conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired."*³⁶

None of these policy considerations lose any of their force when transplanted to the present context. Legal professional privilege has, for the reasons set out above, been "woven into" the fabric of the law of NSW by the courts of NSW. In accordance with that fundamental principle, the Government has been encouraged to seek such advice as is necessary on past, present and future exercises of its functions.

The public interest considerations against disclosure appear sufficiently strong that the further dissemination or disclosure of such documents should in all cases be considered as not "in the public interest" and thus not "reasonably necessary" for the proper exercise of the Legislative Council's functions.

To adopt an alternative policy, as appears to have been the case to date, of "balancing" the public interest factors (or public interest) in a particular document "does not appear to [provide] any objective criteria by which such judgments are made".³⁷

Public Interest Immunity

Public interest immunity stands apart from legal professional privilege as it requires the court to balance the conflicting interests, to determine whether it would "injuriously to the public interest to disclose it".³⁸

In this context, we consider that the task of assessing a claim for public interest immunity is immediately reconcilable with the position outlined in Mr Searle MLC's letter (e.g. that a "balancing" process be undertaken to determine whether it would be injurious to disclose a particular document), and the articulation of the test set out above.

The underlying motivation of the recognition of *any* class of public interest immunity is tied directly to the proper exercise of executive power. As variously articulated, public interest immunity rests on:

- a) the need to preserve confidentiality in order that the exchange of differing views may be made within government and, at the same time, the principle of collective responsibility may be maintained;³⁹

³⁵ *Baker v Campbell* (1983) 153 CLR 52, 89, 94-5.

³⁶ *Baker v Campbell* (1983) 153 CLR 52, 89, 130.

³⁷ Anne Twomey, "Executive Accountability to the Australian Senate and the New South Wales Legislative Council", Sydney Law School Legal Studies Research Paper No 07/70 (November 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031602> (accessed 1 May 2018), 7.

³⁸ *Sankey v Whittlam* (1978) 145 CLR 1, 38-9.

³⁹ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615.

- b) the need to prevent premature, ill-informed or misdirected criticism that would otherwise divert the policy-making process from its proper course;⁴⁰
- c) the need to ensure that decision-making and policy development is uninhibited;⁴¹
- d) the need to promote candour in communication with (and within) the Executive;⁴²
- e) the need to maintain confidence in the public service and encourage the "proper functioning" thereof.⁴³

Like legal professional privilege, public interest immunity has been recognised as a separate principle which may be invoked outside the context of judicial proceedings.⁴⁴

As noted above, in the context of the Legislative Council's power to order the production of documents, the inquiry as to whether it would be injurious to disclose a particular document is merely a consideration which forms part of the overarching test as to whether disclosure of the document is reasonably necessary for the proper exercise of any of the Legislative Council's functions.

Commercial-in-Confidence Information

Public interest immunity does not draw any distinction between the "legislative" and the "commercial" functions of government.⁴⁵

Accordingly, and contrary to the position adopted in some decisions, there is no "prima facie" presumption that the commercial affairs of Government are "less central" to the functions of government, and thus more inimical to disclosure.⁴⁶

It is well established that public interest immunity may extend to inhibit the disclosure of documents where such documents may damage the commercial interests of commercial traders in the market place, including the Government. Such an extension is justified on the basis that the "trading" or "commercial" activities of government are inextricably related to its own state economic policy, and its delivery of services (as authorised by law).

Indeed, so much was recognised in two reports by the previous independent arbiter, who upheld claims to privilege on this basis in respect of unsuccessful tenders.⁴⁷

In this respect, a claim that a document is "commercial-in-confidence" may be understood as asserting that one or more of the following adverse impacts could arise as a result of disclosure:

- a) information would be released of a commercial value (e.g. pricing strategies of private contracting partners) that would, or could, reasonably be expected to be destroyed or diminished if the information were disclosed;

⁴⁰ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 615.

⁴¹ *Commonwealth v Northern Land Council* (1993) 176 CLR 604, 616.

⁴² *Sankey v Whitlam* (1978) 145 CLR 1, 40.

⁴³ *Jacobsen v Rogers* (1995) 182 CLR 572, 590.

⁴⁴ *Jacobsen v Rogers* (1995) 182 CLR 572.

⁴⁵ *Commonwealth v Northern Land Council* (1991) 30 FCR 1.

⁴⁶ Cf *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at [55].

⁴⁷ Report of Sir Laurence Street – Papers on Road Tunnel Filtration, 24 January 2006, 3; Report of Sir Laurence Street – Papers on Sale of PowerCoal Assets, 27 June 2006, 3. See Anne Twomey, "Executive Accountability to the Australian Senate and the New South Wales Legislative Council", Sydney Law School Legal Studies Research Paper No 07/70 (November 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1031602> (accessed 1 May 2018), 11.

- b) disclosure could compromise the Government's interest in the efficient expenditure of resources, by disclosing the criteria through which it assesses tenders. This would allow future tenders to "tailor" their processes, and future pitches, to address these criteria;
- c) disclosure could expose the Government's assets, expenditure or revenue-generating activities to threat of harm;
- d) disclosure could adversely impact the willingness of potential contractors or private sector agents to provide information to government, or to participate in tender processes;
- e) disclosure could inhibit the Government's ability to fully consider and pursue other (alternative) commercial decisions; and
- f) disclosure could place the Government at a commercial disadvantage vis-à-vis other private companies.

Each of these matters relate closely to the "proper functioning" of the Executive, and thus may properly form the basis of a claim for privilege in the present context.

In the context of the Legislative Council's power to order the production of documents, claims that documents are commercial-in-confidence are treated similarly to claims of public interest immunity. Therefore, the considerations outlined above are merely considerations which form part of the overarching test as to whether disclosure of the document is reasonably necessary for the proper exercise of any of the Legislative Council's functions.

Personal Privacy

Finally, it is considered that the principles of public interest immunity are inherently flexible enough to extend to situations where the information would, if published, result in an unreasonable interference with the privacy of an individual (or expose them to some risk).

Such a position has been accepted by the Senate, who note that "[i]t is also usually possible to overcome the problem by disclosing information in general terms without the identity of those to whom it relates".⁴⁸

Following the principles of public interest immunity outlined above, it is more than likely that the disclosure of the personal information of members of the public would:

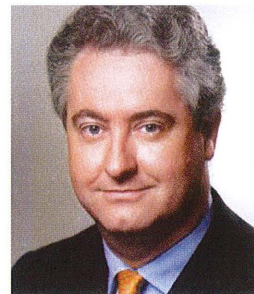
- a) inhibit decision-making and policy development;
- b) reduce candour in communication with (and within) the Executive; and
- c) reduce confidence in the public service and the "proper functioning" thereof.

However, as with the other privileges outlined above, in the context of the Legislative Council's power to order the production of documents, the inquiry above is merely a consideration which forms part of the overarching test as to whether disclosure of the document is reasonably necessary for the proper exercise of any of the Legislative Council's functions.

⁴⁸ See Rosemary Laing (ed), *Odgers' Australian Senate Practice*, 'Order for Production of Documents' (14th Ed, 2016), 663.



LEGISLATIVE COUNCIL



Leader of the Opposition in the Legislative Council
Shadow Minister for Industry, Resources and Energy
Shadow Minister for Industrial Relations

The Honourable Adam Searle MLC

11 May 2018

Mr David Blunt

Clerk of the Parliaments

Parliament House

Macquarie Street

SYDNEY NSW 2000

**DISPUTE OF PRIVILEGE CLAIMS MADE IN RELATION TO THE RETURN TO ORDER ON
SYDNEY STADIUMS**

Dear Mr Clerk,

Please find below the grounds of my challenge to the privilege claimed over the *Memorandum of understanding – NSW Stadia Investment and Content*, created 24 November 2017 (“the MoU”) produced by the Office of the Minister for Sport.

DISPUTED PRIVILEGE CLAIM – OFFICE OF THE MINISTER FOR SPORT

I dispute the claim of privilege in relation to the *Memorandum of understanding – NSW Stadia Investment and Content*, created 24 November 2017 (“the MoU”).

The original privilege claim made by the Minister had three bases.

First, that the MoU requires each party to keep its terms confidential and that matters referred to in cl 9.6(a) or (b) of the MoU are not to be disclosed to any football code, sporting club or potential hirer.

Second, that the document contains commercially sensitive information which would be highly prejudicial to the interests of the National Rugby League to disclose.

Third, the Minister asserts that the information would be protected under common law principles or pursuant to the public interest considerations against disclosure detailed in the table to s14 of the *Government Information (Public Access) Act 2009 (NSW)*.

In support of these propositions, the original submission concludes with a list of eight different detriments that ‘*may arise*’ from disclosure of the MoU.

The submission was expressed to cover all four documents over which privilege is claimed by the Minister’s office. As I disputing the privilege claim in relation to MoU only, points 7 and 8 do not apply. However, and importantly, no details in support of the other claims are advanced for the Minister beyond the mere assertion that such risks ‘*may arise*’. Without any foundation provided, this submission should not be accepted.

No ground of privilege known to law is disclosed by the original submission, or the claims made in support of keeping access to it restricted to Members of the House. This is the case whether regard is had to the principles applicable in litigation or those advanced in my covering submission dated 23 April 2018.

Second Submission for the Minister

On Friday 4 May 2018, the various agencies involved in the return to order submitted further, more refined submissions that focussed only on those documents where the claimed privilege is challenged. In the further submission advanced for the Minister for Sport, the Minister “*adopts Venues NSW’s further submission in so far as it relates to the [MoU].*”

In Venues NSW’s further submission, this issue of the MoU is canvassed in paragraphs 5.7 to 5.15.

Confidential information claim

This is not a claim for privilege. In the further submission for the Minister, it is conceded that this claim does not raise any legal barrier: see Venues NSW further submission at 5.8, adopted by the Minister for Sport. At its highest, it is a request that the document not be disclosed because the parties wished to keep it between themselves. It does not assist the Arbiter in his role, which is to “*report whether legally recognised privileges as claimed apply to the disputed documents*”¹

Commercially sensitive information claim

This is merely asserted in the first submission for the Minister, but developed at paragraphs 5.8 and following of the Venues NSW further submission.

These submissions also do not disclose any claim of privilege known to law, which has been recognised in previous reports of the independent legal arbiter. At its highest, it is a request that in exercising its lawful power the House should - as a matter of discretion - not make the information available beyond Members of the House because it would cause commercial disadvantage to the NRLC/NRL (para 5.10, 5.11) and to the NSW Government (para 5.12).

¹ *Disputed Claim of Privilege – WestConnex Business Case*, Arbiter’s Report, 8 August 2014 (“*WestConnex Arbiter’s Report*”), p8

I refer the Arbiter to pages 3-4 of my submission of 23 April 2018. In summary, what the Arbiter has to determine is whether “a legally recognised privilege as claimed” applies to the disputed document.² The “relevant privilege is what, as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament.”³ The Arbiter will only find privilege exists if disclosure “is likely to injure the public interest”⁴ or it is “necessary in the public interest for [the document] not to be publicly disclosed.”⁵

The test is similar to, but not precisely the same as for public interest immunity. Under the doctrine of ‘public interest immunity’, historically described as ‘Crown privilege’, the Executive Government may seek to claim immunity from requests or orders, by a court or by Parliament, for the production of documents on the grounds that public disclosure of the documents in question would be prejudicial to the public interest.

In the judgment of the High Court of Australia in *Sankey v Whitlam* (1978) 142 CLR 1 it was held that the public interest in the administration of justice outweighed any public interest in withholding documents which were said to belong to a class of documents which may be protected from disclosure irrespective of their contents. The court held that such documents should be inspected by the court which should then itself determine whether the public interest rendered their non-disclosure necessary. The court held that a claim of Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. Accordingly a class claim supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers was not a tenable claim of Crown privilege: at 62–64.

Subsequent court decisions have also supported the principle that no class of document is entitled to absolute immunity from disclosure and that all cases may be resolved by the courts on the balance of the competing aspects of the public interest. See the judgement of the Federal Court of Australia in *Harbours Corporation of Queensland v. Vessey Chemicals Pty Ltd* (1986) 67 ALR 100, which analysed *Sankey v Whitlam* and subsequent judgements. The court found against the proposition that there was a presumption in favour of immunity from disclosure attaching to Cabinet documents.

In any consideration of this question it is important to bear in mind that, because different aspects of the public interest are involved—that is, the proper functioning of the Parliament as against the due administration of justice—the question of disclosure of documents to the Parliament (or in this case – having received the documents, by the Parliament) is not the same question as disclosure of documents to the courts. Similarly, the question here for the Arbiter is not the same as in legal

² *WestConnex* Arbiter’s Report, p8

³ *Disputed Claim of Privilege – Actions of a former WorkCover NSW employee*, Arbiter’s Report, 25 February 2013, p2

⁴ *WestConnex* Arbiter’s Report, p10-11, quoting Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52

⁵ *Egan v Chadwick* (1999) 46 NSWLR 563, per Priestley JA at [139] 593-594

proceedings – a point noted by the Arbiter in the report on the *WestConnex Business Case* at p7. The public interest in the present case is the capacity for Members of the House to properly scrutinise Executive policy and action, including by public discussion of the issues involved (which in this case also involves significant public expenditure and what the public will get for that investment, as opposed to what the other commercial parties will obtain) which (as the Arbiter has previously noted) *“is of the essence of representative democracy”*⁶

While, it is correct that the MoU discloses the level of proposed NSW Government investment (para 5.10 (a)) and the reciprocal obligations of the NRL (para 5.10 (c)), the disclosure of such matters is very much in the public interest and would not *“injure the public interest”* were it to be disclosed. Further, the matters set out at 5.10 (b) are not disclosed in the MoU, (noting that, in this version, the content of schedule 2 is missing) or certainly not in the level of detail that would cause the claimed detriment or that would make it *“necessary in the public interest for [the document] not to be publicly disclosed.”*

The same submission applies with equal force to the interests of the NSW Government set out in para 5.12. There is nothing in the MoU which would *“lead to a distortion of the venues market, which would directly affect the Government’s ability to obtain value for its investment of public funding.”* There is no information provided that support the sweeping claims made in support of keeping the document secret.

Common law principles, GIPAA basis

The Minister does not revisit this third basis for keeping confidential the MoU. It is to be assumed the ‘common law principles;’ relied upon by the Minister is a reference to Crown privilege or public interest immunity, which has been addressed above.

As the GIPA Act does not apply to the Parliament, it has no application to the present circumstance, as outlined at pages 3-4 of my submission of 23 April 2018.

I request to be able to reply to any further submissions advanced for the Minister.



The Hon. Adam Searle MLC

Leader of the Opposition in the Legislative Council

⁶ *WestConnex Arbiter’s Report*, p8



LEGISLATIVE COUNCIL



Leader of the Opposition in the Legislative Council
Shadow Minister for Industry, Resources and Energy
Shadow Minister for Industrial Relations

The Honourable Adam Searle MLC

14 May 2018

Mr David Blunt

Clerk of the Parliaments

Parliament House

Macquarie Street

SYDNEY NSW 2000

**DISPUTE OF PRIVILEGE CLAIMS MADE IN RELATION TO THE RETURN TO ORDER ON
SYDNEY STADIUMS**

Dear Mr Clerk,

Please find below the grounds of my challenge to the remaining claims of privilege claimed by the Office of Sport in relation to the Stadiums return to order.

DISPUTED PRIVILEGE CLAIM – OFFICE OF SPORT

I dispute the claim of privilege made over the documents highlighted in yellow in the index accompanying this submission.

I note the original submissions filed with the privilege claim and the subsequent further submissions provided to the Clerk for the Office of Sport on 4 May 2018. I note further the documents listed in Annexure A to that second submission wherein the Office no longer presses its privilege claims.

I refer the Arbiter to pages 3-4 of my submission of 23 April 2018. In summary, what the Arbiter has to determine in the present matter is whether *"a legally recognised privilege as claimed"* applies to the disputed document.¹ The *"relevant privilege is what, as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament."*² The Arbiter will only find

¹ *WestConnex* Arbiter's Report, p8

² *Disputed Claim of Privilege – Actions of a former WorkCover NSW employee*, Arbiter's Report, 25 February 2013, p2

privilege exists if disclosure “is likely to injure the public interest”³ or it is “necessary in the public interest for [the document] not to be publicly disclosed.”⁴ The test is similar to, but not precisely the same as for public interest immunity.

