

## REPORT UNDER STANDING ORDER 52 ON DISPUTED CLAIM OF PRIVILEGE

### WestConnex Business Case

The Hon Keith Mason AC QC

8 August 2014

#### *The claim of privilege*

On 4 March 2014 the Legislative Council resolved that certain State papers relating to the Business Case for the WestConnex Project should be tabled. In response, the Acting Secretary of the Department of Premier and Cabinet ("DPC") lodged 22 boxes of public documents and 16 boxes of documents over which privilege was claimed. An Index accompanied the documents along with a detailed submission prepared by Roads and Maritime Services ("RMS").

On 4 July 2014, the Hon Dr Mehreen Faruqi MLC wrote to the Clerk of the Parliaments disputing the privilege claimed with respect to 225 of the documents. Those for which the privilege claim was not challenged have been separately boxed and will be made available only to members of the Council not to be published or copied without an order of the House (see Standing Order 52 (5) (b) (ii)).

My appointment as independent arbiter under the Standing Order was authorised by the Acting President of the Council on 7 July 2014.

RMS informed the Clerk on 21 July 2014 that, while not intending to waive privilege, it narrowed its claim to 82 identified documents. DPC confirmed by letter dated 1 August 2014 that it effectively ratified this narrowing of the dispute. However, on 6 August 2014 it emerged that there were a further 49 documents in dispute, these being certain *attachments* to documents originally claimed to be privileged where RMS may have been willing to release the *top* document while maintaining a live privilege claim over the attachment. Representatives of the directly concerned parties, including Dr Faruqi, communicated with the Clerk that day resulting in only 28 of those attachments remaining in dispute. In consequence, a Schedule was prepared outlining the documents still attracting a live issue for my report in a form that allows me to identify documents easily. That Schedule is attached.

I have examined the 110 documents still in contention and considered the submissions identified below.

#### *Submissions considered*

In my Report dated 25 February 2014 on *Actions of former WorkCover NSW employee* I described the role assigned under Standing Order 52. I indicated that I would be in no way offended if, were I to be retained again, any affected party were to offer submissions (disclosed to the others) addressing any relevant consideration.

At my request the Clerk invited interested parties to lodge submissions and respond to the submissions lodged by others within a strict timetable. The Clerk also provided me with three helpful documents.

The submissions considered by me (which I assume will be tabled in due course if they have not already been published) are:

Ministerial statement to the House and response

Ministerial statement made by the Hon Duncan Gay on 6 March 2014, when my earlier report was tabled, and response by the Hon Adam Searle.

Clerk of the Parliaments

Letter from DPC to the Clerk dated 16 April 2014 attaching the Advice of the Solicitor-General dated 9 April 2014 on *Question of Powers of Legislative Council to Compel Production of Documents from Executive* (SG 2014/05).

Letter from the Clerk to me dated 21 July 2014 summarising and extracting reports of earlier independent arbiters.

Letter from the Clerk to me dated 1 August 2014 commenting on one aspect of the latest submission from the Crown Solicitor's Office on behalf of DPC.

Roads and Maritime Services

Submissions accompanying the original Index dated 25 March 2014.

Letter from RMS to the Clerk dated 21 July 2014 attaching a revised Index and further submissions.

Letter from DPC dated 1 August 2014 enclosing an Index of RMS documents for which privilege is no longer claimed.

Dr Mehreen Faruqi MLC

Letter to the Clerk dated 4 July 2014.

Crown Solicitor's Office

Letter to the Clerk dated 21 July 2014 enclosing a submission on behalf of DPC.

Letter to the Clerk dated 1 August 2014 enclosing a further submission on behalf of DPC.

The Hon Adam Searle MLC

Letter addressed to myself dated 21 July 2014 delivered via the Clerk.

Letter addressed to myself dated 1 August 2014 delivered via the Clerk.

David Shoebridge MLC

Letter to the Clerk dated 21 July 2014.

*The privileges claimed by Roads and Maritime Services*

As indicated, RMS has now limited its claims to 110 documents identified in the Schedule. In doing so, it maintains the privileges previously claimed with respect to many more documents while no longer objecting to their release. In the circumstances, I have confined my evaluation and report to the 110 documents.

RMS accepts that these documents have been (and may continue to be) disclosed to members of the House. But privilege from any wider publication is asserted. If accepted by the House after consideration of my report, this means that the documents will not be published or copied without an order of the House.

The privileges asserted fall into three broad categories:

- (i) Public interest immunity based on "commercial-in-confidence"
- (ii) Public interest immunity based on Parliamentary privilege (House Folder Notes)
- (iii) Legal professional privilege.

### ***The role of the independent arbiter***

Standing Order 52 serves as one means whereby the House takes what Priestley JA described as "steps to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed": *Egan v Chadwick* (1999) 46 NSWLR 563 at [139]. The Standing Order provides:

#### **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 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.*

In my earlier Report I wrote:

*To qualify for appointment, the arbiter must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge. The stated functions are to evaluate and report to the House as to the (disputed) claim of privilege. Naturally this involves examining the document(s) and the reasons advanced for the claim of privilege. It is conceivable that privilege may adhere to part only of a document.*

*It is not the arbiter's role to consider whether the Executive might have withheld the document in whole or (redacted) part. So much is clear from the wording of Order 52 and the fact that the arbiter is given access to the document(s) after there has been a return. Under Order 52 (5), only members of the House are entitled to access to documents considered to be privileged, and such documents are not to be published or copied without order of the House pending the House's consideration of the report of the independent arbiter.*

*Disputes as to the legitimacy of a particular order for papers by the House or the adequacy of the Executive's response to it are matters for those bodies to resolve, hopefully by negotiation but ultimately by the House determining what action it will take in response to a return it deems unsatisfactory. If that results in the suspension of a Minister, there will be the opportunity of ultimate recourse to the Supreme Court to determine the legitimacy of the positions adopted by the House and the government. In light of the principles declared in *Egan v Willis* (1998) 195 CLR 424 esp at 451-3, the ultimate issue in any such proceedings would be whether the particular call for papers was reasonably necessary for the proper exercise of all of the Council's functions. None of these matters engage the independent legal arbiter under the current form of Standing Order 52.*

*The word "validity" in Order 52 (6) further confirms that the arbiter's role is to apply his or her understanding of the law relating to privilege in this context. The relevant privilege is what, as a matter of law, exists as between the Executive and the Upper House of the New South Wales Parliament. In context and scope, it is not the privilege or public interest immunity that a litigant or third party to curial proceedings might raise in answer to an order for discovery or a subpoena in litigation. So much was made clear in *Egan v Chadwick* (1999) 46 NSWLR 563 when the Court of Appeal ruled that neither public interest immunity nor legal professional privilege provided a basis for withholding documents the production of which were "reasonably necessary for the proper exercise by the Legislative Council of its functions" according to the principles expounded in *Egan v Willis*.*

*Documents disclosing the workings of Cabinet may be in a different category, according to the majority of the Court in *Chadwick's Case*. If that, or some other, valid claim of privilege applied to a document then it is at least conceivable that such privilege might have a dual operation. It could have*

*provided the Executive with the basis for successfully resisting production in the first place (including having the suspension of a Minister in the Upper House declared invalid by the Court). And it might also justify the independent arbiter reporting that a document returned and tabled subject to such a claim of privilege ought to have its status as such respected by the House in any further dealings.*

The submissions and the issues arising out of the current call for papers require me to consider additional matters, some of them touching my role in general.

Some propositions are clear, in my view. First, Standing Order 52 is not the source of the House's power to compel production of State papers, nor do its terms limit the power of the House to regulate or modify the circumstances under which members or the public may access documents after they are required to be tabled. Secondly, the arbiter evaluates and reports independently of the House and is in no sense the delegate of Parliament or the House. Thirdly, the arbiter's role is to report the outcome of his or her "evaluation" as to the "validity" of any (still) disputed claim of privilege that is (still) pressed, taking account of the contents of the documents and any submissions duly received. Fourthly, it is then up to the House to decide what steps to take it not being bound to accept the report of the arbiter (which is *not* to say that the House has the liberty to disregard privilege, only that *it* must decide what to do). Fifthly, the burden of demonstrating that particular (documented) information is privileged lies upon the body asserting the privilege, this being of the essence of an immunity or privilege. Sixthly, information may conceivably attract privilege at one point of time but not at another.

In the absence of proposals to such effect being put to me from Government or the House I intend generally to consider privilege on an "all or nothing" basis, leaving it to the House to take what steps it deems appropriate in light of my report. This said, it would be open to me, I perceive, to recommend that the House might consider limiting public access to non-privileged documents (as I did in my earlier Report). If I were to do so, I would strive to distinguish any evaluation and report as to privilege from any recommendation I may deem it appropriate to offer.

#### ***"Privilege" in the context of Standing Order 52***

In construing Standing Order 52, I apply ordinary canons of interpretation including the universal need to read words in their context. The context here is that the Executive has, for whatever reason, submitted to the particular call for papers and allowed the tabling of documents that have been and may continue to be examined by individual Members. If privilege is not ultimately recognised by the House, and if the disputed documents are published without restriction, their contents may be accessed by the whole world.

*Egan v Chadwick* (1999) 46 NSWLR 563 establishes that neither legal professional privilege, nor public interest immunity, nor commercial-in-confidence offer a basis for Government to resist an otherwise proper call for papers. Speaking of the first of those privileges, Spigelman CJ said (at [86]-[87], Meagher JA agreeing at [152]):

*"In performing its accountability function, the Legislative Council may require access to legal advice on the basis of which the Executive acted, or purported to act. In many situations, access to such advice will be relevant in order to make an informed assessment of the justification for the Executive decision. In my opinion, access to legal advice is reasonably necessary for the exercise by the Legislative Council of its functions.*

*What, if any access should occur is a matter 'of the occasion and of the manner' of the exercise of a power, not of its existence: R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162. *If the public interest is thereby harmed, the sanctions are political, not legal."*

As indicated in my earlier Report, the arbiter is not concerned with whether papers could have been withheld from the House. But he or she is vested with the role of reporting as to their privileged status where privilege

has been claimed, the papers tabled, and where the validity of any enduring claim of privilege is disputed. The report is designed to assist the House in deciding as to the "manner" of the exercise of its power to access the State papers.

Where the Executive produces State papers in answer to a call and subject to a claim of privilege it must be taken to be asserting a *legal* basis for claiming that the papers should not be made public beyond their being tabled and made available to members who are then obliged not to publish or copy them without an order of the House. In the ordinary course, any such order would not be made until the House had addressed the privilege issues in light of the arbiter's evaluation and report.

There are more than one species of privilege known to the law. All of them entail rights involving the application of legal standards recognised at common law and/or in statute. These are grounds for refusing to produce to a court, tribunal or governmental agency documents (or to answer questions) that are otherwise relevant. Production in this sense means production for use in the proceedings because there are circumstances in which the court or tribunal may call for and examine contested documents for the purpose of ruling on privilege itself.

Standing Order 52 can be taken to acknowledge that "privilege" can still be asserted with respect to State papers required under a call for papers by the House and returned. It is, however, clear that some adjustment is required to the principles of privilege in a litigious setting when privilege issues arise in the parliamentary setting, if only because Parliament exercises different roles to those of a court or tribunal.

The Crown Solicitor's Office on behalf of DPC submits that, in addressing any privilege issues touching State papers required to be returned, (a) the arbiter is not necessarily confined by reference to the grounds of privilege developed at common law to determine an objection to production of documents to a court; and (b) it should be kept in mind that the House's authority to call for papers and its authority to access them, use them, and allow their publication all stem from the constitutional functions recognised in *Egan v Willis*. I agree. And I also accept that the arbiter should assume that any dissemination of the papers under the authority of the House will only be for the purpose of exercising the House's constitutional functions.

