

Privileges Committee

**Possible non-compliance
with the 2009 Mt Penny
order for papers**

Ordered to be printed 30 April 2013

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Terms of reference

1. That under Standing Order 77, the Privileges Committee inquire into and report on:
 - (a) whether documents identified in the document comparison matrix provided by the Commissioner of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in this House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process, and
 - (b) if so, what further action the House should take, including any possible further involvement by the ICAC.
2. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser.
3. That notwithstanding anything to the contrary in the resolution establishing the Committee, for the purposes of this inquiry:
 - (a) the Committee consist of eight members, and
 - (b) the additional member be Mr Shoebridge.
4. That the Committee report by Tuesday 30 April 2013.

These terms of reference were referred to the Committee by the House on Thursday, 14 March 2013.¹

¹ *LC Minutes* (14/3/2013) 1537-1538.

Committee membership

The Hon Trevor Khan MLC	The Nationals	Chair
The Hon Amanda Fazio MLC	Australian Labor Party	Deputy Chair
The Hon John Ajaka MLC	Liberal Party	
The Hon Greg Donnelly MLC ²	Australian Labor Party	
The Hon Jenny Gardiner MLC	The Nationals	
The Hon Matthew Mason-Cox MLC	Liberal Party	
Revd the Hon Fred Nile MLC	Christian Democratic Party (Fred Nile Group)	
Mr David Shoebridge ³	The Greens	

² The Hon Greg Donnelly replaced the Hon Peter Primrose as a member of the Committee on Monday, 18 March 2013; *LC Minutes* (19/3/2013) 1549.

³ Under the terms of reference Mr Shoebridge was appointed to the Committee for the purposes of this inquiry; *LC Minutes* (14/3/2013) 1537.

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Chair's foreword

This inquiry concerns compliance by the executive government with an order for the production of State papers made by the Legislative Council in 2009.

In November 2009, the House ordered the production of State papers in relation to the 2009 Mt Penny mining exploration licence and tender process. A return to order was received from the Government later that month. However, in late 2012, following the publication of certain documents by the Independent Commission Against Corruption (ICAC) as part of Operation Jasper, concerns were raised whether the 2009 order of the House had been fully complied with. The House subsequently referred the matter to the Privileges Committee in March 2013. The Committee has now concluded that certain documents identified by the ICAC in a 'document comparison matrix' provided to the President should, *prima facie*, have been provided in the 2009 Mt Penny return to order.

The power of the House to order the production of State papers is fundamental to the constitutional role of the Legislative Council in holding the Government to account under the system of responsible government. The power was confirmed by the High Court of Australia and the New South Wales Court of Appeal in the *Egan* decisions of the mid to late 1990s.

Since the final *Egan* decision in 1999, the House has passed 294 orders for the production of State papers. While questions have arisen from time to time about the content of some returns to order, and why particular documents have not been provided to the House, this is the first time that the House has decided that evidence before it of non-provision of documents has warranted formal investigation and report.

It is vital to the protection of the powers of the House that this matter be investigated further. Accordingly, this report includes a recommendation for the House to refer to the Privileges Committee a new inquiry to investigate the reasons why certain documents were not provided in the 2009 Mt Penny return to order and related matters.

The Committee wishes to acknowledge the work of the ICAC in providing the 'document comparison matrix' to the President. The Committee believes that the ICAC invested a considerable amount of time in reconciling its holdings of documents as part of Operation Jasper with the 2009 return to order.

I wish to thank my fellow members of the Committee for their participation in this inquiry.

The Hon Trevor Khan MLC
Chair

Summary of findings and recommendations

Finding 1

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The Committee finds that the potential ramifications of waiving parliamentary privilege include:

- A chilling effect on future proceedings in Parliament, if there is an increased likelihood that privilege will be waived more often.
- Abuse of the waiver by parliamentary majorities for political purposes.
- The creation of public expectations that privilege can be routinely waived whenever an issue becomes one of public concern in the future, and the exposure of Parliament to criticism in the event that privilege is not waived.
- An undermining of Parliament's constitutional role as the principal body responsible for superintendence of the executive government if matters are routinely referred to bodies such as the ICAC.

Finding 2

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The Committee finds that at least 124, if not all, of the documents identified by the ICAC in the 'document comparison matrix' as not having been provided to the House in 2009 related to the 2008/2009 EOI process, and that accordingly, they should, *prima facie*, have been provided in the 2009 Mt Penny return to order.

Recommendation 1

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The Committee recommends that the House adopt new terms of reference referring a further inquiry to the Privileges Committee to consider the matters raised in this report, and suggests the following draft terms of reference for the consideration of the House:

1. That this House notes the findings and recommendations of the Privileges Committee in Report No. 68 entitled 'Possible non-compliance with the 2009 Mt Penny order for papers', dated 30 April 2013.
2. That the Privileges Committee inquire into and report on the failure to provide documents in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process, including documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the House on 14 March 2013, and in particular:
 - (a) the reasons for and circumstances leading to the failure to provide documents in the return,
 - (b) whether other documents held by offices identified in the resolution passed by the House on 12 November 2009 and captured by the terms of the resolution were not provided in the return,
 - (c) any deficiencies in processes or policies of a minister, ministerial office, department or other agency regarding the identification of documents captured by orders for the production of documents under standing order 52, or the inclusion of documents in a return,
 - (d) the identity of the person or persons whose actions resulted in the failure to provide

- documents in the return,
- (e) any further action the House should take in relation to this matter, including:
 - (i) whether a person or persons should be adjudged guilty of contempt,
 - (ii) the scope of sanctions that may be imposed,
 - (iii) any possible further involvement by the Independent Commission Against Corruption,
 - (f) guidelines and policies for the process by which ministers, ministerial offices, departments and agencies respond to orders for the production of documents under standing order 52, in light of current guidelines and policies, and
 - (g) any other related matter.
3. That in order to ensure procedural fairness, natural justice and the protection of witnesses before the Committee, the Committee:
- (a) shall observe the procedures laid down in the standing orders and the practices and procedures of the House, and
 - (b) may adopt and report to the House any additional procedures as the Committee sees fit.
4. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser or advisers.
5. That notwithstanding anything to the contrary in the resolution establishing the Committee, for the purposes of this inquiry:
- (a) the Committee consist of eight members, an
 - (b) the additional member be Mr Shoebridge.

Chapter 1 Background to the inquiry

This chapter provides background information to the inquiry.

The 2008/2009 EOI process for the Mt Penny exploration licence

- 1.1** In 2008/2009, the Department of Primary Industries (DPI) conducted an expression of interest (EOI) process for the exploration of 11 medium and small coal exploration areas in New South Wales, including the Mt Penny expression of interest area in the Bylong Valley in the Western Coalfield.
- 1.2** The process formally began in September 2008 when an EOI package was released by DPI. However, prior to the opening of the EOI process, the office of the Minister for Primary Industries and Minister for Mineral Resources, the Hon Ian Macdonald, specifically requested and was provided with a ministerial briefing by DPI on the Mt Penny coal reserves.⁴
- 1.3** The right to submit an EOI for the 11 medium and small coal exploration areas was initially restricted to a number of smaller companies who had previously expressed interest in developing coal resources in NSW. On the initial closure of the process, two companies had submitted EOIs in respect of Mt Penny: Jain Group and Monaro Mining NL. However, in January 2009, following representations to the Minister by various mining companies, the EOI process was re-opened to allow additional companies to express interest in the 11 areas. Two further companies subsequently submitted an EOI in respect of Mt Penny: Cascade Coal Pty Limited and Breakspheare Coal Mines Ltd. Ultimately, following a delegation from the Minister, the Exploration Licence (Exploration Licence 7406) was granted to Mt Penny Coal Pty Ltd nominated by Cascade Coal Pty Ltd.
- 1.4** During the EOI process, concerns were publicly raised regarding the probity of the EOI process. Of note, questions were asked in the House of Minister Macdonald by Ms Lee Rhiannon in relation to the role of the Minister and the Hon Edward Obeid in the process.⁵ The Committee notes in particular the following response from Mr Macdonald to a question on notice from Ms Rhiannon on Thursday, 12 November 2009:

This particular resource exploration licence was part of a number of small to medium resource licences that were put out for expression of interest. The process was done entirely by the department; I had no role in it. Indeed, I delegated all authority relating to those leases to the department. The whole process was overseen by the former Deputy Auditor-General of New South Wales, Mr Fennell. The decisions of the panel, including the probity auditor, were put forward to the director general, who implemented the results in relation to those coal leases.⁶

⁴ See email from Jamie Gibson, Chief of Staff to Graham Hawkes, DPI asking for a Mt Penny brief that he can provide to the “boss”, J-9 Pp 43-44; Ministerial Briefing, ‘Mt Penny – Bylong Valley’, J-9 Pp 48-49.

⁵ *LC Debates* (10/11/2009) 19134; (12/11/2009) 19468-19469.

⁶ *LC Debates* (12/11/2009) 19468-19469.

The 2009 Mt Penny order for papers

- 1.5 On 10 November 2009, the Hon Duncan Gay gave notice of motion for an order for the production of papers in relation to the Mt Penny mining exploration licence and tender process.
- 1.6 On 12 November 2009, the Legislative Council agreed to the motion. The order stated:
- That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.⁷
- 1.7 A return to order was received by the Clerk from the Department of Premier and Cabinet (DPC) and tabled in the House on 26 November 2009.⁸ The return consisted of one box of public documents and one box of privileged documents. The indexes to the public and privileged documents, together with supporting correspondence, are available at Appendix 1.
- 1.8 The Committee notes that in accordance with established practice, individual agency representatives certified that all papers held by the agency and covered by the terms of the resolution of the House had been provided.

Changes in the ministry at the time of the 2009 order for papers

- 1.9 On 17 November 2009, Mr Macdonald was removed from the Ministry by the then Premier, the Hon Nathan Rees MP. The Hon Peter Primrose was appointed Minister for Regulatory Reform, and Minister for Mineral Resources. The House's receipt of the return to order on 26 November 2009 was whilst Mr Primrose was Minister for Mineral Resources.
- 1.10 On 4 December 2009, the Hon Kristina Keneally MP replaced the Hon Nathan Rees MP as Premier. Subsequently, on 8 December 2009, Mr Macdonald was reappointed to the Ministry and appointed Minister for State and Regional Development, Minister for Mineral and Forest Resources, and Minister for the Central Coast. Mr Primrose ceased to be the Minister for Mineral Resources and was appointed Minister for Small Business, Minister for Volunteering, Minister for Youth, and Minister Assisting the Premier on Veteran's Affairs.
- 1.11 Mr Macdonald continued to hold the mineral resources portfolio until he resigned from the Ministry on 5 June 2010. He ceased to be a member of the Legislative Council on 7 June 2010.

⁷ *LC Minutes* (12/11/2009) 1517.

⁸ *LC Minutes* (26/11/2009) 1580.

Operation Jasper

- 1.12** In 7 August 2012, the Independent Commission Against Corruption (ICAC) announced that it was undertaking an investigation into the circumstances surrounding a decision made in 2008 by the Hon Ian Macdonald to open the Mt Penny expression of interest area in the Bylong Valley for coal exploration, including whether the decision was influenced by the Hon Edward Obeid.
- 1.13** The ICAC subsequently published on its website a range of exhibits incorporating material in relation to the 2008 decision of Mr Macdonald. These exhibits were published progressively by the ICAC as they were tendered during the ICAC inquiry, which commenced public hearings on 12 November 2012.

Concerns whether the 2009 order for papers had been fully complied with

- 1.14** In December 2012, in the light of documents made public as part of Operation Jasper, concerns were raised by the Hon Jeremy Buckingham whether the 2009 Mt Penny order for papers had been fully complied with. The following is a timeline of the raising of these concerns and events in the House in the lead up to this inquiry:
- on 4 December 2012, the Clerk received correspondence from the Hon Jeremy Buckingham expressing concern that relevant documents may not have been included in the Mt Penny return to order, based on documents published by the ICAC as part of Operation Jasper (Appendix 2);
 - on 10 December 2012, the Clerk forwarded Mr Buckingham's correspondence to the Director General of DPC for a response (Appendix 3);
 - on 18 January 2013, the Director General responded by outlining the process that DPC undertakes in co-ordinating the return of documents in response to an order under Standing Order 52, and indicated that as the matter 'appears to touch directly upon matters that are currently before the ICAC', he had forwarded the correspondence from the Clerk and Mr Buckingham to the ICAC (Appendix 4);
 - on 19 February 2013, the first sitting day of 2013, the correspondence of Mr Buckingham, the Clerk and the Director General was tabled in the House by the Clerk;⁹
 - on 25 February 2013, following an approach to the Clerk by a senior investigator at the ICAC, the President wrote to the Commissioner of the ICAC seeking formal advice of the Commission's intentions in relation to this matter, and indicating that papers in the return to order, including the indexes to the documents and associated certification letters, were undoubtedly protected by privilege as 'proceedings in Parliament' (Appendix 5);
 - on 26 February 2013, the Commissioner of the ICAC replied indicating that the Commission was comparing documents it held as part of Operation Jasper with the return to the House in 2009 (Appendix 6). The Commissioner stated in part:

⁹ *LC Minutes (19/2/2013) 1458-1459.*

The work being undertaken by the Commission is to compare the material produced to the House in November 2009 with the Commission's holdings to ascertain whether any of the material held by the Commission but not included in the return might also have fallen within the scope of material in the order for papers. If it appears to the Commission that documents were not included in the return then the Commission will advise the House.

- on 27 February 2013, the President advised the House of his correspondence to the Commissioner, and the Commissioner's response, and tabled both items of correspondence;¹⁰
- on 12 March 2013, the Leader of the House, the Hon Duncan Gay, gave a ministerial statement in the House¹¹ in relation to the 2009 Mt Penny return to order in which he indicated that

should correspondence be received from the Independent Commission Against Corruption indicating that, in the Independent Commission Against Corruption's opinion, documents were not included in the 2009 return when they should have been, I will immediately move under Standing Order 77 to have this matter referred to the Privileges Committee for inquiry and report;¹²

- on 14 March 2013, Mr Buckingham gave notice of the introduction of a bill¹³ for an Act to waive parliamentary privilege in relation to the Mt Penny return to order to allow ICAC to inquire into and report on the matter;
- later on 14 March 2013, the President advised the House that he had received further correspondence from the Commissioner of the ICAC (Appendix 7) indicating that the ICAC had created a 'document comparison matrix' listing documents which the ICAC 'considered as being possibly relevant to the order for papers but which do not appear to have been included in the production to Parliament', and providing a copy of the matrix (Appendix 8) together with copies of the relevant documents.¹⁴ The President subsequently tabled the correspondence and the document comparison matrix.¹⁵

1.15 On tabling of the correspondence from the Commissioner and document comparison matrix on 14 March 2013, the President made a statement to the House, reproduced in part below:

... This is an extremely grave matter. Since the High Court of Australia reaffirmed the power of this House to order the production of State papers, the exercise of that power has been a fundamental part of the work of this House, in holding the Executive Government to account, and the House has made 293 orders for the production of documents. We appear now to be faced with the possibility that one of the orders of the House was not complied with. It is ultimately for the House to determine whether or not its order has been complied with and the consequences that flow.

¹⁰ *LC Minutes* (27/2/2013) 1496.

¹¹ *LC Minutes* (12/3/2013) 1513.

¹² *LC Debates* (12/3/2013) 18323-18324.

¹³ The Independent Commission Against Corruption Amendment (Mount Penny Exploration Licence-Call for Papers) Bill.

¹⁴ *LC Debates* (14/3/2013) 18630.

¹⁵ *LC Minutes* (14/3/2013) 1537.

On Tuesday of this week the Leader of the House foreshadowed that if, as is now the case, the Independent Commission Against Corruption indicated that it held documents relevant to the order of the House which did not appear to have been included in the return to order, he would immediately move, under Standing Order 77, for the matter to be referred to the Privileges Committee for inquiry and report. I can advise members that in a conversation this morning Commissioner Ipp advised me that an inquiry into this matter by the Privileges Committee would in no way interfere with the current investigations being conducted by the Independent Commission Against Corruption and that it was entirely a matter for this House to determine how it proceeded to deal with this matter.

As your President I regard the privileges and powers of this House as matters of vital importance. It is essential that this matter be dealt with in a way that upholds the dignity, role and powers of the House.¹⁶

Establishment of this inquiry

1.16 Immediately following the statement by the President on 14 March 2013 cited above, the Leader of the House, the Hon Duncan Gay, moved that under standing order 77, the House refer the matter to the Privileges Committee for inquiry and report. The motion was put and passed on the voices without debate.¹⁷

1.17 The terms of reference referred to the Committee are at page iv.

Changes to the membership of the Committee

1.18 There were two changes to the membership of the Committee for the purposes of this inquiry:

- The terms of reference appointed Mr Shoebridge as an additional member of the Committee for the purposes of this inquiry only.
- On Tuesday 19 March 2013, the President informed the House that on Monday 18 March 2013, the Clerk had received advice that the Leader of the Opposition had nominated the Hon Greg Donnelly as a member of the Privileges Committee in place of the Hon Peter Primrose.

Conduct of the inquiry

1.19 The Privileges Committee first met to consider the terms of reference on Tuesday, 19 March 2013. At its meeting, the Committee resolved:

That the Clerk of the Parliaments be requested to obtain advice from leading senior counsel relating to whether documents identified in the document comparison matrix provided by the Commissioner of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in the House

¹⁶ *LC Debates* (14/3/2013) 18630.

¹⁷ *LC Minutes* (14/3/2013) 1537-1538.

on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process.

- 1.20** The following day, Mr Bret Walker SC, the Senior Counsel who represented the Legislative Council during the *Egan* cases of the late 1990s, accepted a brief to provide advice to the Committee in accordance with the Committee's resolution. The documents from the Commissioner of the ICAC tabled in the House on 14 March 2013, including the covering correspondence from the Commissioner and the document comparison matrix, were released to Mr Walker on 21 March 2013. Mr Walker was also provided with a copy of the public documents provided in the 2009 Mt Penny return to order, together with the indexes to both the public and privileged documents.
- 1.21** Mr Walker provided his advice on Thursday, 11 April 2013. A copy is at Appendix 9.
- 1.22** Following the receipt of Mr Walker's advice, the Committee met on three further occasions: Tuesday, 16 April 2013, Tuesday, 23 April 2013 and Monday, 29 April 2013. At the meeting on 23 April, the Committee invited the former Clerk, Mr John Evans, to address the Committee regarding the conduct of the Arena inquiry by the Committee in 1997 and 1998.¹⁸ The Committee also wrote to the Commissioner of the ICAC on 23 April seeking advice on whether waiver of privilege over the 2009 Mt Penny return to order would in any way assist the Commission as part of its investigations (see Appendix 10). The Committee adopted this report at its final meeting on 29 April 2013.
- 1.23** The Minutes of the Committee meetings are at Appendix 12.

Structure of this report

- 1.24** This report is in five chapters. The following four chapters are structured as follows:
- Chapter 2 examines the power of the House to order the production of State papers, and the procedures for the production of State papers.
 - Chapter 3 outlines the immunity that attaches to returns to order as a 'proceedings in Parliament', and examines generally the waiving of privilege.
 - Chapter 4 examines whether documents identified in the 'document comparison matrix' provided by the Commissioner of the ICAC to the President and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process.
 - Chapter 5 provides the Committee's conclusions and recommendations in relation to the further investigation of the matters raised in this report.