The submission – advanced for both the Office of Sport and for Venues NSW – that the test is “whether the document is ‘reasonably necessary’ for the proper exercise of the Legislative Council’s functions” should be rejected. It is for the House alone to determine whether a call for State papers is ‘reasonably necessary’ for its proper functioning. This was held in each of *Egan v Chadwick* (1999) 46 NSWLR 563 and *Egan v Willis* (1998) 195 CLR 424. In both the NSW Court of Appeal and the High Court of Australia, it was held that the Legislative Council has such powers as are reasonably necessary for the proper exercise of its functions. The making of an order for production of documents by ministers is a power held to be reasonably necessary for the performance of its functions. When the House makes an order that documents held by the Executive or its agencies be produced, it must have formed such a view. Further, in producing to the House documents in answer to such an order, the Executive has accepted that the order was within the scope of the power of the House; that is, that the production of said documents is reasonably necessary for the discharge by the House of its functions. It is not open to the Office of Sport (or indeed Venues NSW) now to reargue this issue, having produced the documents in answer to the order.

The test advocated by the Office of Sport is not supported by the relevant legal authorities, or by the approach of the Arbitrator (or past Arbitrators).

Legal Professional Privilege

Legal Professional Privilege, or Client Legal Privilege as it is now known, applies to communications given or received for the dominant purpose of giving legal advice or the provision of legal services.

The common law position has been modified in the *Evidence Act*. In the *Evidence Act*, the documents to which the privilege applies in those matters to which it applies include only:

- (a) a confidential communication made between the client and a lawyer; or
- (b) a confidential communication made between two or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client or the lawyer;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

The *Evidence Act* does not apply in the present context, but the matters above give some indication as to what could be protected if this privilege applies to this context (which I submit does not).

³ *WestConnex Arbitrator’s Report*, p10-11, quoting Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52

⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, per Priestley JA at [139] 593-594

Of the 20 documents over which privilege is claimed on this basis, legal professional privilege or client legal privilege would apply to a maximum of eight documents.

Documents to which privilege would attach, if the privilege is available

Only those documents behind tabs 85 and 92 are advice clearly identified in themselves as being from a legal practitioner. If the privilege applies, these documents would be subject to it. However, as I will submit below, even if the privilege would attach to them in other circumstances, in the present situation disclosure will only be withheld if it is held that it would be detrimental to the public interest.

Documents to which privilege may attach, if available

The documents behind tabs 75, 79 and 83 are the same: a one page document styled as being summary legal advice, but without any source or author being identified in the documents. The documents behind tabs 77, 80 and 82 are also the same as each other: a further document also styled as being summary legal advice, also without any identified source or author.

The document behind tab 78 is in the nature of correspondence and is not from or between legal practitioners and does not itself disclose any such advice (and so cannot be privileged). However, it does identify its attachments (documents behind tabs 79 and 80) as being advice from Clayton Utz. The document behind tab 81 is of the same nature as the document behind tab 79. Similarly, it identifies its attachments (the documents behind tabs 82 and 83) as being advice from Clayton Utz. The difficulty with accepting that they are legal advice is that there is no communication from that firm containing the advices, whether in draft or final form, which would have been captured by the return to order but have not been produced. If the covering emails at tabs 78 and 81 are correct, the agency has failed to return all the documents falling within the scope of the order of the House. Rather the documents, clearly in draft form, appear to reflect the position of the agency or the understanding of the agency about the matters contained in the documents, and which are or have been the subject of discussion with the agency's lawyers. However, there is nothing in the material that substantiates that the source of the document is a lawyer providing legal advice.

In any case, documents 75 and 77, standing alone and without any source or author identified, cannot be subject to the privilege, even if it applies to the present context and should be disclosed even if the other, similar documents are not.

The documents to which the privilege would not attach, even if available

For the reasons set out below, none of the other 12 documents come within the scope of legal professional privilege or client legal privilege, if that privilege is available in the present context.

The document behind tab 52 speaks of obtaining advice but it is not from a legal practitioner, or between legal practitioners, and the document itself was not created for the purpose of acquiring or receiving legal advice.

The documents behind tab 54-57 are merely in the nature of correspondence and clearly fall outside the scope of the privilege claimed. Document 54 is the same as document 52.

The document behind tab 65 contains an email chain, with only one communication from a legal practitioner, but none of the material contains any legal advice or other information that could reasonably be said to be confidential.

The document behind tab 66 is of the same nature. Although it contains what may loosely be described as advice, it is not from a legal practitioner.

The document behind tab 69 is styled as being Legal Advice, but its author is Karen Jones, an Executive Director within the agency. While it may be advice, it is not legal advice and cannot be subject to the privilege.

The document behind tab 72 is also styled as being advice, but the source is not identified and so the privilege claimed cannot arise.

The document behind tab 93 is in the nature of correspondence, including from a legal practitioner, but does not contain advice or any other confidential communication.

The privilege claimed, even if it is available in the present context, cannot be maintained in relation to these documents.

Documents 85 and 92

The document behind tab 85 is an email exchange between an employee of the agency and a solicitor for King Wood Mallesons, a firm of solicitors, and was on its face created as part of a process of obtaining/receiving legal advice. The document behind tab 92 is advice on planning law from another solicitor from the same firm. In curial proceedings, they would meet the test for client legal privilege. The question is whether this privilege is a privilege which as a matter of law exists between the Legislative Council and the Executive. On the basis of the applicable legal authorities, it is not.

As the Office of Sport correctly accepts at p23 of its **Annexure C**, legal professional privilege does not provide a basis upon which the Executive may refuse a call for papers made by the Legislative Council. Nothing in its argument set out at pages 24-26 provides any basis for a finding that the privilege which exists as a matter of law between the House and the Executive would of itself require that documents to which legal professional privilege otherwise applies be kept confidential.

The general importance of legal professional privilege in both curial proceedings and the wider administration of justice is not doubted; nor is the force and effect of the authorities cited. However they do not apply in the present context (which was well canvassed in the judgments of the Court of Appeal in *Egan v Chadwick*) and the Office of Sport has not pointed to any relevant authority that would persuade the Arbitrator to accept this submission. As the then Chief Justice in *Egan* noted, at [86], 578: *"In performing its accountability function, the Legislation Council may require access to legal advice on the basis of which the Executive acted, or purported to act."*

The claim that the administration of justice would be threatened by the release of such documents (**Annexure C**, p24) should not be accepted. The risk of disadvantaging government should litigation occur, does not arise here in circumstances where no such litigation is pending or even foreshadowed. The risk of creating discord between the legislature and the Executive is also

overstated, given the tension that exists in that relationship already and the role of the Parliament in holding Executive Government to account. Again, this is a matter identified in *Egan v Chadwick* at [34], 570; [46], 572; [80], 577; [92], [93], 579; [137], [138], 593.

The third reason advanced, defeat of the fundamental policy objective underpinning the privilege "*if the privilege were not generally available*" also does not arise here. There is no general removal of privilege proposed. Also, it is not proposed to remove it from a private citizen or in relation to personal or private commercial and legal rights more generally. At p3 of its submission, the Office of Sport, submits that it would create an odd precedent if government were not afforded the same rights in relation to "*any other citizen*". This misses the point. While government does have legal and commercial rights that legitimately need protection from time to time, these are not absolute and the wider public interest must take precedence. The way in which these competing interests are to be reconciled in the case of these documents is the application of the privilege which applies between the House and the Executive, which should be approached in a manner analogous to public interest immunity claims. How this should be done is discussed below.

Given the nature of the stadiums controversy, involving public policy considerations and the expenditure of significant amounts of public money, and the fact that Executive Government has already made its decision on this policy, there is no detriment to the public interest in the disclosure of these documents. Indeed, release of the documents would facilitate public discussion of the matters involved, which is "*of the essence of representative democracy*."

Public Interest Immunity

Under the doctrine of '*public interest immunity*', historically described as '*Crown privilege*', the Executive Government may seek to claim immunity from requests or orders, by a court or by Parliament, for the production of documents on the grounds that public disclosure of the documents in question would be prejudicial to the public interest. Importantly, the NSW Court of Appeal in *Egan v Chadwick* found this privilege did not apply in the present context.

In the judgment of the High Court of Australia in *Sankey v Whitlam* (1978) 142 CLR 1 it was held that the public interest in the administration of justice outweighed any public interest in withholding documents which were said to belong to a class of documents which may be protected from disclosure irrespective of their contents. The court held that such documents should be inspected by the court which should then itself determine whether the public interest rendered their non-disclosure necessary. The court held that a claim of Crown privilege has no automatic operation; it always remains the function of the court to determine upon that claim. Accordingly a class claim supported by reference to the need to encourage candour on the part of public servants in their advice to Ministers was not a tenable claim of Crown privilege: at 62–64.

Subsequent court decisions have also supported the principle that no class of document is entitled to absolute immunity from disclosure and that all cases may be resolved by the courts on the balance of the competing aspects of the public interest. See the judgement of the Federal Court of Australia in *Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd* (1986) 67 ALR 100, which analysed *Sankey v Whitlam* and subsequent judgements. The court found against the

proposition that there was a presumption in favour of immunity from disclosure attaching to Cabinet documents.

In any consideration of this question it is important to bear in mind that, because different aspects of the public interest are involved—that is, the proper functioning of the Parliament as against the due administration of justice—the question of disclosure of documents to the Parliament (or in this case – having received the documents, by the Parliament) is not the same question as disclosure of documents to the courts.

Similarly, the question here for the Arbiter is not the same as in legal proceedings – a point noted by the Arbiter in the report on the *WestConnex Business Case* at p7. The public interest in the present case is the capacity for Members of the House to properly scrutinise Executive policy and action, including by public discussion of the issues involved (which in this case also involves significant public expenditure and what the public will get for that investment, as opposed to what the other commercial parties will obtain) which (as the Arbiter has previously noted) “*is of the essence of representative democracy*”⁵

Contrary to the submission made on page 1 of the first submission, there is no basis provided to sustain the proposition that “*release of the information would prejudice the proper functioning of NSW Office for Sport.*” Further, in relation to the three categories taken into consideration by the Office in its first submission, I submit:

1. Dropbox account links: As a matter of discretion and judgement, not privilege, I accept there is no reason for this information to be publicly disclosed. It should be redacted.
2. Other “links” (referred to as ‘internal Departmental pathways’ in the second submission for the Office of Sport) which reveal the folder pathways of NSW Office of Sport’s internal IT folder structure: For the same reasons, this information should also be redacted.
3. Material protected by Parliamentary privilege: There is no material provided in the return to Order by the Office of Sport which is protected by Parliamentary privilege. The Office has not identified any such material. If it is said to refer to House folder notes provided for the potential use by the Minister, it has been accepted by previous Arbiters that Parliamentary privilege does not extend to material of this nature.

The second submission covers essentially the same material, with the addition of “passwords”. As with 1. and 2. above, any password appearing in any of the documents should be redacted.

In relation to the *General Submissions* section of the submissions provided on 4 May 2018, it rests upon the discussion set out in **Attachment C** to this submissions, which I note are also relied upon in the further submissions of Infrastructure NSW. In summary, however, it proceeds on the basis that the legal test to be applied here is whether the disclosure of the documents is ‘*reasonably necessary*’ for the ‘*proper exercise*’ of the Legislative Council’s functions. Contrary to the submission at the final paragraph of p18, there is no authority for this proposition. Nor can it said to be derived from

⁵ *WestConnex* Arbiter’s Report, p8

broader Constitutional principles. Rather, this is the test the House itself must be satisfied of in order to make a call for State papers: *Egan v Willis* [2], 565.

In the penultimate paragraph of p18 to **Annexure C**, the Office of Sport accepts that the House - analogous to a court - is required to prohibit the disclosure of documents which it has obtained where disclosure is inimical to the public interest.", citing *Egan v Chadwick* in support of that proposition. I accept this and it is consistent with my submission that the proper legal test for the Arbiter to apply here is whether disclosure would be inimical to the public interest. Further, it would be inconsistent with this approach if there was a second '*reasonably necessary*' test for the House to apply, this time in relation to disclosure rather than production.

On the one hand, the '*public interest*' test is found in *Egan v Chadwick*. On the other hand, there is a complete absence of any authority in support of this 'second test' proposition advanced by the Office of Sport. The existence of such a second test, or a second application of the same test, would be overly complicated, is unnecessary, and its existence should not be implied as suggested by the Office of Sport. There is nothing in *Egan v Chadwick* or other applicable authority that supports it.

As stated at p19 of **Annexure C**, where a claim of privilege is made Parliament is said to be *duty bound* to balance the competing interests which may impact the resolution of that question in a manner 'broadly equivalent' to a judicial resolution of privilege disputes, again citing *Egan v Chadwick*. This proposition is supportive of the approach for which I am advocating, rather than the 'second test' approach being advanced by the Office of Sport. This is because the approach speaks to the nature of the privilege which is at issue, which informs the nature of the role of the Arbiter: to report on whether a legally recognised privilege between the Executive and the House exists.

Pages 20-21 of **Annexure C** proceed on two false bases: the wrong legal test to be applied in the present context and assuming that I have advocated that the Arbiter can make a decision which is one which is for the House alone.

The discussion of what privilege is available in the present context, found at pp21-22 of **Annexure C**, provides a summary of what the Office of Sport submits are the relevant principles. This submission should be rejected, for the following reasons:

- a. **be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);⁶**

This submission cannot be safely drawn from *Egan v Chadwick*. The parts of *Egan v Chadwick* relied upon for this submission focus on whether or not Cabinet documents, or some Cabinet documents, are immune from production. The comment by the then Chief Justice at [88], 579 makes clear that whether documents fell within the scope of any immunity or privilege would depend upon whether "*their disclosure would have a consequence which gives rise to a conflict with constitutional principle.*" It is also clear that

⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 579

in his view, any privilege would not derive from *public interest immunity* or *legal professional privilege* claims at common law.

b. undermine a “fundamental right” or “principle” recognised by the general law;⁷

Again the submission does not reflect a fair reading of the decision of the NSW Court of Appeal in *Egan v Chadwick* or those parts which are footnoted. In those parts which are relied upon by the Office of Sport, Priestley JA is summarising the argument being put him, which ultimately was not successful in the court. These parts also do not reflect His Honour’s conclusions on the matter, at:

[127], 590, where he queries whether “*the policy behind the doctrine has any relevance to the different kind of situation that arises between the executive and a House of Parliament.*” and

[139], 593, where His Honour concludes that legal professional privilege does not apply when a House of Parliament seeks the production of Executive documents, and further at

[140], 594, where His Honour reaches the same conclusion, but with greater force, regarding public interest immunity.

iii. “threaten the proper functioning of the Executive arm and of the public service”;⁸ and/or

Again, that part of the *Egan* case cited here does not establish this proposition, and goes too far, particularly given the conclusion by the NSW Court of Appeal that public interest immunity does not apply in the present context and did not limit the scope of the Legislative Council’s power. However, application of what I submit is the correct test – whether disclosure is inimical to the public interest – would capture a step that did in truth threaten or undermine the Executive arm (which would include the public service).

iv. be otherwise inconsistent with the “public interest” (and thus no longer be “reasonably necessary” for the “proper exercise” of the Legislative Council’s functions);⁹ and

This submission is correct, insofar as conflict with or harm to the public interest would justify non-disclosure of disputed documents. However, there is nothing in *Egan* or any other applicable authority that justifies a

⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 587

⁸ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-594; *Sankey v Whitlam* (1978) 142 CLR 1, 56

⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-594

second “*reasonably necessary*” test, or a second application of the same test.

Privacy

The claims made on this basis do not disclose any claim of privilege known to law, whether in the context of litigation or in the Executive-Parliament context. However, accepting that personal details of members of the public should only be disclosed in rare cases, I agree that personal information of individual members of the public should be redacted to avoid identification, whether in documents they have sent or provided to government and in any government documents. This would include details such as any person’s:

- ☐ Postal address;
- ☐ Residential address;
- ☐ Telephone numbers;
- ☐ Email address;
- ☐ Membership numbers;
- ☐ Bank account and/or credit card numbers.

For businesses or companies, there are no privacy issues as such. However, I think that any bank account and/or credit card details belonging to companies should also be redacted.

Commercial in confidence - agreements with sporting codes

The Office of Sport correctly accepts that the fact the parties have agreed to keep these documents confidential does not overcome any compulsion of law.

Commercial-in-confidence, as I set out at pages 3-4 of my submission of 23 April 2018, is also not a privilege known to law. See also the *WestConnex* Arbitrator’s Report p10. The test is whether disclosure of the documents would be inimical to the public interest.

The six documents in this category are said to record three things:

- (a) the level of investment to which Government commits:

Disclosure of this information is largely already in the public domain. In any case, disclosure would be in the public interest.
- (b) the ARLC and ARU’s intentions regarding naming rights, supplier rights, corporate hospitality, venue hire fees, ticketing, stadium members, technology, merchandise and other key elements:

The documents do not disclose information of this character. If, on reviewing the material, the Arbiter forms a different view, these details should be redacted.

- (c) the ARLC and ARU's commitment to hosting particular events, for a particular time, at particular venues.

This information goes beyond private commercial information to the heart of what the NSW public will get in return for the significant investment by the NSW Government. There is no detriment to the public interest that would arise from disclosure of this material. Disclosure would be in the public interest.