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

The statements by the Minister and the Hon Adam Searle on 6 March 2014 appear at first blush to depart from one another on the question whether the independent arbiter should see his or her task as "analogous to the role that a court undertakes if privilege is claimed and disputed in judicial proceedings" (the Hon Duncan Gay) or "not, strictly speaking, the same" (the Hon Adam Searle). From my vantage point, both descriptions are, with respect, accurate. Consistent with the Minister's observation, I acknowledge that the arbiter's role, like that of a judge considering a disputed claim of privilege, is to determine where the law points as regards the documents examined and the claims made. This may require the application of balancing tests if that is the measure of the legal rule in question, but the *evaluative* role of the independent legal arbiter does not include some discretion to override the applicable rules of privilege by reference to what may be thought wise in the circumstances. (The fact that the arbiter reports, whereas a judge decides, does not bear on the present issue. Nor does the possibility that the arbiter may exceptionally choose to tender additional advice, as indicated above.)

The point being made by Mr Searle, as I perceive it, is that the independent arbiter is not vested with the role of determining some particular legal dispute which serves as the focus for approaching the privilege issues. As explained in *Egan v Willis*, the House's right to call for papers stems from its roles as a legislator and body scrutinising the activities of Government. I therefore agree with Professor Anne Twomey when she writes:

*"While the rules for the identification of the category of privileged documents remain the same, [for parliamentary proceedings, as for court proceedings] the balancing exercise [at least where public interest immunity is at stake] ought then to involve an assessment of the significance and relevance of the documents for parliamentary proceedings, as opposed to legal proceedings."*

"Executive Accountability to the Senate and the NSW Legislative Council" (2008) *APR 23* (1) 257 at 264

My second set of square brackets emphasises that Professor Twomey's statement was made in the context of that branch of privilege known as public interest immunity, where some balancing of competing interests is required. The professor's point, reflected in those submissions of the Crown Solicitor's Office which I have accepted, is that the House's needs for access to documents is quite different to a court's needs, which are focussed on specific legal proceedings.

While it is obvious that the independent arbiter and the House are *not* addressing privilege issues in the context of litigation between parties, it is equally clear that the law recognises privileges such as legal professional privilege and public interest immunity as rights or immunities capable of being asserted outside curial contexts. Public interest immunity is more than a rule of evidence. There is a right and there may be a duty to assert it and High Court authority supports its availability in extra-curial proceedings (*Jacobsen v Rogers* (1995) 182 CLR 572 at 588-9). When raised, a balancing of potential harms is required.

With legal professional privilege in contrast, whether claimed in judicial or other contexts, the law has already struck the balance. If a proper claim has been made and it is not waived by the client, the privilege (or immunity) exists, as a rule of substantive law, yielding only to clearly expressed legislation to the contrary: see *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9]-[11]. The legal advice of a solicitor in government employment may attract this privilege: *Waterford v Commonwealth* (1987) 163 CLR 54.

But there may be an additional complication when one translates these principles to a parliamentary context and it is one on which there is presently no guidance from the courts so far as I am aware. I simply flag it in this report given my ability to dispose of the solitary claim of legal professional privilege on an alternative ground (see below). It is at least conceivable that some adjustment of these rules may be called for *in law* in a context where the House is reviewing the conduct of the Executive. For example, the House may be concerned to explore whether a government whose conduct it is scrutinising has sought and followed legal advice in a particular matter. Recognising that legal professional privilege is a right personal to the client, capable of waiver, there may conceivably be circumstances in which the House has a constitutionally-derived *legal right* to more unrestricted access than the strict application of the common law rules of legal professional privilege may suggest. I am not indicating that public interest immunity balancing factors necessarily intrude into this constitutional setting, although they might. And I am not proposing that the arbiter has some discretionary power to override a privilege determined to exist (cf Twomey, *op cit*, p 265). If this issue surfaces in a later matter, I would anticipate further assistance through the exchange of submissions.

It will be apparent that I have avoided the use of the expression "technical legal privilege". In doing so, I accept that the arbiter's evaluative role is both technical and legal. But I am pointing to the context in which it takes place, which is not that of a courtroom faced with a claim to resist production of information for the purpose of particular litigation. Some of the debate in the submissions placed before me involving close analysis of the language sometimes used in the reports of my predecessors has been bedevilled by semantic and at times confusing invocation of the "technical legal" expression that I am anxious to avoid. Likewise with the debate about "one-stage" or "two-stage" approaches by the arbiter.

In similar vein, I consider that the arbiter's evaluative role is not assisted by arguments (from both "sides", in the latest submissions received) based on past practices of the Executive in claiming privilege or pointing to

alternative ways and means of protecting privacy, such as those adopted (on my recommendation) concerning the recent WorkCover claim. Sometimes privilege is properly claimed, sometimes not. Privacy concerns may translate into "privilege", but not always. There may also be additional roles for the arbiter (by recommendation) and for the House (by resolution) to address privacy matters. And there is nothing to stop Government from putting suggestions to the House as to how it may efficiently and justly deal with access issues touching tabled documents. However, as indicated, it is better to for the arbiter to keep any evaluation of the "privilege" issues separate, notwithstanding their inherent difficulty in this parliamentary context.

In the course of his ministerial statement made on 6 March 2014, the Hon Duncan Gay said that:

*"...the Government considers that matters such as the privacy of individuals, and the statutory entitlement to anonymity to whistleblowers under the Public Interest Disclosures Act are indeed proper bases for claiming that a document may be privileged under Standing Order 52."*

With respect, I do not agree, if the Minister was suggesting that the two matters he mentioned by themselves ground a valid claim of privilege either for a court or the House. I most certainly do agree that they may be factors which, taken with others, may generate a valid claim or at least call for close attention by the House as it seeks to deal responsibly with papers in its custody.

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

If, in the present situation one asked: "Privileged from what?" the answer must be: "From dissemination to the general public either through unconditional release, or through disclosure of their particular contents". Speaking hypothetically, the impact of such dissemination or disclosure potentially cuts both ways. From Government's perspective, there is risk of harm if confidential information gets into "the wrong hands" (in the sense of hands other than those chosen by Government or the hands of members of the House). From the House's perspective, there is the desirability of stimulating further information-gathering and of debate proceeding without the restrictions consequent upon complying with Standing Order 52 (5) (b) (ii). The latter restrictions are potentially significant because the Order would appear to preclude a member from obtaining assistance from any source when seeking to understand the meaning or significance of a document. While I have unfeigned respect for the natural capacities of individual members, it would be absurd to think that their endeavours would not be assisted if they could at least be free to share what they have and to talk freely about it, both in the House and elsewhere.

Wider public interests also deserve acknowledgement, again speaking hypothetically. Those addressed by legal professional privilege include assisting the administration of justice by facilitating the representation of clients by legal advisers. Those addressed by public interest immunity include Government's need to garner and process information from third parties under assurances of confidentiality that will not be lightly overridden by the House and the House's need to stimulate the production of information from the public by broadcasting or allowing the media to broadcast the papers it has had returned. I do not see why the arbiter should in principle be troubled by the possibility that non-privileged documents duly called for may, under the House's control, be accessed by the media or by members of the public with axes to grind. So long as overriding harm is not done to the "proper functioning of the executive arm of government and of the public service" (*Sankey v Whitlam* (1978) 142 CLR 1 at 56 per Stephen J), public debate stemming potentially from such sources is of the essence of representative democracy.

If there is a collateral risk of access being abused by particular members (see *Twomey op cit*, pp 266-9) then the House should be expected to take disciplinary action. If the House wants to limit any perceived risk stemming from unconditional publication of confidential but unprivileged documents it is of course free to do



so. I reiterate that these considerations do not in themselves justify the overriding of a privilege recognised by law. But, as regards public interest immunity at least, they are aspects of the countervailing interest favouring disclosure that have to be weighed.

It should be noted that I am not suggesting that there is a relevant interest in "the public" gaining access to compulsorily tabled documents. The focus should always be upon the needs of the House in performing its constitutional functions. With some snippets of confidential information the House's needs will be met if only members are free to access them while remaining under the constraints imposed by Standing Order 52 (5) (b). (Portion of document 25 is of this character in my evaluation (see below).) With most information, however, the House's needs may indicate that it should be free to disseminate the information publicly unless there is a clear overriding need for the confidentiality urged by the Executive.

In its submissions on behalf of DPC, the Crown Solicitor's Office has suggested that, when determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the arbiter to understand:

- i) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published;
- ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of the function; and
- iii) how publication of the documents is reasonably necessary for the House to fulfil that function.

I am not persuaded that my task extends to items (ii) and (iii), if the invitation is for me to inquire into the particular goals being pursued or likely to be pursued by individual members or the House as a whole with the papers in question. I would have thought that the House should be taken to have decided that a reasonable basis existed for the original call for papers and that the Government should be taken to have accepted as much by producing the papers. As I indicated in the passage from my first report set out above, these are matters outside the remit of the independent arbiter. I should not assume any likely abuse of the House's constitutionally-derived powers.

This latitudinal approach is not designed to give the House a blank cheque privilege-wise. But I do not see that it is part of the arbiter's role under the Standing Order to be calling upon the House or its individual members to declare their hands in advance. If, however, nothing particular is obvious or advanced by submissions as favouring full disclosure and if persuasive reasons are offered by Government showing why the balance of public interest falls in favour of non-disclosure, then this may determine the outcome of any public interest immunity evaluation as regards a particular document.

I remind myself that in *Egan v Willis* (1998) 159 CLR 424 at 453, the High Court cited with approval the observations of Priestley JA when he referred to:

*"...the imperative need for both the Legislative Assembly and the Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws. The first of these subjects clearly embraces the way in which the Executive Government is executing the laws."*

### ***The instant privilege claims evaluated***

The 110 documents that remain in contention are listed in the Schedule, being those not there highlighted in green ("Release"). RMS identified each document in detail. Thus, document 1 has a Document ID (RMS.002.001.4074) and a description (5303103 1 DBMOTORWAYS WestConnex HFN Federal Funding.DOC). As indicated, 28 of the documents are attachments to documents which still attract a disputed privilege claim.

For example, document 71 ("Released") has three disputed attachments which I shall refer to as documents 71 (a), (b) and (c).

I shall use the simple numbering in the Schedule itself.

**(a) Public interest immunity stemming from "commercial-in confidence"**

Most of the documents still in dispute are subject to claims broadly of this nature, variously formulated, for example "specific tolling strategy information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money".

Gibbs ACJ observed, in *Sankey v Whitlam* (1978) 142 CLR 1 at 38, that "the general rule is that the court will not order production of a document, although relevant and otherwise admissible, if it would be injurious to the public to disclose it". In the judicial context before the High Court, he depicted the task as that of assessing the competing effect of two interests of the state – the public interest whose protection demands non-disclosure and that of the proper administration of justice. Stephen J (at 56) described the former of those interests as "the need to safeguard the proper functioning of the executive arm of government and of the public service". I have already attempted to describe the countervailing public interest in the House performing *its* constitutional roles and the potential harms that may attend upholding a claim of privilege.

I understand that WestConnex will not be delivered as a conventionally fully funded project. There will be a structured arrangement modelled on a public-private partnership (PPP). The State will raise both equity and debt financing and will use toll revenue to fund ongoing sections of the program.

Documents have been identified in the Index as "commercial-in-confidence". Privilege is asserted on the basis that they disclose (a) government confidential information including assumptions underpinning capital costing, tolling strategy, demand forecasting and financial modelling, as well as deliberative processes in relation to the development and assessment of these factors; (b) third party confidential information relied upon to develop these processes; and (c) matters the subject of current competitive procurement processes. The disclosure of this information may, according to the submission, harm the government's competitive and commercial position in securing best value for money for the procurement of the WestConnex works; adversely impact on the government's reliance on competitive processes to procure significant infrastructure assets with minimal financial impact on the State; and affect the capacity of government to effectively allocate financial and construction risks for the project that may be detrimental to the State's long term fiscal strategies to reduce State debt.