¹⁸ NSW Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report No. 6, June 1998.

Chapter 2 Orders for the production of State papers

This Chapter examines the power of the House to order the production of State papers. The Chapter also outlines the procedures for the production of State papers under standing order 52, including the procedures followed by the Department of Premier and Cabinet in coordinating returns to order.

The power of the House to order the production of State papers

- 2.1** Orders for the production of papers are one of the principal means by which the executive is held accountable to the Legislature and the people of New South Wales.
- 2.2** The power of the House to order the production of State papers is a common law power based on the principle of reasonable necessity – that is, the House has such powers as are ‘reasonably necessary’ for the House to carry out its legislative and scrutiny functions. Unlike some other Australian jurisdictions, the power to order the production of documents has not been conferred on the Houses by statute or by reference to the powers of the House of Commons.
- 2.3** However, the powers of the House in this regard were confirmed in the mid to late 1990s as the result of a long running dispute between the Executive Government and the Legislative Council, which culminated in a series of decisions, the *Egan* decisions, by the High Court and the New South Wales Court of Appeal.

The *Egan* decisions

- 2.4** Between 1856 and 1934 the Council made a number of orders for the production of documents, the vast majority of which were complied with by the governments of the day. From 1934 to 1995 the practice of ordering documents fell into disuse. However the practice was revived in the early 1990s, precipitating a challenge to the House’s power to order the production of documents.¹⁹
- 2.5** In May 1996, the Legislative Council suspended the Treasurer and Leader of the Government, the Hon Michael Egan, from the service of the House for failing to comply with a number of orders for the production of papers.²⁰ In response to the House’s actions, Mr Egan brought proceedings in the Supreme Court challenging the Council’s powers to call for State papers or enforce such a call by suspending him. The proceedings were later removed, by consent, to the Court of Appeal.
- 2.6** The Court of Appeal handed down its decision in *Egan v Willis & Cabill*²¹ in November 1996, holding that a power to order the production of state papers is reasonably necessary for the proper exercise by the Legislative Council of its functions. In his decision, Gleeson CJ stated:

¹⁹ For a more detailed commentary, see Lovelock L and Evans J, *New South Wales Legislative Council Practice*, The Federation Press, 2008, pp 474-85.

²⁰ *LC Minutes* (2/5/1996) 112-118.

²¹ (1996) 40 NSWLR 650.

The capacity of both Houses of Parliament, including the House less likely to be ‘controlled’ by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.²²

- 2.7 In 1997, the High Court granted Mr Egan special leave to appeal the decision of the Court of Appeal. The decision of the High Court in *Egan v Willis*²³ was handed down in November 1998. The majority confirmed that it was reasonably necessary for the Council to be able to order a minister who is a member of the House to produce certain State papers in accordance with the system of responsible government.²⁴

Executive claims of privilege and immunity: *Egan v Chadwick & Ors*

- 2.8 While *Egan v Willis* confirmed the power of the Council to order the production of State papers, the High Court expressly left open the question of whether the power to call for documents extends to documents for which claims of privilege or immunity could be made at common law.
- 2.9 This matter came to a head in late 1998, when the Government once again refused to return documents in response to an order of the House, indicating that the documents would not be produced on the grounds of legal professional privilege and public interest immunity, citing Crown Solicitor’s advice.²⁵ Following a further suspension from the House, Mr Egan again instituted proceedings in the Supreme Court. The matter was again removed, by consent, to the Court of Appeal.
- 2.10 The Court of Appeal delivered its judgement in *Egan v Chadwick & Ors*²⁶ on 10 June 1999. The Court held that the Council’s power to call for documents extends to compelling the executive to produce documents in respect of which a claim of legal professional privilege or public interest immunity may be made. However, the majority (Spigelman CJ and Meagher JA) held that the power did not extend to Cabinet documents.²⁷
- 2.11 For Meagher JA, the restriction was absolute, applying to Cabinet documents generally.²⁸ However, Spigelman CJ argued that the restriction depended on the content of Cabinet documents: only those documents which reveal the ‘actual deliberations of Cabinet’ should remain confidential, based on the idea of collective Cabinet responsibility and the confidentiality of Cabinet deliberations.²⁹ Documents prepared outside Cabinet for

²² *Ibid* at 665 per Gleeson CJ.

²³ (1998) 195 CLR 424.

²⁴ *Ibid* at 453-454.

²⁵ *LC Minutes* (13/10/1998) 740; *LC Debates* (13/10/1998) 8073-8074.

²⁶ (1999) 46 NSWLR 563.

²⁷ Spigelman CJ argued the restriction is necessary in order to avoid inconsistency between the power to call for documents and one of the bases on which it has been determined that the power is reasonably necessary, namely executive accountability derived from responsible government: (1999) 46 NSWLR 563 at 576.

²⁸ *Ibid* at 597.

²⁹ *Ibid* at 574-576.

submission to Cabinet ‘may or may not, depending on their content’, lie beyond the Council’s power, the status of such documents requiring assessment on a case by case basis.³⁰

- 2.12 Priestley JA, dissenting, argued that no restriction fell on any documents as government documents are generated at public expense for public benefit,³¹ and concluded that:

...notwithstanding the great respect that must be paid to such incidents of responsible government as cabinet confidentiality and collective responsibility, no *legal right to absolute* secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.³² [emphasis in original]

- 2.13 In effect, the three *Egan* decisions confirmed the Legislative Council’s power to order the production of State papers for which claims of legal professional privilege or public interest immunity could be made at common law, however the extent of the immunity afforded to Cabinet documents was not decided by the majority. This question has not since been tested in the courts.

Executive compliance with orders for documents: Cabinet documents

- 2.14 Following the decision in *Egan v Chadwick*, the Legislative Council agreed to a new resolution requiring the production of the documents previously ordered.³³ The Government complied with that order,³⁴ and has continued to comply with subsequent orders requiring the production of documents. However, the issue of documents that are the subject of Cabinet confidentiality has not been resolved.

- 2.15 In most returns to orders since 1999, where Cabinet documents have seemingly not been included in a return, the omission has not been specified in correspondence from the relevant departments. However, on several occasions, the Government’s position regarding Cabinet documents has been clearly articulated, with the Government stating that documents had not been produced as they had been ‘classified as Cabinet documents’.³⁵ In one case, the Government also disputed the Council’s power to order the preparation of a return with the date, description and author of each document not produced on the grounds that it had been classified as a Cabinet document, and reasons why the document would disclose the deliberations of Cabinet.³⁶ As Cabinet documents have been referred to in only a small

³⁰ *Ibid* at 575.

³¹ *Ibid* at 591-5.

³² *Ibid* at 595.

³³ *LC Minutes* (23/6/1999) 148-150.

³⁴ *LC Minutes* (29/6/1999) 162.

³⁵ Return to order—Dalton reports into Juvenile Justice, *LC Minutes* (9/11/2004) 1099; Return to order—Sinclair Reports concerning Brigalow Belt South Bioregion, *LC Minutes* (3/5/2005) 1340; (26/5/2005) 1408; Return to order—Redfern-Waterloo Authority, *LC Minutes* (22/2/2005) 1229; Return to order—Grey nurse shark, *LC Minutes* (22/3/2005) 1283; Return to order—Incident at Acmena Juvenile Justice Centre, *LC Minutes* (23/5/2006) 19; Return to order—2010-11 Budget finances, *LC Minutes* (31/8/2010) 1994.

³⁶ Return to order—Grey nurse shark—Further order, *LC Minutes* (28/2/2006) 1839.

number of returns, it is possible that there have been other occasions on which documents have been withheld on the basis of Cabinet confidentiality and the Council not advised.

- 2.16** In this context, if the House were to find itself in a position where it appeared that documents had not been included in a return to order, a possible explanation is that the Government had made a decision that the documents fell within the category of Cabinet documents.
- 2.17** As noted earlier, *Egan v Chadwick* confirmed that a distinction can be drawn between those documents which disclose the actual deliberations of Cabinet (presumably, for example, Cabinet minutes) and a broader category of Cabinet documents comprised of, for example, reports, submissions and other documents prepared for the assistance of Cabinet. However, the majority did not come to a final decision as to which Cabinet documents should be excluded from scrutiny, or how broadly or narrowly the courts would interpret the restriction on Cabinet documents. The House has adopted an arbitration mechanism under standing order 52 which enables assessment of the validity of claims of privilege made over documents that are lodged with the House. However, there is no mechanism for assessing the validity of the Cabinet immunity claimed over documents as this judgement is made within the context of the departments' internal processes – the documents are simply not provided to the Parliament.

Procedures for the production of State papers under standing order 52

- 2.18** In *Egan v Willis & Cabill*, Gleeson CJ observed that the Legislative Council's standing orders do not operate as a source of power, but rather regulate the exercise of powers that exist independently by some other means.³⁷ To this end, standing order 52 regulates the Council's common law power to order the production of State papers.³⁸ The full terms of the standing order are published at Appendix 11.
- 2.19** Under standing order 52, orders for papers are initiated by resolution of the House. On a resolution for the production of papers being agreed to, the terms are communicated by the Clerk to the Director General of the Department of Premier and Cabinet, who liaises with the departments or ministerial offices named in the resolution to coordinate the retrieval of the documents requested. On or before the due date imposed by the resolution, the Director General lodges the return comprising the documents with the Clerk of the Parliaments. If the House is not sitting the Clerk receives the documents out of session and announces receipt of the return on the next sitting day.
- 2.20** In addition to the documents required by the resolution, standing order 52 requires that an indexed list of all documents tabled be included in the return, showing the date of creation of each document, a description of the document and the author of the document. Where a claim of privilege is made over documents, the return must also include reasons for the claim of privilege.

³⁷ *Egan v Willis & Cabill* (1996) 40 NSWLR 650 at 664 per Gleeson CJ.

³⁸ Prior to the adoption of the current standing orders in 2004, the power to order the production of state papers was regulated under previous standing orders, albeit in different terms. Between 1856 and 1870, orders for papers fell within the purview of SO 23. Between 1870 and 1895, SO 26 regulated the power, and from 1895 to 2003, orders for documents were made under SO 18.

2.21 Once the documents have been tabled in the House or received out of session by the Clerk, they are deemed to have been published by authority of the House, unless a claim of privilege has been made. Documents over which a claim of privilege has been made are made available to members of the Legislative Council only and may not be copied or published without an order of the House. Standing order 52 also provides a procedure by which members may dispute the validity of a claim of privilege made over documents in writing to the Clerk, who is authorised to release the disputed documents to an independent legal arbiter for evaluation and report to the House. The House then determines whether or not to make the disputed documents public.

Departmental procedures

2.22 As noted in Chapter 1, on 10 December 2012, the Clerk of the Parliaments wrote to the Director General of the Department of Premier and Cabinet (DPC) following concerns being raised that the 2009 order for papers relating to the Mt Penny exploration licence had not been fully complied with in 2009. The Director General's response to the Clerk, dated 18 January 2013, included an explanation of the process that the Department undertakes in co-ordinating the return of documents in response to an order for papers under standing order 52. While the full text of the correspondence can be found at Appendix 4, the following is a summary of the process outlined by the Director-General:

- DPC coordinates the return of documents in response to orders under SO 52,
- however, in accordance with the principles of responsible government and ministerial responsibility to Parliament, responsibility for producing the documents to the House rests formally with the ministers who represent the government in the Legislative Council,
- the administrative process by which the executive government responds to an order under SO 52 is set out in a memorandum that DPC sends to agencies named in an order,
- DPC does not independently review the documents being produced – instead, each agency is responsible for ensuring that the documents it is producing are fully responsive to the order,
- the relevant agency is required to provide a separate index of the documents provided, in accordance with the terms of the standing order,
- although not required by SO52, DPC also requests each agency to provide letters of certification that, to the best of the agency's knowledge (the certification is usually provided by the Head of the Agency), all documents held by that agency and covered by the terms of the order have been produced. These letters of certification are typically included in the return to order provided to the House. This certification does not extend to Cabinet documents. The Director-General states that Cabinet documents are not covered under the terms of any order under SO52.

2.23 The Director-General further advised that the process outlined above that applies now when the Government responds to orders under standing order 52 is substantially the same as that which applied in 2009. This is supported by the copy of the memorandum sent to the Department of Primary Industries in respect of the Mt Penny order in 2009, attached to the

Director-General's correspondence to the Clerk of the Parliaments of 18 January 2013 at Appendix 4.

Chapter 3 The immunity attaching to returns to order as ‘proceedings in Parliament’

This Chapter outlines the general nature of parliamentary privilege, the immunity that attaches to returns to order as ‘proceedings in Parliament’, and the waiving of privilege.

Parliamentary privilege and returns to order

- 3.1** Parliamentary privilege encompasses powers, such as the power of the Houses to conduct inquiries, and immunities from the ordinary law. The chief immunity is the immunity of ‘proceedings in Parliament’ from impeachment or question outside Parliament. This immunity is enshrined in Article 9 of the *Bill of Rights 1689*³⁹ which is in force in New South Wales under the *Imperial Acts Application Act 1969*.⁴⁰
- 3.2** The purpose of the immunity attaching to proceedings in Parliament is to ensure that the Legislature can exercise its powers freely on behalf of the electors without fear of external interference from the other branches of government. The protection is said to be a ‘safeguard of the separation of the powers: it prevents the other branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature.’⁴¹ The immunity reflects a wider constitutional principle whereby the courts will not allow any challenge to be made to what is said or done in Parliament in the performance of its functions.⁴²
- 3.3** For the purpose of the immunity, ‘proceedings in Parliament’ encompasses not just the formal transaction of business in the House or a committee but matters closely related or incidental to such business. As formulated in the Commonwealth *Parliamentary Privileges Act 1987*, ‘proceedings in Parliament’ includes ‘all words spoken and acts done ... for purposes of or incidental to’ the transacting of the business of a House or committee.⁴³
- 3.4** Just as an order by the House requiring the production of government documents constitutes a proceeding in Parliament, so the provision of a return to that order constitutes a proceeding in Parliament, attracting immunity from the ordinary law. Save through the waiver of privilege, only the House itself, or a committee of the House, may investigate matters relating to the provision of such a return.

³⁹ Article 9 of the *Bill of Rights 1689* provides: ‘That the freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court of place out of Parliament.’

⁴⁰ Section 6 and schedule 2.

⁴¹ Evans H and Laing R (eds), *Odgers’ Australian Senate Practice*, 13th edition, Canberra, Department of the Senate, p 44.

⁴² *Prebble v Television New Zealand* [1995] 1 AC 321 at 332.

⁴³ *Parliamentary Privileges Act 1987* (Cth), section 16(2).

Waiver of parliamentary privilege

3.5 'Waiver of privilege' generally refers to a process of suspending the application of the immunity in Article 9 of the *Bill of Rights 1689* to enable 'proceedings in Parliament' to be impeached or questioned outside Parliament where there is such a compelling public interest that some departure from the settled constitutional arrangement is warranted.

3.6 It is generally accepted that privilege is not capable of being waived by an individual member or the House, but requires the authority of statute,⁴⁴ although the position in New South Wales does not appear to have been tested in the courts.⁴⁵ As the immunity is recognised by the law and Article 9 itself is statutory, any dispensing with its application requires a change to the law. As stated in *Odgers' Australian Senate Practice*:

The immunities of the Houses are established by law, and a House or a member cannot change that law any more than they can change any other law.⁴⁶

3.7 Parliamentary privilege was waived by statute in New South Wales in 1997 and 2012.

The Special Commissions of Inquiry Amendment Act 1997

3.8 In 1997 a member of the Legislative Council claimed in a speech to the House that the Premier, the Leader of the Opposition and others had met to ensure that the names of high profile persons allegedly involved in paedophile activity would not be made public.

3.9 In response to concerns arising from the member's speech, the Parliament passed the *Special Commissions of Inquiry Amendment Act 1997*, which amended the *Special Commissions of Inquiry Act 1983* by the insertion of Part 4A. Part 4A empowered either House, by resolution passed by a two thirds majority, to authorise the Governor to establish a special commission of inquiry (similar to a royal commission) to investigate such matters relating to parliamentary proceedings as were specified in the resolution. It also authorised the House to declare by resolution passed by a two thirds majority that parliamentary privilege was waived in connection with the inquiry. However, while permitting a collective waiver of privilege by the House, Part 4A preserved the right of any individual member to claim parliamentary privilege in relation to anything said or done by the member in parliamentary proceedings while authorising the member to give evidence in the inquiry if the member chose to do so. Further, the provisions of Part 4A were specified to expire six months after their commencement date.

3.10 Following the passage of the *Special Commissions of Inquiry Amendment Act 1997*, the Legislative Council passed a resolution, endorsed by a two-thirds majority, authorising the establishment of a special commission of inquiry to investigate the truth of the member's claims. The resolution also waived parliamentary privilege in connection with the inquiry. A commissioner

⁴⁴ See *Odgers' Australian Senate Practice*, p 93; Wright B and Fowler P (eds), *House of Representatives Practice*, 6th edition, Canberra, Department of the House of Representatives, 2012, p 743; Campbell E, *Parliamentary privilege*, Sydney, The Federation Press, 2003, p 125; Griffith G., *Parliamentary privilege: use, misuse and proposals for reform*, NSW Parliamentary Library, Briefing paper 4/97, 1997, p 35-36; Leopold P, 'Free speech in Parliament and the Courts' (1995) 15 *Legal Studies*, pp 205-207.

⁴⁵ Griffith G, *Parliamentary privilege: use, misuse and proposals for reform*, p 37.

⁴⁶ *Odgers' Australian Senate Practice*, p 93.

was duly appointed to conduct the inquiry. While the member exercised her right under the Act not to participate in the inquiry, other persons gave evidence to the inquiry including persons alleged by the member to have participated in meetings concerning the suppression of names.⁴⁷ In its report, the commission found that the member's claims were false and that the member had no evidence to support them.⁴⁸

- 3.11** Following the commencement of the special commission of inquiry the member challenged the validity of Part 4A of the Act in the Supreme Court of New South Wales. The proceedings were removed to the Court of Appeal, which upheld the validity of Part 4A.⁴⁹ The member then sought special leave to appeal to the High Court, which was refused.⁵⁰ In refusing leave the High Court stated that it was not persuaded the Act 'so affected the parliamentary privilege of free speech that it invalidly erodes the institution of Parliament itself'.⁵¹

The Independent Commission Against Corruption (Register of Disclosures by Members) Act 2012

- 3.12** In 2012, as part of Operation Acacia, the Independent Commission Against Corruption sought and obtained access to the Register of Disclosures of Members of the Legislative Council. The Register contains the returns supplied by members disclosing their pecuniary interests and other matters in accordance with the *Constitution (Disclosures by Members) Regulation 1983*. The Register is published pursuant to the Regulation.
- 3.13** Subsequently, the Commission advised that it intended to refer to information contained in members' returns in the Register in a brief of evidence to be used in its investigation. This intention raised the question of whether the Register might be subject to parliamentary privilege. If the Register was subject to parliamentary privilege, it would be protected by Article 9 of the *Bill of Rights 1689* and would not be able to be used in the Commission's investigation as foreshadowed.
- 3.14** The Crown Solicitor was requested to provide an opinion on the status of the Register. The Crown Solicitor advised that there are competing arguments as to whether the Register is protected by parliamentary privilege and that those arguments are finely balanced. However, he was inclined to think that the arguments in favour of the view that the Register is part of 'proceedings in Parliament', and are thus privileged, are of slightly greater weight than those to the contrary.⁵²
- 3.15** Legislation was subsequently introduced to ensure that, if the Register is subject to parliamentary privilege, it could be used in the Commission's investigations. The *Independent Commission Against Corruption (Register of Disclosures by Members) Act 2012* amended section 122 of

⁴⁷ The commission also had access to copies of documents tabled by the member in the House which were referred to the commission by resolution of the House; *LC Minutes* (21/10/1997) 123-126.