The harm that disclaimed would be suffered by the ARLC, NRL and ARU from disclosure of the documents is not substantiated by any information provided, nor from a review of the documents. These claims should not be accepted.

The prejudice to Government that is claimed should also not be accepted. There is no material to substantiate the claim that disclosure of the MOUs *"would lead to a distortion of the venues market, which would directly affect the Government's ability to obtain value for money for its investment in public funding."* To the contrary, disclosure will reveal what benefits the public will receive for the investment.

Commercial in confidence claims - general

There is no "commercial-in-confidence" privilege. For privilege to attach to these documents a relevant detriment to the public interest would have to be established.

In relation to these documents, I say:

- (a) **banking details etc:** These details should be redacted. There is no privilege but as a matter of good sense and discretion they should not be disclosed.
- (b) **commercially sensitive methodology and know-how of private commercial entities:** There is no such information contained in these documents.
- (c) **commercially sensitive pricing data (including hourly rates) of private commercial entities:** There is also no such information contained in these documents. Some documents do disclose the hourly rates charged by a well-known consulting firm but this is not constitute '*commercially sensitive pricing information*'. While not privileged, the hourly rates charged should be redacted.
- (d) **Insurance certificates of private commercial entities:** No privilege attaches to these documents and no basis to withhold them has been advanced.

Among these documents are documents that do show how much has been charged by consulting firms and what work they performed. Disclosure of this information, in the context of the stadiums controversy, is very much in the public interest and does not disclose any proprietary information or anything that could be termed 'trade secrets' or otherwise confidential information.

Documents 62 and 64 do not reveal "*KPMG's social media monitoring strategy and methodology*". They are presentational material outlining how the firm proposes to deal with the particular issue of the stadiums and does not disclose broader commercial information of, or relating to, the firm.

The harms claimed at paragraphs (a) to (e) on p7 of the submission are not substantiated by any material provided and should not be accepted.

At p8 of its submission, the Office of Sport seeks to characterise my earlier submission of 23 April. In reply, I say:

- (a) I do not suggest that the independent legal arbiter should '*go beyond a technical evaluation of claims of privilege and [emphasise] the balancing of competing interests*'. To say so is a misreading of my submission. I refer in particular to p3 of my 23 April submission where I set out my understanding of the Arbiter's role, as set out by the Arbiter himself.
- (b) to (e) are a correct understanding of my earlier submission.

There should be no lack of clarity as to what factors bear upon the '*public interest*' and the '*balancing*' process, which is complained of by the Office of Sport.

The relevant privilege is the privilege which exists as a matter of law between the Executive and the Legislative Council. This is to be determined by whether disclosure of a particular document would cause a relevant harm to the public interest. This issue is to be determined by approaching the matter in a manner analogous to public interest immunity matters, as I have discussed above.

In relation to the concluding submissions on p8, I reply as follows:

- a) **Only the Legislative Council can resolve claims of privilege. The independent arbiter does not have the power to do so.**

This is agreed and, so far as I am aware, has never been in doubt or the subject of controversy. The role of the Arbiter is to report to the House as to whether (in his view) a "*legally recognised privilege*", or the privilege "*which as a matter of law exists between the Executive and the Upper House*", applies to disputed documents.

- b) **The test to be applied is not whether a relevant harm to the public interest has been established, but whether the release is '*reasonably necessary*' for the '*proper exercise*' of any of the Legislative Council's powers.**

This submission should be rejected, as I have argued above. In calling for State papers, the House has already determined that to do so is '*reasonably necessary*' for the '*proper exercise*' of its powers. The Executive, in complying with the order, has accepted this. There

is also no authority that supports the argument advanced here for the application of a second test (or a second application of the same test).

c) **When considering the release of documents over which privilege is claimed, the following factors must be balanced, including whether disclosure would:**

- i. **be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);¹⁰**

This submission cannot be safely drawn from *Egan v Chadwick*. The parts of *Egan v Chadwick* relied upon for this submission focus on whether or not Cabinet documents, or some Cabinet documents, are immune from production. The comment by the then Chief Justice at [88], 579 makes clear that whether documents fell within the scope of any immunity or privilege would depend upon whether *"their disclosure would have a consequence which gives rise to a conflict with constitutional principle."* It is also clear that in his view, any privilege would not derive from *public interest immunity* or *legal professional privilege* claims at common law.

- ii. **undermine a "fundamental right" or "principle" recognised by the general law;¹¹**

Again the submission does not reflect a fair reading of the decision of the NSW Court of Appeal in *Egan v Chadwick* or those parts which are footnoted. In those parts which are relied upon by the Office of Sport, Priestley JA is summarising the argument being put him, which ultimately was not successful in the court. These parts also do not reflect His Honour's conclusions on the matter, at:

[127], 590, where he queries whether *"the policy behind the doctrine has any relevance to the different kind of situation that arises between the executive and a House of Parliament."* and

[139], 593, where His Honour concludes that legal professional privilege does not apply when a House of Parliament seeks the production of Executive documents, and further at

[140], 594, where His Honour reaches the same conclusion, but with greater force, regarding public interest immunity.

- iii. **"threaten the proper functioning of the Executive arm and of the public service";¹² and/or**

Again, that part of the *Egan* case cited here does not establish this proposition, and goes too far, particularly given the conclusion by the NSW

¹⁰ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 579

¹¹ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 587

¹² *Egan v Chadwick* (1999) 46 NSWLR 563, 593-594; *Sankey v Whitlam* (1978) 142 CLR 1, 56

Court of Appeal that public interest immunity does not apply in the present context and did not limit the scope of the Legislative Council's power. However, application of what I submit is the correct test – whether disclosure is inimical to the public interest – would capture a step that did in truth threaten or undermine the Executive arm (which would include the public service).

- iv. **be otherwise inconsistent with the “public interest” (and thus no longer be “reasonably necessary” for the “proper exercise” of the Legislative Council’s functions);¹³ and**

This submission is correct, insofar as conflict with or harm to the public interest would justify non-disclosure of disputed documents. However, there is nothing in *Egan* or any other applicable authority that justifies a second “reasonably necessary” test, or a second application of the same test.

- d) **Further publication of the disputed documents cannot be said to be characterised as ‘reasonably necessary’ for the ‘proper exercise’ of any of the Legislative Council’s functions.**

As submitted above, this argument is misconceived as it proceeds on the wrong premise; firstly, as to the correct legal test, and secondly that it is not for the Arbiter to determine what is ‘reasonably necessary’ for the ‘proper exercise’ of the functions of the House: that is for the House (which the Office of Sport accepted in other parts of its submission, including **Annexure C**). In making the order, the House has already determined its view that the order was ‘reasonably necessary’ and the Executive has complied with that order.

I request to be able to reply to any further submissions advanced for the Office of Sport.



The Hon. Adam Searle MLC

Leader of the Opposition in the Legislative Council

¹³ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-594



LEGISLATIVE COUNCIL



Leader of the Opposition in the Legislative Council
Shadow Minister for Industry, Resources and Energy
Shadow Minister for Industrial Relations

The Honourable Adam Searle MLC

14 May 2018

Mr David Blunt

Clerk of the Parliaments

Parliament House

Macquarie Street

SYDNEY NSW 2000

DISPUTE OF PRIVILEGE CLAIMS MADE IN RELATION TO THE RETURN TO ORDER ON SYDNEY STADIUMS

Dear Mr Clerk,

Five of the six agencies providing a return to order make claims of privilege over a number of documents on the basis that there would be an unwarranted disclosure of personal information belonging or relating to individual members of the public.

Please find below a general submission I make which applies to all the privilege claims made on this basis in relation to disputed documents from Venues NSW, Infrastructure NSW, the Sydney Cricket and Sports Ground Trust and the Department of Premier and Cabinet.

The submission has also been made in my submission provided this day relating to the disputed documents provided by the Office of Sport.

No issue in relation to privacy/personal information arose in relation to the one disputed document produced by the Office of the Minister for Sport.

DISPUTED PRIVILEGE CLAIM – PRIVACY/PERSONAL INFORMATION CLAIMS

The claims made on this basis by the five agencies do not disclose any claim of privilege known to law, whether in the context of litigation or in the Executive-Parliament context.

However, accepting that personal details of members of the public should only be disclosed in rare cases, I agree that personal information of individual members of the public should be redacted to avoid identification, whether in documents they have sent or provided to government and in any government documents. This would include details such as any person's:

- Postal address;
- Residential address;
- Telephone numbers;
- Email address;
- Membership numbers;
- Bank account and/or credit card numbers;
- Any other personal identifiers.

For businesses or companies, there are no privacy issues as such. However, I think that any bank account and/or credit card details belonging to them should also be redacted.

Regards,

A handwritten signature in black ink, appearing to be 'Adam Searle', with a large, stylized loop at the end.

The Hon. Adam Searle MLC

Leader of the Opposition in the Legislative Council



LEGISLATIVE COUNCIL



Leader of the Opposition in the Legislative Council
Shadow Minister for Industry, Resources and Energy
Shadow Minister for Industrial Relations

The Honourable Adam Searle MLC

14 May 2018

Mr David Blunt

Clerk of the Parliaments

Parliament House

Macquarie Street

SYDNEY NSW 2000

DISPUTE OF PRIVILEGE CLAIMS MADE IN RELATION TO THE RETURN TO ORDER ON SYDNEY STADIUMS

Dear Mr Clerk,

Please find below the grounds of my dispute of the remaining claims of privilege maintained by Infrastructure NSW ("INSW") in relation to the Stadiums return to order.

DISPUTED PRIVILEGE CLAIM – INFRASTRUCTURE NSW

I note the original submissions made for INSW in relation to the stadiums return to order and the further submissions made for it on 4 May 2018. In particular, I note the documents listed at Annexure A wherein the claims of privilege are no longer pressed.

INSW relies upon the same **Annexure C** that were attached to the submissions for the Office of Sport. To the extent that I do not here reproduce in full my submissions on the matters canvassed in **Annexure C** which I advanced in relation to the privilege claims made by the Office of Sport, I invite the Arbiter to have regard to them in answer to the claims advanced here by INSW.

In *Egan v Chadwick* (1999) 46 NSWLR 563, the NSW Court of Appeal found that neither legal professional privilege or public interest immunity applied in the context of a dispute between the Legislative Council and the Executive: [50], 573; [79], 577; [86], 578; [127], 590; [139], 593; [140], 594; [152], 596. Nevertheless, in seeking to resist the disclosure of documents produced in answer to a call for State papers by the Legislative Council, agencies have continued to advance these style of claims, along with others (such as *commercial in confidence* and *privacy*) which are not grounds of privilege known at law.

As to the approach the Arbiter should take to this matter, I refer the Arbiter to pages 3-4 of my submission of 23 April 2018 and pages 1-2 of my submissions in relation to disputed privilege claims maintained by the Office of Sport of 14 May 2018. In summary, what the Arbiter has to determine is whether “a legally recognised privilege as claimed” applies to the disputed documents.¹ The “relevant privilege is what, as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament.”² The Arbiter will only find privilege exists if disclosure “is likely to injure the public interest”³ or it is “necessary in the public interest for [the document] not to be publicly disclosed.”⁴

The submission advanced here for INSW – that the test for the Arbiter is whether disclosure is ‘reasonably necessary’ for the ‘proper exercise’ of the functions of the House – should be rejected for the reasons I advanced in my submissions in relation to the disputed privilege claims made by the Office of Sport.

Regarding those documents that remain in dispute, I will adopt the structure of INSW’s further submissions.

Privacy claims

Although the claims made on this basis do not disclose any claim of privilege known to law, whether in the context of litigation or in the Executive-Parliament context, I agree that the personal details of members of the public should only be disclosed in rare cases and that the personal information of individual members of the public should be redacted to avoid identification in the way I proposed in my submission regarding the dispute with the Office of Sport at p9 and in my general submission on privacy/personal information claims made in relation to the stadiums return to order.

Public Interest Immunity

Under the doctrine of ‘public interest immunity’ (“PII”), the Executive Government may seek to claim immunity from requests or orders, by a court or by Parliament, for the production of documents on the grounds that public disclosure of the documents in question would be prejudicial to the public interest. I refer to my earlier submissions of 23 April at pages 5-6 as to how this matter should be approached in the context of the present dispute, given that PII does not in terms apply to disputes between the Legislative Council and the Executive.

The test is similar to, but not precisely the same as for PII. In any consideration of this question it is important to bear in mind that, because different aspects of the public interest are involved—that is, the proper functioning of the Parliament as against the due administration of justice—the question

¹ WestConnex Arbiter’s Report, p8

² Disputed Claim of Privilege – Actions of a former WorkCover NSW employee, Arbiter’s Report, 25 February 2013, p2

³ WestConnex Arbiter’s Report, p10-11, quoting Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52

⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, per Priestley JA at [139] 593-594

of disclosure of documents to the Parliament (or in this case – having received the documents, by the Parliament) is not the same question as disclosure of documents to the courts.

Similarly, the question here for the Arbiter is not the same as in legal proceedings – a point noted by the Arbiter in the report on the *WestConnex Business Case* at p7. The public interest in the present case is the capacity for Members of the House to properly scrutinise Executive policy and action, including by public discussion of the issues involved (which in this case also involves significant public expenditure and what the public will get for that investment, as opposed to what the other commercial parties will obtain) which (as the Arbiter has previously noted) “*is of the essence of representative democracy*”⁵

In this category, there is only one remaining disputed document. Similar to the Office of Sport claims, this involves three URLs to “Dropbox” folders where documents are stored for general access by those with whom the URL has been shared. INSW is concerned that disclosure of the URL would permit access not only to the “Dropbox” folders but to other INSW documents as well, with a resultant detriment to the security of the agency.

The Arbiter should not accept the legal test advanced at p3 of the INSW submissions, that disclosure should be permitted only if held to be ‘*reasonably necessary*’ for the ‘*proper exercise*’ of the functions of the House. As is submitted by INSW at p4 of its second submissions, it is not for the Arbiter to determine this issue, but for the House itself. The Arbiter may only report on the existence or non-existence of privilege.

Furthermore, the documents have already been produced to the House by the Executive in answer to a call for State papers. The presumption, therefore, is in favour of disclosure. The agency bears the heavy onus of establishing the existence of the requisite privilege that as a matter of law exists between the House and the Executive that would require the documents to be kept confidential. Based on the authorities, the privilege only exists if disclosure would cause harm to the public interest.

However, as the only concern identified by the agency is the URL it should be redacted and the balance of the document able to be disclosed.

Summary of the INSW submissions

At p3 of its submission, INSW seeks to characterise my earlier submission of 23 April. In reply, I say:

- (a) I do not suggest that the independent legal arbiter should ‘*go beyond a technical evaluation of claims of privilege and [emphasise] the balancing of competing interests*’. To say so is a misreading of my submission. I refer in particular to p3 of my 23 April submission and earlier in this submission where I set out my understanding of the Arbiter’s role, as set out by the Arbiter himself.
- (b) to (e) are a correct understanding of my earlier submission.

⁵ *WestConnex Arbiter’s Report*, p8

There should be no lack of clarity as to what factors bear upon the '*public interest*' and the '*balancing*' process, which is complained of by INSW at the top of p4 of its second submission.

The relevant privilege is the privilege which exists as a matter of law between the Executive and the Legislative Council. This is to be determined by whether disclosure of a particular document would cause a relevant harm to the public interest. This issue is to be determined by approaching the matter in a manner analogous to public interest immunity matters, as I have discussed above.

In relation to the concluding submissions on p4, I reply as follows:

- a) **Only the Legislative Council can resolve claims of privilege. The independent arbiter does not have the power to do so.**

This is agreed and, so far as I am aware, has never been in doubt or the subject of controversy. The role of the Arbiter is to report to the House as to whether (in his view) a "*legally recognised privilege*", or the privilege "*which as a matter of law exists between the Executive and the Upper House*", applies to disputed documents.

- b) **The test to be applied is not whether a relevant harm to the public interest has been established, but whether the release is '*reasonably necessary*' for the '*proper exercise*' of any of the Legislative Council's powers.**

This submission should be rejected, as I have argued above and my earlier submission of 14 May in connection with the disputed privilege claims made by the Office of Sport. In calling for State papers, the House has already determined that to do so is '*reasonably necessary*' for the '*proper exercise*' of its powers. The Executive, in complying with the order, has accepted this. There is also no authority that supports the argument advanced here for the application of a second test (or a second application of the same test).