"Commercial-in-confidence" and "privacy" are loose and often conclusive expressions. They are not in themselves recognised heads of privilege (even for courts). And it would be wrong to conclude that a stipulation to safeguard them in a government contract could or should erect an automatic bar to parliamentary scrutiny. The observations of Sir Anthony Mason in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 52 explain:

*"It may be a sufficient detriment to the citizen that disclosure of information relating to his affairs will expose his actions to public discussion and criticism. But it can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action."*

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

*The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained. There will be cases in which the conflicting considerations will be finely balanced, where it is difficult to decide whether the public's interest in knowing and in expressing its opinion, outweighs the need to protect confidentiality."*

The House's right of access to State papers and its legitimate power to publish them ancillary to its constitutional functions could be no less constrained. I would therefore reject RMS' earlier submission that contractual stipulations or understandings as to confidentiality surrounding the engagement of its advisers could in themselves ground a legitimate public interest immunity claim. Likewise any submission that draws some *direct* support from provisions in the *Government Information (Public Access) Act 2009 (NSW)* (the GIPA Act).

For the WestConnex matter, the thrust of RMS's second set of submissions is that rejection of privilege would prejudice the workings of Government both generally and in the instant matter in the sense that the ability to protect sound government and the financial interests of taxpayers would be compromised. Like earlier independent arbiters I accept that this can form the basis of a claim of public interest immunity in a proper case. Whether any document attracts the privilege can only be evaluated after weighing the legitimate governmental interests against the legitimate competing interests of the House.

Dr Faruqi and the Hon Adam Searle have submitted that public interest immunity does not attach to the still contentious documents. Many of the RMS submissions are challenged both generally (eg reliance on contractual duties of confidence and direct reliance on the GIPA Act) and specifically as regards particular documents and the formulae invoking privilege for them. Dr Faruqi has also provided general information about the importance of transparency and accountability in a project of this nature and magnitude.

I now proceed to evaluate the particular groups of claims, considering the asserted basis of the claim, the extent to which the document satisfies that basis on examination, the issues raised by Dr Faruqi and the Hon Adam Searle, and the countervailing interests of the House to obtain "access (and ready access)" so that it may perform its constitutional functions.

- (i) Documents said to include "specific [tolling strategy/tolling scenario/tolling effects/tolling/traffic projections/financial and staging modelling] information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money"

Documents 18, 19, 21, 23, 24, 27, 34, 35, 36, 53, 57, 58, 67, 73, 79, 80, 81, 82, 90, 93, 104, 105, 119, 123, 160, 161, 162, 165, 168, 172, 173.

These documents are not privileged on my evaluation.

These are working papers, drafts, statements of assumptions or surveys about traffic flows, potential operating costs and potential revenue streams. They disclose options being considered, methodologies and relationships with existing RMS tolling operations. Some address very specific situations, such as projected traffic flows at a particular exit. Others are in the nature of a draft summary of the project in overview. As to all of them, I detect no adverse risk to any future tendering strategy. Not that it is conclusive, I perceive that unrestrained access to these types of information would aid the House in scrutinising the path of the still

projected trajectory of this immense venture intended to be managed by government itself. No particular item of information has been identified as having special sensitivity.

- (ii) Documents said to contain "commercially sensitive information relating specifically to Sydney Airport/the M4 Managed Motorway and not the WestConnex Project and so should not be released through this Order for Papers"

Documents 29, 31, 38, 40, 41, 42, 43, 44.

These documents are not privileged on my evaluation.

I have already explained that it is not my role to consider if there was an appropriate order for papers or an adequate response.

"Commercially sensitive" is not in itself a ground of privilege even for a court. Having examined the papers they address matters similar to those noted at (i) above. I was not always able to discern if they have any bearing on WestConnex. Regardless, I see nothing of any particular sensitivity that would enliven privilege here.

- (iii) A document considered to contain username and login and so should not be released

Document 25.

I can see no reason why the House would want to use, let alone publish, the person's username and login. The potential for harm to the individual from such publication may be acknowledged. Privilege should be recognised for the portion of the document disclosing this information but not to the document as a whole.

- (iv) Documents said to contain "commercially sensitive information of a third party and so should not be released"

Documents 49, 51, 84, 85, 86, 114, 115, 121, 122.

These documents are not privileged on my evaluation.

The "third parties" appear to be other governmental agencies such as Sydney Ports, persons charging them for services or persons in contemplation for engagement to assist in the delivery of the WestConnex Project. The information touches upon the assessment of the methodology and cost of the Project. No particular basis for commercial sensitivity was identified.

I have not overlooked the additional basis for privilege raised with respect to documents 84, 85 and 86.

- (v) Documents said to contain "specific confidential and commercially sensitive information from a third party and its release would impact the ongoing commercial negotiations with contractors for the WestConnex Project"

Documents 102, 103.

I would uphold this claim of privilege.

- (vi) Documents said to contain "specific information relating to a package of work that is currently under procurement and its release would affect the competitive tendering process"

Documents 133, 134, 135.

These documents are not privileged on my evaluation.

They contain information descriptive of the scope of the Project that may be relevant to the House's foreshadowed scrutiny. I cannot see how their publication would affect any competitive tendering process.

- (vii) Documents said to contain "sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money"

Documents 139, 140, 141, 142, 147, 151, 152, 153, 170, 171, 177.

These documents are not privileged on my evaluation.

Most of what I have written above regarding the group (i) documents applies here. The documents discuss options and figures in very global terms. To the extent that the documents contain compendious financial estimates of what may lie ahead it is difficult to see why such information should be kept exclusive to government in the context of parliamentary scrutiny of government activities, planning and goals. I reiterate that WestConnex as a whole is not going to be a project that goes outside government by way of some competitive tender process. No particular confidential information has been drawn to my attention.

- (viii) The 28 attachments that remain in dispute

Documents 4 (a), 5 (a), 6 (a), 15 (a), 28 (a), 30 (a), 60 (a), 64 (a), 67 (a), 71 (a), (b), (c), 84 (a), 100 (a), 102 (a), 103 (a), 123 (a), 130 (a), 132 (a), 138 (a), 151 (a), (b), 160 (a), 161 (a), 170 (a), 171 (a), (b), 172 (a).

These documents are not privileged on my evaluation.

They may be addressed fairly globally given that RMS in its latest schedule indicates no more than "RMS ...relies on its previous submission".

Apart from a couple of documents that appear to be draft House Folder Notes, the basis of the privilege seems to be within the broad category of "commercial-in-confidence". No specific information has been highlighted for my attention. The documents contain discussions of options and cost assumptions, surveys etc to which my comments regarding group (i) above apply. There is a letter from a federal minister to a State minister.

***(b) Public interest immunity stemming from parliamentary privilege***

Sixteen documents described as House Folder Notes are the subject of this particular claim being those numbered 1-3, 7-12, 39, 45-48, 100 and 130 in the Schedule. No further information is provided although, as with all of the material now under consideration, I have examined the documents. It will reveal nothing secret if I recorded that House Folder Notes characteristically contain information provided to Ministers faced with potential questioning in Parliament. None of the present documents suggest that such information was of a nature that it was not ready to be used in answering the hypothetical question. This is hardly the stuff of information attracting public interest immunity.

The House Folder Notes are not privileged, on my evaluation.

I note and respectfully endorse the advice of the Solicitor-General that the reasoning in *Egan v Chadwick* suggests that this class of documents is not immune from a call for papers. Of course, the separate issue for me (and ultimately the House) is whether, having been tabled and made available to members subject to a disputed claim of privilege, that claim was validly made.

RMS points out that s 14 (1), read with cl 4 of Schedule 1, of the GIPA Act conclusively presumes an overriding public interest against the disclosure of information the public disclosure of which would, but for any immunity of the Crown, infringe the privilege of Parliament. It is not suggested that the GIPA Act applies directly, but its principles are said to inform public interest immunity consideration. My attention was drawn to a particular GIPA Act ruling by the Administrative Decisions Tribunal that is mentioned below.

In *RP Data Ltd v Western Australian Land information Authority* (2010) 272 ALR 332 [2010] FCA 922 at [49] ministerial briefing notes were held to not automatically attract public interest immunity.

There are decisions in Queensland and New South Wales upholding claims of "parliamentary privilege" with respect to briefing notes: *Rowley v O'Chee* [2000] 1 Qd R 207, *In the matter of Opel Networks Pty Ltd (in liq)* (2010) 77 NSWLR 128, *Tziolas v NSW Department of Education* [2012] NSWADT 68. But these all stem from the relationship between courts and tribunals on the one hand and Parliament on the other and they involve the application of Article 9 of the *Bill of Rights* 1688. They have no bearing on the activities of Parliament itself or privileges that the Executive may assert as against the House.

The conclusive presumption in the GIPA Act does not bear directly on the present issue. This for two reasons: first, because the GIPA Act deals with freedom of information applications made by members of the public against the Executive; and secondly, because Parliament's privileges could not, by definition, be infringed by something done under the authority the House.

#### ***Legal professional privilege***

Document 61 in the Appendix is said to be a communication seeking legal advice and therefore subject to legal professional privilege. Its status as such is disputed in the submissions of Dr Faruqi MLC and the Hon Adam Searle.

This document is not privileged on my evaluation.

It does not on its face satisfy the relevantly essential requirements of having been created with the dominant purpose of being placed before a lawyer for legal advice. It deals with another topic altogether.

The claim as formulated in the original RMS submission applied to a number of additional documents and was formulated in a variety of ways. Perhaps this accounts for the fact that it appears to be quite inapt in its current solitary application. Dr Faruqi apparently accepted the claim touching the other documents.

#### ***Concluding remarks***

In my evaluation, privilege should be recognised with respect to documents 102 and 103 and the identified portion of document 25. Otherwise not.

I record my gratitude to those who have assisted me by their submissions, the Clerk and his staff and to Ms Alison Stowe, Council Officer.

Schedule A

		Document ID	Document	Comment
(1)		RMS.002.001.4074	5303103 1 DBMOTORWAYS WestConnex HFN Federal funding. DOC	
(2)		RMS.002.005.0576	N10-Westconnex- including M4 Widening_M5 Duplicatino- 7 November 2013.doc	
(3)		RMS.002.005.0909	131011_N10- BE13 Motorways- Westconnex- including M4 Widening M5 Duplication -10 October 2013.doc	
(4)		RMS.003.001.1684	West Conn ex Focus Group and Roundtable Research Request for Quotation [RTA-DBMOTORWAYS.FID16760]	Released
	(a)	RMS.003.001.1685	Category (b) WE301 Westconnex proposal vF (29.01.13).pdf 29-Jan-13 Unknown	
(5)		RMS.003.001.6940	WestConnex stats	Released
	(a)	RMS.003.001.6941	Category (b) 4feb 11feb-hys.pdf 12-Feb-13 Unknown	
(6)		RMS.004.004.2927	WestConnex- Key Risks (project wide- not just comms focussed)	Released
	(a)	RMS.004.004.2928	Category (b) Document1.doc 24-Dec-12 Unknown	
(7)		RMS.004.004.5339	Approved House File Note for review: collapse of toll road companies [RTA-DBMOTORWAYS.FID16473]	
(8)		RMS.004.004.5340	5300851_2_DBMOTORWATS_RoadsGeneral- Queensland toll road operators in administration 20 February 2013.doc.DOC	
(9)		RMS.004.004.5910	Draft WestConnex Federal funding HFN [RTADBMOTORWAYS.FID16473]	
(10)		RMS.004.004.5911	5303103 1 DBMOTORWAYS WestConnex HFN Federal funding. DOC	
(11)		RMS.004.004.6471	Revised WestConnex Federal funding HFN [RTADBMOTORWAYS.FID16473]	
(12)		RMS.004.004.6473	5303103_1_DBMOTORWAYS_WestConnex HFN Federal funding amended. DOC	
(13)		RMS.009.002.5038	FWWestcon Community Action Groups Update No 16- Release the WestConnex Business Case	Released
(14)		RMS.009.002.5042	WestConnex business case draft email to MLCs.docx	Released
(15)		RMS.010.002.0949	RTA economic analysis manual	Released