⁴⁸ The Hon John Anthony Nader RFD QC, *Report of the Special Commission of inquiry into allegations made in Parliament by the Honourable Franca Arena MLC*, 7 November 1997.

⁴⁹ *Arena v Nader* (1997) 42 NSWLR 427.

⁵⁰ *Arena v Nader* (1997) 71 ALJR 1604

⁵¹ *Ibid* at 1605.

⁵² Knight I, Crown Solicitor, 'Parliamentary Privilege and the Register of Disclosures by Members', 17 October 2012.

the *Independent Commission Against Corruption Act 1988*, which preserves parliamentary privilege in relation to the Commission. The amendments provided that:

- The Commission may use the register for the purpose of any investigation into whether a member publicly disclosed a particular matter or the nature of any matter disclosed and for the purpose of related findings, opinions or recommendations,
- Parliament is taken to have waived ‘any parliamentary privilege that may apply’ to the register for that purpose,
- However, any parliamentary privilege that applies to the register will continue to apply for other purposes such as court proceedings.

3.16 Unlike the waiver provisions of the *Special Commissions of Inquiry Amendment Act 1997*, the amendments made by the *Independent Commission Against Corruption (Register of Disclosures by Members) Act 2012* are not subject to a sunset clause and therefore remain in force.

When is waiver of parliamentary privilege justified?

3.17 As indicated, the purpose of the immunity attaching to ‘proceedings in Parliament’ is to ensure the Legislature can exercise its powers freely on behalf of the electors without fear of external interference from the other branches of government. A compelling public interest needs to be established to justify a departure from these established arrangements. Otherwise, the waiver of privilege has the potential to erode the fundamental protections embodied in Article 9 of the *Bill of Rights 1689*.

3.18 The Committee finds that the potential ramifications of waiving parliamentary privilege include:

- A chilling effect on future proceedings in Parliament, if there is an increased likelihood that privilege will be waived more often.
- Abuse of the waiver by parliamentary majorities for political purposes.
- The creation of public expectations that privilege can be routinely waived whenever an issue becomes one of public concern in the future, and the exposure of Parliament to criticism in the event that privilege is not waived.
- An undermining of Parliament’s constitutional role as the principal body responsible for superintendence of the executive government if matters are routinely referred to bodies such as the ICAC.

Finding 1

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 - An undermining of Parliament's constitutional role as the principal body responsible for superintendence of the executive government if matters are routinely referred to bodies such as the ICAC.
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3.19 The waiver of parliamentary privilege is a very serious matter and there is a strong, and in almost all cases, overriding principle of protecting the privileges of the Parliament and especially the unfettered right of elected members to speak in the House on often very controversial subjects.

3.20 That said, the Committee accepts that in rare circumstances the waiver of privilege may be justified to permit an external inquiry to be made into parliamentary proceedings. With reference to the *Special Commissions of Inquiry Amendment Act 1997*, Professor Enid Campbell observed that 'there can be exceptional circumstances in which extra-parliamentary inquiry into the veracity of statements made under parliamentary privilege may be fully justified.'⁵³ The merits of legislation providing for the waiver of parliamentary privilege would appear to depend on the circumstances of the individual case, and the extent to which the legislation incorporates appropriate qualifications and safeguards.

⁵³ Campbell E, *Parliamentary privilege*, Sydney, The Federation Press, 2003, p 125.

Chapter 4 The documents identified by the ICAC

This Chapter examines whether documents identified in the document comparison matrix provided by the Commissioner of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process.

The ICAC ‘document comparison matrix’

- 4.1 As indicated in Chapter 1, on 14 March 2013, the Commissioner of the ICAC provided to the President a ‘document comparison matrix’. The President tabled it in the House the same day.⁵⁴ The matrix is at Appendix 8.
- 4.2 The matrix is a simple spreadsheet which provides a reconciliation of certain documents held and made public by the ICAC as part of Operation Jasper with the documents returned to the House in 2009:
- In column 2, the ICAC lists the documents returned in response to the order for papers in 2009.
 - In column 4, the ICAC lists documents made public as part of Operation Jasper which the ICAC considered as being possibly relevant to the order for papers but which do not appear to have been included in the 2009 return to order. The ICAC also provided copies of these documents.
 - In column 5, the ICAC provides an index to the documents based on the ICAC exhibit number and page number.
- 4.3 In total, the ICAC document comparison matrix lists 139 documents (or 140⁵⁵) which, in the opinion of the ICAC, fall within the terms of the order for papers in 2009 but were not included in the documents returned to the House.

The advice of Mr Bret Walker SC

- 4.4 As indicated in Chapter 1, on 20 March 2013, following a resolution of the Committee, Mr Bret Walker SC agreed to provide advice to the Committee on the following question: whether documents identified in the document comparison matrix provided by the Commissioner of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process?
- 4.5 Mr Walker’s advice was received on Thursday 11 April 2013. A copy is at Appendix 9.

⁵⁴ *LC Minutes* (14/3/2013) 1537.

⁵⁵ Depending on the status of the document listed as exhibit J-13 Pp 759-858 on page 6 of the document comparison matrix. The document provided in the 2009 return to order appears to be an abridged version of the document provided by the ICAC.

- 4.6** Mr Walker indicated that, in his opinion, ‘nearly all’ of the documents identified by the ICAC in its document comparison matrix should have been produced in the 2009 return to order. The only exceptions in Mr Walker’s opinion were 15 documents identified by the following ICAC exhibit page numbers: J-9 Pg 77; J-9 Pp 127-128; J-9 Pp 129-130; J-9 Pg 131; J-9 Pp 132-133; J-9 Pp 136-137; J-9 Pp 147-151; J-9 Pg 159; J-9 Pp 218-219; J-9 Pg 227; J-12 Pg 585; J-12 Pg 587; J-12 Pp 588-594; J-13 Pg 596; J-13 Pp 597-601.
- 4.7** Accordingly, of the 139 documents identified by the ICAC as falling within the terms of the 2009 order for papers but not provided in the return, Mr Walker agreed with the ICAC that 124 of those documents should have been provided in the 2009 return.
- 4.8** In explaining the reasons for his advice, Mr Walker argued that the terms of the 2009 order for papers were ‘calculated to produce borderline cases and reasonable differences of opinion’, and that if anything, he had ‘erred (if at all) on the side of giving the benefit of the doubt to those who did not produce these documents’:

It should be well understood that the expressions “in relation to” and “relating to” found in the crucial terms of the order are calculated to produce borderline cases and reasonable differences of opinion. Doing the best I can, I estimate that I have been perhaps narrower than a judge might be in an analogous position in assessing some of the documents specified in 7⁵⁶ above as not falling, prima facie, within the terms of the order. That is, I think I have erred (if at all) on the side of giving the benefit of the doubt to those who did not produce these documents.⁵⁷

- 4.9** Mr Walker also provided reasons for identifying the 15 documents which he believed fell outside the terms of the 2009 order for papers:

The document at J-[9] Pg 77 could easily be seen, in hindsight, as having a sufficient connexion with the relevant Exploration Licence and “the tender process”, but is reasonably arguably so general as not to be caught. The documents from J-9 Pg 127 to Pg 133, and Pp 136-137 and 147-151 relate to the availability and market conditions in connexion with drilling surfaces in areas including that eventually covered by the relevant Exploration Licence. The licence did not exist when those documents were created. I note that the existence (or not) of exploration data was explicitly a factor in later consideration of what should fairly be understood to be within “the tender process”. However, these drilling documents could genuinely be regarded as outside the order. The other documents noted in 7 above are not obviously outside the order, but are so borderline and lacking in explicit reference to either the eventual Exploration Licence or “the tender process” as to justify the benefit of the doubt noted in 8⁵⁸ above.⁵⁹

- 4.10** Mr Walker indicated that, in making these findings, he had interpreted reference to ‘the tender process’ in the 2009 order for papers as reference to ‘the so-called Expression of Interest (or EOI) process’.⁶⁰

⁵⁶ See the documents identified by Mr Walker referred to in paragraph 4.6 above.

⁵⁷ Paragraph 8 of Mr Walker’s advice.

⁵⁸ See the quotation of Mr Walker in paragraph 4.8 above.

⁵⁹ Paragraph 9 of Mr Walker’s advice.

⁶⁰ Paragraph 10 of Mr Walker’s advice.

Should the documents identified by the ICAC have been provided in the Mt Penny return to order?

- 4.11** The question before the Committee is whether the documents identified by the ICAC in the ‘document comparison matrix’ should, *prima facie*, have been provided in the return to order. The advice from Mr Walker SC is that ‘nearly all of them should have been so produced’.
- 4.12** In its own approach to this matter, the Committee first considered the wording of the 2009 order for papers. Notices of motion for the production of papers in the Legislative Council are carefully worded to produce the documents sought. By the inclusion of the words ‘in relation to’ and ‘relating to’, the House deliberately sought the production of all documents that could be said in any way to bear upon or inform an understanding of any aspect of the 2008/2009 ‘tender process’. The Committee interpreted the ‘tender process’ as referring to the 2008/2009 EOI process, as did Mr Walker in his advice.
- 4.13** From this starting point, the Committee examined all of the documents identified by the ICAC in the document comparison matrix to determine whether they could be said to meet the above test. In the Committee’s opinion, the vast majority (if not all) of the documents identified by the ICAC could be said to do so. It is the Committee’s opinion that documents such as the following, some of which explicitly mention the Mt Penny exploration area, clearly fell within the terms of the 2009 order for papers:
- An email from Jamie Gibson, Deputy Chief of Staff to Graham Hawkes, DPI asking for a Mt Penny brief that he can provide to the “boss”, J-9 Pp 43-44.
 - Ministerial Briefing, ‘Mt Penny – Bylong Valley’, J-9 Pp 48-49.
 - Ministerial Briefing BN08/1229, ‘Potential Coal Allocation Areas in Western NSW’ (J-9 Pp 100 – 108).
 - An email from Brad Mullard, DPI to ministerial staff attaching maps and information on the North Bylong – Mount Penny exploration area (J-9 Pp 176 – 182).
 - Ministerial Briefing BN08/1589, ‘Coal Allocation Proposal’ (J-9 Pp 254-264).
 - Letters and an email from various companies and the NSW Minerals Council on behalf of its members expressing interest in the potential coal allocation areas in Western NSW (J-12 Pp 421, 422, 423 – 424, 425, 426, 427, 429, 430 – 431).
 - Ministerial Briefing BN08/2311 ‘Extension of Coal Allocation Areas Expression of Interest’ – version 2 (J-12 Pp 435-437).
 - Ministerial Briefing BN0/9 ‘Re-opening Expressions of Interest for 11 Coal Release Areas’ (J-13 Pp 631 – 640).
 - Letter from John McGuigan, Cascade Coal to Brad Mullard, DPI regarding the Expression of Interest in the Mt Penny Exploration area (J-48 Pp 47-48).
 - Ministerial submission 08/8229 ‘Coal Release Exploration Areas – Expression of Interest Recommendation’ (J-13 Pp 687-734).

- 4.14 In making the above observations, the Committee notes, as did Mr Walker,⁶¹ that some of the documents identified in the matrix are drafts, working versions or otherwise repetitive versions of later documents, at least some of which were returned in the return to order.
- 4.15 The Committee has reached its position independently, but with the benefit, of the advice of Mr Walker.
- 4.16 In his advice, Mr Walker identified 15 documents as documents which fell outside the terms of the 2009 order for papers. Mr Walker gave reasons, while expressing himself cautiously.
- 4.17 The Committee examined the 15 documents identified by Mr Walker, and understands Mr Walker's reasons cited at paragraph 4.9 above for indicating that, in his opinion, the documents fall outside the scope of the 2009 order. The Committee agrees with Mr Walker that the question of whether these 15 documents fall within the terms of the 2009 order for papers could be answered either way.
- 4.18 Accordingly, the Committee finds that at least 124, if not all, of the documents identified by the ICAC in the 'document comparison matrix' as not having been provided to the House in 2009 related to the 2008/2009 EOI process, and that accordingly, they should, *prima facie*, have been provided in the 2009 Mt Penny return to order.

Finding 2

The Committee finds that at least 124, if not all, of the documents identified by the ICAC in the 'document comparison matrix' as not having been provided to the House in 2009 related to the 2008/2009 EOI process, and that accordingly, they should, *prima facie*, have been provided in the 2009 Mt Penny return to order.

- 4.19 In making this finding, the Committee acknowledges the possibility that some documents may not have been provided in the 2009 return to order on the basis that they were Cabinet documents. The Committee examined the issue of Cabinet documents in Chapter 2. The Committee does not have enough information to make a definitive judgement whether documents may not have been provided in 2009 on the basis that they were Cabinet documents. This would need to be determined by further inquiry.⁶²
- 4.20 It is also important to note that the Committee has not attempted to undertake its own reconciliation of the terms of the 2009 order for papers with other documents made public by the ICAC on its website as part of Operation Jasper (that is, documents not identified in the

⁶¹ Paragraph 11 of Mr Walker's advice.

⁶² It is noted that during the ICAC's public hearings as part of Operation Jasper, when asked if Cabinet made a decision whether or not to grant any specific licence for the exploration of minerals or coal, former Premier Nathan Rees MP stated 'I don't recall specific Exploration Licences coming to Cabinet' (Transcript, 13/11/2012, p 524T). Former Premier Morris Iemma stated that he did not have any recollection of Mr Macdonald raising with Cabinet or the Budget Committee issues about the opening or his intention to open 11 new mining areas. Nor did he recall Mr Macdonald raising a decision of his that if new mining areas were to be opened, the participants could only be smaller or medium-sized miners (Transcript, 13/11/2012 p 488T).

document comparison matrix). Nor has the Committee sought to establish the existence of any other documents that may not have been returned in 2009. To do so would have been outside the Committee's terms of reference. However, the processes followed as part of this inquiry do not preclude the existence of other documents, outside of those identified by the ICAC, which also fall within the terms of the 2009 order for papers. The Committee believes that whatever body further considers this matter should consider this issue in its inquiry.

- 4.21** While the Committee is satisfied that at least 124, if not all, of the documents identified by the ICAC in the 'document comparison matrix' as not having been provided to the House in 2009 should, *prima facie*, have been provided in the 2009 Mt Penny return to order, the question as to why the documents were not returned can only be determined following further investigation. This is discussed in the following chapter.

Chapter 5 Further investigation of this matter

This Chapter examines three alternatives for further investigation of the Committee's finding in the previous Chapter that certain documents were not provided in the 2009 Mt Penny return to order:

- Reference of this matter by the House to the ICAC for further investigation, together with the introduction of legislation to waive privilege to allow the ICAC to proceed. This would likely be followed by a further reference of the matter to this Committee after the ICAC reports its findings.
- Full investigation of this matter by the House through the calling of witnesses to the Bar of the House.
- Full investigation of this matter by the Privileges Committee, requiring the House to refer new terms of reference to the Committee.

Option 1: Reference of this matter by the House to the ICAC for further investigation

- 5.1** The first option considered by the Committee for the further investigation of this matter was for the House to refer to the ICAC the question why certain documents were not provided in the 2009 Mt Penny return to order. Under section 73(1) of the *Independent Commission Against Corruption Act 1988*, both Houses of Parliament may, by resolution of each House⁶³, refer a matter to the ICAC for inquiry and report. Under section 73(2), it is the duty of the Commission to fully investigate a matter so referred to it for investigation.
- 5.2** To enable the ICAC to investigate this matter, however, the Parliament would need to pass legislation waiving privilege over the documents provided in the 2009 Mt Penny return to order to enable their use by the ICAC. As indicated in Chapter 3, section 122 of the *Independent Commission Against Corruption Act 1988* preserves parliamentary privilege in relation to the Commission.⁶⁴
- 5.3** Following an investigation, the ICAC would be required to table a report in Parliament.⁶⁵ It would then be open to the House to consider the matter further, including the possibility of a further reference of the matter to this Committee to consider the findings of the ICAC, including potentially what actions the House should take in relation to any individuals responsible for the non-provision of documents, and what processes should be put in place to ensure that orders for papers are complied with in the future.

⁶³ This section has been interpreted as allowing the Houses to refer matters to the ICAC independently. There is also a precedent where both Houses referred a matter to the ICAC following the exchange of messages.

⁶⁴ Save in one respect: Parliament has waived privilege attaching to the *Register of Disclosures by Members of the Legislative Council* and the *Register of Disclosures by Members of the Legislative Assembly* to allow the ICAC to make use of either Register for particular purposes.

⁶⁵ *Independent Commission Against Corruption Act 1988*, s 74.

- 5.4** The advantage of this approach is that the ICAC has extensive powers and resources for the conduct of such an inquiry, coupled with an in-depth understanding of the matters arising from Operation Jasper and the 2008/2009 EOI process. In addition, if the ICAC identified any individuals as having engaged in corrupt conduct within the meaning of sections 7, 8 and 9 of the *Independent Commission Against Corruption Act 1988*, there is scope for the referral of such matters to the Director of Public Prosecutions for possible prosecution.⁶⁶
- 5.5** However, the Committee also notes disadvantages to such an approach. First, while the House may refer to the ICAC the question why certain documents were not provided in the 2009 Mt Penny return to order, the focus of any inquiry by the ICAC would necessarily be on issues of possible corrupt conduct. The non-provision of documents would still need to be considered by the House.
- 5.6** Second, reference of this matter to the ICAC would require the waiver of privilege over the 2009 Mt Penny return to order.⁶⁷ As discussed in Chapter 3, the Committee accepts that in some circumstances the waiver of privilege may be justified to permit an external inquiry to be made into parliamentary proceedings. However, a compelling public interest needs to be established to do so. For reasons discussed later in this Chapter bearing on the ultimate responsibility of the House to determine issues of compliance and non-compliance with orders for papers, the Committee does not believe that the waiver of privilege is appropriate or necessary in the present circumstances.

Option 2: Full investigation of this matter by the House

- 5.7** The second option considered by the Committee for the further investigation of this matter was for the House itself to inquire into why certain documents were not provided in the 2009 Mt Penny return to order.
- 5.8** In the Legislative Council, inquiries are generally conducted by committees that report their findings to the House. However, the Council, like other comparable Houses of Parliament, is itself vested with the power to conduct inquiries and take evidence from witnesses directly under the *Parliamentary Evidence Act 1901*.
- 5.9** Witnesses other than members may be examined at the Bar of the House. Members may be examined at their place.
- 5.10** There is one example in recent times where a person has been summoned to the Bar of the House and examined by members. In 1998 the House resolved that the Auditor-General be summoned to give evidence at the Bar of the House in relation to the Appropriation (1997-98 Budget Variations) Bill (No. 2) 1998.⁶⁸ The Auditor-General was issued with a summons and attended at the Bar of the House on 10 November 1998. He was sworn and then examined, answering questions from members of the House.