- c) **When considering the release of documents over which privilege is claimed, the following factors must be balanced, including whether disclosure would:**

- A) **be inconsistent with, or undermine, another constitutional principle (e.g. collective responsibility);⁶**

This submission cannot be safely drawn from *Egan v Chadwick*. The parts of *Egan v Chadwick* relied upon for this submission in **Annexure C** focus on whether or not Cabinet documents, or some Cabinet documents, are immune from production. The comment by the then Chief Justice at [88], 579 makes clear that whether documents fell within the scope of any immunity or privilege would depend upon whether "*their disclosure would have a consequence which gives rise to a conflict with constitutional principle.*" It is also clear that in his view, any privilege would not derive from *public interest immunity* or *legal professional privilege* claims at common law.

⁶ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 579

B) undermine a “fundamental right” or “principle” recognised by the general law;⁷

Again the submission does not reflect a fair reading of the decision of the NSW Court of Appeal in *Egan v Chadwick* or those parts which are footnoted in **Annexure C**. In those parts which are relied upon by INSW, Priestley JA is summarising the argument being put him, which ultimately was not successful in the court. These parts also do not reflect His Honour’s conclusions on the matter, at:

[127], 590, where he queries whether “*the policy behind the doctrine has any relevance to the different kind of situation that arises between the executive and a House of Parliament.*” and

[139], 593, where His Honour concludes that legal professional privilege does not apply when a House of Parliament seeks the production of Executive documents, and further at

[140], 594, where His Honour reaches the same conclusion, but with greater force, regarding public interest immunity.

C) “threaten the proper functioning of the Executive arm and of the public service”,⁸ and/or

Again, that part of the *Egan* case cited in **Annexure C** does not establish this proposition, and goes too far, particularly given the conclusion by the NSW Court of Appeal that public interest immunity does not apply in the present context and did not limit the scope of the Legislative Council’s power. However, application of what I submit is the correct test – whether disclosure is inimical to the public interest – would capture a step that did in truth threaten or undermine the Executive arm (which would include the public service).

D) be otherwise inconsistent with the “public interest” (and thus no longer be “reasonably necessary” for the “proper exercise” of the Legislative Council’s functions);⁹ and

This submission is correct, insofar as conflict with or harm to the public interest would justify non-disclosure of disputed documents. However, there is nothing in *Egan* or any other applicable authority that justifies a second “*reasonably necessary*” test, or a second application of the same test.

⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 576, 587

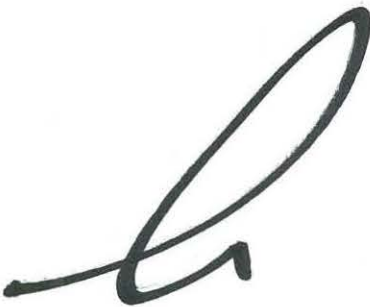
⁸ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-594; *Sankey v Whitlam* (1978) 142 CLR 1, 56

⁹ *Egan v Chadwick* (1999) 46 NSWLR 563, 593-594

- d) Further publication of the disputed documents cannot be said to be characterised as '*reasonably necessary*' for the '*proper exercise*' of any of the Legislative Council's functions.

As submitted above and in earlier submissions, this argument is misconceived as it proceeds on the wrong premise; firstly, as to the correct legal test, and secondly that it is not for the Arbitrator to determine what is '*reasonably necessary*' for the '*proper exercise*' of the functions of the House: that is for the House (which INSW accepted in its reliance on **Annexure C**). In making the order, the House has already determined its view that the order was '*reasonably necessary*' and the Executive has complied with that order.

I request to be able to reply to any further submissions advanced for INSW.

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a smaller 'S' and a final flourish.

The Hon. Adam Searle MLC

Leader of the Opposition in the Legislative Council

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Order for Papers – Sydney Stadiums

Dear Mr Blunt

I refer to the resolution of the Legislative Council under Standing Order 52 made on 15 March 2018. I also refer to your email of 11 May 2018 attaching a further letter from the Honourable Adam Searle MLC regarding the dispute he has lodged relating to the privilege claim made over a document in the Sydney Stadiums return to order provided by the Office of the Minister for Sport.

In your email, you advised that the Independent legal arbiter, the Honourable Keith Mason AC QC, has invited a response to Mr Searle's further letter by **5pm on Tuesday 15 May**.

In accordance with your request, I enclose at **Annexure A** to this letter further submissions from:

- the Office of the Minister for Sport,
- Venues NSW and
- the Sydney Cricket and Sports Ground Trust.

Should you require any clarification or further assistance, please contact me on telephone (02) 9228 4514.

Yours sincerely



Karen Smith
Deputy Secretary, Cabinet and Legal

15 May 2018

ORDER FOR PAPERS – SYDNEY STADIUMS

SUBMISSION IN SUPPORT OF CLAIM FOR CONFIDENTIALITY AND PRIVILEGE BY THE OFFICE OF THE MINISTER FOR SPORT – RESPONSE TO LETTER OF THE HON. ADAM SEARLE DATED 11 MAY 2018

The Office of the Minister for Sport has made two previous submissions in support of its claim for privilege, namely:

- a submission provided to Parliament on **5 April 2018** (along with the documents it provided on a privileged basis in response to the Legislative Council's resolution seeking the production of documents relating to the Sydney Stadiums under Standing Order 52); and
- a further submission provided to the independent legal arbiter appointed under Standing Order 52, the Hon Keith Mason AC QC, on **4 May 2018** (in response to the letter from the Hon. Adam Searle MLC dated 23 April 2018 notifying of Mr Searle's intention to dispute a number of the privilege claims made in relation to the documents provided in response to the Legislative Council's resolution).

On 11 May 2018, a further letter was received from Mr Searle, outlining the grounds of his challenge to the privilege claimed by the Office of the Minister for Sport over the document identified as document (e)1 and described as 'Memorandum of Understanding – NSW Stadia Investment and Content' (the **Document**).

In response to Mr Searle's most recent letter, the Office of the Minister for Sport again confirms that the original claim for privilege in respect of the Document is maintained, without qualification, and reiterates both its submission of 5 April 2018 and its submission of 4 May 2018 in support of that claim. The Office of the Minister for Sport also makes this further submission in support of the claim for privilege.

We note that a copy of the Document was provided by a number of other agencies on a privileged basis, including Venues NSW. Having had regard to Mr Searle's further letter of 11 May 2018, which directly addresses Venues NSW's further submission of 4 May 2018, Venues NSW has made a further submission in support of its claim for privilege relating specifically to the Document. The Office of the Minister for Sport adopts Venues NSW's further submission.

The Office of the Minister for Sport also notes and relies on the two letters provided by the National Rugby League, being the letter attached to the Office's original submission of 5 April 2018, and a further letter provided to the arbiter via the Clerk of the Parliaments, Legislative Council, on 4 May 2018. The Office of the Minister for Sport considers rejection of the privilege claim made over the Document would prejudice the workings of Government generally and in relation to the matters addressed in Venues NSW's further submission and would be detrimental to the financial interests of taxpayers (Report Under Standing Order 52 On Disputed Claim Of Privilege - WestConnex Business Case pg11).

For the reasons given in its previous submissions, the submissions of Venues NSW, and the letter provided by the National Rugby League, the Office of the Minister for Sport maintains that it would be detrimental to the public interest for the Document to be made public.

The Office of the Minister for Sport would be happy to provide any further information or assistance requested by the arbiter.

STANDING ORDER 52 - NSW STADIA

VENUES NSW SUPPLEMENTARY SUBMISSION ON DISPUTED CLAIMS OF PRIVILEGE

On 11 May 2018, Mr Searle MLC provided further submissions in related to the disputed claim of privilege made by Government agencies in connection with the Memorandum of Understanding between Government parties and the National Rugby League (NRL) and Australian Rugby League Commission (ARLC) dated 24 November 2017 (MOU).

1. MR SEARLE'S SUBMISSION

1.1 The substance of Mr Searle's submission is that:

- (a) the Independent Arbiter's task is to determine whether the MOU is privileged as a matter of law;
- (b) a privilege claim may be able to be made in circumstances where it can be shown that disclosure of a document will "*injure the public interest*" or would be "*prejudicial to the public interest*";
- (c) it is for the agency asserting the privilege to demonstrate it, and the relevant Government agencies have not done this, apart from what Mr Searle describes as, among other things, "*sweeping claims*"; and
- (d) in any event, disclosure of the MOU would not injure the public interest. Rather, it is in the public interest that the document be disclosed.

1.2 In relation to the legal point made by Mr Searle, while the Independent Arbiter's task is to determine whether privilege subsists in a document, in the case of a privilege being claimed on the basis of public interest immunity (as is the case with the MOU), consideration of that privilege will inevitably involve a consideration of the public interest and, as has been variously described by the Independent Arbiter, involve a weighting exercise (WestConnex Report at 9) or application of "*balancing tests*" (WestConnex Report at 6).

1.3 Venues NSW's claims of privilege do not rest merely on the proposition that disclosure of the documents in respect of which privilege is claimed would prejudice Venues NSW or Government as a whole. Rather, the claims rest on the fact that the prejudice produces a number of consequences which would injure, or are otherwise contrary to, the public interest.

2. VENUES NSW'S STATUTORY CONTEXT

2.1 In order to understand in more detail the way in which the public interest operates in respect of Venues NSW, it is useful to consider Venues NSW's statutory context.

2.2 Venues NSW is constituted as a "*regional sporting venues authority*" under section 12 and Schedule 1 of the *Sporting Venues Authorities Act 2008 (SVA Act)*. The functions of a "*regional sporting venues authority*" are set out at section 21 which provides:

"(1) *The principal functions of a regional sporting venues authority are as follows:*

- (a) *to maintain and improve the authority's land,*
- (b) *to establish and manage sporting grounds, sporting facilities and recreational facilities (whether or not on the authority's land),*
- (c) *to establish and manage facilities for the purposes of sporting competitions, sports training and sports education (whether or not on the authority's land),*

- (c1) *to establish and manage community facilities and to establish and manage facilities for community and recreational purposes (whether or not on the authority's land),*
- (d) *to permit the use of the whole or any part of the authority's land for activities of a sporting, recreational or community nature, including the use of that land for events and general community access,*
- (e) *to encourage the use and enjoyment of the authority's land by the public and clubs, associations or other bodies, where appropriate in its opinion,*
- (f) **to undertake or provide, or facilitate the undertaking or provision of, commercial and retail activities and facilities on the authority's land,**
- (g) *to make all reasonable attempts to ensure that any new development carried out on the authority's land accords with best practice environmental and planning standards,*
- (h) *to ensure that proper asset management plans are in place and are implemented for the authority's land."* (Emphasis added)

2.3 Venues NSW owns, Stadium Australia, Hunter Stadium and Newcastle Entertainment Centre in Newcastle, Wollongong Stadium and the Wollongong Entertainment Centre. It will also own the Western Sydney Stadium at Parramatta which is currently under construction and due for completion in 2019. Venues NSW has recently appointed an operator for the Western Sydney Stadium which operator has commenced negotiations to secure high quality content for that venue.

2.4 Venues NSW's overall business model operates through:

- (a) the key revenue drivers of Stadium Australia (and Western Sydney Stadium in future) providing the majority of revenue;
- (b) this revenue is then used to fund Venues NSW in exercising its functions including operating the other stadia which it owns; and
- (c) the revenue can also be used in order to exercise Venues NSW's other section 21 functions, including in relation to land which it does not own.

2.5 However, the key to all of this is maximising revenue derived from the premium venues. Quite simply, the more successful that Venues NSW can be in generating revenue from its premium assets, the primary source of which is venue hire revenue, the more funding that will be available for sporting, recreational and community facilities in NSW.

2.6 Further, under section 15, Venues NSW is subject to the direction and control of the Minister for Sport in the exercise of its functions.

2.7 In other words, the effective fulfilment by Venues NSW of its statutory functions is predicated on its ability to obtain value for money on its commercial transactions in respect of the stadia assets which it owns and/or operates. Without this, Venues NSW will be significantly impaired in its ability to carry out each of its section 21 functions.

3. CONSEQUENCES OF DISCLOSURE OF THE MOU FOR GOVERNMENT

3.1 Venues NSW's submissions to date have focussed on the conceptual nature of the respective public interests which would be relevant if the MOU were to be disclosed.

- 3.2 In order to appreciate the significance of the adverse impact if the MOU was disclosed, it is necessary to understand the character and context of that document:
- (a) Firstly, the MOU is the culmination of extended commercial negotiations which contains the key terms on which the ARLC/NRL has agreed to hire venues in NSW for “premium content” events, and the terms which Venues NSW was prepared to offer to secure those events;
 - (b) Secondly, securing premium, high profile content over the long term is critical to the success of Venues NSW’s business model as described in section 2 above. In particular, it improves Venues NSW’s “offering” including:
 - (i) its ability to attract and retain similar premium content in a competitive market; and
 - (ii) the benefits of memberships to the venues and therefore attractiveness of membership to the general public, providing a further source of revenue.
 - (c) Thirdly, the MOU represents one (albeit significant and important) agreement that Venues NSW is currently negotiating or which it will need to negotiate. Other agreements include:
 - (i) Agreements equivalent to the MOU with other sporting codes to attract premium content over the long term;
 - (ii) Agreements with individual clubs, both long term and short term, including to cover provision of venues while stadia are redeveloped or refurbished; and
 - (iii) Agreements with promoters for major international artists for concerts, all of which play an important function in underpinning the financial viability of the venues both collectively and individually.
- 3.3 Finally, the MOU sets out the terms of Venues NSW’s hiring agreement. The most commercially sensitive and therefore valuable asset of a venue operator (whether public or private) is the commercial terms on which it is prepared to offer access to its venues.
- 3.4 It is in this context that Venues NSW submits that If the MOU was to be disclosed, a number of adverse consequences would flow.
- 3.5 *First*, the world at large would know:
- (a) the amount which the NRL parties would pay to the Government for various venue rights; and
 - (b) the general nature of the rights which the NRL parties were to be granted in return for that sum.
- 3.6 This would, at least notionally, reveal the business model upon which the Government proceeded, including revenue forecasts and the value that Government assigned to the rights granted to the NRL parties. The business model formed the basis for the Government decision to proceed and indicates the key economic and policy drivers which Government considers to be important.
- 3.7 Revealing Government’s business model would significantly prejudice Government in ongoing and future negotiations for premium content for stadia (see 3.8(a) below);
- 3.8 *Second*, because the world at large would know these matters, they would also be known by:

- (a) *the NRL parties' competitors, including the ARU, FFA, and other bodies which need to obtain access to premium stadium venues for their own purposes.*

In this regard, Venues NSW is currently in negotiations with the ARU and FFA for access to Stadium Australia and Western Sydney Stadium. These negotiations are much less advanced than those with the NRL parties and the disclosure of the MOU would prejudice these ongoing negotiations.

Similarly, Venues NSW is currently negotiating access to Western Sydney Stadium with a number of NRL clubs and Western Sydney Wanderers. Disclosure of the MOU would reveal Venues NSW's strategy in relation to the provision of content and the value which it places on that venue to secure that content;

- (b) *the owners of other venues, including those with whom Venues NSW competes to attract premium content.*

Other venues with whom Venues NSW competes include Suncorp Stadium in Brisbane, as well as, for certain events (particularly football World Cup qualifiers), the Melbourne Cricket Ground and Optus Stadium, Perth and (for concerts) the Docklands Stadium. If any of those entities were to understand Venues NSW's hiring terms and economic drivers, it would enable them to utilise that information to disrupt Venues NSW's value proposition (by, for example, undercutting Venues NSW for premium content) at minimal commercial risk to those competitors; and

- (c) *other potential hirers of venues (including, for example, overseas entertainers);*

Venues NSW is currently negotiating with a number of promoters for concert content for the summer of 2018/2019 which is proposed to include three major concert events involving world class international artists, each of which may potentially involve multiple concerts. Disclosure of the MOU would disclose hiring terms for the relevant stadia. In circumstances where hiring venues comprises the sole or at least a very significant part of Venues NSW's function, knowledge of Venues NSW's hiring terms would place it at a very significant disadvantage in securing favourable terms for these and future concerts.

3.9 In other words, if the MOU were to be disclosed, to take hypothetical examples:

- (a) a stadium owner in Brisbane would know:
- (i) what the NRL was willing to pay for access in Venues NSW's Sydney stadia;
 - (ii) the hiring terms agreed by Venues NSW and the particular commercial offer to attract the premium content agreed to be provided by the NRL;
 - (iii) what it may need to offer to secure the same or equivalent premium content to the detriment of Venues NSW and therefore the State of New South Wales; and
- (b) the ARU would know what rights Venues NSW was prepared to give for a particular sum; and
- (c) a world-class performer would know the terms that would be available at a Venues NSW venue, which would make it significantly more difficult for Venues NSW to attract that performer on favourable terms.

3.10 In practical terms, this would, of course, mean that the terms on which the MOU was settled would become the starting point for any future negotiation by Venues NSW rather than the culmination of a negotiation process between equal parties.