		Document ID	Document	Comment
	(a)	RMS.010.002.0951	Category (b) SYDNP4912 13022013 081534PM.pdf 13-Feb-13 Unknown	
(16)		RMS.012.001.4132	RE: WestConnex- Procurement Options Assessment Matrix	Released
(17)		RMS.012.001.4136	WestConnex- Budget Inputs 2013/14-16/17	Released
(18)		RMS.013.001.0189	FW: Tolling Strategy Paper- background info discussion	
(19)		RMS.013.001.0190	WestConnex Tolling paper outlineV2.docx	
(20)		RMS.013.002.6092	AADTs	Released
(21)		RMS.013.003.8007	RE: Operational Modelling for WestConnex	
(22)		RMS.013.005.6491	WestConnex Business Case	Released
(23)		RMS.014.004.1351	SMPO Benchmarking Operations and Maintenance Cost Comparison 2012 03 08DRAFT-LATEST 11 March.pdf	
(24)		RMS.014.004.1413	Traffic Information (sent to TNSW).pdf	
(25)		RMS.014.006.7551	Re: Fw: NB11553- Westconnex Traffic Analysis: Final Stream 1 report	
(26)		RMS.014.006.8256	FW: Centenary Drive modelling- Options Performance results	Released
(27)		RMS.014.006.8257	performance.xls	
(28)		RMS.014.007.3409	NB11553- WestConnex Traffic Analysis: SP update #2	Released
	(a)	RMS.014.007.3412	Category (b) WestConnex Exp Design V2.docx 12-Mar-13 Unknown	
(29)		RMS.014.007.3468	RE: Traffic Analysis for M4MM	
(30)		RMS.014.007.4163	NB115533- WestConnex Traffic Analysis: SP update	Released
	(a)	RMS.014.007.4165	Category (b) NB11553 PureProfile Engagement.pdf 1-Mar-13	
(31)		RMS.014.007.3920	RE: Traffic Volume information	
(32)		RMS.014.007.6782	RE: WestConnex modelling issues	Released
(33)		RMS.014.007.8680	Re: WestConnex	Released
(34)		RMS.014.010.3150	Re: Operational Modelling for WestConnex	
(35)		RMS.014.010.3152	Fw: Operational Modelling for WestConnex	



	Document ID	Document	Comment
(36)	RMS.014.010.3850	Re: Position Paper- for discussion at PCG tomorrow	
(37)	RMS.014.010.4271	RE: Road network assumptions for modelling	Released
(38)	RMS.014.010.4651	RE: Traffic Analysis for M4MM	
(39)	RMS.014.010.7244	RE: Questions on Notice [RTA-DBMOTORWAY.FID16475]	
(40)	RMS.014.010.8039	RE: Data from RMS Modelling	
(41)	RMS.014.010.8068	RE: Data from RMS Modelling	
(42)	RMS.014.010.8143	RE: Data from RMS Modelling	
(43)	RMS.014.010.8158	RE: Data from RMS Modelling	
(44)	RMS.014.010.8163	RE: Data from RMS Modelling	
(45)	RMS.014.012.6299	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx	
(46)	RMS.014.012.6300	RE: Ministerial note Call for papers on the WestConnex Business Case	
(47)	RMS.014.012.6306	Ministerial note Call for papers on the WestConnex Business Case	
(48)	RMS.014.012.6307	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx	
(49)	RMS.014.013.1007	Re: WestConnex- Information Request- Department of Transport (Part 1)	
(50)	RMS.014.013.1527	FW: HPV on NSW roads- supporting material	Released
(51)	RMS.014.013.4161	FW: NB11553- WestConnex Traffic Analysis: Forecast Billings	
(52)	RMS.014.013.5239	RE: Tunnel Estimate and Peer Review	Released
(53)	RMS.014.013.5299	RE: WestConnex Peer Review	
(54)	RMS.014.013.7203	FW: Change request for Westconnex- PD review	Released
(55)	RMS.016.001.3832	RE: WCX-Tolling Strategy Meeting Note	Released
(56)	RMS.016.010.0764	WestConnex Revitalisation- Transport Planning Final Draft	Released
(57)	RMS.016.010.0765	2014 0227 Integrated Transport Study final draft v3.pdf	

		Document ID	Document	Comment
(58)		RMS.016.024.4096	FW: NB11553- WestConnex Traffic modelling- next round clarifications	
(59)		RMS.016.024.7407	RE: Wex- Opex & Lifecycle Input Template Update	Released
(60)		RMS.016.024.8268	FW: WestConnex and Commonwealth Government Funding- Letter from Minister Albanese to Minister Gay [SEC=UNCLASSIFIED] [ReADBAMOTORWAYS.FI D14818]	Released
	(a)	RMS.016.024.8270	Category (b) tpl323633143.pdf 21-Jan-13	
(61)		RMS.016.027.8229	Release of Business Case extracts in Dataroom.docx	
(62)		RMS.016.029.1814	RE: Wex- Opex & Lifecycle Input template Update	Released
(63)		RMS.017.015.0022	FW: Notification: Usha Jacmoe has sent you files	Released
(64)		RMS.017.016.1972	2012 Trucks by origin (HCV LCV)- from Usha.xls	Released
	(a)	RMS.017.016.1968	Category (b) RE: Fact Checking 23-May-13 LI James	
(65)		RMS.017.018.5468	Re: AspireSydney M4 East- affordable alternative to WestConnex	Released
(66)		RMS.017.019.4146	FW: WestConnex- Network assumptions v2	Released
(67)		RMS.017.019.4294	M4 toll plaza info	
	(a)	RMS.017.019.4295	Category (b) M4 Motorway Toll Plaza Volumes.xls 10-Jul-13	
(68)		RMS.017.019.4335	NB11553- WestConnex Traffic Analysis: Concept Designs for Opt 13	Released
(69)		RMS.017.019.4479	RE: C&F/traffic	Released
(70)		RMS.017.019.4955	RE: NB11553- WestConnex Traffic Analysis: Concept Designs for Opt 13	Released
(71)		RMS.017.019.4964	RE: NB11553- WestConnex Traffic Analysis: HTS query to help identify NHB trips missing from STM IIB Tours	Released
	(a)	RMS.017.019.4970	Category (b) HTS tours example1.xlsx 5-Mar-13	
	(b)	RMS.017.019.5041	Category (b) HTS tours example2.xlsx 5-Mar-13	
	(c)	RMS.017.019.5215	Category (b) HTS tours example3.xlsx 5-Mar-13	
(72)		RMS.017.019.5434	RE: Notification: Usha Jacome has sent you files	Released
(73)		RMS.017.019.6026	Tolling Assumptions	

		Document ID	Document	Comment
(74)		RMS.017.021.0430	Re: NB11553- WestConnex Traffic Analysis: Final Stream 1 report.	Released
(75)		RMS.017.021.0712	FW: C&F/traffic	Released
(76)		RMS.017.021.1229	RE: A background paper on toll roads and forecasts	Released
(77)		RMS.017.021.1552	Re: NB11553- WestConnex Traffic Analysis: Discussion topics for tomorrow	Released
(78)		RMS.017.021.1556	Re: NB11553- WestConnex Traffic Analysis: Discussion topics for tomorrow	Released
(79)		RMS.017.021.1563	Re: NB11553- WestConnex Traffic Analysis: LCV Proportion	
(80)		RMS.017.021.1567	Re: NB11553- WestConnex Traffic Analysis: LCV Proportion	
(81)		RMS.017.021.1570	Re: NB11553- WestConnex Traffic Analysis: LCV Proportion	
(82)		RMS.017.021.1639	RE: NB11553- WestConnex Traffic Analysis: Toll charges for Airport Lite (s7)mwhat	
(83)		RMS.017.021.1641	Re: NB11553- WestConnex Traffic Analysis: Weekly progress	Released
(84)		RMS.017.021.1834	Re: WestConnex -Information Request- Department of Transport (Part 1)	
	(a)	RMS.017.021.1840	Category (b) Re: WestConnex- Information Request Department of Transport (Part 1)- 21-Mar-13 ZITO Christopher </O=RTNOU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDL T)/CN=RECIPIENTS/CN=ZITOC>	
(85)		RMS.017.021.1841	Re: WestConnex -Information Request- Department of Transport (Part 1)	
(86)		RMS.017.021.1843	Re: West Conn ex- Information Request- Department of Transport (Part 1)	
(87)		RMS.017.021.1847	Re: WestConnex- Network assumptions v2	Released
(88)		RMS.017.021.1853	RE: WestConnex- reference case scope for Sunday run	Released
(89)		RMS.017.021.2834	Re: WestConnex-- Parramatta Road capacity	Released
(90)		RMS.017.021.3933	RE: Data breakdown for HCV & LCVs	
(91)		RMS.017.022.2987	WestConnex Traffic- C&F/traffic	Released
(92)		RMS.017.022.2992	WCX traffic extracts for economics (270313).xlsx	Released
(93)		RMS.017.022.3564	FW: Traffic modelling- next round	
(94)		RMS.017.022.3911	RE: Total WestConnex Workforce	Released

		Document ID	Document	Comment
(95)		RMS.017.022.4024	RE: WestConnex- quality assurance review of Mac Bank model	Released
(96)		RMS.017.022.4250	WestConnex- quality assurance review of Mac Bank model	Released
(97)		RMS.017.022.4357	WestConnex Traffic- C&F/traffic	Released
(98)		RMS.017.022.4482	Proposed Motorway	Released
(99)		RMS.017.024.8480	5291337 1_DBMOTORWAYS_Briefing Note-Steering Committee 4-Item C&CE Dec2012 A3607051.1.DOC	Released
(100)		RMS.017.025.2306	Approved WestConnex HFN [RTA-DBMOTORWAYS.FID16473]	
	(a)	RMS.017.025.2307	Category (b) 5297070_1_DBMOTORWAYS_130130_HF N WestConnex.doc.DOC 30-Jan-13 Unknown	
(101)		RMS.018.001.6287	Heavy Vehicle Design Parameters for WestConnex Business Case	Released
(102)		RMS.019.001.3231	Comparison of Contractors Multipliers.xlsx	
	(a)	RMS.019.001.3229	Category (b) ___ FW: WestConnex Cost Briefing 8-Apr-13 PROLOV Walter	
(103)		RMS.019.001.3235	RE: WestConnex Cost Briefing	
	(a)	RMS.019.001.3237	Category (b) Comparison of Contractors Multipliers.xlsx 7-Apr-13 Unknown	
(104)		RMS.022.001.1656	Package and Models, WestConnex	
(105)		RMS.022.001.1657	Assumptions and Package Model Selection criteria.docx	
(106)		RMS.022.003.1471	RE: WestConnex- financing papers from Mac Bank	Released
(107)		RMS.022.003.2405	FW: WCX economics methodology & data template	Released
(108)		RMS.022.003.3336	Updated: Commercial & Finance workstream- business case and key milestones	Released
(109)		RMS.022.003.3345	RE: WestConnex Steering Committee Update- 26th February 2013(FINAL). PDF	Released
(110)		RMS.022.004.3361	RE: WestConnex Contract	Released
(111)		RMS.022.003.3364	RE: WC Advisory Group follow up	Released
(112)		RMS.022.003.3366	WCX Economic Advisory Group (meeting minutes #1).docx	Released
(113)		RMS.022.004.0268	NTER / Treasury discussion	Released