⁶⁶ Although such a course of action would require a further waiver of privilege.

⁶⁷ Save through the waiver of privilege, only the House itself, or a committee of the House, may investigate 'proceedings in Parliament'.

⁶⁸ *LC Minutes* (29/10/1998) 831-835; (10/11/1998) 841-842.

- 5.11** The Australian Senate and New South Wales Legislative Assembly have also examined persons at the Bar of the House, although the examples from the Legislative Assembly are from the 19th century.⁶⁹
- 5.12** The Committee notes this option for the further investigation of this matter. However, in the Committee's opinion, given the complexity of the issues arising out of this matter, a committee of the House would be better suited to investigating this matter than an inquiry by the House as a whole.

Option 3: Full investigation of this matter by the Privileges Committee

- 5.13** The third option considered by the Committee for the further investigation of this matter was for the House to refer new terms of reference to the Privileges Committee for the Committee to inquire into why certain documents were not included in the 2009 Mt Penny return to order and related matters.
- 5.14** This is the Committee's preferred approach.
- 5.15** As noted in Chapter 2, orders for the production of State papers are one of the principal means by which the executive is held accountable to the Legislature and the people. The power to make such orders supports the performance by the Council of its constitutional roles of legislating and scrutinising the actions of the executive government. The House has a responsibility to determine issues of compliance and non-compliance with such orders. As the President stated to the House on 14 March 2013:
- It is ultimately for the House to determine whether or not its order has been complied with and the consequences that flow.
- 5.16** The Committee has powers to compel the attendance of witnesses, the answering of 'lawful questions' and the production of documents that would enable it to undertake such an inquiry.
- 5.17** The Committee is established by the House to consider and report on any matter relating to parliamentary privilege referred to it by the House or the President. For this reason the inquiry was referred to the Committee when the matter arose in March. The Committee believes that any future inquiry should similarly be conducted by the Committee.
- 5.18** In advocating this approach, the Committee believes that the outcomes of any further full investigation of this matter should be not only the identification of any individuals whose actions may have resulted in the exclusion of documents from the 2009 return to order, but the investigation of processes within government for coordinating responses to orders for papers, and the development of guidelines and policies to ensure full compliance with orders for papers in the future.
- 5.19** The Committee therefore recommends that the House adopt new terms of reference referring a further inquiry to the Privileges Committee to consider the matters raised in this report, and suggests draft terms of reference below for the consideration of the House.

⁶⁹ Evans H and Laing R (eds), *Odgers' Australian Senate Practice*, 13th edition, Canberra, Department of the Senate, pp 607-608; Grove R (ed), *New South Wales Legislative Assembly Practice, Procedure and Privilege*, 1st edition, pp 247-248.

Recommendation 1

The Committee recommends that the House adopt new terms of reference referring a further inquiry to the Privileges Committee to consider the matters raised in this report, and suggests the following draft terms of reference for the consideration of the House:

1. That this House notes the findings and recommendations of the Privileges Committee in Report No. 68 entitled 'Possible non-compliance with the 2009 Mt Penny order for papers', dated 30 April 2013.
 2. That the Privileges Committee inquire into and report on the failure to provide documents in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process, including documents identified in the document comparison matrix provided by the Commissioner of the Independent Commission Against Corruption and tabled in the House on 14 March 2013, and in particular:
 - (a) the reasons for and circumstances leading to the failure to provide documents in the return,
 - (b) whether other documents held by offices identified in the resolution passed by the House on 12 November 2009 and captured by the terms of the resolution were not provided in the return,
 - (c) any deficiencies in processes or policies of a minister, ministerial office, department or other agency regarding the identification of documents captured by orders for the production of documents under standing order 52, or the inclusion of documents in a return,
 - (d) the identity of the person or persons whose actions resulted in the failure to provide documents in the return,
 - (e) any further action the House should take in relation to this matter, including:
 - (i) whether a person or persons should be adjudged guilty of contempt,
 - (ii) the scope of sanctions that may be imposed,
 - (iii) any possible further involvement by the Independent Commission Against Corruption,
 - (f) guidelines and policies for the process by which ministers, ministerial offices, departments and agencies respond to orders for the production of documents under standing order 52, in light of current guidelines and policies, and
 - (g) any other related matter.
 3. That in order to ensure procedural fairness, natural justice and the protection of witnesses before the Committee, the Committee:
 - (a) shall observe the procedures laid down in the standing orders and the practices and procedures of the House, and
 - (b) may adopt and report to the House any additional procedures as the Committee sees fit.
-

4. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser or advisers.
 5. That notwithstanding anything to the contrary in the resolution establishing the Committee, for the purposes of this inquiry:
 - (a) the Committee consist of eight members, and
 - (b) the additional member be Mr Shoebriidge.
-

Appendix 1 Indexes to the 2009 Mt Penny return to order



Ms Lynn Lovelock
Clerk of the Parliaments
Legislative Council
Parliament House
Sydney NSW 2000

Dear Ms Lovelock

Request for Papers – Exploration Licence – Mt Penny

I refer to the resolution of the Legislative Council under Standing Order 52 made on 12 November 2009, concerning Exploration Licence – Mt Penny.

I am now delivering to you the documents referred to in that resolution.

On 17 November 2009 the Ministerial portfolio responsibilities for Mineral Resources and Primary Industries were assigned to two different Ministers. Accordingly, responses have been obtained from the offices of both of those Ministers in relation to this order.

The documents have been obtained from the Office of the Premier, the Office of the Minister for Mineral Resources, the Office of the Minister for Primary Industries, the Department of Industry and Investment, the Office of the Treasurer and NSW Treasury.

Enclosed at **Annexure A** are certification letters from the Office of the Premier, the Office of the Minister for Mineral Resources, the Office of the Minister for Primary Industries, the Department of Industry and Investment, the Office of the Treasurer and NSW Treasury indicating that, to the best of their knowledge, all documents held and covered by the terms of the resolution have been provided.

I can also certify that to the best of my knowledge all documents held by the Department of Premier and Cabinet and covered by the terms of the resolution have been provided.

Enclosed at **Annexure B** are indexes of all non-privileged documents that have been provided in response to the resolution.

In accordance with Item 5(a) of Standing Order 52, those documents for which a claim for privilege has been made have been separately indexed and the case for privilege has been noted.

Enclosed at **Annexure C** are indexes of all privileged documents and submissions in support of the case for privilege.

Should you require any clarification or further assistance please do not hesitate to contact Mr Paul Miller, Executive Director, Legal Branch on (02) 9228 5543.

Yours sincerely


John Lee
Director General

Received at 4.25pm
Thursday 26 November 2009

Lynn Lovelock

1 box privileged documents

1 box non-privileged documents



Hon Tony Kelly MLC
Minister for Primary Industries
Minister for Lands
Deputy Leader of the Government in the Legislative Council
Leader of the House in the Legislative Council

24 November 2009

Ms Leigh Sanderson
Deputy Director General (General Council)
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

Attn: Mr Paul Miller
Executive Director, Legal Branch

Dear Ms Sanderson

Standing Order 52 – Order for Papers – Exploration Licence – Pt Penny

I refer to your advice dated 13 November 2009 of the Order by the Legislative Council for the production of all documents held by the Minister for Primary Industries relating to Exploration Licence 3771 – Mt Penny.

I certify to the best of my knowledge that there are no documents covered by the terms of the resolution in this office.

Yours faithfully

A handwritten signature in black ink that reads 'L. Brown 24/11/09'.

Laurie Brown
Chief of Staff

Level 34, Governor Macquarie Tower
1 Farrer Place, Sydney NSW 2000
T (02) 9228 3999 F (02) 9228 3988

Room 809, Parliament House
Macquarie Street, Sydney NSW 2000
T (02) 9230 2528 F (02) 9230 2530



Office of the
Premier of New South Wales
Australia

Ms Leigh Sanderson
Deputy Director General (General Counsel)
Department of Premier and Cabinet
Level 39, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Ms Sanderson

Order for Papers – Mt Penny

I refer to your memorandum of 12 November 2009 seeking papers in response to a Resolution of the Legislative Council regarding the exploration licence relating to Mt Penny.

I certify to the best of my knowledge that all documents held by the Office of the Premier and covered by the terms of the Resolution have been provided.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graeme Wedderburn'.

Graeme Wedderburn
Chief of Staff



New South Wales
TREASURY

Ms Leigh Sanderson
Director General
Department of Premier and Cabinet
Level 39 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Contact: C Yuen
Telephone: (02) 9228 4165
Our Reference: E28982

Dear Ms Sanderson


Order for Papers – Exploration Licence – Mt Penny

I refer to your letter of 13 November 2009 seeking submission of papers in response to an Order in the Legislative Council of 12 November 2009 relating to:

- a) Exploration Licence 3771 (now Exploration Licence 7406) – Mt Penny including any documents relating to the tender process and
- b) any document which records or refers to the production of documents as a result of this order of the House.

I certify to the best of my knowledge that all documents held by New South Wales Treasury and covered by the terms of the resolution, have been provided.

Yours faithfully


Michael Schur
Secretary
20.11.09



OFFICE OF THE TREASURER
MINISTER FOR STATE DEVELOPMENT

Ms Leigh Sanderson
Deputy Director General (General Counsel)
Department of Premier and Cabinet
Level 39, Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000

17 November 2009

Dear Ms Sanderson

Order for Papers – Exploration Licence – Mt Penny

I refer to your memorandum 12 November 2009 seeking submission of papers in response to an Order in the Legislative Council of 12 November 2009 relating to Exploration Licence 3771 (now Exploration Licence 7406).

I certify to the best of my knowledge that all documents held by this Office and covered by the terms of the resolution, have been provided.

Yours faithfully

A handwritten signature in black ink, appearing to be "Walt Secord", written over a horizontal line.

Walt Secord
Chief of Staff




New South Wales

INDUSTRY & INVESTMENT NSW

Ms Leigh Sanderson
Deputy Director General (General Council)
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

23 NOV 2009

Attn: Mr Paul Miller
Executive Director, Legal Branch

By Hand

Dear Ms Sanderson,

Standing Order 52 – Order for Papers – Exploration Licence – Pt Penny

I refer to your advice dated 13 November 2009 of the Order by the Legislative Council for the production of all documents held by Industry & Investment NSW (I&I NSW) relating to Exploration Licence 3771 – Mt Penny.

Enclosed are copies of the required documents presented in the suggested format.

Separate indexed lists are provided for Privileged and Non-Privileged papers.

Where privilege has been claimed over part of a document two versions of the document have been provided - a full copy in the schedule of Privileged Documents, and an edited version with the privileged information obscured in the schedule of Non-Privileged Documents.

I certify to the best of my knowledge all documents held by I&I NSW and covered by the terms of the resolution have been provided.

Yours sincerely



RICHARD SHELDRAKE
DIRECTOR GENERAL



Minister for Mineral Resources
Minister for Regulatory Reform

Ms Leigh Sanderson
Deputy Director General (General Council)
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

Attn: Mr Paul Miller
Executive Director, Legal Branch

By Hand

Dear Ms Sanderson,

Standing Order 52 – Order for Papers – Exploration Licence – Pt Penny

I refer to your advice dated 13 November 2009 of the Order by the Legislative Council for the production of all documents held by the Minister for Primary Industries relating to Exploration Licence 3771 – Mt Penny.

I attach the one document covered by the terms of the resolution in this office.

Yours sincerely


Jason Kara
Acting Chief of Staff

23/11/09

NSW DEPARTMENT OF PREMIER AND CABINET

NON-PRIVILEGED DOCUMENTS – ORDER FOR PAPERS – 12 NOVEMBER 2009 –

EXPLORATION LICENCE – MT PENNY

Document No.	Item	Document	Date	Author	Privilege Claim?
1	Any document which records or refers to the production of documents as a result of this order of the House.	Letter from Clerk of Parliaments advising of order	12/11/09	Lyn Lovelock, Clerk of Parliaments	No
2	Any document which records or refers to the production of documents as a result of this order of the House.	Briefing to Deputy Director General advising of order and letter sent to relevant agencies	11/11/09	George Makrides, Senior Project Officer, Department of Premier and Cabinet	No
3	Any document which records or refers to the production of documents as a result of this order of the House.	Briefing to Deputy Director General readdressing memoranda to Chiefs of Staff	20/11/09	George Makrides, Senior Project Officer, Department of Premier and Cabinet	No
4	Any document which records or refers to the production of documents as a result of this order of the House.	Memorandum undertaking searches within the Department of Premier and Cabinet	13/11/09	George Makrides, Senior Project Officer, Department of Premier and Cabinet	No
5	Any document which records or refers to the production of documents as a result of this order of the House.	Written response to searches memorandum	16/11/09	Nazil Munir, Manager, Policy, National Reform Unit, Department of Premier and Cabinet	No
6	Any document which records or refers to the production of documents as a result of this order of the House.	Memorandum concerning amount on time taken to comply with order	Undated	Joanne Paizes, Branch Manager, Cabinet Secretariat, Department of Premier and Cabinet	No
7	Any document which records or refers to the production of documents as a result of this order of the House.	Memorandum concerning amount on time taken to comply with order	20/11/09	Michael Petrie, Chief of Staff, Office of the Director General, Department of Premier and Cabinet	No

Document No.	Item	Document	Date	Author	Privilege Claim?
8	Any document which records or refers to the production of documents as a result of this order of the House.	Memo concerning compliance with order	19/11/09	Peter Duncan, Deputy Director General, Government Coordination, Department of Premier and Cabinet	No
9	Any document which records or refers to the production of documents as a result of this order of the House.	Memo concerning compliance with order	20/11/09	Dianné Leeson, Director, Major Projects Coordination, Department of Premier and Cabinet	No
10	Any document which records or refers to the production of documents as a result of this order of the House.	Email concerning compliance with order	16/11/09	Peter Heron, Cabinet Secretariat, Department of Premier and Cabinet	No
11	Any document which records or refers to the production of documents as a result of this order of the House.	Briefing to Director General concerning compliance with order	12/11/09	George Makrides, Senior Project Officer, Department of Premier and Cabinet	No

Office of the Premier

ORDER FOR PAPERS – MT PENNY

Document No.	Item	Document	Date of Creation	Author	Privilege Claim Y/N?
1	Any document which records or refers to the production of documents as a result of this order of the House	Memo from NSW Department of Premier and Cabinet	12 November 2009	Leigh Sanderson, Deputy Director General (General Counsel)	N

NSW Treasury

Order for Papers - EXPLORATION LICENCE - MT PENNY

SCHEDULE 1: UNPRIVILEGED

Resolution of the Legislative Council: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of the passing of this resolution in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer and NSW Treasury:

- (a) all documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny,
- (b) including any documents relating to the tender process,
- (c) any document which records or refers to the production of documents as a result of this order of the House.

Note: Every effort has been made to comply with this order in the time frame specified. To avoid unnecessary waste of resources, multiple versions of similar documents have not been included in circumstances where the information requested has otherwise been provided in a substantially similar way.

Document No.	Item	Document	Date of Creation	Author	Privilege Claim?
Item (a), 1 (c)	<i>all documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny and resolution (c)</i>	Letter from Department of Premier and Cabinet	13/11/2009	Department of Premier and Cabinet	No
Item (a) 1	<i>all documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny</i>	Email referring to a number of remnant and small coal deposits	26/09/2008	The former Department of Primary Industries	No (redacted version provided)

1

OFFICE OF THE MINISTER FOR MINERAL RESOURCES
NON-PRIVILEGED DOCUMENTS – ORDER FOR PAPERS – 12 NOVEMBER 2009 –
EXPLORATION LICENCE – MT PENNY

Document No.	Item	Document	Date	Author	Privilege Claim?
1	Any document which records or refers to the production of documents as a result of this order of the House.	Memorandum from Leigh Sanderson	20/11/09	Leigh Sanderson	No

Office of the Treasurer

EXPLORATION LICENCE – MT PENNY

ORDER FOR PAPERS

Schedule 1

Document No.	Standing Order Item	Document	Date of Creation	Author	Privilege Claim
1	na	Memorandum from Leigh Sanderson to Walter Secord	12 November 2009	Leigh Sanderson	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)1	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Coal Exploration Licence Application/Renewal ID Sheet	26.6.08	Fred Schiavo, Land Information Officer I&I NSW	No
a)2	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Mt Penny ID Diagram	7.7.08	Fred Schiavo, Land Information Officer I&I NSW	No
a)3	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Expression of Interest Information	Aug-08	I&I NSW	No
a)4	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Director General Briefing - Coal Allocation Proposal	9.9.08	Patricia Madden, Manager Operations, Mineral Resources I&I NSW	No
a)5	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Ministerial Briefing - Extension of Coal Allocation Areas Expressions of Interest	13.10.08	Patricia Madden, Manager Operations, Mineral Resources I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)6	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Expression of Interest Information	Jan-09	I&I NSW	No
a)12	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Withdrawal by Monaro Mining from Mt Penny EOI	9.6.09	Loyal Coal Pty Ltd	No
a)13	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	EOI Recommendation - Approved by Director General I&I NSW 19.6.09. EDITED VERSION with privileged information obscured	18.6.09	William Hughes, Principal Advisor Coal & Strategic Projects I&I NSW	No
a)14	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Successful letter	19.6.09	Brad Mullard Executive Director Mineral Resources I&I NSW	No
a)15	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Unsuccessful letters	19.6.09	Brad Mullard Executive Director Mineral Resources I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)16	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Letter re Standard Licence Conditions	8.7.09	David Agnew, Manager Coal & Petroleum Titles and Systems I&I NSW	No
a)17	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Consent Letter Cascade Coal Pty Ltd	11.8.09	David Agnew, Manager Coal & Petroleum Titles and Systems I&I NSW	No
a)18	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	ELA 3771 Co-ordinates	23.8.09	Cascade Coal Pty Ltd	No
a)21	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Receipt - Contribution to Coal Development Fund by Cascade Coal Pty Ltd	25.8.09	Finance Branch, I&I NSW	No
a)22	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Receipt - Assessment Fee - Cascade Coal Pty Ltd	25.8.09	Finance Branch, I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)23	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Receipt - ELA 3771 - Application Fee - Cascade Coal Pty Ltd	25.8.09	Finance Branch, I&I NSW	No
a)24	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Acknowledgement Letter - ELA 3771	28.8.09	Peta Johannessen, Titles Administrator I&I NSW	No
a)25	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	ID Diagram X	2.9.09	Gary Walker, Titles Officer Coal & Petroleum I&I NSW	No
a)26	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	ELA 3371 ID	2.9.09	Gary Walker, Titles Officer Coal & Petroleum I&I NSW	No
a)27	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents	Application Diagram E3771-01	11.9.09	Peter Hord, Land Information Co-ordinator I&I NSW	No
a)28	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents	Memorandum ELA3771 Cascade Coal - EDITED VERSION with privileged information obscured	11.9.09	Sarah Jardine, Geoscientist I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)29	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents	Email exchange regarding Financial Review article. EDITED VERSION with privileged information obscured	23.9.09	Conan Yuen, Financial Analyst, NSW Treasury. Jeannine Biviano,	No
a)30	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Email re Exploration Licence Conditions	30.9.09	David Agnew, Manager Coal & Petroleum Titles and Systems I&I NSW	No
a)31	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Exploration Licence Conditions	6.10.09	Peta Johannessen, Titles Administrator I&I NSW	No
a)32	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	ELA 3771 Exploration Licence Document	6.10.09	Peta Johannessen, Titles Administrator I&I NSW	No
a)33	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	ELA 3771 Grant Proposal Letter	8.10.09	Peta Johannessen, Titles Administrator I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)34	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Parliamentary House Folder Note - Mt Penny	14.10.09	William Hughes, Principal Advisor Coal & Strategic Projects I&I NSW	No
a)35	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	ELA Grant Submission	21.10.09	Peta Johannessen, Titles Administrator I&I NSW	No
a)36	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EL 7404 Grant Document	26.10.09	Peta Johannessen, Titles Administrator I&I NSW	No
a)37	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EL 7404 Grant Letter	27.10.09	Peta Johannessen, Titles Administrator I&I NSW	No
a)38	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Response to Notice of Motion	11.11.09	Brad Mullard Executive Director Mineral Resources I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)39	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	Drilling and Geological Data	1982	various	No
a)40	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, Including any documents relating to the tender process.	"The Western Coalfield" - Narrative	2001	I&I NSW	No
b)1	Any document which records or refers to the production of documents as a result of this order	Letter - Order for Papers	13.11.09	Leigh Sanderson, Deputy Director General DPC	No
b)2	Any document which records or refers to the production of documents as a result of this order	Email - Order for Papers	19.11.09	Ron Taylor, Manager Corporate Projects I&I NSW	No
b)3	Any document which records or refers to the production of documents as a result of this order	Email - Order for Papers	19.11.09	David Agnew, Manager Coal & Petroleum Titles and Systems I&I NSW	No
b)4	Any document which records or refers to the production of documents as a result of this order	Email - Order for Papers	19.11.09	William Hughes, Principal Advisor Coal & Strategic Projects I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - NON PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
b)5	Any document which records or refers to the production of documents as a result of this order	Email - Order for Papers	19.11.09	William Hughes, Principal Advisor Coal & Strategic Projects I&I NSW	No
b)6	Any document which records or refers to the production of documents as a result of this order	Letter - Response by Director General, Industry & Investment NSW	23.11.09	Ron Taylor, Manager Corporate Projects I&I NSW	No