- 3.11 *Third*, from the perspective of the NRL parties, their competitors would know both the NRL's financial exposure and the substance of the rights it was able to secure. Disclosure would give the NRL's competitors information as to its commercial position.
- 3.12 It is important to note, in this context, that disclosure of the MOU would give a wide range of parties access to commercially useful information which they would not ordinarily be in a position to obtain.
- 3.13 The MOU is the record of a specific agreement made in a commercial context between two parties which, if made in any other circumstances, would be completely confidential. Indeed, the parties expressly provided in the MOU itself that it contained commercially sensitive information and was to be treated as strictly confidential. The MOU is the specific outcome of a substantial level of strategic consideration and commercial negotiation, which itself is commercially sensitive. It is not a guiding or strategic document, it is not a strategy or broad principle-based document (although, in Venues NSW's submission, documents of these types will also often be privileged) but is rather the specific commercial outworking of these principles.

4. **THE PUBLIC INTEREST**

- 4.1 The question then arises as to whether the clear prejudice which would be suffered through disclosure of the MOU injures or would otherwise be contrary to the public interest.
- 4.2 There is a public interest in third parties which contract with Government being confident that the commercially sensitive elements of those contracts will not be disclosed to their competitors. The interest here is public, not because it protects the third party's commercial position per se, but because, particularly in circumstances where the Government regularly enters markets to either provide or procure goods and services, disclosure of the commercial position would:
- (a) disadvantage those third parties that enter the market vis-à-vis their competitors; and
 - (b) as a consequence, discourage those and other third parties from participating in the market, which would in turn reduce demand and prevent the market from functioning effectively.
- 4.3 The diminution of the market in turn makes it significantly more difficult for Venues NSW to fulfil its section 21 functions which have been imposed on it by Parliament.
- 4.4 Similarly, the public interest in Government not being required to disclose its commercially sensitive contracting terms is not that disclosure would adversely affect Government's commercial interests per se (although as set out in section 3, that prejudice would be significant), but rather that disclosure would make it materially more difficult for Government to achieve a suitable return for any future investment of public money. Ultimately, the public interest is in public funding achieving appropriate value, which, for the reasons outlined above, is materially undermined in circumstances where commercially sensitive documents are disclosed.
- 4.5 For example, if one of the effects of disclosure of the MOU would be that the ARU obtained more favourable terms than it would have obtained in the absence of disclosure, then one of the effects of disclosure would be that disclosure materially affected the ability of Venues NSW to obtain value for money.
- 4.6 In Venues NSW's submission, these matters strongly reinforce Venues NSW's claim for privilege in relation to the MOU.

15 May 2018

Email: Jacqueleine.Moore@dpc.nsw.gov.au

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Your reference:

Our reference:
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Dear Ms Moore

Standing Order 52 – Order for Papers – Sydney Stadiums

The Trust has been provided with a copy of a letter dated 11 May 2018 from the Honourable Adam Searle MLC to Mr David Blunt, Clerk of the Parliaments and responds as follows.

The Trust supports the supplementary submission on disputed claims of privilege produced by Venues NSW and notes the Trust would suffer similar commercial and other challenges if the MOU was made public.

The Trust and all relevant agencies have made the claim for privilege for the MOU, as has the NRL. It is the Trust's contention that it would not be in the public interest for a claim for privilege over the MOU to be rejected, in whole or in part.

The Trust notes, that if Mr Searle MLC was to dispute a claim for privilege made by the Trust in respect of documents, it would respectfully seek an opportunity to respond to any such request up to and including making further submissions. The Trust reserves its right in that respect.

Yours faithfully



Stephen Gorry
Partner
Norton Rose Fulbright Australia

APAC-#68296290-v1

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LEGISLATIVE COUNCIL



Leader of the Opposition in the Legislative Council
Shadow Minister for Industry, Resources and Energy
Shadow Minister for Industrial Relations

The Honourable Adam Searle MLC

17 May 2018

Mr David Blunt

Clerk of the Parliaments

Parliament House

Macquarie Street

SYDNEY NSW 2000

**DISPUTE OF PRIVILEGE CLAIMS MADE IN RELATION TO THE RETURN TO ORDER ON
SYDNEY STADIUMS**

Dear Mr Clerk,

Please find below the grounds of my dispute of the remaining claims of privilege maintained by Venues NSW in relation to the Stadiums return to order.

DISPUTED PRIVILEGE CLAIM – VENUES NSW

I note the original submissions made for Venues NSW in relation to the stadiums return to order, the further submissions made for it on 4 May 2018 and the additional submissions provided on 15 May 2018 which mainly concern the issue of the MOU.

In *Egan v Chadwick* (1999) 46 NSWLR 563, the NSW Court of Appeal found that neither *legal professional privilege* or *public interest immunity* applied in the context of a dispute between the Legislative Council and the Executive: [50], 573; [79], 577; [86], 578; [127], 590; [139], 593; [140], 594; [152], 596. Nevertheless, in seeking to resist the disclosure of documents produced in answer to a call for State papers by the Legislative Council, agencies have continued to advance these style of claims, along with others (such as *commercial in confidence* and *privacy*) which are not grounds of privilege known at law.

As to the approach the Arbiter should take to this matter, I refer the Arbiter to pages 3-4 of my submission of 23 April 2018 and my submissions in relation to disputed privilege claims maintained by other agencies already provided to the Arbiter. In summary, what the Arbiter has to determine is whether “a legally recognised privilege as claimed” applies to the disputed documents.¹ The “relevant privilege is what, as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament.”² The Arbiter will only find privilege exists if disclosure “is likely to injure the public interest”³ or it is “necessary in the public interest for [the document] not to be publicly disclosed.”⁴

To the extent they cover issues of legal principle relevant to this disputed privilege claim, I refer to and incorporate my earlier submissions provided in this stadiums privilege dispute.

Regarding those documents that remain in dispute, I will adopt the structure of Venues NSW’s further submissions.

Legal professional privilege (“LPP”)

I refer to the submissions already made by myself on this subject in this stadiums privilege dispute process, as to the applicable law and how privilege claims of this nature should be evaluated.

There are four document over which Venues NSW claims LPP: 0075, 0078, 0079 and 0080. Venues NSW submits that the documents attach, refer to or legal advice given by Venues NSW legal advisers. This is simply not correct.

Document 0075 is a set of Board Minutes. Pages 137-145 are a slide presentation by law firm Clayton Utz. The content is at a reasonably high level of generality and while imparting information is not in the nature of legal advice. The balance of the document does not contain, refer to or reflect anything that could reasonably be said to constitute legal advice or to have been created for the dominant purpose of obtaining or receiving legal advice. In relation to the Clayton Utz slide presentation, even if it is held to be legal advice, or that LPP would attach to it in curial proceedings, nothing in the presentation would compromise the legal position of Venues NSW or the State or create any legal liability or difficulty. Consequently, disclosure would not harm the public interest.

The balance of the documents are authored by the Chair of Venues NSW, Mr Paul Doorn, and appears to be a briefing note. Nothing contained in the briefing note is identified as

¹ WestConnex Arbiter’s Report, p8

² Disputed Claim of Privilege – Actions of a former WorkCover NSW employee, Arbiter’s Report, 25 February 2013, p2

³ WestConnex Arbiter’s Report, p10-11, quoting Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52

⁴ *Egan v Chadwick* (1999) 46 NSWLR 563, per Priestley JA at [139] 593-594

being legal advice, or reflecting such advice, nor has it been prepared for the dominant purpose of the obtaining or receiving legal advice. Even if this privilege exists in the present context, which it does not, it would not attach to these three documents.

There is nothing contained in the documents which would compromise the legal position of Venues NSW or the State or create any legal liability or difficulty. Consequently, disclosure would not harm the public interest.

Public Interest Immunity ("PII")

Under the doctrine of '*public interest immunity*' ("PII"), the Executive Government may seek to claim immunity from requests or orders, by a court or by Parliament, for the production of documents on the grounds that public disclosure of the documents in question would be prejudicial to the public interest. I refer to my earlier submissions of 23 April at pages 5-6 as to how this matter should be approached in the context of the present dispute, given that PII does not in terms apply to disputes between the Legislative Council and the Executive.

The test is similar to, but not precisely the same as for PII. As set out above and in my earlier submissions, the question for the Arbiter is whether disclosure of a disputed document would cause harm to the public interest. Only then will the privilege which as a matter of law exists between the House and the Executive be found to exist. In any consideration of this question it is important to bear in mind that, because different aspects of the public interest are involved—that is, the proper functioning of the Parliament as against the due administration of justice—the question of disclosure of documents to the Parliament (or in this case – having received the documents, by the Parliament) is not the same question as disclosure of documents to the courts.

Similarly, the question here for the Arbiter is not the same as in legal proceedings – a point noted by the Arbiter in the report on the *WestConnex Business Case* at p7. The public interest in the present case is the capacity for Members of the House to properly scrutinise Executive policy and action, including by public discussion of the issues involved (which in this case also involves significant public expenditure and what the public will get for that investment, as opposed to what the other commercial parties will obtain) which (as the Arbiter has previously noted) "*is of the essence of representative democracy*"⁵

Importantly, Venues NSW concedes that PII "*is not a ground of privilege itself.*" (at paragraph 2.8) However, Venues NSW submits that in relation to the documents over which this ground of privilege is maintained "*the public interest requires that they not be disclosed*". (Paragraph 2.9) The submission at paragraph 2.11 is that the contention made regarding privacy protections and the potential commercial disadvantage of Government

⁵ *WestConnex Arbiter's Report*, p8

and third parties should be evaluated by whether *“the public interest requires that the document not be disclosed.”* This is very close to the test I advance above.

The argument advanced at paragraph 2.10, however, seeking to make analogies with the application of the GIPA Act are wrong in law, and should not be accepted.

Claims no longer pressed

I note Venues NSW no longer presses its claim in relation to 8 documents but says it has not waived privilege (see paragraph 3.2). With respect, Venues NSW either presses or abandons its privilege claim over the 8 documents and, from its submission, it appears to have abandoned the claims.

Qualification to existing privilege claims

Venues NSW identifies 18 documents in relation to which it would no longer press its privilege claims, if the personal details of private individuals were redacted.

For the reasons I have advanced in earlier submissions in this process, I agree to this course of action.

ADDITIONAL SUBMISSIONS

Under various sub-headings, Venues NSW provides further details in support of its privilege claims. A number of documents appear in more than one category. In each category, Venues NSW states that *“Documents in this category include ...”* The suggestion is that the documents listed are not a complete list of those documents which fall into that category. I am not in a position to determine what additional documents could or should be in each category, due to both reasons of time and not knowing the criteria on which the agency has grouped the documents. It is a matter for the agency as to how it advances its claims.

For the purpose of this submission I will assume that those documents listed are the complete list, unless advised differently.

Documents that contain projected costings or other spending details including the timing of such spending or refer to such documents

Documents in this category are 00061, 00062 (Board minutes), 00081 (a briefing prepared for the Board), 0082 (another briefing document), 00556, 0057 (a submission on the \$300 million Parramatta Stadium), 00559, 00561 (styled as Master Program), 00562 (also styled as Master Program), 00604 (a covering email) and 00605 (the attachment to the email, being the ANZ Stadium Redevelopment White Paper, March 2017 and marked 'Confidential').

Contrary to Venues NSW's submissions at paragraph 5.3, none of these documents would provide potential tenderers or contractors with information that would inhibit the ability of Government to obtain value for money in procurement. They contain interesting and useful insights into the NSW Government's stadiums policy, its development and the proposed cost, but not the detail which could lead to any commercial disadvantage for the State or any of its agencies.

In relation to document 0057, if it was prepared for consideration by a Cabinet sub-Committee as claimed, I assume the Executive would have taken the same approach that it took in relation to the call for papers made by the House for the Business Case in relation to the relocation of the Powerhouse Museum, which was to not only not produce the document but to not even acknowledge its existence (on the claimed basis the Executive is not required to produce Cabinet documents in answer to a call for papers).⁶ There is no information in this document which would cause harm to the public interest if disclosed.

Documents that reveal the economic justification for particular projects

At paragraph 5.5 of Venues NSW's submissions it is claimed that the disclosure of document 00067 would reveal important aspects of the benefit cost ratio applicable to the NSW Stadiums Strategy. Far from injuring the public interest, disclosure of this document is very much in the public interest and would facilitate the capacity of the House and its members to scrutinise the policy of the NSW Government on this matter and explore both its costs and benefits, and whether or not the policy is soundly based.

As the NSW Government has already determined its policy on stadiums, there is no reason for this document to be withheld.

⁶ See the explanation given by the Leader of the Government in the Legislative Council *Hansard* 1 May 2018 <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-76049/link/95>

The memorandum of understanding between the Government parties the National Rugby League (NRL) parties (MOU) and documents referring to it

These documents are 00076, 00077, 00079, 00080 and 0087 (which is the MOU itself).

In answer to paragraphs 5.7 to 5.18 dealing with the complaint of the NRL in relation to the Memorandum of Understanding ("MoU"), I refer to and rely upon p4 of my earlier submissions in connection with the same document produced by the Office of the Minister for Sport, dated 11 May 2018, and my earlier submissions in connection with the same document produced by INSW, dated 15 May 2018.

I submit that while, it is correct that the MoU discloses the level of proposed NSW Government investment (para 5.10 (a) of Venues NSW's submission) and the reciprocal obligations of the NRL (para 5.10 (c)), the disclosure of such matters is very much in the public interest and would not "*injure the public interest*" were it to be disclosed. Further, the matters set out at 5.10 (b) are not disclosed in the MoU. I note that, in the version produced by the other two agencies, the content of schedule 2 is missing but is present here.

Nothing in the MoU, including schedule 2, would cause the claimed detriment or would make it "*necessary in the public interest for [the document] not to be publicly disclosed.*" (as was held in *Egan v Chadwick* at [139], 593-594; [142], 594 per Priestley JA). However, if the Arbitrator is persuaded that

In answer to the submission of the NSW Government in para 5.12, there is nothing in the MoU which would "*prejudice Government in its negotiations with other content providers*" or would "*directly inhibit the Government's ability to obtain value for money.*" Nor would disclosure "*reveal ... the commercial model including pricing underpinning each venue's operations*". Contrary to paragraph 5.13, no detail in the MoU would "*lead to a distortion of the venues market, which would directly affect the Government's ability to obtain value for its investment of public funding.*" There is no information provided that support the sweeping claims made in support of keeping the document secret.

In its third set of submissions dated 15 May 2018, Venues NSW replied to my submissions of 11 May 2018 (which dealt with a version of the MOU produced by the Minister for Sport) with a more extensive set of reasons in support of its claims. In essence, its contention is that the MOU discloses sufficient detail of commercial operation that would expose its business model to competitors and would also have the effect of disclosing how much revenue Venues NSW would be able to make (with consequent damage to its commercial position in future negotiations) but would have the same effect on the NRL as well as the disclosure of the rights the NRL had secured under the agreement and the financial value it places upon them.

None of this is evident in the content of either document 0087 (the MoU) or the other documents in this category. However, this version of the MOU is different to the versions produced by each of the Office of the Minister for Sport and the Sydney Cricket and Sports Ground Trust ("the Trust"). The Venues NSW version has a significant body of content in chart or table format behind Schedule 2 to the MOU. As I understand the concerns articulated by Venues NSW, the matters set out now with greater clarity in its 15 May 2018 submissions (particularly at paragraphs 3.3 and following) relate to the content of Schedule 2.

It is my submission that, if the MOU were to be disclosed, with Schedule 2 redacted, most of the concerns raised by Venues NSW would be met and the potential harms foreshadowed would be removed.

In relation to the remaining documents in this category - 00076, 00077, 00078, 00079 and 00080 – there is in each of them a chart or table which, if masked, would also address the concerns raised.

Apart from the redaction of Schedule 2 to the MOU and the table/chart from the other documents, the disputed documents should not be kept confidential.

Documents which reference the role of the ANZ Stadium operator in the redevelopment

Documents in this category include 00083 and 00084 (paragraph 5.16). The documents are said to disclose probity advice and harm the conduct of future potential procurements (at paragraph 5.18).

The documents are letters to Mr Jim Betts the CEO of Infrastructure NSW from the Chair of Venues NSW and do canvass a range of important issues, including the ongoing role envisaged for the stadium operator, VenuesLive, during the redevelopment of ANZ Stadium. However, none of those matters would cause any harm to future procurements or disclose any matter harmful to the commercial position of any party.

Documents which reveal Government's economic, policy and other drivers in relation to the NSW Stadium Strategy

It is claimed that the disclosure of the 43 documents in this category would prejudice the ability of Government to obtain value for money in procurement processes.

At paragraphs 5.20 and 5.21 a narrative of the flavour of the documents is provided.