		Document ID	Document	Comment
(114)		RMS.022.004.0524	Multimodal Modelling	
(115)		RMS.022.004.1658	RE: WestConnex- traffic multi modal analysis	
(116)		RMS.022.004.1659	RE: WestConnex- traffic multi modal analysis	Released
(117)		RMS.022.004.1725	FW: NBI1553- WestConnex Traffic Analysis: Weekly progress	Released
(118)		RMS.022.004.2198	RE: Draft Tolling Paper	Released
(119)		RMS.022.004.3015	RE: WestConnex Tolling Costs	
(120)		RMS.022.004.3361	Re: West Connex Tolling Costs	Released
(121)		RMS.022.005.4746	WestConnex- further feedback to Financial Advisors	
(122)		RMS.022.005.4747	RE: RFP- WestConnex Financing Scoping Study	
(123)		RMS.022.005.7224	WestConnex- Financial Advisors traffic.xlsx	
	(a)	RMS.022.005.7223	Category (b) RE: Briefing on Monday 22-Feb-13 WEBB Matthew	
(124)		RMS.022.005.7493	RE: WestConnex- CPI, AWE and capital cost escalation forecasts	Released
(125)		RMS.022.005.7495	WestConnex- Value capture work for NSW Treasury	Released
(126)		RMS.022.0065.8475	WestConnex- Business case Development costs- expense or capitalise?	Released
(127)		RMS.023.001.0656	Re: Leighton Contractors AECOM report NPR-RPT-0000-GE001A, Westconnex Business Case	Released
(128)		RMS.023.001.0721	RE: Top of Mind summarised	Released
(129)		RMS.023.001.0722	Appendix A Top of Mind SS 130428CS.DOCX	Released
(130)		RMS.023.001.6492	130423 WestConnex Hawthorne Canal.doc	
	(a)	RMS.023.001.6490	Category (b) RE: Hawthorne Canal holding statement 23-Apr-13 ALLEN Alisha Y </0-RTA/OU-EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ALLENA>	
(131)		RMS.023.001.6579	FW: MS East economic analysis	Released
(132)		RMS.023.001.6789	Strategic Environmental assessment- draft brief	Released

		Document ID	Document	Comment
	(a)	RMS.023.001.6790	Category (b) Brief- Strategic Environmental Assessment- (1).doc 14-Nov-12 Unknown	
(133)		RMS.023.001.8005	FW: WestConnex- Western Portal- split connections	
(134)		RMS.023.001.8007	Short Long Tunnel Review.doc	
(135)		RMS.023.001.8008	Splitting the Western Portals.pptx	
(136)		RMS.023.004.5978	RE: Steering Committee papers	Released
(137)		RMS.023.004.6104	FW: Scan Data from FX-BSC3AO	Released
(138)		RMS.023.004.6112	Multi-Criteria Analysis. doc	Released
	(a)	RMS.023.004.6107	Category (b) Brief for Urban design framework- slot- Taverners Hill to Concord.doc 2-Nov-12 Unknown	
(139)		RMS.028.016.5492	Slidepack for federal govt- WestConnex	
(140)		RMS.028.016.5493	WestConnex Aug12 v 3.pptx	
(141)		RMS.028.016.7537	FW: Slidepack for federal govt- Westconnex	
(142)		RMS.028.016.7538	WestConnex Aug12 v3.pptx	
(143)		RMS.032.001.3912	RE: WestConnex travel time savings	Released
(144)		RMS.032.001.3913	RE: WestConnex travel time savings	Released
(145)		RMS.032.001.3914	WestConnex travel time savings	Released
(146)		RMS.032.001.3915	WestConnex: Traffic Data Request: Mapping M4 and M5 Users	Released
(147)		RMS.032.014.5692	FW: Traffic Update 26 April2012 [RTA-DBMOTORWAYS.FID14818]	
(148)		RMS.032.014.5697	WestConnex Traffic Analysis Summary 26 April 2012.xls	Released
(149)		RMS.032.021.1779	Fwd: WestConnex	Released
(150)		RMS.032.021.3519	RE: WestConnex business case review	Released
(151)		RMS.034.003.7752	1. Econ Eva I- WestConnex (VTT 23.81) 27072012 Option 13.1-Final v2.pdf	
	(a)	RMS.034.003.7750	Category (b) FW: GIPA 1213-31 WestConnex 4-Sep-13 ALLEN Alisha Y </0-RTA/OU-EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDL	

		Document ID	Document	Comment
			T)/CN=RECIPIENTS/CN=ALLENA>	
	(b)	RMS.034.003.7777	Category (b) 2013 02 27 Decision - partial.docx 3-Apr-13 Unknown	
(152)		RMS.034.003.7765	2. WestConnex Evaluation Option v11#2.pdf	
(153)		RMS.034.003.7766	3. Revenue and ADT Volume. Pdf	
(154)		RMS.034.003.7783	2013 04 OS Memo- draft decision.pdf	Released
(155)		RMS.034.004.0494	RE: MS East visualisation material	Released
(156)		RMS.034.004.0910	Data for travel time calculator.xls	Released
(157)		RMS.034.004.0911	Data for travel time calculator.xls	Released
(158)		RMS.034.004.66115	FW: WestConnex-	Released
(159)		RMS.034.006.2008	Induced Demand	Released
(160)		RMS.034.006.6818	WestConnex- Actual tolled traffic volumes on M4West from ASX releases	
	(a)	RMS.034.006.6819	Category (b) img-528114143-000 1.pdf 28-May-13 Unknown	
(161)		RMS.034.006.8102	FW: WestConnex- Actual tolled traffic volumes on M4West from ASX releases	
	(a)	RMS.034.006.8104	Category (b) img-528114143-0001.pdf 28-May-13 Unknown	
(162)		RMS.034.006.8105	M4 Volumes.xlsx	
(163)		RMS.034.006.8121	FW: WestConnex traffic- C&P/traffic	Released
(164)		RMS.034.006.8126	WCX traffic extracts for economics (270313).xlsx	Released
(165)		RMS.034.007.3791	RE:	
(166)		RMS.034.007.3888	RE: Figures from SKM model	Released
(167)		RMS.034.007.4629	RE: Westconnex: Induced Demand Assessment	Released
(168)		RMS.034.007.8203	Re:	
(169)		RMS.034.008.1297	WestConnex Business Case- Confidential- Large 30Mb file	Released
(170)		RMS.035.023.0754	FW: Latest Updated Estimates	

		Document ID	Document	Comment
	(a)	RMS.035.023.0758	Category (b) Short Tunnel - Concord Interchange Rev 19-Jun-13 Unknown	
(171)		RMS.035.166.0543	FW:Re: SMPO Escalation Rate Assumptions	
	(a)	RMS.035.166.0546	Category (b) December 2012 RPI publication paper. pdf 15-Apr-13 Unknown	
	(b)	RMS.035.166.0550	Category (b) March 2013 RCI publication paper.pdf 20-Mar-13 Unknown	
(172)		RMS.035.140.0650	WCX AADT Summary 20 May 2013.xlsx	
	(a)	RMS.035.140.0648	Category (b) WCXAADT 21-May-13 james.lee-warner@au.ey.com <james.lee-warner@au.ey.com>	
(173)		RMS.035.141.0385	FW: NB11553- WestConnex Traffic Analysis: Revised reference case traffic projections and economics	
(174)		RMS.035.147.0541	*Confidential: RE: WestConnex :Confidential clarification question	Released
(175)		RMS.035.166.0713	RE: WestConnex- Financing strategies	Released
(176)		RMS.509.002.0020	Briefing for Chief Executive- Engagement of KPMG and Allen & Overy LLP to Carry out Westconnex Business Case Peer Review and Assist Sydney Motorways Project Office SMPO- Complete the Business Case in Accordance with the Revised Delivery Plan	Released
(177)		RMS.502.004.0036	Off Balance Sheet Financing	
(178)		RMS.509.002.0028	WestConnex Peer Review	Released





**Dr Mehreen Faruqi**  
Greens Member of the NSW Legislative Council

Mr David Blunt  
Clerk of the Parliaments  
Parliament House  
Macquarie St  
SYDNEY NSW 2000

4/7/2014



Dear David,

**Re: Dispute of claims for privilege by Roads & Maritime Services in relation to WestConnex documents**

D14/17005  
C-13/143.11

In accordance with Standing Order 52(6), I wish to dispute the claims for privilege in respect of a number of documents concerning the Business Case for the WestConnex motorway project. Roads & Maritime Services has claimed privilege for 16 of 38 boxes of papers relating to the WestConnex project. While I do not wish to formally dispute the privilege claims for all of the documents, there are a number of documents which I believe may have been erroneously privileged or documents that I wish to challenge as I believe that there is considerable public interest in the release of these documents and that the public interest overrides any claim for privilege.

These documents are listed in Appendix A to this letter. When an individual document is identified, the dispute extends also to all documents attached or accompanying; for example when an email is identified as disputed, it extends to all email 'history' and any and all attachments to the email or any other history. If any document is found to contain sections of genuinely privileged information, I request that these parts be withheld or redacted and the non-privileged sections of the document to be released.

Reasons for seeking review

Given the scale of the WestConnex project and its importance to the government and the community, it is imperative that the public is made aware of the processes and decisions underpinning this enormous expense and use of government resources.

NSW Legislative Council clearly voted in favour of the Greens motion to release all relevant documents including the final version of the WestConnex Business Case. Speaking to the urgency of my Order for



Papers in Parliament on 4 March 2014, I said: “Large government projects such as WestConnex need to be planned and built with a genuine commitment to transparency and accountability. The Government’s delay in releasing the full business case serves only to diminish community confidence in this project.”

The WestConnex project is the largest infrastructure project in Australia, and one that has been conducted outside the spirit of transparency that is expected when public funds are expended. The lack of transparency and accountability that has been shown by the government is of significant public and community concern, as demonstrated through the passing of the Standing Order 52.

The recent re-ordering of the stages of this project, the issuing of compulsory acquisition letters, and the later changes of these decisions have raised further public concerns about the conception, decision-making and planning of this project.

There is also a history of Government mismanagement of major motorways and infrastructure projects, such as the Cross City Tunnel and the Lane Cove Tunnel. Greater public scrutiny, such as is requested of WestConnex, could have prevented the waste of billions of dollars in public money.

I specifically wish to address the following areas where privilege is claimed.

#### Commercial-in-confidence

RMS seeks to protect commercially sensitive information that arises “from the engagement of contractors or advisers” involved in the preparation of the Business Case, as well as that which is “contained within the Business Case”. RMS claims that the contractual duties of the government, including an express obligation of confidence, prevent it from doing so. I dispute the extent to which commercial-in-confidence is claimed, on a number of grounds.

#### Documents of a ‘strategic nature’

RMS distinguishes between documents concerning the engagement of contractors where pricing, negotiations, etc are discussed and documents that simply involve broader discussion of a “strategic nature” (2.16). It is this second category of document that I wish to challenge privilege.

It is one thing to seek to protect the terms and correspondence around the negotiation of particular commercial contracts, and quite another to seek protection of documents concerning opinions and advice that may detrimentally impact upon the Government's ability to obtain value for public money. Protection of this information at all costs is based on the assumption that the government is correctly pursuing a policy involving expenditure in the public interest. This, I believe, is a dangerous assumption, especially for large government projects such as WestConnex that will take decades to build and require an enormous amount of good faith from the electorate.

I also take note of Sir Laurence Street's contribution to the Cross City Tunnel – 2<sup>nd</sup> Report, October 2005, specifically: "...a public interest protecting what might be called commercially sensitive material". "There is a contrary public interest recognising the public's right to know and the need for transparency and accountability on the part of the executive".

In any event, commercial in confidence claims are not an established basis on which to claim privilege from producing documents under legal compulsion.

#### Erroneously using GIPA Act and related standards

RMS also seeks to draw attention to the relevant public interest tests of the GIPA Act and other policy documents, which provide broad coverage for the protection of documents. The parameters or scope of freedom of information legislation such as the GIPA Act should be considered entirely separately to an Order for Papers claim, which is a prerogative of the parliament.