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)7	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EOI - Jain Group	20.11.08	Jain Group	Yes
a)8	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EOI - Monaro Mining	21.11.08	Monaro Mining	Yes
a)9	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EOI - Cascade Coal Pty Ltd	16.2.09	Cascade Coal Pty Ltd	Yes
a)10	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EOI - Breakspeare Coal Mines Ltd	Feb-09	Breakspeare Coal Mines Ltd	Yes
a)11	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Evaluation of Expressions of Interest	Jun-09	Evaluation Team, I&I NSW	Yes

Possible non-compliance with the 2009 Mt Penny order for papers

Order for Papers - Exploration Licence - Mt Penny - Industry & Investment NSW - PRIVILEGED					
Document No.	Type	Item	Date of Creation	Author	Privilege Claim
a)13	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	EOI Recommendation - Approved by Director General I&I NSW 19.6.09	18.6.09	William Hughes, Principal Advisor Coal & Strategic Projects I&I NSW	Yes
a)19	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Underwriting agreement	24.8.09	Arthur Phillip Funding, Strategy & Business investment	Yes
a)20	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Nomination Letter plus supporting information - ELA 3771 - Cascade Coal Pty Ltd	25.8.09	Cascade Coal Pty Ltd	Yes
a)28	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Memorandum ELA3771 Cascade Coal	11.9.09	Sarah Jardine, Geoscientist I&I NSW	Yes
a)29	Documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any documents relating to the tender process.	Email exchange regarding Financial Review article	23.9.09	Conan Yuen, Financial Analyst, NSW Treasury; Jeannine Biviano, Executive Director Corporate Services I&I NSW	Yes

Attachment**Claims for Privilege
Mt Penny**

Industry and Investment NSW is claiming privilege in regard to:

1. Information contained within the documents outside the scope of the Order.

Mt Penny was one of eleven areas for which concurrent action was taken to seek Expressions of Interest and issue Exploration Licences. The information contained in the documents concerning the other ten areas is outside the scope of the Order and contains commercially sensitive material provided in confidence by private sector parties.

Details of financing arrangements and expected returns, methodology, proposed recovery strategies and work programs are considered commercial-in-confidence and are held in the industry to be valuable intellectual property. There would be an unreasonable adverse effect upon the business, commercial, professional and/or financial affairs of these third parties if this information was made available to the public and their competitors.

The Expression of Interest process relies upon strong, detailed bids to ensure a robust and competitive selection. If sensitive commercial details were to be released this would impact upon the information included in bids and compromise confidence in the process and outcomes.

Release would also be a strong deterrent across the Industry to participation generally in future Expressions of Interest, reducing the Government's ability to deliver the maximum public benefit.

2. The four (4) Expressions of Interest submitted regarding the Mt Penny Exploration Licence.

These documents contain commercially sensitive material provided in confidence by private sector parties.

Details of financing arrangements and expected returns, methodology, proposed recovery strategies and work programs are considered commercial-in-confidence and are held in the industry to be valuable intellectual property. There would be an unreasonable adverse effect upon the business, commercial, professional and/or financial affairs of these third parties if this information was made available to the public and their competitors.

The Expression of Interest process relies upon strong, detailed bids to ensure a robust and competitive selection. If sensitive commercial details were to be released this would impact upon the information included in bids and compromise confidence in the process and outcomes.

Release would also be a strong deterrent across the industry to participation generally in future Expressions of Interest, reducing the Government's ability to deliver the maximum public benefit.

3. Information contained elsewhere within the documents referencing confidential material from the Expressions of Interest.

The processing and evaluation of the Expressions of Interest, granting the Exploration Licence to the successful party and subsequent documentation necessarily extracted and referred to critical, sensitive details of the bids and potential recovery.

Privilege is claimed over these details on a similar basis to that claimed for the documents from which this information was originally sourced.

Order for Papers - EXPLORATION LICENCE - MT PENNY

NSW Treasury

SCHEDULE 2: PRIVILEGED ITEMS

Resolution of the Legislative Council: That, under standing order 52, there be laid upon the table of the House within 14 days of the date of the passing of this resolution in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer and NSW Treasury:

- (a) all documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny,
- (b) including any documents relating to the tender process,
- (c) any document which records or refers to the production of documents as a result of this order of the House.

Note: Every effort has been made to comply with this order in the time frame specified. To avoid unnecessary waste of resources, multiple versions of similar documents have not been included in circumstances where the information requested has otherwise been provided in a substantially similar way.

Commercial in confidence

Information provided to Treasury on a commercial in confidence basis (Schedule 2 Item 1)

These documents provide sensitive commercial information provided by Government businesses and agencies to Treasury on a commercial in confidence basis. Where documents have been compiled by Treasury, the information is based on information provided on a confidential basis from those entities. Many of the documents provide intellectual property of value to the entities and the private sector.

Document No.	Item	Document	Date of Creation	Author	Privilege Claim?
Item (a) 1	all documents in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny	Email referring to a number of remnant and small coal deposits	26/09/2008	The former Department of Primary Industries	Yes

1

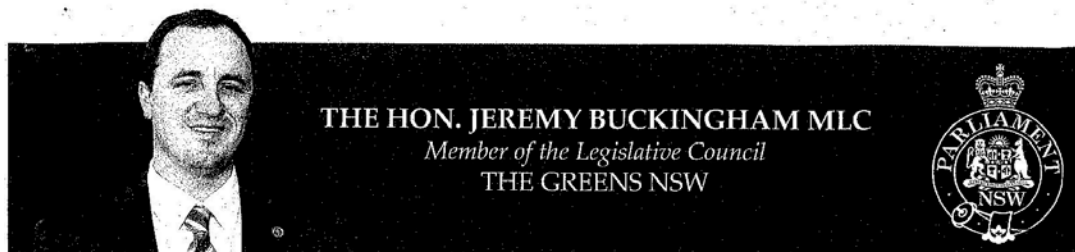
**SUBMISSION IN SUPPORT OF CLAIM FOR PRIVILEGE
BY THE NSW TREASURY**

Exploration Licence – Mt Penny

These documents provide sensitive commercial information provided by Government businesses and agencies to Treasury on a commercial in confidence basis. Where documents have been compiled by Treasury, the information is based on information provided on a confidential basis from those entities. Many of the documents provide intellectual property of value to the entities and the private sector.

A full version of each document has been included with the index of privileged documents. A version of each document, with the commercial-in-confidence information redacted, has been produced with the index of non-privileged documents.

Appendix 2 Correspondence from the Hon Jeremy Buckingham



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

3 December 2012

Dear Mr Blunt,

I write expressing my concern that relevant documents may be missing from a call for papers into the Mt Penny exploration licence that was moved by The Hon. Duncan Gay in November 2009.

The current ICAC hearings into the Mt Penny licence have referred to a series of documents from persons related to Cascade Coal requesting that the tender process for 11 licences be reopened and that additional companies be allowed to enter the process. In addition, considerable evidence has been presented at the ICAC inquiry about the process of reopening the tender process and allowing new companies into the process. I enclose a couple of media articles referring to some of the documents raised at the ICAC hearing.

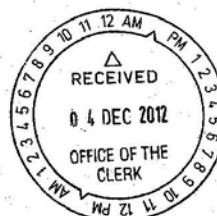
I've had a look through the public and privileged documents that were returned by the call for papers, as well as the list of documents found under the call, and there is no reference to any correspondence requesting a reopening of the tender process or any other paperwork generated by the reopen requests.

The call for papers had a broad frame of reference:

"...all of those documents in relation to exploration licence 7406 including any document relating to the tender process, and any document which records or refers to production of documents as a result of the order of the House"

I would presume that such documents would be relevant for three reasons:

- 1) The call explicitly mentions the tender process.
- 2) There is a document released relating the findings of the probity audit on reopening the tender process. So if the probity audit was relevant, then the requests and discussion about reopening the tender process would also be relevant.
- 3) At the time of the call for papers (12 November 2009) I believe that Cascade Coal was the holder of the Mt Penny exploration licence (invited to take up licence 19 June 2009, granted 21 October 2009). Therefore, any documentation from Cascade coal or relating to Cascade Coal, even if the documents related to the tender process for the 11 licences rather than specifically Mt Penny, would be relevant to this call for papers.



012 | 32941
C11/152

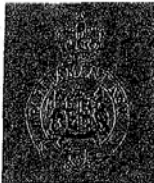
I therefore request that you investigate whether certain documents that should have been released to the parliament have been withheld, and that, if this is the case, that these documents be released to the parliament and that an explanation be given as to why this may have occurred.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'JB', with a long horizontal flourish extending to the right.

Jeremy Buckingham

Appendix 3 Correspondence from the Clerk to the Director General of the Department of Premier and Cabinet



LEGISLATIVE COUNCIL

C11/152

OFFICE OF THE CLERK

10 December 2012

Mr Chris Eccles
 Director-General
 Department of Premier and Cabinet
 Level 39
 Governor Macquarie Tower
 1 Farrer Place
 SYDNEY NSW 2000

Attention: Mr Paul Miller, General Counsel

Dear Mr Eccles

On 12 November 2009 the Legislative Council ordered:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.

On 26 November 2009 my predecessor received correspondence from the former Director-General of the Department of Premier and Cabinet providing documents captured by the order, together with certification letters from various office holders, a copy of which is enclosed.

The documents provided with that correspondence have recently been retrieved from State Records following a request from a member of the Legislative Council, the Hon Jeremy Buckingham MLC. Both the public and privileged documents have since been examined (the privileged documents by Mr Buckingham only).

Mr Buckingham has now written to me to express concern that relevant documents may not have been included in the documents returned in response to the order of 12 November 2009. (A copy of Mr Buckingham's letter, dated 3 December 2012, is enclosed.)

Parliament House
 Macquarie Street Sydney
 NSW 2000 Australia

Telephone (02) 9230 2321
 Facsimile (02) 9230 2761
 council@parliament.nsw.gov.au

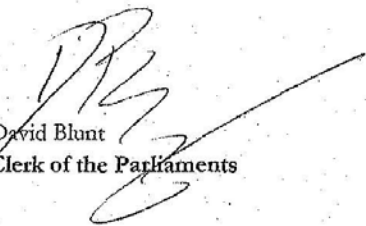
Attached to Mr Buckingham's letter are two media articles referring to documents disclosed during the hearings concerning mining exploration licences currently being conducted by the Independent Commission Against Corruption (ICAC), together with a sample of the sorts of documents referred to, printed from the ICAC's website. I note that a significant volume of similar correspondence appears to have been tendered as exhibits in the course of the current ICAC hearings:

<http://www.icac.nsw.gov.au/images/investigations/jasper/Volume%202%20EXHIBIT%20J%2012.pdf>

Mr Buckingham has requested that I investigate whether or not all documents that should have been provided with the return to order on the exploration licence for Mt Penny have been provided and whether, if not, the documents should now be provided with an explanation.

As a first step I am therefore writing to you to seek any information or advice you may be able to provide in relation to this matter.

Yours sincerely



David Blunt
Clerk of the Parliaments

Appendix 4 Reply from the Director General of the Department of Premier and Cabinet



**Premier
& Cabinet**



2013-12705
D3/009
C11/52

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

18 JAN 2013

Dear Mr Blunt

I refer to your letter dated 10 December 2012 concerning a resolution of the Legislative Council under Standing Order 52 on 12 November 2009 concerning Exploration Licence - Mount Penny (the 2009 Order).

I note that you have been requested by a Member of the Legislative Council to investigate whether or not all documents that should have been provided with the return to the 2009 Order were in fact provided.

You have asked for any information or advice I can provide.

The Department of Premier and Cabinet (DPC) co-ordinates the return of documents in response to orders under Standing Order 52. In accordance with the principles of responsible government and Ministerial responsibility to Parliament, however, responsibility for producing the documents to the House formally rests with those Ministers who represent the Government in the Legislative Council.

The administrative process by which the Executive Government responds to an order under Standing Order 52 is set out in a memorandum that DPC sends to the agencies named in the relevant order on each occasion when such an order is made. By way of example, I have enclosed a copy of the DPC memorandum that was sent to the Department of Industry and Investment in respect of the 2009 Order.

In respect of documents that are being provided by other agencies (whether they be other departments, ministers' offices, or other agencies), DPC does not independently review the documents being produced. Instead, each agency is responsible for ensuring that the documents it is producing are fully responsive to the order, and it is required to provide a separate index of those documents.

Although not required by Standing Order 52, DPC also requests each agency to provide a certification that, to the best of its knowledge, all documents held by that agency and covered by the terms of the order have been produced. This certification does not extend to Cabinet documents as these are not covered by the terms of any order under Standing Order 52.

Governor Macquarie Tower, 1 Farrer Place, Sydney NSW 2000 ☎ GPO Box 5341, Sydney NSW 2001
Tel: (02) 9228 5555 ☎ F: (02) 9228 5249 ☎ www.dpc.nsw.gov.au

The purpose of the certification is to give assurance to the relevant Ministers that they are meeting their responsibility under Standing Order 52. Copies of the certifications are typically also included in the return to the relevant order that is provided to Parliament as most orders include a provision requiring that any document which refers or relates to the production of documents under the order must also be produced.

I am advised that the process that applies now when the Government responds to orders under Standing Order 52, as outlined above, is substantially the same as that which applied in 2009.

I note that the Member who has requested your investigation of this matter has suggested that any documents that should have been, but were not, provided with the return to the 2009 Order should now be provided to the Legislative Council. I am advised, however, that with the expiry of the previous Parliament and the formation of the new Government, the 2009 Order cannot have any continuing effect.

The allegation that documents may have been withheld from production under Standing Order 52 is a serious one, particularly in the context of the current investigations by the Independent Commission Against Corruption (ICAC).

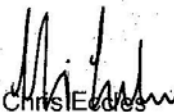
Given that the allegation appears to touch directly upon matters that are currently before the ICAC, upon receiving your correspondence DPC immediately forwarded it and the enclosed letter from the Hon. Mr Buckingham MLC to the ICAC.

It is a matter for the Legislative Council to determine what, if any, action it might wish to pursue in the event that its Members have any concerns regarding compliance with the Standing Orders.

If, however, the Council proposes to consider any action prior to the completion of the current ICAC investigations, it may be appropriate to seek the advice of the ICAC first in order to ensure that any such action will not inappropriately traverse matters that are currently before the ICAC and potentially risk prejudicing those investigations.

I trust that this information is of assistance to you.

Yours sincerely



Chris Eades
Director General

cc Commissioner, Independent Commission Against Corruption



Premier
& Cabinet

URGENT

13 NOV 2009

Dr Richard Sheldrake
Director General
Department of Industry and Investment
161 Kite Street
ORANGE NSW 2800

COPY

Facsimile: (02) 6391 3336

BY FACSIMILE AND POST

Dear Dr Sheldrake

Standing Order 52 – Exploration Licence – Mt Penny

I write to inform you that on Thursday, 12 November 2009 the Legislative Council agreed to the following Resolution:

That, under standing order 52, there be laid upon the table of the House within 14 days of the date of the passing of this resolution all documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury, in relation to Exploration Licence 3771 (now Exploration Licence 7406) – Mt Penny, including any documents relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.

An extract from the Minutes of the Proceedings of the Legislative Council, Thursday 12 November 2009, entry 9, page 1516, is attached.

The resolution requires the documents to be tabled within 14 days.

The following guidelines apply to your response to the Resolution.

1. Provision of Papers

All papers (other than Cabinet documents) which fall within the terms of the Resolution must be produced. Cabinet documents must **not** be produced (see section 6 below).

Papers which fall within the terms of the Resolution should be produced in full, even if they contain irrelevant information. That is, material should not be blacked out or otherwise masked when photocopying papers which fall within the terms of the Resolution.

It may, however, be appropriate to mask some material in documents if a claim for privilege is made (see section 3 below).

Please note that only photocopies of original papers and files are to be provided. All papers should be delivered by close of business on **Friday, 20 November 2009** to:

Mr Paul Miller
Executive Director, Legal Branch
Department of Premier and Cabinet
Level 37, Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Please contact Mr George Makrides, Senior Project Officer, Legal Branch, on (02) 9228 5871 if you wish to discuss any aspect of this request.

2. Non-privileged papers

Standing Order 52(3) provides that, 'A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document'.

A document showing the standard format to be used when preparing an index under Standing Order 52 is enclosed at **Annexure A**. Please adhere to the standard format when preparing an index of documents.

Please note that the index should contain the following information:

<i>Document Number</i>	The document number should follow the format '(a)(i) 1', where '(a)' refers to the relevant paragraph of the Resolution, '(i)' refers to the relevant subparagraph of the Resolution, and '1' refers to the first document in the group of documents that fall within subparagraph (a)(i).
<i>Item</i>	The description of the relevant item as per the Resolution. For example, 'Documents relating to concept formulation and cost benefit analyses'.
<i>Document</i>	A short description of the relevant document. For example, 'Letter from X to Y'.
<i>Date of creation</i>	Where the exact date is unknown, insert an estimated date range if possible.
<i>Author</i>	The agency or organisation that created the document.
<i>Privilege Claim</i>	If the index relates to privileged documents, write 'Yes'. If the index relates to non-privileged documents, write 'No'.