It is claimed that the content of these documents would enable tenderers to understand what matters were considered by Government to be important and the commercial and other constraints under which Government is operating (at paragraph 5.22)

Having reviewed each of these documents closely, and on more than one occasion, I submit that none of these claims is accurate. While I will not, for reasons of time and economy of space, set out an analysis or description of every document in the category, I will shortly describe a number of them.

Documents 0075 and 0086 are Board Minutes. 0545 appears to be an agency email to the Chair, Paul Doorn. 0550 is a "Stadium Implementation Update" and 0551 is a "Stadium Network Implementation UPDATE". 0573 and 0574 is a draft letter from the Minister to Mr Shepherd.

Documents 0613-0621 are email exchanges containing a discussion among Venues NSW board members and agency officials about the stadiums policy and the provision of an email to members regarding the redevelopment proposal.

0627 is a draft letter from the Chair of the Board to the Minister.

00625-00631 are the same draft letter from four member elected board members to the Minister.

00632-00635 is an exchange of emails discussing a draft email to members, including feedback on that draft.

00636 is an email from the Chair of Venues NSW, Mr Doorn, to a staff member providing instructions for an email to members. 00639 is a reply to Mr Doorn from that member of staff and 00640 is Mr Doorn's further communication.

00641 contains a discussion of an email to be provided to members.

00642 is the ANZ STADIUM FACT SHEET which contains government key messages around the policy and its elements.

00643, 00644 are emails containing a discussion of 'hot issues' to be prepared for Ministers in connection with the stadiums policy.

00645 is another ANZ STADIUM FACT SHEET dealing with the timing of different stages of implementation of the redevelopment.

00647, 00648 are a draft standard letter to members regarding the Stadium Redevelopment Update.

00650, 00651 is an email regarding a "simple Q&A on the redevelopment of ANZS", but which does not provide the Q&A document said to be attached.

While there are other documents in this category, the above is a useful sample conveying the kind of documents they are. While providing interesting and useful insights into the NSW Government's stadiums policy, and reflections on that policy, and some details of how it will be carried out, none of these documents disclose information of the kind claimed in the Venues NSW submission.

I submit that disclosure of the documents would not cause any harm to the public interest and the privilege claim is not made out.

Documents which reveal third party economic and other drivers in relation to the NSW Stadia Strategy

Documents in this category are 00546, 00589, 00590, 00591, 00592, 00593, 00594 and 00595 (paragraph 5.23) It is claimed they "*set out business investment decisions, anticipated actions and other steps*" proposed to be taken by third parties as part of the NSW Stadia Strategy which, if disclosed, would place the third parties at a commercial disadvantage in any procurement process (paragraph 5.24. 5.25).

This is simply untrue. What the documents show is communication between the agency and the NRL around the stadiums issue but does not reveal anything of the nature set out in the Venues NSW submission.

Briefings supporting answers in Parliament

Documents in this category are 00547 and 00548 (paragraph 5.27) and are briefing notes prepared by the agency for the Minister for possible use in Parliament. Documents of this kind do not attract privilege.

Documents relating to tenders or other procurement processes, including requests for proposals, and documents which underpin them and other tendering documents

Documents in this category are 00549, 00577, 00578, 00580, 00581, 00582, 00583, 00584, 00586, 00587, 00588 (paragraph 5.29) While the description of the documents provided is more or less applicable, and does provide an indication of the range of services being sought or offered, the information is at an early, even preparatory stage and does not contain the level of detail which could cause detriment. Accordingly, no claim of privilege is made out.

Documents relating to the Stadium Network Implementation Group

Documents in this category are 00550, 00551, 00552, 00553, 00554, 00555, 00558 and 00560 (paragraph 5.31) It is claimed at paragraph 5.32 that disclosure would affect the commercial and strategic relationships between key stakeholders (but does not identify how or why this would occur, or which stakeholders) and that disclosure of certain details would prejudice Government in procurement decisions (but with no explanation of how or why this would result).

While some documents do disclose the expected timing of development, there is no information provided to support the claim that this would be contrary to the public interest, which to my mind would be very much supported by this information being available. If the documents do reveal *“policy, economic and other drivers of Government”* as claimed at paragraph 5.32, it does so only at a broad level and in a way which is very much in the public interest.

Documents which record unsolicited expressions of interest from third parties

Documents 00565, 00566 and 00567 contain an exchange of emails concerning the Laing O’Rourke Solution for the ANZ Stadium, an unsolicited proposal. Contrary to the submissions of Venues NSW, disclosure of this information would not prejudice future tenders or undermine public confidence in such processes.

The documents disclose to some degree how this unsolicited proposal came forward and was not progressed with, but does not disclose any of the details of that proposal or any other information which could be reasonably described as commercially sensitive or confidential.

Documents which disclose the terms of existing contracts or benefits arising from the current arrangements

Venues NSW submits that disclosure of this information would reveal the terms of Government contracts with third party content providers, the benefits of those terms, an analysis of how the NSW Stadia Strategy would impact those contracts and an assessment by Government of its potential exposures which may prejudice its ability to exercise its rights. This is said to be contrary to the public interest and may be, were it a correct assessment of the documents. The documents do not have the character ascribed to them and certainly do not in terms reveal the terms of contracts.

00570, 00571 and 00575 are the "Redevelopment Plan, October 2016" prepared by Venues NSW. The remaining documents are emails from Venues NSW Chair, Paul Doorn, seeking information.

However, the Redevelopment Plan does contain a table which summarises various legal matters. If the Arbiter has any concerns about the content of this table, I would have no objection to it being redacted with the balance of the document being disclosed. Otherwise, the document should not be kept confidential.

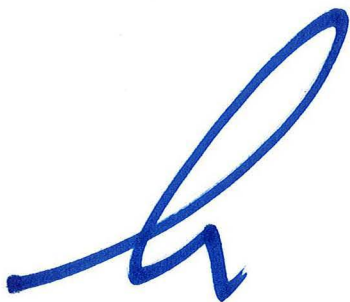
Documents which disclose positions in respect of third parties and/or Government

These documents contain discussion among agency staff, including the Venues NSW Chair, Paul Doorn, regarding their analysis of media coverage (which is also included) of the stadiums policy issue. The matters canvassed are not of any technical or commercial nature, but are very much in the nature of a frank discussion of public affairs with an insight into the implications of the matters canvassed.

There is no basis for the submission, made at paragraph 5.41, that disclosure could prejudice the functions of Venues NSW, or could be taken to impugn the integrity of third parties (at paragraph 5.42). The matter raised in paragraph 5.43 would not be a basis for keeping the material confidential, but it is not made out from the material.

Conclusion

For these reasons, the claims of privilege maintained by Venues NSW are not made out.



The Hon. Adam Searle MLC

Leader of the Opposition in the Legislative Council

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Order for Papers – Sydney Stadiums

Dear Mr Blunt

I refer to the resolution of the Legislative Council under Standing Order 52 made on 15 March 2018. I also refer to your various emails of 14 and 15 May 2018 attaching submissions made by the Honourable Adam Searle MLC regarding the dispute he has lodged relating to the privilege claims made in the Sydney Stadiums return to order.

Mr Searle's four submissions relate respectively to the privilege claims made by the Office of Sport, Infrastructure NSW and the Sydney Cricket and Sports Ground Trust, and the privacy / personal information claims made by various agencies, including the Department of Premier and Cabinet (**Department**), Venues NSW, the Office of Sport, Infrastructure NSW and the Sydney Cricket and Sports Ground Trust.

In your emails, you advised that the Independent legal arbiter, the Honourable Keith Mason AC QC, has invited a response to Mr Searle's submissions by **11am** on Thursday, **17 May 2018**.

In accordance with your request, I enclose at **Annexure A** to this letter a further submission from the Sydney Cricket and Sports Ground Trust.

The Office of Sport has advised that it is unable to meet the 11am deadline, but will provide its further submission as soon as possible this afternoon.


Regarding Mr Searle's letter of 14 May 2018 relating to privacy / personal information claims, the Department notes that Mr Searle has agreed that personal details of members of the public should be redacted to avoid identification, and therefore this matter is no longer in dispute.

Should you require any clarification or further assistance, please contact me on telephone (02) 9228 4514.

Yours sincerely



Karen Smith
Deputy Secretary, Cabinet and Legal
17 May 2018

Received at 11:20 am
Thursday 17 May 2018


Sydney Cricket and Sports Ground Trust

**Second Further Submissions – Response to Resolution made pursuant to
Standing Order 52 made on 15 March 2018**

1. On 16 May 2018, the Sydney Cricket and Sports Ground Trust (the **Trust**) received from the Department of Premier and Cabinet correspondence from the Hon. Adam Searle MLC dated 15 May 2018 (**15 May Letter**). The 15 May Letter contained further submissions disputing the privilege claims made over certain documents returned by the Trust under the resolution made by the Legislative Council on 15 March 2018.
2. These are the second further submissions of the Trust made in support of a claim of client legal privilege and public interest immunity in relation to documents returned by the Trust. In addition to these submissions, the Trust also relies on the submissions previously provided by the Trust on 5 April 2018, 6 April 2018 and 4 May 2018.
3. While the Trust does not agree with many of the submissions contained in the 15 May Letter, given the confined timeframe to respond, the Trust by these submissions responds to a number, but not all, of the matters contained in the 15 May Letter.
4. Firstly, the Trusts accepts and appreciates the clarity provided by the Hon. Adam Searle MLC that the dispute is maintained in respect of the documents highlighted in yellow only and does not extend to the rest of the 'family' of documents.
5. In relation to the privilege claim for client legal privilege (or legal professional privilege), the Trust submits that privilege should be upheld because disclosure of legal advice sought and obtained by the Trust would harm the public interest. The Trust repeats its submissions made in relation to client legal privilege in previous submissions provided on 5 April 2018, 6 April 2018 and 4 May 2018.
6. Without intending to waive privilege over those documents, the Trust submits that legal advice sought and obtained over which a claim for privilege is made relates to current and ongoing matters of legal concern for the Trust. As a result, disclosure of the documents marked 'Yes – CLP' in Schedule A to the Trust's submissions dated 4 May 2015 (**Schedule A**) may adversely impact on the Trust's ability to deal with those matters and certainly compromises the legal position of the Trust to negotiate outcomes to those issues because they are of continuing concern to the Trust.
7. To provide an example, document number 165 in Schedule A (being document no. SCG.002.001.0072) expresses anticipation of a potential claim being made against the Trust and provides legal advice as to the strategy for this potential claim. Legal advice such as this, and as contained in other documents, are of current and ongoing legal concern to the Trust. Disclosure of these documents would compromise the legal position of the Trust, potentially create legal liability, and, at the very least, create legal difficulty for the Trust's position in dealing with and negotiating these issues.
8. Further, if the protection of documents subject to a client legal privilege claim is not upheld in the Standing Order 52 process, it would certainly undermine the confidential relationship between the Trust and its legal advisers and act as a disincentive of the Trust from seeking and obtaining legal advice, as government entities would effectively have no assurance that legal advice would remain confidential. The Trust submits that the consequences of such disclosure would harm the public interest as the Trust, and other government entities, would be discouraged from making full and frank disclosure to their legal advisers.

9. Moreover, the 15 May Letter fails to demonstrate how the particular documents disputed are relevant to the terms of reference as provided by the NSW Legislative Council's Public Works Committee. To provide an example, it is not clear how document number 131 (being document no. SCG.003.001.3823) is relevant to the terms of reference of the Committee.
10. In relation to the 11 documents that substantially reproduce legal advice, with respect the Trust does not accept and submits that it is simply not correct that, as submitted in the 15 May Letter, the matters canvassed within those communications are not expressed as having been derived from legal advisors, or to reflect legal advice being sought or having been obtained, even in part.
11. A close reading of the 11 documents shows that each document substantially reproduces legal advice sought and obtained by the Trust as indicated by the words 'We recently discussed with our solicitors the [subject of legal advice sought] who provided the following [...]'. As a result, each of these 11 documents substantially reproduces legal advice provided to the Trust by its legal advisers.
12. Accordingly, these 11 document are clearly expressed as having being derived from legal advisers and reflect legal advice sought and obtained by the Trust. Therefore, the Trust submits that disclosure of these documents, or any other document marked 'Yes-CLP' in Schedule A would compromise the legal position of the Trust in a material way.
13. In respect to confidential commercial information, the Trust submits that privilege should be upheld because disclosure would harm the public interest. The Trust repeats its submissions made in relation to client legal privilege in previous submissions provided on 5 April 2018, 6 April 2018 and 4 May 2018.
14. There is a public interest in third parties being able to deal with government on the basis that their correspondence, negotiations and outcomes will not be disclosed. To reiterate this, a number of those documents (such as document number 30 of Schedule A, being document no. SCG.003.001.0633) have been specifically marked as 'Commercial in confidence' by third party consultants. Disclosure of these documents would reveal commercially sensitive information or commercially sensitive strategies that have been developed by those consultants.
15. Further, page 6 of the 15 May Letter refers to a number of documents as being covering emails and providing lists of persons or bodies, rather than containing confidential information. As explained at paragraph 12 and 13 of the Trust's submissions dated 4 May 2018, to avoid any confusion, rather than splitting the 'family' of document into parts, a privilege claim was applied across the family of documents. As a result, there are a number of documents (including cover emails) in the Trust's privileged list which, while they may not contain privileged information, form part of a family of documents which do.
16. Finally, the submissions at the top of page 7 of the 15 May Letter appear to be confused with respect to document 108 of Schedule A. Contrary to the submissions in the 15 May Letter, document 108 of Schedule A (being document no. SCG.003.001.1681) is not a letter from the Trust Chair, Mr Shepherd, in reply to the letter from a member of the public (referred to in the 15 May Letter as the 'Shepherd reply letter'). The correct number for the 'Shepherd reply letter' is document 109 of Schedule A (being document no. SCG.001.001.0714).
17. Accordingly, a commercial in confidence claim is not made, nor has ever been made, over the Shepherd reply letter; the only claim made over this letter is a public interest immunity claim on the basis of that the Shepherd reply letter contains personal information.

17 May 2018

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Mr Blunt

ORDER FOR PAPERS — SYDNEY STADIUMS - DISPUTE OF PRIVILEGE CLAIMS

We refer to the letter from the Hon Adam Searle MLC to yourself dated 14 May 2018 (the **Second Searle Submission**), providing further submissions in support of his disputed claims of privilege made by agencies, including the NSW Office of Sport, in relation to documents produced to the Legislative Council in response to the Order for Papers dated 5 April 2018 in relation to Sydney Stadiums (**Order for Papers**).

NSW Office of Sport has been advised by the Department of Premier and Cabinet that the independent arbiter appointed by the Parliament to evaluate and report on Mr Searle MLC's disputed claim of privilege has requested that the Office of Sport provide a response to the Second Searle Submission.

NSW Office of Sport makes the following general submissions for consideration by the independent arbiter.

We request that the submissions be read in their entirety.

Principles governing Parliamentary publication of privileged documents

As the NSW Office of Sport understands it, Mr Searle challenges a number of its claims for privilege and asserts that the restrictions upon publication of the documents subject to his challenge ought to be removed, such that those documents are deemed "public documents".

Therefore, the entire dispute relates to the Disputed Documents (as defined in our letter dated 4 May 2018) and whether they should be made public documents. At the present time, all members of the Legislative Council have access to the documents produced in response to the Order for Papers. As such, there is no impediment to any member of the Legislative Council, nor the Council as a whole, performing their role and function.

The broader matter in dispute between the parties is the existence and scope of those privileges which may be validly claimed (if any) to prevent the public release of certain documents produced in response to an Order for Papers.

Importantly, and contrary to a number of assertions made in the Second Searle Submission, the Office of Sport does not seek to challenge the existence of Legislative Council's power to issue the Order for Papers.

Furthermore, the Office of Sport does not seek to impugn the Legislative Council's finding, implicit in the Order for Papers, that such an order was "reasonably necessary" for the "proper exercise" of its functions.

The Office of Sport considers that this test applies both at the time the Order for Papers is made, and at the time the publication of privileged documents is being considered. Although it is accepted that this test has been addressed at the time the Order for Papers is made, the Office of Sport submits that this is not determinative of whether the Disputed Documents should be made public. That is, the same test needs to be applied again at the time privileged documents are being considered for publication.

In that context, the Office of Sport simply seeks to assert that the Disputed Documents, over which the Office of Sport has claimed a relevant privilege, should not be released to the public (but should remain available to members of the Legislative Council).

Where a dispute as to privilege arises, Standing Order 52 simply requires the independent legal arbiter to prepare a report on the "validity" of that "claim of privilege".¹

Unfortunately, nothing in Standing Order 52, the decision of the NSW Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563 (*Chadwick*), any previous publicly available Arbiter's decisions, or other judicial decision definitively determines:

- a) precisely what privileges may apply;
- b) the test to be applied in ascertaining whether such a privilege exists; and/or
- c) the circumstances in which the Legislative Council may "override" or "disregard" that privilege.