For instance, one of the considerations for determining whether there is an overriding public interest against disclosure of government information in the GIPA Act is that it would "prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results". While this may be a more appropriate standard for an unsolicited FOI request (though I do not believe that to be true), it is surely too rigorous a standard for a NSW Legislative Council Order for Papers, where the democratically elected legislature has expressly sought the production of such information.

Parliamentary Privilege

RMS also seeks to rely on GIPA standards in its claim of parliamentary privilege over various documents, in relation to the case of Tziolas v NSW Department of Education and Communities where parliamentary privilege was found to apply to House Folder Notes for the purposes of the GIPA Act. This has the same inherent problems as detailed above regarding reliance on GIPA standards for an Order for Papers. The NSW Legislative Council Practice guide (2008) does not in any way refer to freedom of information legislation (either GIPA or its predecessor, the Freedom of Information Act 1989) in determining the relevant test or standard for the production of documents: rather, it discusses the case law.

It is essential that the power of the Legislative Council to compel the Government to produce documents it deems necessary and that purported claims of parliamentary privilege are not misused to undermine the directions of the Legislative Council. The 'New South Wales Legislative Council Practice' (2008) details Justice Gleeson's decision in the *Egan vs Willis and Cahill* (1996) case:

"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"

I therefore request that you seek the legal arbiter's opinion as to the appropriateness of applying privilege on the documents listed in Appendix A.

Please do not hesitate to contact me for further information.

Kind Regards

*Mehreen Faruqi*

Dr Mehreen Faruqi MLC

Greens NSW MP

*Appointment of independent  
legal arbiter authorised*

*Acting President  
7 July 2014*



**Dr Mehreen Faruqi**  
Greens Member of the NSW Legislative Council

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I therefore request that you seek the legal arbiter's opinion as to the appropriateness of applying privilege on the documents listed in Appendix A.

Please do not hesitate to contact me for further information.

Kind Regards

*Mehreen Faruqi*

Dr Mehreen Faruqi MLC

Greens NSW MP

*Appointment of independent  
legal arbiter authorised*

*[Signature]*

*Acting President*

*7 July 2014*



Appendix A

Document ID	Document
RMS.002.001.4074	5303103_1_DBMOTORWAYS_WestConnex HFN Federal funding.DOC
RMS.002.005.0576	N10 – Westconnex – including M4 Widening_M5 Duplication – 7 November 2013.doc
RMS.002.005.0909	131011_N10 – BE13 Motorways – Westconnex – including M4 Widening_M5 Duplication – 10 October 2013.doc
RMS.003.001.1684	West Connex Focus Group and Roundtable Research Request for Quotation [RTA-DBMOTORWAYS.FID16760]
RMS.003.001.6940	WestConnex stats
RMS.004.004.2927	WestConnex – Key Risks (project wide – not just comms focussed)
RMS.004.004.5339	Approved House File Note for review: collapse of toll road companies [RTA-DBMOTORWAYS.FID16473]
RMS.004.004.5340	5300851_2_DBMOTORWAYS_RoadsGeneral – Queensland toll road operators in administration_20_February 2013.doc.DOC
RMS.004.004.5910	Draft WestConnex Federal funding HFN [RTA-DBMOTORWAYS.FID16473]
RMS.004.004.5911	5303103_1_DBMOTORWAYS_WestConnex HFN Federal funding.DOC
RMS.004.004.6471	Revised WestConnex Federal funding HFN [RTA-DBMOTORWAYS.FID16473]
RMS.004.004.6473	5303103_1_DBMOTORWAYS_WestConnex HFN Federal funding amended.DOC
RMS.009.002.5038	FW:Westcon Community Action Groups Update No 16 – Release the WestConnex Business Case
RMS.009.002.5042	WestConnex business case draft email to MLCs.docx
RMS.010.002.0949	RTA economic analysis manual
RMS.012.001.4132	RE: WestConnex – Procurement Options Assessment Matrix
RMS.012.001.4136	WestConnex – Budget Inputs 2013/14-16/17
RMS.013.001.0189	FW: Tolling Strategy Paper – background info discussion
RMS.013.001.0190	WestConnex_Tolling paper outlineV2.docx
RMS.013.002.6092	AADTs
RMS.013.003.8007	RE: Operational Modelling for WestConnex
RMS.013.005.6491	WestConnex Business Case
RMS.014.004.1351	SMPO Benchmarking Operations and Maintenance Cost Comparison_2012_03_08DRAFT – LATEST 11 March.pdf
RMS.014.004.1413	Traffic Information (sent to TNSW).pdf
RMS.014.006.7551	Re: Fw: NB11553 – WestConnex Traffic Analysis: Final Stream 1 report
RMS.014.006.8256	FW: Centenary Drive modelling – Options Performance results
RMS.014.006.8257	performance.xls
RMS.014.007.3409	NB11553 – WestConnex Traffic Analysis: SP update #2
RMS.014.007.3468	RE: Traffic Analysis for M4MM
RMS.014.007.4163	NB115533 – WestConnex Traffic Analysis: SP update
RMS.014.007.3920	RE: Traffic Volume information
RMS.014.007.6782	RE: WestConnex modelling issues...
RMS.014.007.8680	Re: WestConnex
RMS.014.010.3150	Re: Operational Modelling for WestConnex

RMS.014.010.3152	Fw: Operational Modelling for WestConnex
RMS.014.010.3850	Re: Position Paper – for discussion at PCG tomorrow
RMS.014.010.4271	RE: Road network assumptions for modelling
RMS.014.010.4651	RE: Traffic Analysis for M4MM
RMS.014.010.7244	RE: Questions on Notice [RTA-DBMOTORWAY.FID16475]
RMS.014.010.8039	RE: Data from RMS Modelling
RMS.014.010.8068	RE: Data from RMS Modelling
RMS.014.010.8143	RE: Data from RMS Modelling
RMS.014.010.8158	RE: Data from RMS Modelling
RMS.014.010.8163	RE: Data from RMS Modelling
RMS.014.012.6299	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx
RMS.014.012.6300	RE: Ministerial note Call for papers on the WestConnex Business Case
RMS.014.012.6306	Ministerial note Call for papers on the WestConnex Business Case
RMS.014.012.6307	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx
RMS.014.013.1007	Re: WestConnex – Information Request – Department of Transport (Part 1)
RMS.014.013.1527	FW: HPV on NSW roads – supporting material
RMS.014.013.4161	FW: NB11553 – WestConnex Traffic Analysis: Forecast Billings
RMS.014.013.5239	RE: Tunnel Estimate and Peer Review
RMS.014.013.5299	RE: WestConnex Peer Review
RMS.014.013.7203	FW: Change request for Westconnex – PD review
RMS.016.001.3832	RE: WCX – Tolling Strategy Meeting Note
RMS.016.010.0764	WestConnex Revitalisation – Transport Planning Final Draft
RMS.016.010.0765	2014_0227 Integrated Transport Study_finaldraft_v3.pdf
RMS.016.024.4096	FW: NB11553 – WestConnex Traffic modelling – next round – clarifications
RMS.016.024.7407	RE: Wcx – Opex & Lifecycle Input Template Update
RMS.016.024.8268	FW: WestConnex and Commonwealth Government Funding – Letter from Minister Albanese to Minister Gay [SEC=UNCLASSIFIED] [RTA-DBAMOTORWAYS.FID14818]
RMS.016.027.8229	Release of Business Case extracts in Dataroom.docx
RMS.016.029.1814	RE: Wcx – Opex & Lifecycle Input template Update
RMS.017.015.0022	FW: Notification: Usha Jacmoe has sent you files
RMS.017.016.1972	2012 Trucks by origin (HCV LCV) – from Usha.xls
RMS.017.018.5468	Re: AspireSydney M4 East – affordable alternative to WestConnex
RMS.017.019.4146	FW: WestConnex – Network assumptions v2
RMS.017.019.4294	M4 toll plaza info
RMS.017.019.4335	NB11553 – WestConnex Traffic Analysis: Concept Designs for Opt 13
RMS.017.019.4479	RE: C&F/traffic
RMS.017.019.4955	RE: NB11553 – WestConnex Traffic Analysis: Concept Designs for Opt 13
RMS.017.019.4964	RE: NB11553 – WestConnex Traffic Analysis: HTS query to help identify NHB trips missing from STM HB Tours
RMS.017.019.5434	RE: Notification: Usha Jacome has sent you files
RMS.017.019.6026	Tolling Assumptions
RMS.017.021.0430	Re: NB11553 – WestConnex Traffic Analysis: Final Stream 1 report.
RMS.017.021.0712	FW: C&F/traffic
RMS.017.021.1229	RE: A background paper on toll roads and forecasts

RMS.017.021.1552	Re: NB11553 – WestConnex Traffic Analysis: Discussion topics for tomorrow.
RMS.017.021.1556	Re: NB11553 – WestConnex Traffic Analysis: Discussion topics for tomorrow.
RMS.017.021.1563	Re: NB11553 – WestConnex Traffic Analysis: LCV Proportion
RMS.017.021.1567	Re: NB11553 – WestConnex Traffic Analysis: LCV Proportion
RMS.017.021.1570	Re: NB11553 – WestConnex Traffic Analysis: LCV Proportion
RMS.017.021.1639	RE: NB11553 – WestConnex Traffic Analysis: Toll charges for Airport Lite (s7)mwhat
RMS.017.021.1641	Re: NB11553- WestConnex Traffic Analysis: Weekly progress
RMS.017.021.1834	Re: WestConnex - Information Request – Department of Transport (Part 1)
RMS.017.021.1841	Re: WestConnex - Information Request – Department of Transport (Part 1)
RMS.017.021.1843	Re: West Connex – Information Request – Department of Transport (Part 1)
RMS.017.021.1847	Re: WestConnex – Network assumptions v2
RMS.017.021.1853	RE: WestConnex – reference case scope for Sunday run
RMS.017.021.2834	Re: WestConnex – Parramatta Road capacity
RMS.017.021.3933	RE: Data breakdown for HCV & LCVs
RMS.017.022.2987	WestConnex Traffic – C&F/traffic
RMS.017.022.2992	WCX traffic extracts for economics (270313).xlsx
RMS.017.022.3564	FW: Traffic modelling – next round
RMS.017.022.3911	RE: Total WestConnex Workforce
RMS.017.022.4024	RE: WestConnex – quality assurance review of Mac Bank model
RMS.017.022.4250	WestConnex – quality assurance review of Mac Bank model
RMS.017.022.4357	WestConnex Traffic – C&F/traffic
RMS.017.022.4482	Proposed Motorway
RMS.017.024.8480	5291337_1_DBMOTORWAYS_Briefing Note-Steering Committee 4 – Item C&CE Dec2012_A3607051.1.DOC
RMS.017.025.2306	Approved WestConnex HFN [RTA-DBMOTORWAYS.FID16473]
RMS.018.001.6287	Heavy Vehicle Design Parameters for WestConnex Business Case
RMS.019.001.3231	Comparison of Contractors Multipliers.xlsx
RMS.019.001.3235	RE: WestConnex Cost Briefing
RMS.022.001.1656	Package and Models, WestConnex
RMS.022.001.1657	Assumptions and Package Model Selection criteria.docx
RMS.022.003.1471	RE: WestConnex – financing papers from Mac Bank
RMS.022.003.2405	FW: WCX economics methodology & data template
RMS.022.003.3336	Updated: Commercial & Finance workstream – business case and key milestones
RMS.022.003.3345	RE: WestConnex Steering Committee Update – 26 <sup>th</sup> February 2013 (FINAL).PDF
RMS.022.004.3361	RE: WestConnex Contract
RMS.022.003.3364	RE: WC Advisory Group follow up
RMS.022.003.3366	WCX Economic Advisory Group (meeting minutes #1).docx
RMS.022.004.0268	NTER / Treasury discussion
RMS.022.004.0524	Multimodal Modelling
RMS.022.004.1658	RE: WestConnex – traffic multi modal analysis
RMS.022.004.1659	RE: WestConnex – traffic multi modal analysis
RMS.022.004.1725	FW: NB11553 – WestConnex Traffic Analysis: Weekly progress