3. Claims of Privilege

A document showing the standard format to be used when making claims for privilege is enclosed at **Annexure B**. Please adhere to the standard format, where appropriate, when making a claim for privilege.

If a privilege claim is subsequently challenged, the question of whether the document is privileged will be referred to a legal arbiter for a ruling.

It is important, therefore, that the basis of the claim is clearly set out in the response to the Resolution so that the arbiter can properly assess the validity of the claim. There will be no opportunity to provide further submissions in support of a claim of privilege if it is challenged.

Please note that a **separate index** is required for 'non-privileged' and 'privileged' documents as these types of documents are returned separately.

If a document contains only a minor amount of privileged material, it may be appropriate to produce two copies of the document: a full copy of the document as a 'privileged' document, and a copy of the document with the privileged material blacked out or otherwise masked as a 'non-privileged' document.

This approach may be appropriate where, for example, a document contains a relatively small amount of personal information which may be subject to a claim for privilege on the grounds of privacy, but which is not needed for the document to be understood. For example, letters to the Government on a particular issue could be produced on a 'non-privileged' basis with the names and addresses of the authors blacked out, with full copies provided on a 'privileged' basis.

4. Delivery and Identification

As time is critical, it would be appreciated if all papers could be delivered in file record boxes with the corresponding parts of the index affixed to the top of each box. For example, that part of the index which lists the documents contained in Box 1 should be attached to the top of Box 1.

Please place 'privileged' and 'non-privileged' documents in separate boxes.

The Legislative Council has also requested that agencies return documents in standard archive boxes (Type 1 boxes). Further information about this type of box may be obtained from State Records at <http://www.records.nsw.gov.au/grr/docs/storageboxes.doc>

5. Certification by CEO

Papers should be accompanied by a letter signed by you stating, "I certify to the best of my knowledge all documents held by the Department of Industry and Investment and covered by the terms of the resolution have been provided".

6. Cabinet Documents

Cabinet documents should not be produced or referred to in responding to the Resolution.

All agencies are obliged to protect the confidentiality of Cabinet documents (refer to Premier's Memorandum 2006-08 *Maintaining Confidentiality of Cabinet Documents and Other Cabinet Conventions*).

7. Agency Contact

Could you please provide the contact details of the officer assigned to coordinate your agency's response to George Makrides as soon as possible.

8. Estimated Cost of Compliance

Consistent with the usual practice, it will be necessary for your agency to provide details of the costs incurred in complying with the resolution **under separate cover** for the Cabinet Standing Committee on Public Administration.

I seek your assistance in ensuring that your agency's documents are with the Legal Branch of the Department no later than by close of business on **Friday, 20 November 2009**.

Yours sincerely



Leigh Sanderson
Deputy Director General (General Counsel)

Appendix 5 Correspondence from the President to the Commissioner of the ICAC



LEGISLATIVE COUNCIL

OFFICE OF THE PRESIDENT

25 February 2013

D13/04402

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

Dear Mr Ipp

Mt Penny Return to Order

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

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

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely



The Honourable Don Harwin MLC
President

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

Appendix 6 Reply from the Commissioner of the ICAC



The Hon Don Harwin MLC
President
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

26 February 2013

Dear Mr Harwin

RE: Mt Penny Return to Order

Thank you for your letter of 25 February 2013.

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

The work being undertaken by the Commission is to compare the material produced to the House in November 2009 with the Commission's holdings to ascertain whether any of the material held by the Commission but not included in the return might also have fallen within the scope of material in the order for papers. If it appears to the Commission that documents were not included in the return then the Commission will advise the House. The Commission does not consider that such action affects the rights or privileges of the House.

The Commission will not take any action in this matter which affects the rights and privileges of the House unless there is a clear waiver of privilege entitling the Commission to do so.

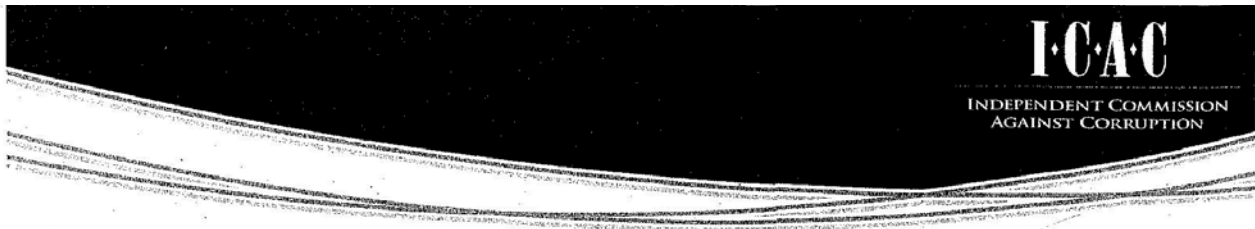
Yours sincerely

A handwritten signature in black ink, appearing to read 'D Copp', is written over the typed name.

The Hon David Copp AO QC
Commissioner

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Appendix 7 Further correspondence from the Commissioner of the ICAC



The Hon Don Harwin MLC
President
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

14 March 2013

Dear Mr Harwin

RE: Mt Penny Return to Order

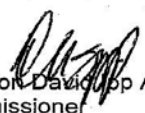
I refer to my letter of 26 February 2013.

In that letter I advised that the Commission was comparing the material produced to the House in November 2009 with the Commission's holdings to ascertain whether any of the material held by the Commission, but not included in the return, might also have fallen within the scope of material in the order for papers. The Commission has now completed that exercise.

The exercise involved a Commission officer cataloguing the documents produced in response to the order for papers and then comparing that list with the contents of the relevant exhibits tendered during the Operation Jasper segment of the public inquiry. The Commission officer then created a document comparison matrix listing the documents considered as being possibly relevant to the order for papers but which do not appear to have been included in the production to Parliament. A copy of the matrix together with a copy of the relevant documents is enclosed.

The Commission does not propose to take any further action with respect to this matter unless Parliament wishes it to do so.

Yours sincerely


The Hon David Copp AO QC
Commissioner

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Appendix 8 The ICAC ‘document comparison matrix’



**E12/2241 : Document Comparison Matrix and copies of
relevant Documents that are not contained within Return to
Order**

CONFIDENTIAL

E12/2241 Document Comparison Matrix

Call for papers 12 November 2009 : All documents in the possession, custody or control of the Premier, the Department of Premier and Cabinet, the Minister for Mineral Resources and Minister for Primary Industries, the Department of Industry and Investment, the Treasurer, NSW Treasury in relation to Exploration Licence 3771 (now Exploration Licence 7406) - My Penny, including any document relating to the tender process, and any document which records or refers to the production of documents as a result of this order of the House.

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
A40	Undated 2001 - The Western Coalfield Narrative : 2001 (GS2001/204)	No		
A39	Mt Penny Boreholes : Drilling and Geological Data	No		
			9/05/2008 12:00:59 email from Graham Hawkes to Jamie Gibson forwarding Mt Penny information provided by Larkings. Attaches Mt Penny Area Map 9 May 2008	J-9 Pp 41 - 42
			9/05/2008 12:06:09 email from Jamie Gibson to Graham Hawkes asking for Mt Penny brief that he can provide to "boss"	J-9 Pp 43 - 44
			9/05/2008 12:57:52 email Graham Hawkes to Jamie Gibson attaching "Mt Penny - Bylong Valley" briefing and Mt Penny Area Map 9 May 2008 for Minister	J-9 Pp 45 - 49
			14/05/2008 11:02 AM email from Jamie Gibson to Craig Munnings requesting more information on the Mt penny area of the Bylong Valley. Gibson asks if it is possible for DPI to open it's holdings for tender	
			14/05/2008 13:39:36 email from Graham Hawkes to Brad Mullard re Gibson's inquiry and forwarding "Mt Penny - Bylong Valley" briefing and Mt Penny Area Map 9 May 2008	J-9 Pp 62 - 64
			14/05/2008 14:43:12 email from Graham Hawkes to Craig Munnings seeking more information about Mt Penny as per Gibson's request	J-9 Pp 65 - 68
			14/05/2008 15:51:27 email from Alan Coutts to Graham Hawkes re Mt Penny as a potential allocation area	J-9 Pp 69 - 72
			1/06/2008 00:28:18 email from Alan Coutts to Brad Mullard re Minister's request on future allocations	J-9 Pp 73 - 74
			2/06/2008 14:13:22 email from Shirley Hibbs to Brad Mullard containing 'Small Areas in the Western Coalfield.doc'	J-9 Pg 77
			2/06/2008 14:13:47 email from Shirley Hibbs to Brad Mullard containing 'Potential Coal Tender Areas.doc'	J-9 Pp 80 - 84
			2/06/2008 16:11:03 email from Leslie Wiles to Brad Mullard containing three maps - Beneabri, North Bylong and Ridglands.	J-9 Pp 85 - 90
			2/06/2008 16:54:08 email from Brad Mullard to Harriet Skinner with "Small Areas in the Western Coalfield.doc" attached	J-9 Pp 91 - 94
			3/06/2008 Ministerial briefing BNO8/1229 prepared by Brad Mullard titled 'Potential Coal Allocation Areas in Western NSW' provided by L Wiles	J-9 Pp 95 - 99
			4/06/2008 10:01:58 email from Brad Mullard to Harriet Skinner containing 'EOI_Areas.doc'	J-9 Pp 100 - 108
			4/06/2008 12:37:24 email from Shirley Hibbs to Leslie Wiles containing 'Potential Coal Allocation Areas in Western NSW.doc'	J-9 Pp 109 - 115
			4/06/2008 16:26:35 email from Jamie Gibson to Brad Mullard re follow up meeting with GMT regarding drilling rig/crew purchase	J-9 Pp 117 - 126
			4/06/2008 17:06:32 email from Jamie Gibson to Brad Mullard re request for maps shown to Macdonald to be enlarged and sent up	J-9 Pp 127 - 128
			5/06/2008 07:19:00 email from Richard Sheldrake to Brad Mullard regarding extra resources required for drilling.	J-9 Pp 129 - 130
				J-9 Pg 131

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			5/06/2008 09:59:29 email from Robert Larkings to Brad Mullard attaching "Drill Rig Indicative Cost summary.xls"	J-9 Pp 132 - 133
			5/06/2008 16:32:06 email from Jamie Gibson to Mullard and Munnings confirming receipt of the maps and requesting full list of resource deposits across NSW	J-9 Pp 134 - 135
			5/06/2008 16:41:36 email from Brad Mullard to Robert Larkings attaching "Copy of Drill Rig Indicative Cost summary.xls"	J-9 Pp 136 - 137
			5/06/2008 16:54:33 email to Brad Mullard from Julie Moloney attaching version of 'Potential Coal Allocation Areas in Western NSW' provided by Wiles	J-9 Pp 138 - 144
			5/06/2008 18:02:15 email from Jamie Gibson to Brad Mullard requesting the full list of resource deposits across NSW in one week	J-9 Pp 145 - 146
			5/06/2008 18:06:49 email from Robert Larkings to Brad Mullard, Harriet Skinner and Patricia Madden attaching 'MB Drill Rig Costs.doc'	J-9 Pp 147 - 151
			5/06/2008 18:38:10 email from Brad Mullard to Julie Moloney re full list of resource deposits across NSW	J-9 Pp 152 - 153
			5/06/2008 18:39:11 email from Brad Mullard to Julie Moloney re full list of resource deposits across NSW	J-9 Pp 154 - 156
			6/06/2008 15:04:08 email from Jamie Gibson to Craig Munnings requesting a copy of the latest Bylong Valley (Mt Penny) map.	J-9 Pg 158
			6/06/2008 15:25:20 email from Brad Mullard to Craig Munnings containing four maps - Benelabri, North Bylong, Ridglands and Western Allocation.	J-9 Pp 159 - 163
			6/06/2008 15:59:01 email from Craig Munnings to Jamie Gibson containing four maps - Benelabri, North Bylong, Ridglands and Western Allocation.	J-9 Pp 164 - 168
			16/06/2008 10:22:34 email from Patricia Madden to Brad Mullard containing 'Coal Exploration & tender areas.doc'	J-9 Pp 171 - 175
			16/06/2008 11:28:23 email from Brad Mullard to Richard Sheldrake, Jamie Gibson and Craig Munnings attaching "EOI Areas.doc"	J-9 Pp 176 - 182
			16/06/11:34:10 email from Julie Moloney to Brad Mullard containing 'West Allocation 16 June 2008.jpg'	J-9 Pp 183 - 184
			17/06/2008 9:22:11 email from Karen Inglis to Mullard containing a pdf and jpg version of 'Future Exploration Tender Areas'	J-9 Pp 188 - 189
			19/06/2008 13:07:03 email from Julie Moloney to Brad Mullard containing list of Western Coalfield companies document	J-9 Pp 193 - 193.1
			19/06/2008 13:46:24 email from Julie Moloney to Brad Mullard containing revised list of Western Coalfield companies document	J-9 Pp 194 - 195
			25/06/2008 10:24:34 email from Julie Moloney re 'Western Coalfield Areas	J-9 Pp 218 - 219
A1	26/06/2008 - Coal Exploration Licence Application / Renewal Identification Sheet : Fred Schiavo	No	27/06/2008 14:32:43 email from Julie Moloney to Fred Schiavo and Melanie Brown regarding shapes files for 5 areas in Western Coalfield with potential EOI's 2/07/2008 17:49:55 email to from Julie Moloney to Brad Mullard with list of companies to be invited 4/07/2008 15:27:39 email from Allan Courts to Sheldrake re meeting with Minister on 7 July 2008 7/07/2008 13:32:13 email from Julie Moloney to Kevin Ruming re Mt Penny	J-9 Pg 216 J-9 Pp 221 - 222 J-9 Pp 225 - 226 J-9 Pg 227 J-9 Pg 231 J-9 Pg 217
A2	7/07/2008 - Mt Penny ID Diagram : Fred Schiavo	No	18/07/2008 15:44:16 email from Julie Moloney to Brad Mullard attaching 3 documents re briefing re potential EOI areas	J-9 Pp 237 - 241.1

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			23/07/2008 Ministerial briefing BN08/1589 'Coal Allocation Proposal' BN08/1589 prepared by Patricia Madden	J-9 Pp 254 - 264
			23/07/2008 11:04:15 email from Brad Mullard to Julie Moloney attaching draft of 'NSW Coal Allocation Strategy.doc'	J-9 Pp 265 - 272
			23/07/2008 11:17:58 email Brad Mullard to Julie Moloney with attachment 'Company EOI July 2008.doc'	J-9 Pp 273 - 274
			23/07/2008 11:33:05 email Brad Mullard to Patricia Madden email with attachment 'Company EOI July 2008''	J-9 Pp 275 - 276
			23/07/2008 11:35:48 Email Patricia Madden to Craig Munnings and Brad Mullard with attachment 'Company EOI July 2008''	J-9 Pp 277 - 278
			23/07/2008 12:05:08 email from Julie Moloney to Brad Mullard with track changes on "NSW Coal Allocation Strategy.doc"	J-9 Pp 279 - 289
			30/07/2008 13:48:37 email from Shirley Hibbs (on behalf of Brad Mullard) to Jamie Gibson regarding his request for more information on the areas	J-12 Pp 294 - 296
			30/07/2008 14:35:32 email from Jamie Gibson to Craig Munnings re TRIM Briefing: BN08/1229 : Potential Coal Allocation Areas in Western NSW	J-12 Pp 297 - 307
			30/07/2008 16:12:39 email from Patricia Madden to Craig Munnings	J-12 Pp 308 - 312
			31/07/2008 16:21:38 email from Patricia Madden to Jamie Gibson titled 'Coal Allocation Proposal' attaching 3 documents re coal tender areas	J-12 Pp 313 - 331
			3/09/2008 9:37:25 Email from Brad Mullard to Alan Coutts attaching "Remnant Release Areas Inform Pack Text Fig 1 August 2008 2008.doc"	J-12 Pp 380 - 395
A3	August 2008 - Coal Release Areas : Gunnedah Coalfield; Hunter Coalfield and Western Coalfield - Expression of Interest Information	No		J-12 Pp 332 - 356
A4	9/09/2008 - Director General Briefing - Coal Allocation Proposal prepared by Patricia Madden, Manager Operations, Mineral Resources, Industry & Investment NSW	No		J-12 Pp 403 - 405
			12/09/2008 letter from Amerod (White Energy) to DPI re EOI	J-12 Pg 414
			17/09/2008 16:10:35 Email Jenny Ward to Lyndall Derrig regarding response to Newcastle Herald	J-12 Pp 415 - 418
			17/09/2008 16:33:16 email Tracey Godwin to Jenny Ward containing list of coal release areas	J-12 Pp 419 - 420
			18/09/2008 letter from White Energy re Expression of interest in NSW Coal Deposits	J-12 Pg 421
			19/09/2008 letter from Arthur Phillip re Arthur Phillip NSW Coal Program	J-12 Pg 422
			19/09/2008 letter from Griffin Coal re Expression of interest for the Gunnedah, Hunter and Western Coalfields	J-12 Pg 423 - 424
			19/09/2008 letter from Cascade Coal re Interest in NSW Coal Deposits	J-12 Pg 425
			20/09/2008 letter from Redman Mining re Pursuit of NSW Coal Deposits	J-12 Pg 426
			25/09/2008 Letter from NSW Minerals Council to Macdonald	J-12 Pg 427
			1/10/2008 16:43:13 email Craig Munnings to Jamie Gibson and Graham Hawkes	J-12 Pg 428
			3/10/2008 letter from Julie Moloney to Richard Poole, Cascade Coal re letter 19/09/2008	J-50 2471
			3/10/2008 letter from Tiaro Coal re Expression of Interest - Coal Release Areas August 2008	J-12 Pg 429
			3/10/2008 14:20:37 email Lindsay Karathanassis to Julie Moloney - expression of interest from Indian companies	J-12 Pg 430 - 431
			13/10/2008 Ministerial briefing note prepared by Patricia Madden titled 'Extension of Coal Allocation Areas Expression of Interest' - version 1	J-12 Pp 432 - 434