However, there is some judicial guidance in relation to these matters in *Chadwick*, as well as *Egan v Willis* (1998) 195 CLR 424, which the Office of Sport relies upon to justify the approach it submits ought to apply.

The Second Searle Submission

Mr Searle submits that the relevant "privilege" is that which "as a matter of law, [exists] between the Executive and the Upper House of the New South Wales Parliament".

Although Mr Searle does not cite any authority for this proposition, this characterisation may be accepted as a matter of principle. However, this only begs the question of what is the privilege that exists between the Executive and the Legislative Council?

In the Second Searle Submission, Mr Searle seeks to answer that question by, in effect, arguing that a privilege will exist between the Executive and the Legislative Council if, either:

- a) disclosure of a document to the public "is likely to injure" or be "inimical to" the public interest; or
- b) it is "necessary in the public interest for [the document] not to be publicly disclosed".

Such a test should be rejected for a number of reasons.

¹ Standing Order 52(6).

Firstly, adoption of the "public interest" as the sole criterion for the existence of a properly maintainable claim of privilege will require Executive agencies themselves to undertake a "balancing test" to determine whether disclosure would (in their view) be injurious to the public interest. This approach would appear to have the seemingly adverse effect of significantly broadening the number and nature of privilege claims which agencies may validly make.

Secondly, adopting the "public interest" test as the relevant touchstone of validity provides no useful guidance to agencies in determining the circumstances in which a valid claim for privilege would exist. This is likely to lead to confusion, as well as inconsistent, arbitrary and subjective claims of privilege which will themselves produce future conflict.

Although Mr Searle appears to place some guidance on the law of public interest immunity in determining whether the "public interest" favours disclosure, he asserts that this is neither the proper start nor end of this inquiry.

In that respect, the Second Searle Submission appears to "go beyond a technical evaluation of claims of privilege" and instead emphasises "the balancing of competing interests" (as set out in our earlier submissions). However, Mr Searle fails to exhaustively identify what factors should, or should not, be taken into account in determining where the "public interest" lies.

Thirdly, it is submitted that the question of whether or not disclosure of a document is in the "public interest" says nothing about the relationship between the Executive and the Legislative Council. On Mr Searle's submission, this relationship is (quite properly) the basis on which *any* privileges against public release of documents produced in response to a call for papers rest. Adoption of this test is thus wholly divorced from the conceptual justification for its existence.

Fourthly, adoption of the "public interest" approach set out by Mr Searle would effectively abolish the notion of privilege. By reducing the relevant inquiry to a balancing test, which is not governed by the principles of public interest immunity, legal professional privilege or any other privilege known to the general law, the approach espoused by Mr Searle does not properly accord with the ordinary operation of a "privilege". As the existence of "privilege" is contemplated by the terms of Standing Order 52, certain features of such "privileges" must be preserved.

Insofar as Mr Searle's submissions may be understood as asserting that Parliament has already considered the possibility of publication in determining whether the Order for Papers was "reasonably necessary", it is submitted that such a position is entirely without authority and not reflective of the nature of the inquiry undertaken by members of the Legislative Council in deciding whether or not to issue an Order for Papers.

Indeed, nothing in Mr Searle's submissions explains why this test should be adopted as an exhaustive statement of principle. The only justification appears to be the comments of Mason J in *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 52, which arose in the context of an equitable dispute of confidentiality (and, indeed, in circumstances where the Commonwealth was seeking to enforce a right of confidentiality which was otherwise established by law). Such comments are thus wholly disconnected from the present circumstances.

In circumstances where the First and Second Searle Submissions themselves do not cite any relevant authority justifying the adoption of this test (or the public interest test) as the relevant criterion, nor do they appear to direct themselves to the central question of a privilege against publication (rather than a privilege against production), the Office of Sport submits that this approach should be rejected.

NSW Office of Sport's Preferred Approach

Instead, the NSW Office of Sport continues to submit that the test governing whether documents subject to a claim of privilege should be publicly released by the Legislative Council is whether the release is "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions.

For the reasons set out in its earlier submission and elaborated upon below, the Office of Sport continues to assert that when considering whether the public release of documents over which privilege has been claimed is "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions, the Legislative Council must consider whether disclosure would:

- a) be inconsistent with, or undermine, another constitutional principle (e.g. collective Ministerial responsibility);
- b) undermine a fundamental "right" or "principle" recognised by the general law;
- c) "threaten the proper functioning of the executive arm and of the public service"; and/or
- d) be otherwise inconsistent with the "public interest" (and thus no longer "reasonably necessary" for the "proper exercise" of the Legislative Council's functions).

Contrary to the Second Searle Submission, the Office of Sport considers that each of these implications can properly be drawn from the decision of the NSW Court of Appeal in *Chadwick*.

Taking each of the Office of Sport's proposed categories in turn:

- a) Recognition of the principle of collective ministerial responsibility as an underlying "constitutional principle" provided one of the bases on which a majority of the Court of Appeal in *Chadwick* recognised the immunity of Cabinet documents against production.²

Accordingly, it is clear that inconsistency with "constitutional principle" may form a basis on which a privilege against publication can be made out.

- b) As recognised by Spigelman CJ in *Chadwick*, "fundamental rights" or "principles" of the common law operate "as part of the common law of the Constitution of New South Wales".³

One such "substantive general principle" of the common law which, at least in the view of Spigelman CJ may be relevant to the question of whether access should be granted to the public, is the principle of legal professional privilege.⁴

The Office of Sport rejects any assertion that this principle is drawn solely from Priestley JA's summary of the arguments put to the Court in *Chadwick*. Indeed, the potential relevance of common law principle was explicitly recognised in *Chadwick* by Spigelman CJ where his Honour noted at 578, that:

² See Spigelman CJ at 572 ([45], [47]), 575 ([62]), 576 ([71]), 579 ([88]),

³ See *Chadwick* at 566, [5]-[6].

⁴ See *Chadwick* at 576, [72].

It may be that principles applicable in other areas of the law will inform the process of determining the right of access to information or documents, but those principles are not, in terms, directly applicable.

- c) As recognised by Priestley JA in *Chadwick*, public disclosure of a document will found a claim of privilege if by the consequences of its disclosure may threaten the proper functioning of the Executive and public service, by, for example, prejudicing "the ordinary business of government".⁵

Such a proposition may also be drawn directly from the relevant test propounded by Mr Searle (e.g. "*what is the privilege which exists between the Executive and the Legislative Council?*"), grounded - as it must be - in constitutional principles of the separation of powers and responsible government.

- d) As accepted by Mr Searle, and all of the judges in *Chadwick*,⁶ disclosure of a document may found a claim of privilege where that disclosure is not in the "public interest" (for whatever reason).

In that respect, the Office of Sport submits that it would rarely (if ever) be "reasonably necessary" for the Legislative Council to disclose privileged documents to the public at large:

- a) where the release of such documents would "be inconsistent with, or undermine, another constitutional principle";
- b) in circumstances where such disclosure would undermine a "fundamental right" or "principle" recognised by the general law;
- c) if the disclosure of such documents would "threaten the proper functioning of the Executive arm and of the public service"; and
- d) if this would otherwise be inconsistent with the public interest (e.g. the test espoused by Mr Searle).

In this respect, the approach espoused by the Office of Sport sets out an "umbrella" principle, against which specific claims of privilege may be determined. The approach for which Mr Searle advocates is encapsulated within this test as one circumstance in which a valid claim for privilege may be made out.

As set out above, this test is directly drawn from the reasoning of the NSW Court of Appeal in *Chadwick*. It is also directly referable to the underlying rationale for the Legislative Council's power to call for papers, and ensures that this purpose remains at the forefront of the determination of whether or not to release those documents to the public.

Contrary to the Second Searle Submission, applying a test of "reasonable necessity" to the question of whether or not a call for papers should be made (in the first instance) and, once produced, whether privileged documents produced to the Members of the Legislative Council should be produced to the public, is not "overly complicated" or "unnecessary".

Instead, the Office of Sport submits that adoption of this test is entirely appropriate. The relevant inquiries are different. They are properly impacted by different factors, each of which reflect different underlying interests which must be balanced by the Legislative Council. The Office of Sport's preferred test also provides clearer guidance for agencies as to the

⁵ See *Chadwick* at 564, [142].

⁶ See especially Priestley JA at 594-5, [142].

circumstances in which privilege is likely to arise, and the manner in which such claims are required to be articulated.

In doing so, the Office of Sport's test ensures that the use of the Legislative Council's functions is attended by "the highest degree of circumspection" and "great respect" (as explained by Priestley JA in *Chadwick* at 574) which is critical to the maintenance of a system of responsible government, and the separation of powers, in New South Wales.

In that light, the Office of Sport continues to apply the test of whether or not the public disclosure of documents subject to a claim of privilege would be "reasonably necessary" for the Legislative Council's exercise of its functions, and invites the independent arbiter to adopt a similar approach.

The Office of Sport submits that the fact that the members of the Legislative Council can currently view all of the documents subject to the contested claims of privilege should weigh heavily in this analysis, on the basis that the proper exercise of the Legislative Council's functions is not impeded in any way by the maintenance of the claims for privilege.

In relation to the specific claims of privilege in dispute, the Office of Sport continues to assert that further publication of the relevant portions of the Disputed Documents cannot properly be characterised as "reasonably necessary" for the "proper exercise" of any of the Legislative Council's functions in circumstances where the entirety of the documents can be seen currently by the members of the Legislative Council.

Legal Professional Privilege

The Office of Sport considers that the publication of documents which are (or would be) subject to legal professional privilege at general law, or otherwise disclose the existence or content of legal advice obtained by Government would:

- a) not be "reasonably necessary for the "proper exercise" of any of the Legislative Council's functions", as such disclosure would undermine a "fundamental right" or "principle" recognised by the general law; and/or
- b) would otherwise be inconsistent with the public interest.

Relevantly, the Office of Sport notes that, in all cases, the documents in dispute have been produced to the Legislative Council, and their content is available to its members.

Contrary to the approach canvassed in the Second Searle Submission, the Office of Sport submits that the policy considerations which are identified in its first submission (and justify the common law's recognition of this right as a "*fundamental common law right*" which "*plays an important role in the effective and efficient administration of justice*")⁷ do not depend upon the content of any individual piece of advice.

Instead, the relevant policy factors identified in that submission are *systemic*, and focus upon the existence and protection of the relationship of trust and confidence between a legal adviser and their client.

Disclosure of any information which has the potential to harm such a professional relationship - or the existence of such relationships generally - by disclosing its existence, or the matters

⁷ *Egan v Chadwick* (1999) 46 NSWLR 563, 576-7, 587.

communicated pursuant to it, should, of itself, be properly seen as inimical to the public interest (regardless of the content of that information).

It is for this reason that the principles of legal professional privilege have been understood by the High Court of Australia as a "natural, if not necessary, corollary of the rule of law",⁸ and a "necessary corollary of fundamental, constitutional or human rights".⁹

The Office of Sport also notes that the Second Searle Submission has adopted an unduly restrictive definition of the circumstances in which legal professional privilege will arise.

Unlike the position set out in the Second Searle Submission, legal professional privilege will be found to exist at common law in the context of the Order for Papers, being a fundamental right in relation to:

- a) a confidential communication between a lawyer and a client for the dominant purpose of contemplated/pending litigation or for obtaining or giving legal advice;
- b) a lawyer and a third party, for the benefit of a client, for the for the dominant purpose of contemplated/pending litigation or for obtaining or giving legal advice; and/or
- c) confidential material which records the work of a lawyer carried out for the benefit of a client.¹⁰

In those circumstances, disclosure of documents which would (or may) be subject to legal professional privilege at general law should not be considered "reasonably necessary" for the "proper exercise" of Parliament's functions, or otherwise in the "public interest".

This is the case:

- a) regardless of whether or not proceedings in relation to the subject of the advice are on foot, or threatened. The prospect of future litigation in which the privileged material may be relevant cannot be excluded.

Indeed, the existence of that species of legal professional privilege known as "advice privilege" is directed towards encouraging clients to seek legal advice *before* such disputes arise;

- b) regardless of the unchallenged importance of the role of the Legislative Council in holding the Executive to account. As set out in our first submission, that function is not in any way impeded in circumstances where the privileged material has been produced to the Legislative Council; and
- c) despite the fact that Government occupies a somewhat unique position to a private citizen. It is well established that the principles of legal professional privilege apply equally to Executive bodies (who should be encouraged to seek advice as to the lawful and proper exercise of those powers).¹¹

⁸ *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121, 161.

⁹ *AM & S Europe Ltd v Commission of the European Communities* [1983] 3 WLD 17, 54 cited with approval in *Baker v Campbell* (1983) 153 CLR 52.

¹⁰ See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

¹¹ *Waterford v Commonwealth* (1987) 163 CLR 54.

Indeed, "*the effective conduct of the activities of the modern state requires ... confidential communications between the government and its professional legal advisers*" (emphasis added).¹²

It may be accepted, that the Legislative Council "*may require access to legal advice on the basis of which the Executive acted, or purported to act*".¹³ However, the Second Searle Submission has failed to identify why it is either necessary or appropriate for the nature and contents of that legal advice to be released to the general public as opposed to Mr Searle and his fellow members of the Legislative Council.

In respect of the specific documents in which the Second Searle Submission accepts that legal professional privilege would, or may, be available at general law:

- a) Documents 85 and 92 represent confidential communications between a legal adviser and the Office of Sport for the purpose of providing legal advice, and disclose the contents of that advice;
- b) Documents 75, 77, 79, 80, 82 and 83 purport to represent summaries, prepared by the Office of Sport, of the content of legal advice rendered to it by external legal advisers, or the instructions issued to those advisers. Those documents clearly disclose the content of the legal advice conveyed by external legal advisers.

Although it may be accepted that those documents, on their face, do not disclose their provenance, proof of such matters is not determinative of the existence of the privilege and is supported by the context in which the documents are produced (including by reference to their "family bundles").

Public disclosure of these documents is clearly not "reasonably necessary" for the proper purpose of the Legislative Council's functions, would undermine a fundamental right of the general law, and would otherwise be inimical to the public interest, for the reasons set out above.

In respect of the specific documents in which the Second Searle Submission submits that legal professional privilege would not be available at general law:

- c) Documents 52 and 54-57 record questions which formed the basis of instructions issued to external legal advisers and discloses the existence of that advice;
- d) Documents 65 and 93 record the process of obtaining advice from external legal advisers and discloses the existence of that advice;
- e) Document 66 contains legal advice issued from the Office of Sport's Manager of Legal Services, who is a Government Legal Practitioner and the holder of a current Australian Practising Certificate. It would thus be subject to legal professional privilege at general law;¹⁴
- f) Documents 69 and 72 contain summaries of the legal advice referred to above and discloses both the existence of that advice and its contents.

¹² *R v Keamey; Ex parte Attorney-General (NT)* (1984) 3 FCR 534, 544.

¹³ (1999) 46 NSWLR 563, 578.

¹⁴ *Waterford v Commonwealth* (1987) 163 CLR 54.

None of these documents have been publicly disclosed, and all reflect confidential communications between the Office of Sport and its lawyers, between the Office of Sport and Cabinet, or within the Office of Sport itself.

In these circumstances, the Office of Sport submits that publication of these documents is clearly not "reasonably necessary" for the proper purpose of the Legislative Council's functions, would undermine a fundamental right of the general law, and would otherwise be inimical to the public interest for the reasons set out above and in its first submission.

In the event that the Office of Sport's preferred approach is rejected, it is nevertheless submitted that the disclosure of the abovementioned documents would be "inimical to" or "likely to injure" the public interest for the reasons set out above, and should not be disclosed to the public.

Commercial in Confidence Documents

For the reasons set out in its first submission, the Office of Sport maintains that disclosure of each of the documents identified as "commercial in confidence" is not "reasonably necessary" for the proper exercise of the Legislative Council's functions, or is otherwise inimical to the public interest.

In this respect, the Office of Sport continues to rely upon the justifications outlined in its earlier submissions.

In response to the claims in the Second Searle Submission regarding the lack of evidence of any of the feared consequences of disclosure, the Office of Sport notes that it has not been provided with an opportunity to provide any such evidence, nor have the organisations whose commercial interests would be impacted if the relevant Dispute Documents were released to the public.

In circumstances where the Office of Sport's claim for privilege is designed to protect not only its own commercial interests, but also those commercial interests of third parties, the Office of Sport invites the independent arbiter to seek evidence from, and the views of, third parties whose interests may be adversely impacted by the disclosure of the Disputed Documents.

We also support and rely on the submissions made by Venues NSW (and any other agency) to the extent that its (or their) submissions relate to the same documents where a claim of commercial in confidence has been made and are contained within the Disputed Documents produced by the Office of Sport.