RMS.022.004.2198	RE: Draft Tolling Paper
RMS.022.004.3015	RE: WestConnex Tolling Costs
RMS.022.004.3361	Re: West Connex Tolling Costs
RMS.022.005.4746	WestConnex – further feedback to Financial Advisors
RMS.022.005.4747	RE: RFP – WestConnex Financing Scoping Study
RMS.022.005.7224	WestConnex – Financial Advisors traffic.xlsx
RMS.022.005.7493	RE: WestConnex – CPI, AWE and capital cost escalation forecasts
RMS.022.005.7495	WestConnex – Value capture work for NSW Treasury
RMS.022.006.8475	WestConnex – Business case Development costs – expense or capitalise?
RMS.023.001.0656	Re: Leighton Contractors AECOM report NPR-RPT-0000-GE001A, WestConnex Business Case
RMS.023.001.0721	RE: Top of Mind summarised
RMS.023.001.0722	Appendix A_Top of Mind_SS_130428CS.DOCX
RMS.023.001.6492	130423 WestConnex_Hawthorne Canal.doc
RMS.023.001.6579	FW: M5 East economic analysis
RMS.023.001.6789	Strategic Environmental assessment – draft brief
RMS.023.001.8005	FW: WestConnex – Western Portal – split connections
RMS.023.001.8007	Short_Long Tunnel Review.doc
RMS.023.001.8008	Splitting the Western Portals.pptx
RMS.023.004.5978	RE: Steering Committee papers
RMS.023.004.6104	FW: Scan Data from FX-B5C3A0
RMS.023.004.6112	Multi-Criteria Analysis.doc
RMS.028.016.5492	Slidepack for federal govt – WestConnex
RMS.028.016.5493	WestConnex Aug12 v 3.pptx
RMS.028.016.7537	FW: Slidepack for federal govt - WestConnex
RMS.028.016.7538	WestConnex Aug12 v3.pptx
RMS.032.001.3912	RE: WestConnex travel time savings
RMS.032.001.3913	RE: WestConnex travel time savings
RMS.032.001.3914	WestConnex travel time savings
RMS.032.001.3915	WestConnex: Traffic Data Request: Mapping M4 and M5 Users
RMS.032.014.5692	FW: Traffic Update 26 April 2012 [RTA-DBMOTORWAYS.FID14818]
RMS.032.014.5697	WestConnex Traffic Analysis Summary 26 April 2012.xls
RMS.032.021.1779	Fwd: WestConnex
RMS.032.021.3519	RE: WestConnex business case review
RMS.034.003.7752	1. Econ Eval- WestConnex (VTT 23.81) 27072012 Option 13.1 – Final v2.pdf
RMS.034.003.7765	2. WestConnex Evaluation Option v11#2.pdf
RMS.034.003.7766	3. Revenue and ADT Volume.pdf
RMS.034.003.7783	2013 04 05 Memo – draft decision.pdf
RMS.034.004.0494	RE: M5 East visualisation material
RMS.034.004.0910	Data for travel time calculator.xls
RMS.034.004.0911	Data for travel time calculator.xls
RMS.034.004.6615	FW: WestConnex -
RMS.034.006.2008	Induced Demand
RMS.034.006.6818	WestConnex – Actual tolled traffic volumes on M4West from ASX releases
RMS.034.006.8102	FW: WestConnex – Actual tolled traffic volumes on M4West from ASX releases
RMS.034.006.8105	M4_Volumes.xlsx

RMS.034.006.8121	FW: WestConnex traffic – C&F/traffic
RMS.034.006.8126	WCX traffic extracts for economics (270313).xlsx
RMS.034.007.3791	RE:
RMS.034.007.3888	RE: Figures from SKM model
RMS.034.007.4629	RE: Westconnex: Induced Demand Assessment
RMS.034.007.8203	Re:
RMS.034.008.1297	WestConnex Business Case – Confidential – Large 30Mb file
RMS.035.023.0754	FW: Latest Updated Estimates.
RMS.035.166.0543	FW:Re: SMPO Escalation Rate Assumptions
RMS.035.140.0650	WCX AADT Summary 20 May 2013.xlsx
RMS.035.141.0385	FW: NB11553 – WestConnex Traffic Analysis: Revised reference case traffic projections and economics.
RMS.035.147.0541	*Confidential: RE: WestConnex :Confidential clarification question
RMS.035.166.0713	RE: WestConnex – Financing strategies
RMS.509.002.0020	Briefing for Chief Executive – Engagement of KPMG and Allen & Overy LLP to Carry out Westconnex Business Case Peer Review and Assist Sydney Motorways Project Office SMPO – Complete the Business Case in Accordance with the Revised Delivery Plan
RMS.502.004.0036	Off Balance Sheet Financing
RMS.509.002.0028	WestConnex Peer Review

## David Blunt

---

**From:** David Blunt  
**Sent:** Thursday, 10 July 2014 5:06 PM  
**To:** Adam Searle; Amanda Fazio; Catherine Cusack; Charlie Lynn; David Clarke; David Shoebridge; Don Harwin; Ernest Wong; Fred Nile; Greg Donnelly; Greg Pearce; Helen Westwood; Jan Barham; Jenny Gardiner; Jeremy Buckingham; John Kaye; Luke Foley; Lynda Voltz; Marie Ficarra; Mehreen Faruqi; Melinda Pavey; Michael Gallacher; Mick Veitch; Natasha MacLaren-Jones; Niall Blair; Paul Green; Penny Sharpe; Peter Phelps; Peter Primrose; Rick Colless; Robert Borsak; Robert Brown; Sarah Mitchell; Scot MacDonald; Shaoquett Moselmane; Sophie Cotsis; Steve Whan; Trevor Khan; Walt Secord; Duncan Gay; John Ajaka (Office@ajaka.minister.nsw.gov.au); Matthew Mason-Cox MLC (office@mason-cox.minister.nsw.gov.au)  
**Subject:** Disputed claim of privilege - WestConnex Business Case  
**Attachments:** Transcript of proceedings.pdf; Arbiter- Report on actions of former WorkCover NSW employee.pdf

Dear members

I write to advise you that I have received a dispute in relation to the claim of privilege on documents regarding the WestConnex Business Case that were returned to the House in compliance with an order for papers under Standing Order 52 dated 4 March 2014.

The Acting President has authorised the appointment of the Honourable Keith Mason AC QC as an independent legal arbiter to evaluate and report on the claim of privilege.

Members may recall that earlier this year following the tabling of the first such report from Mr Mason (Report on actions of former WorkCover NSW employee), Minister Gay made a statement in the House in relation to the report and the role of the independent arbiter. Mr Searle also addressed the House. The statements by Minister Gay and Mr Searle are available in the transcript of proceedings, attached. I forwarded a copy of those statements to Mr Mason as requested by Minister Gay in his address to the House.

I also note that Mr Mason in his first report, attached, stated that, "I would be in no way offended if, were I to be retained again, any party affected were to offer submissions (disclosed to the others) addressing any relevant consideration, included the matters stated below [concerning the role of the independent legal arbiter]".

Following on from the statements made in the House by Minister Gay and Mr Searle, Mr Mason has indicated that in evaluating the claim of privilege in the WestConnex Business Case he will undertake a more extensive consultation process than has been done in the past. Mr Mason has proposed the following:

- he will undertake an initial review of the disputed documents on Tuesday 15 July,
- he then invites submissions from members either in respect of the role of the independent legal arbiter, or in relation to this claim of privilege [which will need to be delivered to my office by 5.00 pm on Monday 21 July],
- subsequently, he will allow for any party who lodges such a submission to review and respond to any other submissions by 5.00 pm on Monday 28 July, and

- finally, he will complete the evaluation of the claim and provide the report by Tuesday 5 August 2014.

Any members who are interested in making a submission to Mr Mason are encouraged to contact me in the first instance at any time prior to Monday 21 July 2014. I will be making a submission to Mr Mason and I anticipate that the General Counsel in the Department of Premier and Cabinet will also be doing the same.

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Please do not hesitate to contact me if you have any questions in relation to this matter.

Kind regards,  
David

**David Blunt**

Clerk of the Parliaments

Ext. 2323

[david.blunt@parliament.nsw.gov.au](mailto:david.blunt@parliament.nsw.gov.au)

## David Blunt

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**From:** David Blunt  
**Sent:** Friday, 11 July 2014 9:58 AM  
**To:** Paul Miller (paul.miller@dpc.nsw.gov.au)  
**Cc:** 'Rachel.McCallum@dpc.nsw.gov.au'; Karen Smith (karen.smith@dpc.nsw.gov.au)  
**Subject:** FW: Disputed claim of privilege - WestConnex Business Case  
**Attachments:** Transcript of proceedings.pdf; Arbitrator- Report on actions of former WorkCover NSW employee.pdf

Dear Paul,

As discussed with Rachel McCallum earlier this week, the Honourable Keith Mason AC QC has been appointed as an independent legal arbiter to evaluate and report on the disputed claim of privilege concerning the WestConnex Business Case.

Set out below for your information is an email communication that I sent to all members of the Legislative Council yesterday afternoon. I particularly draw your attention to Mr Mason's intention to receive submissions on this matter. If you wish to make a submission, it will need to be provided through my office by 5.00 pm on Monday 21 July. It would also be appreciated if you could alert Roads and Maritime Services to the opportunity to make a submission in relation to this particular dispute.

Please do not hesitate to contact me if you would like to discuss this matter.

With kind regards,  
David

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**From:** David Blunt  
**Sent:** Thursday, 10 July 2014 5:06 PM  
**To:** Adam Searle; Amanda Fazio; Catherine Cusack; Charlie Lynn; David Clarke; David Shoebridge; Don Harwin; Ernest Wong; Fred Nile; Greg Donnelly; Greg Pearce; Helen Westwood; Jan Barham; Jenny Gardiner; Jeremy Buckingham; John Kaye; Luke Foley; Lynda Voltz; Marie Ficarra; Mehreen Faruqi; Melinda Pavey; Michael Gallacher; Mick Veitch; Natasha MacLaren-Jones; Niall Blair; Paul Green; Penny Sharpe; Peter Phelps; Peter Primrose; Rick Colless; Robert Borsak; Robert Brown; Sarah Mitchell; Scot MacDonald; Shaoquett Moselmane; Sophie Cotsis; Steve Whan; Trevor Khan; Walt Secord; Duncan Gay; John Ajaka ([Office@ajaka.minister.nsw.gov.au](mailto:Office@ajaka.minister.nsw.gov.au)); Matthew Mason-Cox MLC ([office@mason-cox.minister.nsw.gov.au](mailto:office@mason-cox.minister.nsw.gov.au))  
**Subject:** Disputed claim of privilege - WestConnex Business Case

Dear members

I write to advise you that I have received a dispute in relation to the claim of privilege on documents regarding the WestConnex Business Case that were returned to the House in compliance with an order for papers under Standing Order 52 dated 4 March 2014.

The Acting President has authorised the appointment of the Honourable Keith Mason AC QC as an independent legal arbiter to evaluate and report on the claim of privilege.

Members may recall that earlier this year following the tabling of the first such report from Mr Mason (Report on actions of former WorkCover NSW employee), Minister Gay made a statement in the House in relation to the report and the role of the independent arbiter. Mr Searle also addressed the House. The

statements by Minister Gay and Mr Searle are available in the transcript of proceedings, attached. I forwarded a copy of those statements to Mr Mason as requested by Minister Gay in his address to the House.