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			13/10/2008 Ministerial briefing note prepared by Patricia Madden titled 'Extension of Coal Allocation Areas Expression of Interest' - version 2	J-12 Pp 435 - 437
A5	13/10/2008 - Mineral Briefing - Coal Allocation Areas Expressions of Interest prepared by Patricia Madden, Manager Operations, Mineral Resources, Industry & Investment NSW	No	13/10/2008 11:21:49 email Graham Hawkes to Craig Munnings with list of companies 28/10/2008 letter from Real Brand Holdings re EOI 28/10/ 2008 MOC08/1547 Briefing and draft letters re NSW Minerals Council and Tiarru Coal	J-12 Pp 438 - 440 J-12 Pp 441 - 449 J-12 Pg 450 - 452 J-12 Pp 453 - 456 J-12 Pg 457
			6/11/ 2008 11:24:44 email from Tracey Godwin to Tony Vankeulen et al re media enquiries for EOI areas	
			1/11/2008 12:16:45 email Jamie Gibson to Alan Coutts re discussion this morning sending names of companies who have contacted DPI	J-12 Pp 458 - 459
			12/11/2008 12:16:45 email from Jamie Gibson to Alan Coutts regarding list of companies	J-12 Pg 467
			13/11/2008 1:42:20 email from Patricia Madden to Brad Mullard with list of companies	J-12 Pp 460
			13/11/2008 16:07:38 email from Alan Coutts to Jamie Gibson containing list of companies	J-12 Pp 461 - 462
Nil	14/11/2008 - Email from Garth Holmes to Alan Coutts re "Coal Release Areas" EOI Evaluation Process dated	No		J-12 Pg 468 J-12 Pp 469 - 470
			14/11/2008 17:06:36 email to Zanella, Mullard and Hughes from Garth Holmes	
			20/11/ 2008 copy of signed letter from Brad Mullard to Kevin Fennell confirming his engagement	J-12 Pg 475
A7	20/11/2008 - Expression of Interest -Jain Group	Yes		
			21/11/2008 12:29:25 email from Garth Holmes to Brad Mullard attaching draft "Coal Release Areas ED letter to KFennell 21Nov2008.doc"	J-12 Pp 463 - 465
			21/11/2008 copy of signed letter from Brad Mullard to Kevin Fennell regarding proposed re-opening of EOI process	J-12 Pp 476 - 477 J-20 Pp 1196 - 1315
A8	21/11/2008 - Expression of Interest Monaro Mining	Yes		
			23/11/2008 18:23:47 email correspondence between Brad Mullard and Garth Holmes re Fennell letters	J-12 Pp 478 - 481 J-12 Pg 482
			24/11/2008 letter to Kevin Fennell from Lindsay Gilligan	
			24/11/2008 14:51:12 email from Garth Holmes to Brad Mullard re Declaration of Expressions of Interest	J-12 Pp 483 - 485
			24/11/2008 16:42:46 email Patricia Madden to Jamie Gibson	J-12 Pp 486 - 489
			25/11/2008 Fax cover sheet and letter from Brad Mullard to Kevin Fennell replacing letter dated 21/11/08 re re:-opening	J-12 Pg 490 - 492 J-12 Pp 493 - 497
			25/11/2008 09:11:28 Email Sheldrake to Brad Mullard regarding letter to Kevin Fennell	
			25/11/2008 10:05:49 Email Jenny Ward to Julie Moloney and Brad Mullard regarding media enquiries on EOI's	J-12 Pp 498 - 501
			25/11/2008 11:44:26 email from Garth Holmes to Zanella, Mullard and Hughes re evaluation process	J-12 Pp 502 - 503
			25/11/2008 14:54:43 Email Patricia Madden to Garth Holmes attaching Kevin Fennell letter	J-12 Pp 504 - 506 J-12 Pp 507 -509
			25/11/2008 15:16:02 Email Brad Mullard to Garth Holmes attaching Fennell letter	
			25/11/2008 15:32:55 Garth Holmes to Brad Mullard cc Patricia Madden attaching revised Fennell letter	J-12 Pp 510 - 513

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			25/11/2008 15:39:59 Email Madden to Holmes cc Mullard attaching revised Fennell letter	J-12 Pp 514 - 516
			25/11/2008 16:46:20 Email Garth Holmes to Patricia Madden cc Mullard	J-12 Pp 517 - 518
			26/11/2008 letter from Kevin Fennell to Garth Holmes re engagement	J-12 Pg 520
			26/11/2008 08:26:11 email from Brad Mullard to Richard Sheldrake advising of meeting with Fennell re change to EOI process	J-12 Pg 521
			26/11/2008 08:28:39 email from Brad Mullard to Jamie Gibson advising of meeting with Fennell re change to EOI process	J-12 Pg 522
			27/11/2008 17:18:15 email from Brad Mullard to Richard Sheldrake re outcome of meeting with Fennell	J-12 Pp 523 - 525
			27/11/2008 17:44:41 email from Brad Mullard to Jamie Gibson re meeting with Fennell	J-12 Pg 526
			28/11/2008 15:40:47 Email Patricia Madden to Julie Moloney attaching letter to Fennell	J-12 Pp 527 - 529
			28/11/2008 16:40:55 Email Garth Holmes to Brad Mullard cc Julie Moloney attaching Letter from Kevin Fennell 28/11/2008	J-12 Pp 530 - 533
			28/11/2008 Letter from Richard Poole, Cascade Coal to Julie Moloney, DPI re Expression of Interest in Specific NSW Coal Deposits	J-48 Pp 10 - 15
			3/12/2008 Unsigned ministerial brief reopening EOI	J-12 Pp 534 - 536
			5/12/2008 15:39:33 email from Brad Mullard to Richard Sheldrake containing documents re re-opening of EOI process	J-12 Pp 537 - 575
			5/12/2008 15:46:44 Email from Brad Mullard to Jamie Gibson re re-opening of EOI process (attachments same as email 5/12/2008 15:39:33)	J-12 Pp 577 - 578
			8/12/2008 12:47:28 email from Brad Mullard to Kevin Fennell re re-opening of EOI (attachments same as email 5/12/2008 15:39:33)	J-12 Pp 579 - 580
			10 December 2008 letter from Fennell to Mullard	J-12 Pg 581
			12/12/2008 12:07:00 email from Patricia Madden to Graham Hawkes, Brad Mullard et al attaching correspondence with draft briefing and information package re re-opening of EOI process (attachments same as email 5/12/2008 15:39:33)	J-12 Pp 582 - 584
			16 December 2008 14:46:02 Email Brad Mullard to Jamie Gibson re delegation of Ministerial functions	J-12 Pg 585
			18/12/2008 17:08:24 Email from David Agnew to Joy Agnew and Tracey Godwin re delegation of Ministerial functions	J-12 Pg 587
			22/12/2008 16:33:47 Email from Adrian Delany to Pam Joyce re ministerial delegation	J-12 Pp 588 - 594
			23/12/2008 Signed instrument of delegation	J-13 Pg 596
			23/12/2008 15:47:41 Email Graham Hawkes to Jamie Gibson re Ministerial delegation attaching relevant documents	J-13 Pp 597 - 601
			6/01/2009 14:05:00 Ministerial briefing V1 reopening EOI	J-13 Pp 628 - 630
			6/01/2009 15:16:00 Ministerial briefing V2 reopening EOI with attachments	J-13 Pp 631 - 640
			8/01/2009 Signed ministerial briefing reopening EOI	J-13 Pp 641 - 649
A6	January 2009 Expression of Interest Package for Re-opening of Expressions of Interest as per email from William Hughes to Ron Taylor on 19/11/2009	No		J-13 Pp 602 - 627
			9/01/2009 Letter to Brad Mullard to Monaro Mining re reopening of EOI	J-13 Pp 650 - 651
			16/02/2009 Letter Lindsay Gilligan to Kevin Fennell re declaration process for new EOI applicants	J-13 Pg 652
			16/02/2009 Letter from John McGuigan, Cascade Coal to Brad Mullard, DPI regarding Expression of Interest Mt Penny	J-48 Pp 47 - 48

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
A9	16/02/2009 - Expression of Interest Cascade Coal	Yes		J-21 Pp 1603 - 1633
A10	February 2009 - Expression of Interest Breakspeare Coal Mines Ltd	Yes		
			16/02/2009 14:03:00 Email Julie Moloney to William Hughes re new EOI applicants	J-13 Pp 653 - 655
			16/02/2009 14:31:36 Email William Hughes to Brad Mullard et al re new EOIs received	J-13 Pp 656 - 658
			16/02/2009 14:36:00 Email William Hughes to Kevin Fennell re new EOI applicants	J-13 Pp 659 - 661
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Kevin Fennell	No		J-13 Pg 853
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by William Hughes	No		J-13 Pg 854
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Ado Zanella	No		J-13 Pg 855
A11	18/02/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Julie Moloney	No		J-13 Pg 856
			29/04/2009 17:12:00 Email William Hughes to Kevin Fennell re evaluation panel	J-13 Pp 662
A11	1/05/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Brad Mullard	No		J-13 Pg 858
A11	7/05/2009 - Declaration of Conflict of Interest and Non-Disclosure of Confidential Information signed by Richard Sheldrake	No		J-13 Pg 857
Nil	May 2009 - Exploration Licence Conditions 2009 pages 11 - 18	No		
			6/05/2009 Coal Release Areas : Evaluation of Expressions of Interest Prepared by William Hughes May 2009	J-13 Pp 663 - 686
			6/05/2009 Ministerial Submission Coal Release Exploration Areas Recommendations	J-13 Pp 687 - 734
A11	15/05/2009 - Letter from Kevin Fennell to William Hughes, Director, Development Coordination Mineral Resources with audit opinion			J-13 Pp 735 - 736
			21/05/2009 16:58:49 Email Damian Jeffree to Brad Mullard and William Hughes re 11 coal release areas	J-13 Pg 748
			26/05/2009 11:36:47 Email Selina Ranger to Lynnette Sisson and Shirley Hibbs re meeting with the Minister	
			<i>The corresponding document in the Return to Orders appears to be an abridged version of this document.</i>	J-13 Pp 756 - 757
A11	June 2009 - Evaluation of Expressions of Interest by Evaluation Team, Industry and Investment NSW	Yes		J-13 Pp 759 - 858
			1/06/2009 10:02:57 Email William Hughes to Brad Mullard attaching meeting notes Macdonald.pdf	
			1/06/2009 16:35:38 Email Mart Rampe to William Hughes cc Gardner Brook attaching Monaro letter 1Jun09	J-13 Pp 859 - 860
			2/06/2009 16:16:52 Email Mart Rampe to William Hughes attaching Monaro letter 2Jun09	J-13 Pp 861 - 864
A12	9/06/2009 - Letter from Loyal Coal Pty Ltd to William Hughes regarding EOI for Monaro Mining from Gardner Brook	No		J-13 Pp 867 - 870
			10/06/2009 10:30:15 Email William Hughes to Ado Zanella and Julie Moloney regarding reconvening re Monaro Mining	J-13 Pg 872
			10/06/2009 11:25:26 Email William Hughes to Ado Zanella and Julie Moloney reconvening re Monaro Mining	J-13 Pg 873
			10/06/2009 11:36:36 Email William Hughes to Mart Rampe re Loyal Coal	J-13 Pp 874 - 875
				J-13 Pp 876 - 877

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
			10/06/2009 11:45:43 Email William Hughes to Kevin Fennell regarding reconvening re Monaro Mining	J-13 Pg 878
			10/06/2009 17:20:34 Email from Gardner Brook to William Hughes re Loyal Coal	J-13 Pp 879 - 883
			10/06/2009 20:19:46 Email William Hughes to Gardner Brook re Loyal Coal	J-13 Pg 884 - 887
			15/06/2009 11:36:38 Email William Hughes to Julie Moloney cc Ado Zanella re regarding reconvening evaluation panel	J-13 Pp 889 - 891
			17/06/2009 16:55:58 Email William Hughes to Marte Rampe attaching Change name re Monaro, share certificates Voope	J-19 Pp 892 - 900
A13	18/06/2009 - EOI Recommendation - Approved by Director General I & I NSW 19/06/2009	Yes		J-19 Pp 903 - 907
A13	19/06/2009 - Letter from Kevin Fennell to William Hughes regarding Evaluation Panel deliberations about withdrawal of Monaro Mining NL	No		J-19 Pg 908
A14	19/06/2009 - Letter from Richard Sheldrake, DPI to John McGuigan, Cascade Coal Pty Ltd notifying they are the successful EOI applicant for Mt Penny	No		J-19 Pp 911 - 912
A15	19/06/2009 - Letter from Richard Sheldrake, DPI to Robert McLennan, Breakspeare Coal Mines Pty Ltd notifying they are were unsuccessful in their EOI application for Mt Penny	No		J-19 Pg 937
A15	19/06/2009 - Letter from Richard Sheldrake, DPI to Sumit Kumar Khetan, Jain Group notifying they are were unsuccessful in their EOI application for Mt Penny	No	19/06/2009 15:40:17 Email William Hughes to Jenny Ward re EOI process and recommendations	J-19 Pg 935
A16	8/07/2009 - Letter from David Agnew, DPI to John McGuigan, Cascade Coal Pty Ltd regarding exploration licence conditions	No	19/06/2009 16:05:32 Email William Hughes to Gardner Brook re Monaro Mining EOI	J-19 Pp 958 - 962 J-19 Pp 963 - 965
A17	10/08/2009 - Letter from David Agnew, DPI to John McGuigan, Cascade Coal Pty Ltd regarding consent to make application for Mt Penny EL	No	20/07/2009 Signed DPI submission re consent to apply prepared by William Hughes, signed by Richard Sheldrake	J-48 Pg 256 J-19 Pg 966
A18	23/08/2009 - Document from Cascade Coal Pty Ltd listing Mt Penny ELA 3771 Coordinates	No		J-19 Pp 973 - 974
A19	24/08/2009 - Arthur Phillip Funding Underwriting Agreement	Yes		J-48 Pp 267 - 280
A20	25/08/2009 - Nomination Letter plus supporting information - ELA 3771 - Cascade Coal Pty Ltd	Yes		J-48 Pg 281
A21	25/08/2009 - Receipt / Tax invoice from DPI for \$1 million payment - contribution to Coal Development Fund from Cascade Coal Pty Ltd	No		
A22	25/08/2009 - Receipt / Tax invoice from DPI for \$10,000.00 payment - Reassessment Fee (Mt Penny) from Cascade Coal Pty Ltd	No		
A23	25/08/2009 - Receipt / Tax invoice from DPI for \$50,820.00 payment - ELA Application Fee (Mt Penny) from Cascade Coal Pty Ltd	No		
A24	28/08/2009 - Letter from Director General DPI to James McGuigan, Cascade Coal Pty Ltd acknowledging receipt of application for Mt Penny EL	No		
A25	2/09/2009 - Exploration Licence Applications Newspaper Guidelines by Gary Walker	No		
A25	2/09/2009 - Example of coal and mineral advertisement diagrams prepared by Gary Walker	No		
A25	2/09/2009 - ELA 3771 Diagram X prepared by Gary Walker	No		

Document Comparison Matrix

Index Ref	Call for Papers	Privileged	Relevant documents from ICAC EOI Brief not in Call for Papers	ICAC Exhibit / Page number
A26	2/09/2009 - Coal Exploration Licence Application Identification Sheet prepared by Gary Walker	No		
A27	8/09/2009 - Diagram of Exploration Licence No ELA 3771 held by Mt Penny Coal Pty Ltd prepared by Gary Walker	No		
A28	11/09/2009 - Memorandum re ELA 3771 Cascade Coal Pty Ltd to Peter Johannessen, Titles from Sarah Jardine, Coal Advice	No		
A29	26/09/2009 - Email from Jeannine Biviano, DPI to Conan Yuen, Treasury re Financial Review Article	Yes		
A30	30/09/2009 - Email between David Agnew and David Holmes re EOI conditions	No		
A31	6/10/2009 - Exploration Licence Conditions 2009 prepared by Peta Johannessen - May 2009 version	No		
A32	6/10/2009 - ELA 3771 Exploration Licence Document for EL 7406 for Mt Penny Coal Pty Ltd dated 21 October 2009 (unsigned)	No		
A33	8/10/2009 - Letter from Peta Johannessen, DPI to James McGuigan, Cascade Coal Pty Ltd re intention to Grant Exploration Licence Application No 3771	No		J-48 Pp 282 - 291
A34	14/10/2009 - Parliamentary House Folder Note - Mt Penny prepared by William Hughes	No		
A35	21/10/2009 - Recommendation to Grant ELA 3771 to Mt Penny Coal Pty Ltd nominated by Cascade Coal Pty Ltd prepared by Peta Johannessen	No		
A36	21/10/2009 - Executed Exploration Licence for EL No 7406 to Mt Penny	No		J-19 Pp 971 - 1001
A37	27/10/2009 - Letter to James McGuigan, Mt Penny Coal Pty Ltd from DPI - Grant of EL 7406	No		J-48 Pg 292
A38	11/11/2009 - Response to Notice of Motion regarding the request for granting of exploration licences for 11 areas including Mt Penny approved by Brad Muliard	No		
B1	12/11/2009 - Letter to John Lee, Director General, Dept Premier and Cabinet from Lynn Lovelock, Clerk of the Parliament re Order for Papers - Exploration Licence - Mt Penny	No		
B1	13/11/2009 - Letter to Dr Richard Sheldrake from Leigh Sanderson - Deputy Director General (General Counsel) re Standing order 52 - Exploration - Mt Penny	No		
B2	19/11/2009 11:18AM - Email from Ron Taylor, Manager Corporate Projects, Industry & Investment NSW to Mark Duffy re Standing Order 52 - Exploration Licence - Mt Penny noting the Director General must certify that all documents held by Industry and Investment NSW and covered by the terms of the resolution have now been provided	No		
B3	19/11/2009 11:45AM - Email from David Agnew, Industry & Investment NSW to Ron Taylor noting geological data is available on CD.	No		
B4	19/11/2009 3:44PM - Email from William Hughes, Principal Adviser Coal and Strategic Projects, Industry & Investment NSW to Ron Taylor attaching "Release Areas Inform Pack August 2008" and "2nd Release Inform Pack January 2009"	No		
B5	19/11/2009 11:54AM - Email from William Hughes, Principal Adviser Coal and Strategic Projects, Industry & Investment NSW to Ron Taylor attaching TRIM number re DDG Approval for 11 Coal Release Areas EOI. TRIM INTO08/62117	No		
B6	23/11/2009 - Letter to Leigh Sanderson, General Counsel, Dept Premier and Cabinet from Richard Sheldrake, Director General of Industry & Investment NSW certifying all documents have been provided	No		

Appendix 9 Advice of Mr Bret Walker SC

LEGISLATIVE COUNCIL PRIVILEGES COMMITTEE
2009 MT PENNY ORDER FOR PAPERS



ADVICE

I am asked to advise the Clerk on behalf of the Privileges Committee whether documents made public by the Independent Commission Against Corruption as part of Operation Jasper and provided by the Commissioner of ICAC to the Legislative Council on 14th March 2013 should, prima facie, have been provided to the House in 2009 as part of a return to order concerning Mt Penny.

2 The order in question, made on 12th November 2009, described the documents in question as being “in relation to Exploration Licence 3771 (now Exploration Licence 7406) - Mt Penny, including any document relating to the tender process ...”.

3 The Privileges Committee resolved on 19th March 2013 to obtain advice from me, if I were available, on this question. The Clerk has supplied to me copies of all the documents identified in the document comparison matrix provided by the Commissioner of the ICAC tabled in the House on 14th March 2013. I have read, examined and considered all of them.

4 I have also read, examined and considered the documents, copies of which I have been supplied with by the Clerk, which were produced in response to the order.

5 An understanding of the documents that were produced in response to the order provides useful context for reading the documents that were not produced, being

those identified in the ICAC matrix. However, I have not substituted a generalised view of the produced documents for what would otherwise have been my interpretation of what documents were called for by the order. Nonetheless, in my opinion the documents that were produced in response to the order were properly so produced. None of them fell outside the terms of the order.

6 The advice sought from me by the Privileges Committee is whether any of the other documents, not produced in response to the order, but identified in the ICAC matrix, should have been produced. In short, in my opinion nearly all of them should have been so produced.