With specific regard to the certificates of insurance identified in the Second Searle Submission, the Office of Sport considers that it is not reasonably necessary for the proper exercise of the Legislative Council's functions to publicly disclose the nature and amounts of insurance cover held by successful (and unsuccessful) tenderers in circumstances where Mr Searle and his fellow members of the Legislative Council have access to these documents in their entirety.

Disclosure of these documents tends to disclose the terms of insurance (including policy exclusions, deductibles/excesses and special conditions) negotiated between the parties and the insurer's underwriting practices, and thus may unduly prejudice the legitimate commercial interests of these parties.

We otherwise note that Mr Searle has accepted that banking details, hourly rates, and the ARLC and ARU's intentions regarding naming rights, supplier rights, corporate hospitality,

venue hire fees, ticketing, stadium members, technology, merchandise and other key elements ought not be publicly disclosed.

Public Interest Immunity

As set out at above, the operation of "public interest immunity" is only relevant insofar as it sheds light on the circumstances in which disclosure is "reasonably necessary" for the functions of the Legislative Council, or otherwise inimical to the public interest.

At page 6 of the Second Searle Submissions, Mr Searle has accepted that there is "no reason" for "Dropbox account links", "passwords" and "internal departmental pathways" to be publicly disclosed.

As this resolves each of the claims pressed by the Office of Sport on this basis, no further submissions on this issue are required.

Privacy

Consistently with the approach set out above, the Office of Sport submits that the disclosure of documents which would threaten the privacy of members of the public would be contrary to the public interest, and thus would not be "reasonably necessary" for the "proper exercise" of the Legislative Council's functions.

In this respect, the Second Searle Submission accepts that disclosure of postal addresses, residential addresses, telephone numbers, email addresses, membership numbers, bank account details, and/or credit card numbers would be contrary to the public interest.

As this resolves each of the claims pressed by the Office of Sport on this basis, no further submissions on this issue are required.

Thank you for the opportunity to provide these submissions.

Yours sincerely



Dr Phil Hamdorf
A/Chief Executive
Office of Sport

Mr David Blunt
Clerk of the Parliaments
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Order for Papers – Sydney Stadiums

Dear Mr Blunt

I refer to the resolution of the Legislative Council under Standing Order 52 made on 15 March 2018. I also refer to your emails of 17 May 2018 attaching submissions made by the Honourable Adam Searle MLC dated 17 May 2018 regarding the dispute he has lodged relating to the privilege claims made in the Sydney Stadiums return to order.

Mr Searle's three submissions provided to the Department of Premier and Cabinet (**Department**) yesterday relate respectively to the privilege claims made by Venues NSW, the privilege claims made by the Department, and further submissions made on 15 May 2018 by the Office of the Minister for Sport, Venues NSW and the Sydney Cricket and Sports Ground Trust.

In your emails, you advised that the Independent legal arbiter, the Honourable Keith Mason AC QC, has invited a response to Mr Searle's submissions by **1pm on Friday, 18 May 2018**.

In accordance with your request, I enclose at **Annexure A** to this letter further submissions from:

- the Sydney Cricket and Sports Ground Trust and
- Venues NSW.

Regarding Mr Searle's submission about the Department's privilege claims, the Department notes that Mr Searle has agreed that personal details of members of the public should be redacted. Accordingly, Mr Searle asserts that the documents for which the Department has claimed privilege on the basis that they contain personal information should be redacted and then disclosed. This process has already been undertaken by the Department. Documents covered by the terms of the resolution that contain personal information were provided on 5 April 2018 both in full as privileged documents, and in a redacted form in the Department's set of non-privileged documents.

The Department notes that Mr Searle does not otherwise dispute the Department's privilege claims.

Should you require any clarification or further assistance, please contact me on telephone (02) 9228 4514.

Yours sincerely



Karen Smith
Deputy Secretary, Cabinet and Legal

18 May 2018

18 May 2018

Email: Jacqueline.Moore@dpc.nsw.gov.au

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Your reference:

Our reference:
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Dear Ms Moore

Standing Order 52 – Order for Papers – Sydney Stadiums

The Trust has been provided with a copy of a letter dated 17 May 2018 from the Honourable Adam Searle MLC to Mr David Blunt, Clerk of the Parliaments (**17 May Letter**) and responds as follows.

The Trust repeats its previous submissions made in respect of the MOU and reiterates that it supports the supplementary submission on disputed claims of privilege produced by Venues NSW.

The Trust and all relevant agencies have made the claim for privilege over the whole of the MOU, as has the NRL. The 17 May Letter proposes that the Venues NSW version of the MOU be disclosed with Schedule 2 redacted. The Trust makes the submission with regard to its version of the MOU, and contends that it would not be in the public interest for a claim for privilege over the MOU to be rejected, in whole or in part, as proposed by the 17 May Letter.

Yours faithfully

A handwritten signature in blue ink that reads "Norton Rose Fulbright".

Stephen Gorry
Partner
Norton Rose Fulbright Australia

APAC-#68477291-v1

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STANDING ORDER No 52

LEGISLATIVE COUNCIL RESOLUTION DATED 15 MARCH 2018

FURTHER SUBMISSION IN SUPPORT OF VENUES NSW'S CLAIMS FOR PRIVILEGE

This document supports Venues NSW's claims for privilege in respect of documents which it produced to the Legislative Council in response to the resolution dated 15 March 2018 (**Resolution**).

It specifically responds to the submission made by Mr Searle MLC and dated 17 May 2018.

Venues NSW adopts each of its previous submissions. This submission follows the structure of Mr Searle's most recent submission.

1. **LEGAL PROFESSIONAL PRIVILEGE**

- 1.1 Mr Searle posits, in rejecting Venues NSW's claims for legal professional privilege (**LPP**), that there is nothing in the relevant documents that would compromise Venues NSW's legal position.
- 1.2 This is not a judgment which Mr Searle is in a position to make. Nor is it determinative of whether the document is subject to LPP. Venues NSW's claims rely on the fact that the Board Minutes attach and refer to legal advice from Clayton Utz, and the briefing note, in its draft form, calls for wording to be included from Clayton Utz, which wording was ultimately included and which, in some versions, was identified as advice from Clayton Utz, the disclosure of which would reveal Clayton Utz's view in relation to the document in question.
- 1.3 Disclosure of these documents would disclose legal advice in such a way as to threaten the privileged character of both the documents in respect of which the claim is made, and any other documents which record or rely on that advice.

2. **PUBLIC INTEREST IMMUNITY**

- 2.1 Venues NSW is content to largely adopt the test advanced by Mr Searle.
- 2.2 That test requires an identification of the public interest and an evaluation of whether the public interest is prejudiced or harmed by disclosure. The heart of the dispute between Venues NSW and Mr Searle appears to lie in the view taken on this question. Mr Searle's conception of the public interest is, perhaps unsurprisingly, shaped by the public interest in the scrutiny of the Executive and public discussion of issues, as the "*essence of representative democracy*".
- 2.3 Venues NSW has sought to recognise these aspects of the public interest, but also to point to other elements of the public interest. These aspects have been canvassed extensively in Venues NSW's previous submissions, but generally relate to, among other things:
 - (a) the ability for Venues NSW, as a Government business, to obtain value for the public funds and public assets which are vested in it and to fulfil its statutory functions imposed on it by Parliament (see, in this regard, Venues NSW's submissions in relation to the MOU);
 - (b) the public interest, in circumstances where Government plays a role in a commercial market, in entities being able to treat with Government on the basis that they will not be prejudiced by engaging with Government in that market context; and
 - (c) the public interest, as a hallmark of responsible government, in Government being able to consider, evaluate and develop policy positions in a frank manner, which

would be undermined if the process in developing that policy were to be made public.

- 2.4 Each of these elements of the public interest would be materially undermined by disclosure of documents which show Government's commercial position, its policy drivers, and those of third parties.
- 2.5 These elements of the public interest are no less relevant than the elements to which Mr Searle points, and should not be ignored in any evaluative exercise. In its submissions, Venues NSW has sought to point to the prejudice to the public interest which would flow from disclosure and to explain why that prejudice should result in the documents not being disclosed.
- 2.6 Further, the functions of the House to scrutinise the Executive would not be adversely affected by not disclosing these documents.

3. CLAIMS NO LONGER PRESSED

- 3.1 Venues NSW's purpose in seeking not to waive privilege in respect of claims no longer pressed is to make clear that Venues NSW preserves its right to claim privilege in those documents to the extent that they may become relevant in another context.

4. QUALIFICATIONS TO EXISTING PRIVILEGE CLAIMS

- 4.1 Venues NSW notes Mr Searle's agreement to the course proposed by Venues NSW.

5. ADDITIONAL SUBMISSIONS

- 5.1 Venues NSW addresses the submissions made by Mr Searle in relation to the categories, adopted by Mr Searle, in its previous submission.
- 5.2 Venues NSW is content to proceed on the basis that the listed documents in its previous submission form a complete list.

Documents that contain projected costings or other spending details including the timing of such spending or refer to such documents

- 5.3 The documents in this category show the proposed costs and proposed timing of expenditure in respect of the stadiums policy. It is evident that information as to the amount which Government had budgeted and the timing of intended expenditure would be information which tenderers could use to their advantage in any procurement process. In commercial terms, the budgeted amount becomes a de facto floor for negotiation.
- 5.4 This clearly counts against Government's commercial position in any procurement process for the items whose proposed costs are revealed. So, for example, the TAM details in document 00061, and which are referred to and attached at 7.2 of 00062, would provide valuable information to tenderers and correspondingly injure Government's commercial position.
- 5.5 As noted previously, especially in circumstances where expenditure is projected to occur in the future, the disclosure of this information provides a signal to the market and directly inhibits the ability of Government to obtain value for money in any procurement process. The ability to discuss these costing and policy issues does not overcome the prejudice that would be suffered by the public interest.
- 5.6 In relation to document no 00557, this was disclosed inadvertently. In any event, while the ordinary practice is not to disclose or refer to Cabinet documents, Cabinet documents are subject to a powerful public interest against disclosure.

Documents that reveal the economic justification for particular projects

- 5.7 This document reveals both the BCR and proposed cost, feasibility and economic assumptions on which the BCR was based, of elements of the stadia policy.
- 5.8 It should not be disclosed for the reasons outlined at 5.3-5.5 above. The ability of the House to scrutinise the policy would not be adversely affected by not disclosing the document, and the commercial position of Government would be protected.

The memorandum of understanding between Government parties and the National Rugby League (NRL) parties (MOU) and documents referring to it

- 5.9 Venues NSW notes Mr Searle's agreement that Schedule 2 be redacted, and that the table in documents 00076-00080 be similarly masked.
- 5.10 Venues NSW maintains that the balance of the documents should also not be disclosed for the reasons outlined in its MOU submissions. The nature of the rights granted remains apparent from the terms of the MOU.
- 5.11 Venues NSW notes that some of these documents are also the subject of claims for LPP for the reasons outlined in section 1.

Documents which reference the role of the ANZ Stadium operator in the redevelopment

- 5.12 In order to confine the dispute, Venues NSW does not press its claim in relation to this category, on the basis articulated in paragraph 3.1 above.

Documents which reveal Government's economic, policy and other drivers in relation to the NSW Stadia Strategy

- 5.13 There are a number of different types of document in this category, and Venues NSW has sought, for reasons of time and economy of space (shared by Mr Searle) to deal with this category in a general way.
- 5.14 The Board Minutes discuss sequencing and timing of expenditure for the redevelopment, which are central to the development of the procurement process, and implementation of the stadia strategy. For example, the specification of the number of months for redevelopment of a particular stadium has impacts for scheduling of events and content displacement. Venues NSW's competitors, aware of the timing and duration of shutdown, would be able target content in advance of Venues NSW being in a position to develop a strategy for content displacement within the stadia network. Similarly, the Stadium implementation updates (00550 and 00551) provide details as to the potential timing and cost of expenditure. The disclosure of these updates would have the same adverse effect. The fact sheets (00642 00645) and "hot issues" papers (00643 and 00644) detail the intended period of redevelopment, content displacement and the cost and timing of expenditure.
- 5.15 The draft letters to Mr Shepherd refer to and discuss internal Government budget processes and timings.
- 5.16 Documents 00612 - 00614, 00616, 00619 - 6024, 00641, 00647, 00648 refer to potential correspondence with members of Stadium Australia concerning the redevelopment and timing of it. As noted in Venues NSW's submissions on the MOU, membership of Stadium Australia represents a key revenue stream for Venues NSW and, as such, internal and external considerations concerning the way in which Venues NSW communicates with members, and the possible substance of those communications, have the potential, if disclosed, to prejudice relationships with a key stakeholder.
- 5.17 Notwithstanding these matters, on the basis of confining the dispute, and as articulated in paragraph 3.1, Venues NSW does not press its claim in relation to documents 00545, 00573, 00574, 00615, 00617, 00618, 00625 - 00640, 00650, 00651.

Documents which reveal third parties' economic and other drivers in relation to the NSW Stadia Strategy

- 5.18 Document 00546 relates to the SCG Trust's (Trust) proposed expenditure. Disclosure of this document would disclose business investment decisions, anticipated actions and other steps which are proposed to be taken by a third party as part of the NSW Stadia Strategy.
- 5.19 Disclosure of this document would place the Trust at a competitive disadvantage in any procurement process that it may undertake. This would be contrary to the public interest.
- 5.20 In relation to documents 00589, 00590, 00591, 00592, 00593, 00594 and 00595, and in an effort to confine the dispute, Venues NSW does not press its claim on the basis set out in paragraph 3.1.

Briefings supporting answers to Parliamentary questions

- 5.21 Venues NSW presses its claim on the basis previously identified.

Documents relating to tenders or other procurement processes, including requests for proposals, and documents which underpin them and other tendering documents

- 5.22 Mr Searle accepts the characterisation of these documents, but suggests that they relate to a point too early in a procurement process to provide the level of detail where disclosure would harm the public interest.
- 5.23 The stage of the procurement process does not affect the fact that key policy, economic and other drivers of Government are revealed by the document. Similarly, to the extent that there is any lack of detail, this does not affect the significance of the matters that would be revealed by disclosure.
- 5.24 There is a clear public interest in Government tenders being able to be conducted on a confidential basis, and in Government not being required to disclose its reasons for seeking tenders, nor the other drivers in the procurement process.

Documents relating to the Stadium Network Implementation Group

- 5.25 There is a clear market sensitivity to documents which reveal the way in which, and the times at which, the stadia strategy is proposed to be implemented and the manner in which governance of the strategy will be implemented.
- 5.26 As previously noted:
- (a) the determination of governance models will have a direct effect on the way in which procurement decisions are made, and will affect the commercial and strategic relationships between key stakeholders;
 - (b) part of the role of the group was also to develop an implementation plan for the Government's stadium investment strategy, which was ultimately to be considered by Cabinet. Disclosure of these documents would reveal policy, economic and other drivers of Government, including the process of development of Government policy; and
 - (c) some of these documents also detail the expected timing of development and therefore expenditure,

which disclosure would be contrary to the public interest for reasons set out above. Even if, which is not conceded, these documents only reveal the relevant drivers at a broad level, as asserted by Mr Searle, this does not diminish the prejudice to the public interest that would be caused by disclosure.

Documents which record unsolicited expressions of interest from third parties

- 5.27 The fact that an unsolicited proposal was made, even though it was not acted on, could undermine the potential that third parties would make proposals to Government which may be of value to Government, due to concerns regarding confidentiality. Accordingly, disclosure would prejudice the public interest.

Documents which disclose the terms of existing contracts or benefits arising from the current arrangements

- 5.28 Venues NSW notes Mr Searle's agreement to redact the table at section 9.1 in its entirety in document 00570, 00571 and 00575 (it appears that this list should also include 00572). On this basis, Venues NSW does not object to the documents being disclosed.
- 5.29 In relation to 00652 and 00653, those documents relate to anticipated income generated by a visiting football team, which (it is noted in document 00653), would not normally be published. Only document 00653 contains the amount in question. Accordingly, Venues NSW does not press its claim in relation to document 00652, but presses the claim in relation to document 00653.

Documents which disclose positions in respect of third parties and/or Government

- 5.30 Venues NSW does not press its claim in relation to documents 00667 and 00668, on the basis articulated in paragraph 3.1.
- 5.31 Venues NSW presses its claim in relation to 00576, 00606, 00607, 00646 and 00649.
- 5.32 Venues NSW disagrees with Mr Searle in relation to impugning the integrity of third parties.
- 5.33 Venues maintains that:
- (a) emails where editorial comment is made in relation to the likely conduct of Government (including, for example, the briefing of journalists);
 - (b) emails where editorial comment is made as to the motivations or backgrounds of persons, including journalists,

in circumstances where the effective exercise of Venues NSW's functions would be prejudiced by the disclosure of such documents, particularly in circumstances where the editorial comment is made without basis being provided, should not be disclosed.