7 The only exceptions are the documents which may be identified by the following ICAC exhibit page numbers:

J-9 Pg 77

J-9 Pp 127-128

J-9 Pp 129-130

J-9 Pg 131

J-9 Pp 132-133

J-9 Pp 136-137

J-9 Pp 147-151

J-9 Pg 159

J-9 Pp 218-219

J-9 Pg 227

J-12 Pg 585

J-12 Pg 587

J-12 Pp 588-594

J-13 Pg 596

J-13 Pp 597-601

8 It should be well understood that the expressions “in relation to” and “relating to” found in the crucial terms of the order are calculated to produce borderline cases and reasonable differences of opinion. Doing the best I can, I estimate that I have been perhaps narrower than a judge might be in an analogous position in assessing some of the documents specified in 7 above as not falling, prima facie, within the terms of the order. That is, I think I have erred (if at all) on the side of giving the benefit of the doubt to those who did not produce these documents.

9 Within the documents specified in 7 above, I should make these further comments to explain 8 above. The document at J-7 Pg 77 could easily be seen, in hindsight, as having a sufficient connexion with the relevant Exploration Licence and “the tender process”, but is reasonably arguably so general as not to be caught. The documents from J-9 Pg 127 to Pg 133, and Pp 136-137 and 147-151 relate to the availability and market conditions in connexion with drilling surfaces in areas including that eventually covered by the relevant Exploration Licence. The licence did not exist when those documents were created. I note that the existence (or not) of exploration data was explicitly a factor in later consideration of what should fairly be

understood to be within “the tender process”. However, these drilling documents could genuinely be regarded as outside the order. The other documents noted in 7 above are not obviously outside the order, but are so borderline and lacking in explicit reference to either the eventual Exploration Licence or “the tender process” as to justify the benefit of the doubt noted in 8 above.

10 I note that I have interpreted “the tender process” as applying to and comprehending the so-called Expression of Interest (or EOI) process. In my opinion, there can be no doubt that all such references must be so read.

11 The only other note that I respectfully express with the intention of assisting the Privileges Committee is that some of the documents that I advise should, *prima facie*, have been produced in response to the order are in the nature of drafts, file copies or otherwise repetitive versions of other documents. Some of those other documents (but not all) were themselves produced in response to the order.

12 Finally, in relation to the request for my advice in terms of what should have been “*prima facie*” produced, I state that my approach has been to read, examine and consider the documents noted above, in light of my understanding of the parliamentary law and practice, and to advise what I consider to be a proper final view of what should have been produced.

FIFTH FLOOR,
ST JAMES' HALL.

11th April 2013



Bret Walker

Appendix 10 Correspondence from the Chair to the Commissioner of the ICAC



LEGISLATIVE COUNCIL

PRIVILEGES COMMITTEE

23 April 2013

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

Dear Mr Ipp

Mt Penny Return to Order

As you would be aware, the Legislative Council Privileges Committee is currently investigating whether documents identified by the Commission and provided to the Council should, *prima facie*, have been provided in the 2009 Mt Penny return to order, and if so, what further action the House should take, including any possible further involvement by the ICAC. The Committee is due to report on 30 April 2013.

Should the House refer new terms of reference for a further inquiry into this matter by the Privileges Committee, it would be likely that such an inquiry would take several months. I seek your advice on whether any waiver of privilege over the 2009 Mt Penny return to order would in any way assist the Commission as part of its investigations at this time.

I note that in your correspondence to the President of the Legislative Council dated 26 February 2013, you observed that the Commission will take no further action in relation to this matter which might affect the rights and privileges of the House unless there is a clear waiver of privilege entitling the Commission to do so.

Yours sincerely

A handwritten signature in blue ink, appearing to be 'Trevor Khan', written over the words 'Yours sincerely'.

The Hon Trevor Khan
Chair

Appendix 11 Standing order 52

Order for the production of documents

- (1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.
- (2) When returned, the documents will be laid on the table by the Clerk.
- (3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.
- (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.
- (7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.
- (8) A report from the independent legal arbiter is to be lodged with the Clerk and:
 - (a) made available only to members of the House,
 - (b) not published or copied without an order of the House.
- (9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.

Appendix 12 Minutes

Minutes No. 15

Tuesday 19 March 2013

Members' Lounge, Parliament House, Sydney, at 7.31 pm

1. **Members present**

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Ajaka

Mr Donnelly

Miss Gardiner

Mr Mason-Cox

Revd Mr Nile

Mr Shoebridge (for consideration of the Mr Penny inquiry only)

In attendance: Steven Reynolds, Stephen Frappell.

2. **New members of the Committee**

The Chair noted the advice of the Leader of the Opposition discharging Mr Primrose from the Committee and appointing Mr Donnelly to the Committee.

The Chair further noted the appointment of Mr Shoebridge to the Committee for the purposes of the Inquiry into possible non-compliance with the 2009 Mt Penny order for papers.

3. *******

4. *******

5. **Inquiry into possible non-compliance with the 2009 Mt Penny order for papers**

The Chair noted the following terms of reference referred by the House on 14 March 2013:

1. That under Standing Order 77, the Privileges Committee inquire into and report on:
 - (a) whether documents identified in the document comparison matrix provided by the Commissioner of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in this House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process, and
 - (b) if so, what further action the House should take, including any possible further involvement by the ICAC.
2. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser.
3. That notwithstanding anything to the contrary in the resolution establishing the Committee, for the purposes of this inquiry:
 - (a) the Committee consist of eight members, and
 - (b) the additional member be Mr Shoebridge.
4. That the Committee report by Tuesday 30 April 2013.

The Chair briefed the Committee.

The Chair tabled:

- Summary of the 2008/2009 EOI process for the exploration of 11 medium and small coal exploration areas based on the documents provided by the ICAC and the return to order of 2009
- Timeline of the order for papers process in 2009.

The Committee deliberated.

Resolved, on the motion of Mr Shoebridge: That the Clerk circulate questions and answers without notice from Ms Lee Rhiannon to Mr Macdonald concerning Mt Penny from November 2009 and May 2010, and that the questions and answers be made available to any person providing advice to the Committee.

Revd Mr Nile moved: That the Clerk of the Parliaments be requested to obtain advice from leading senior counsel relating to whether documents identified in the document comparison matrix provided by the Commissioner of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process.

Mr Donnelly moved: That the question be amended by deleting 'leading senior counsel' and inserting instead 'Mr John Evans'.

The Committee deliberated.

Amendment put and negatived.

Original question put and passed.

Resolved, on the motion of Mr Donnelly: That the secretariat contact Mr Bret Walker to ascertain his availability to provide advice to the Committee within a timeframe suitable to enable the Committee to complete its inquiry by 30 April 2013, and that if Mr Bret Walker is not available, the Committee reconvene to consider alternative advisers.

Mr Shoebridge moved: That to assist the Committee in its deliberations, the Chair, with the assistance of the secretariat, seek information from ICAC as to the timeline of its present inquiries and what timeframe would be considered reasonable for the ICAC to further inquire into this matter if Parliament determined to refer the matter to it for further consideration.

The Committee deliberated.

Question put and negatived.

Resolved, on the motion of Revd Mr Nile: That subject to the ability of Mr Bret Walker to provide advice to the Committee, the Committee meet again on Tuesday, 16 April 2013 at 2.00 pm to consider the advice of Mr Walker, and on Tuesday 23 April 2013 at 10.00 am to consider the report of the Committee.

Mr Shoebridge left the meeting.

6. ***

7. ***

8. ***

9. ***

10. **Adjournment**

The Committee adjourned at 8.17 pm until Tuesday, 16 April 2013 at 2.00 pm.

Stephen Frappell
Clerk to the Committee

Minutes No. 16

Tuesday 16 April 2013

Room 1153, Parliament House, Sydney, at 2.02 pm

1. Members present

Mr Khan, *Chair*

Ms Fazio, *Deputy Chair*

Mr Ajaka

Mr Donnelly

Miss Gardiner

Mr Mason-Cox

Revd Mr Nile

Mr Shoebridge

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Velia Mignacca.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Ms Fazio: That minutes no. 15 be confirmed.

3. Inquiry into possible non-compliance with the 2009 Mt Penny order for papers

The Chair noted that:

- On 20 March 2013, in accordance with the resolution of the Committee of 19 March 2013, Mr Bret Walker SC agreed to provide advice to the Committee. The Chair subsequently published a media release indicating that the Committee met to consider the terms of reference on 19 March 2013, and that Mr Bret Walker SC had agreed to provide advice to the Committee.
- On 21 March 2013, the Clerk sent instructions to Mr Bret Walker SC in relation to the requested advice.
- On 3 April 2013, the secretariat on behalf of the Chair circulated electronically to all members a copy of the Chair's draft report structure. The email also flagged the possibility of inviting Mr John Evans to the Committee's scheduled meeting on 23 April 2013.
- On 11 April 2013, the advice from Mr Bret Walker was received.
- On 15 April 2013, the Clerk, at the request of the Committee Chair, circulated an email between the Chair and the Clerk in relation to briefing notes provided to the Hon Ian Macdonald during Question Time.

The Chair further noted the distribution to the Committee of a discussion paper evaluating the merits of different approaches to this inquiry.

The Committee deliberated.

Resolved, on the motion of Mr Shoebridge:

- 1) That the Committee note the advice of Mr Walker SC;
- 2) That the Committee conclude that in accordance with the advice of Mr Walker and its own deliberations, certain documents identified in the document comparison matrix provided by the Commissioners of the ICAC and tabled in the House on 14 March 2013 should, *prima facie*, have been provided in the return to order tabled in the House on 26 November 2009 concerning the Mt Penny mining exploration licence and tender process.

Resolved, on the motion of Ms Fazio: That the secretariat prepare draft terms of reference and draft procedures for the protection of witnesses for a possible further full inquiry into this matter by the Privileges Committee.

Resolved, on the motion of Revd Mr Nile: That Mr Evans be invited to attend the meeting of the Committee scheduled for 23 April 2013 to provide advice in relation to the conduct of the Arena inquiry.

Revd Mr Nile moved: That the Committee Chair write to the Commissioner of the ICAC to advise him of the Committee's proposed course of action and to seek advice whether this would have any impact on the Commission's current investigations.

The Committee deliberated.

Miss Gardiner moved: That the motion of Revd Mr Nile be amended to omit all words after That and insert instead: the Committee consider at its next meeting whether to write to the Commissioner of the ICAC concerning the impact of a full inquiry by the Committee into this matter on the ICAC.

Question resolved in the affirmative.

Original question, as amended, put and passed.

Resolved, on the motion of Ms Fazio: That the Committee hold a further meeting on Monday, 29 April 2013 at 11.00 am.

4. Adjournment

The Committee adjourned at 3.06pm until Tuesday, 23 April 2013 at 10.00 am.

Stephen Frappell
Clerk to the Committee

Minutes No. 17

Tuesday 23 April 2013
Room 1153, Parliament House, Sydney, at 10.01 am

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Ajaka
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile
Mr Shoebridge

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Velia Mignacca.

2. Confirmation of minutes of previous meeting

Resolved, on the motion of Revd Mr Nile: That minutes no. 16 be confirmed.

3. Inquiry into possible non-compliance with the 2009 Mt Penny order for papers

The Committee invited Mr John Evans, former Clerk of the Parliaments and Clerk of the Legislative Council, to address the Committee.

Mr Evans addressed the Committee.

The Chair left the meeting. Ms Fazio took the Chair.

The Chair returned to the meeting.

Mr Evans concluded and withdrew.

The Committee adjourned at 11.03 am.

The Committee resumed at 11.34 am.

Resolved, on the motion of Mr Ajaka: That the Committee Chair write to Mr Evans on behalf of the Committee to thank him for his advice to the Committee.

The Chair tabled draft terms of reference for a further inquiry into this matter by the Privileges Committee.

Resolved, on the motion of Ms Fazio: That paragraph 2(c) be amended to delete the words ‘in place at the time of the 2009 resolution’.

Resolved, on the motion of Mr Donnelly: That paragraph 2(f) be amended to insert the words ‘and policies’ after the word ‘guidelines’, and to insert the words ‘in light of current guidelines and policies’ after the words ‘standing order 52’.

Resolved, on the motion of Mr Ajaka: That paragraphs 2(a) and (d) be amended to delete the words ‘the exclusion of the documents in the return’ and insert instead ‘the failure to provide documents in the return’.

Resolved, on the motion of Revd Mr Nile: That paragraph 2 be amended to delete the words ‘the exclusion of the documents in the return’ and insert instead ‘the failure to provide documents in the return’.

Mr Donnelly moved: That paragraph 3 be amended to insert the word ‘may’ before the word ‘adopt’ and insert the words ‘natural justice’ after the words ‘procedural fairness’.

Miss Gardiner moved: That the question be amended by deleting paragraph 3 and inserting instead:

‘That in order to ensure procedural fairness, natural justice and the protection of witnesses before the Committee, the Committee:

1. shall observe the procedures laid down in the standing orders and the practices and procedures of the House, and
2. may adopt and report to the House any additional procedures as the Committee sees fit’.

Question put and resolved in the affirmative.

Original question, as amended, put and passed.

Resolved, on the motion of Ms Fazio: That the following new paragraph 4 be inserted:

4. That in conducting its inquiry, the Committee may utilise the services of an appropriately qualified adviser or advisers.

Resolved, on the motion of Mr Donnelly: That the draft terms of reference, as amended, be adopted by the Committee for recommendation to the House.

Resolved, on the motion of Ms Fazio: That:

1. the Committee Chair write to the Commissioner of the ICAC seeking advice in relation to the possible need for waiver of parliamentary privilege to enable the ICAC to use any of the documents provided in the Mt Penny return to order during its current investigations, and
2. on receipt of a response from the Commissioner, the Committee urgently reconvene to consider the response.

Resolved, on the motion of Mr Shoebridge: That the Committee further consider draft procedures for the protection of witnesses at its next meeting.

Resolved, on the motion of Ms Fazio: That in accordance with Standing Order 227(1), the Chair prepare a draft report and submit it to the Committee.

Resolved, on the motion of Revd Mr Nile: That the secretariat be authorised to distribute the Chair's Draft Report electronically to the members of the Committee.

4. Adjournment

The Committee adjourned at 12.11 pm until Monday, 29 April 2013 at 11.00 am.

Stephen Frappell
Clerk to the Committee

Minutes No. 18

Monday 29 April 2013

Room 1153, Parliament House, Sydney, at 11.05 am

1. Members present

Mr Khan, *Chair*
Ms Fazio, *Deputy Chair*
Mr Donnelly
Miss Gardiner
Mr Mason-Cox
Revd Mr Nile
Mr Shoebridge

In attendance: Steven Reynolds, Stephen Frappell, Jenelle Moore, Velia Mignacca.

2. Apologies

Mr Ajaka

3. Confirmation of minutes of previous meeting

Resolved, on the motion of Mr Donnelly: That minutes no. 17 be confirmed.

4. Correspondence

The Committee noted the following items of correspondence sent:

- Letter dated 23 April 2013 from the Chair to Commissioner Ipp regarding the Mt Penny Inquiry.
- Letter dated 23 April 2013 from the Chair to Mr John Evans thanking him for his advice to the Committee on 23 April 2013.

5. Inquiry into possible non-compliance with the 2009 Mt Penny order for papers

The Chair tabled his draft report entitled 'Possible not compliance with the 2009 Mt Penny order for papers', which having been previously circulated, was taken as being read.

Chapter One read.

Resolved on the motion of Revd Mr Nile: That Chapter One be adopted.

Chapter Two read.

Resolved on the motion of Mr Shoebridge: That Chapter Two be adopted.

Chapter Three read.

Resolved, on the motion of Miss Gardiner: That the following finding be inserted after paragraph 3.17, and that the text of paragraph 3.17 be amended to reflect this finding:

‘Finding 1

The Committee finds that the potential ramifications of waiving parliamentary privilege include:

- A chilling effect on future proceedings in Parliament, if there is an increased likelihood that privilege will be waived more often.
- Abuse of the waiver by parliamentary majorities for political purposes.
- The creation of public expectations that privilege can be routinely waived whenever an issue becomes one of public concern in the future, and the exposure of Parliament to criticism in the event that privilege is not waived.
- An undermining of Parliament’s constitutional role as the principal body responsible for superintendence of the executive government if matters are routinely referred to bodies such as the ICAC.’

Resolved, on the motion of Miss Gardiner: That paragraph 3.18 be amended by omitting ‘some’ and insert instead ‘rare’.

Resolved, on the motion of Mr Shoebridge: That the following paragraph be inserted after Finding 1:

‘The waiver of parliamentary privilege is a very serious matter and there is a strong, and in almost all cases, overriding principle of protecting the privileges of the Parliament and especially the unfettered right of elected members to speak in the House on often very controversial subjects.’

Resolved on the motion of Mr Donnelly: That Chapter Three, as amended, be adopted.

Chapter Four read.

Resolved, on the motion of Mr Shoebridge: That the Finding be amended by omitting ‘could be said to bear upon or inform an understanding of’ and inserting instead ‘related to’, and that the text of paragraph 4.18 be amended to reflect this change.

Resolved, on the motion of Miss Gardiner: That the following footnote be inserted at the end of paragraph 4.19, but that the secretariat be permitted to research the footnote further:

It is noted that during the ICAC’s public hearings into Operation Jasper, former Premiers Iemma and Rees indicated that the Mt Penny matter had not in fact been considered by Cabinet or a Cabinet committee.

Resolved, on the motion of Mr Shoebridge: That the following sentence be added at the end of paragraph 4.20:

‘The Committee believes that whatever body further considers this matter should consider this issue in its inquiry.’

Resolved on the motion of Revd Mr Nile: That Chapter Four, as amended, be adopted.

Resolved, on the motion of Ms Fazio: That the decision of the Committee to adopt Chapter One be rescinded.

Resolved, on the motion of Ms Fazio:

1. That paragraph 1.22 be amended to omit the words ‘in relation to the further conduct of this matter’ and insert instead ‘seeking advice on whether waiver of privilege over the 2009 Mt Penny return to order would in any way assist the Commission as part of its investigations’.
2. That the report be amended to include the Chair’s correspondence to the Commissioner of the ICAC dated 23 April 2013 in an appendix.

Resolved, on the motion of Ms Fazio: That Chapter One, as amended, be adopted.

Chapter Five read.

Resolved, on motion of Miss Gardiner: That Recommendation 1 be amended to include in the recommendation the full text of the draft terms of reference suggested by the Committee for the consideration of the House.

Resolved on the motion of Mr Mason-Cox: That Chapter Five, as amended, be adopted.

The Chair noted the inclusion of the Chair's foreword in the report.

Ms Fazio moved:

1. That the draft report, as amended, be the report of the Committee and that the Committee present the report to the House;
2. That the minutes of proceedings, correspondence and briefing notes relating to the inquiry be tabled in the House with the report; and
3. That upon tabling, all minutes of proceedings, correspondence and briefing notes relating to the inquiry not already made public be made public by the Committee.

Mr Shoebridge moved: That the motion of Ms Fazio be amended to omit the words 'Committee present the report to the House' and insert instead 'Committee Chair present the report to the Clerk as soon as possible later today in accordance with SO 231(1)'.

Debate ensued.

Question put and negatived.

Original question put and passed.

The Chair noted the possible unauthorised disclosure of the Chair's draft report following the publication of an article in the *Sydney Morning Herald*.

The Committee deliberated.

Resolved, on the motion of Ms Fazio: That the Committee:

1. expresses concern that the deliberations of the Committee may have been improperly disclosed; and
2. acknowledges the need for confidentiality of all committee deliberations, particularly those of the Privileges Committee.

6. Adjournment

The Committee adjourned at 11.57 am *sine die*.

Stephen Frappell
Clerk to the Committee