I also note that Mr Mason in his first report, attached, stated that, "I would be in no way offended if, were I to be retained again, any party affected were to offer submissions (disclosed to the others) addressing any relevant consideration, included the matters stated below [concerning the role of the independent legal arbiter]".

Following on from the statements made in the House by Minister Gay and Mr Searle, Mr Mason has indicated that in evaluating the claim of privilege in the WestConnex Business Case he will undertake a more extensive consultation process than has been done in the past. Mr Mason has proposed the following:

- he will undertake an initial review of the disputed documents on Tuesday 15 July,
- he then invites submissions from members either in respect of the role of the independent legal arbiter, or in relation to this claim of privilege [which will need to be delivered to my office by 5.00 pm on Monday 21 July],
- subsequently, he will allow for any party who lodges such a submission to review and respond to any other submissions by 5.00 pm on Monday 28 July, and
- finally, he will complete the evaluation of the claim and provide the report by Tuesday 5 August 2014.

Any members who are interested in making a submission to Mr Mason are encouraged to contact me in the first instance at any time prior to Monday 21 July 2014. I will be making a submission to Mr Mason and I anticipate that the General Counsel in the Department of Premier and Cabinet will also be doing the same.

Please do not hesitate to contact me if you have any questions in relation to this matter.

Kind regards,  
David

**David Blunt**  
Clerk of the Parliaments  
Ext. 2323  
[david.blunt@parliament.nsw.gov.au](mailto:david.blunt@parliament.nsw.gov.au)



Transport  
Roads & Maritime  
Services

21 July 2014

Our Ref: LEX5412  
Your Ref:

Clerk of Parliaments  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Attention: David Blunt

By Email: [David.Blunt@parliament.nsw.gov.au](mailto:David.Blunt@parliament.nsw.gov.au)

Dear Clerk

**Standing Order 52 – WestConnex Business Case  
Objections to Claim for Privilege**

I refer to your email to the Members of the House dated 10 July 2014 and enclose Roads and Maritime Services' further submissions in respect of the claim for privilege.

Please phone me on 02 8588 5370 should you wish to discuss this matter.

Yours sincerely

  
Christine Lithgow  
General Counsel

Roads & Maritime Services

**Submissions in support of claims for Public Interest Immunity and Legal Professional Privilege**

**Roads and Maritime Services**

**Order for Papers – WestConnex Business Case – 21 July 2014**

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**Background to the Current Privilege Dispute**

1. The resolution of the Legislative Council under Standing Order 52 dated 4 March 2014 (the **Order for Papers**) required production of the following documents relating to the Business Case for the WestConnex Project (the **Business Case**):
  - a. All drafts and the final version of the Business Case and any related materials prepared by Sydney Motorways Project Office, Roads and Maritime Services or consultants engaged by Roads and Maritime Services;
  - b. All correspondence, including letters of engagement and emails, meeting diaries, meeting agendas, and meeting minutes created by Sydney Motorways Project Office, Roads and Maritime Services or consultants engaged by Roads and Maritime Services
  - c. All advice concerning the development of the Business Case for the WestConnex Project; and
  - d. any document which records or refers to the production of documents as a result of this order of the House.
2. In response to the Order for Papers, Roads and Maritime Services (**RMS**) reviewed a significant number of documents (including cabinet in confidence documents) and produced 7,938 documents. Privilege was claimed in relation to 1,306 documents.
3. RMS's claimed public interest immunity privilege, specifically, commercial-in-confidence and parliamentary privilege (the **Public Interest Immunity Category**) and legal professional privilege (the **Legal Professional Privilege**)



**Category**). The details of this claim were recorded in a document entitled "Privileged Index" and produced in response to the Order for Papers.

4. The Privilege Index was accompanied by general submissions entitled "Submission in support of claims for public interest immunity, legal professional privilege and commercial-in-confidence". RMS continues to rely on those submissions (annexed as **Appendix B**) and by these submissions, augments them.

#### **Dispute of Privilege Claimed**

5. By letter dated 4 July 2014, the Hon. Dr Mehreen Faruqi MLC (**Dr Faruqi**) has challenged the privilege claimed with respect to 178 of those documents (**the Disputed Documents**). The matter has been referred to an independent legal arbiter, the Honourable Keith Mason AC QC (**the Independent Legal Arbiter**).
6. The following issues are in contention:
  - a. the extent to which commercial in confidence privilege is claimed;
  - b. whether documents concerning opinions and advice should be released;
  - c. whether principles derived from freedom of information legislation such as the Government Information (Public Access) Act 2009 (NSW) is relevant to an Order for Papers matter; and
  - d. whether parliamentary privilege attaches to House File Notes

#### **RMS review process in relation to the Disputed Documents**

7. RMS has determined not to press its claim with respect to some of the Disputed Documents. This leaves only 83 documents in contention. With respect to those 83 documents, RMS wishes to restate its claim that the wider release of these documents, being of commercial value to the Government, is currently not in the public interest. RMS maintains there should be no

disclosure beyond the Members of the Legislative Council of these documents.

8. RMS's decision not to press the claims with respect to a group of Disputed Documents is not intended to constitute a waiver of the privilege otherwise claimed on similar or like documents or the Disputed Documents attachment's or sources.
9. **Appendix A** to these submissions is a table which addresses each document over which privilege remains maintained with a précis of its character and why the claim for privilege has been maintained together with a reference back to the relevant discussion of the principles and matters which inform the claim as maintained in these submissions.
10. The column titled "RMS Response" in Appendix A outlines the position adopted by RMS with respect to each of the Disputed Documents.

#### **The character of the privilege claimed**

11. The Documents in Contention falling within the Public Interest Immunity Category can be understood to fall within the following sub-categories:
  - i. Commercial-in-confidence; and
  - ii. Parliamentary privilege.
12. One of the documents is a request for legal advice and is therefore subject to a claim of legal professional privilege.
13. The character of the commercial-in-confidence documents fall into the following broad categories:
  - i. Government confidential information including:
    1. Assumptions underpinning capital costing, tolling strategy, demand forecasting and financial modelling for the WestConnex project; and

2. Deliberative processes in relation to the development and assessment of capital costing, tolling strategies, demand forecasting and financial modelling for the WestConex project.
  - ii. third party confidential information that was relied on to develop the processes in (1) and (2) above;
  - iii. matters the subject of current competitive procurement processes.

14. The disclosure of this information may:

- a. harm the Government's competitive and commercial position in securing best value for money for the procurement of the WestConnex works;
- b. adversely impact on the Government's reliance on competitive processes to procure significant public infrastructure assets with minimal financial impact on the State;
- c. affect the capacity of Government to effectively allocate financial and construction risks for the project that may be detrimental to the State's long term fiscal strategies to reduce State debt.

**The Disputed Documents: the task on evaluation**

15. The evaluation that the Independent Legal Arbiter is required to make represents a balancing of the public interest affecting a particular document in upholding genuine grounds of immunity on one hand, and on the other, upholding Parliamentary authority to deny privilege where considerations of public interest affecting the particular document outweigh what would otherwise be a valid and enforceable claim for privilege. There are no fixed rules to govern this task. It considered that "no general rule about protection will fit" and the merits of each case with respect to each document will need to be considered. The following principles are, nonetheless, relevant to this task.

### **Relevant factual context**

16. WestConnex is not being delivered as a conventional fully funded road project. The project will be delivered in a structured arrangement and modeled on a conventional Public Private Partnership (PPP). To supplement the currently available funds to finance the WestConnex program of works, the State will raise both equity and debt financing, and will use toll revenue to fund ongoing sections of the program.
17. The program is being delivered in such a way so as to optimise investment and minimise risk to taxpayers. This task is still in its critical formative stages and to see the release of documents which go to the issue of financial modelling or to release information used (or soon to be used) in tender documentation has the potential to jeopardise this process by reducing the bargaining power of the State in negotiations with potential investors and financial institutions for the financing of the project.

### **Relevant legal principles**

18. Appendix B sets out the relevant legal principles which serve to inform the task of the Independent Arbiter. The following is also of assistance.
19. Public interest immunity is applicable in extra-judicial and quasi-judicial matters (and would apply to the present review by the Independent Legal Arbiter).<sup>1</sup> It requires the decision maker to balance whether the public interest in the disclosure of information outweighs the interest in keeping sensitive information from being freely available.<sup>2</sup>
20. In relation to commercially sensitive or commercial in confidence information, it is common that when matters come before Court measures can be taken to prevent the disclosure of information that will affect the commercial position of

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<sup>1</sup> *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 52.

<sup>2</sup> The classic statement of the terms of public interest immunity from Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 is that: "The general rule is that the court will not order the production of a document, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose it."

parties.<sup>3</sup> However, disclosure in the present context would effectively be disclosure to the "world at large".

21. For present purposes, and by analogy, reference can also be had to the common law concept of the law of confidentiality of which there are four elements<sup>4</sup>:

- a. Information is confidential so long as the specific information can be identified;
- b. Information must be inherently confidential, that is, it must be information that is not in the public domain and which has "the necessary quality of confidence";
- c. The occasion on which the information was imparted must be such as to import an obligation of confidence;
- d. There must be an actual or threatened misuse of the information. The essence of breach of confidentiality is that it is inherently detrimental to break the confidence so that the detriment element is very likely to be present.

22. The Disputed Documents satisfy each of these four elements:

- a. First, the Disputed Documents contains specific information, which provides specific numbers or information, while more general information has been disclosed in the 6,632 documents over which privilege was not claimed.
- b. Secondly, the information is not currently in the public domain as it has been withheld from the general public and can only be viewed by Members of the Legislative Council.
- c. Thirdly, at the time the information was created, there was a clear expectation that the information being created was confidential. Consultants and internal personnel would have signed confidentiality

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<sup>3</sup> *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 39-40.

<sup>4</sup> Set out in set out in Gummow J's judgment in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at [443]; see also Nicholas Seddon, *Government Contracts - Federal, State and Local* (The Federation Press, 4<sup>th</sup> ed, 2009), pp 460-464

agreements, would have known not to disseminate the information and would have understood the commercial sensitivity of it when the emails and documents were created and transmitted.

- d. Fourthly, if the information is released, it is likely to have detrimental effect on the State at this point in time when it is seeking to maximize value for money in the delivery of the WestConnex assets.

23. RMS does not contend that the documents in Contention should never be released and recognizes that their commercial sensitivity may erode with time. However, given the particular timing of this project and the ongoing commercial negotiations and financing, the public interest at this point in time weighs in favour of not disclosing the documents. It is likely that the sensitive nature of the Documents in Contention will not outweigh the public interest in disclosure once the project has progressed past this crucial cost optimization stage. This consideration has been recognised both by the High Court<sup>5</sup> and by previous independent legal arbiters in their adjudication of analogous issues.<sup>6</sup>

24. RMS addresses the issue of **parliamentary privilege** as follows.

*House Folder Notes*

25. The principles enunciated in the Government Information (Public Access) Act 2009 (NSW) (the **GIPA Act**) are relevant to the instant task and can inform the consideration of whether parliamentary privilege in respect of house folder notes should be upheld. The spirit and the intent of the GIPA Act is derived from the applicable common law principles and is designed in such a way that governmental bodies are directed to provide open access to information, other than where public interest considerations against disclosure outweigh the public interest considerations in favour of disclosure. Certainly, this matter

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<sup>5</sup> *Sankey v Whitlam* (1978) 142 CLR 1

<sup>6</sup> Report of Sir Laurence Street as legal arbiter on disputed of claim of privilege in respect of CBD Metro Rail, dated 7 May 2010.

will need to be considered based on the public interest immunity considerations that apply.

26. Nevertheless, in RMS's submission, there are strong policy considerations militating against the public need for disclosure of such ministerial and parliamentary documents. This is especially so given that such documents were prepared for the Minister for the purposes of, inter alia, addressing Parliament or responding to questions in Parliament. Any speeches, comments or responses by the Minister in Parliament is protected by Parliamentary privilege and by logical extension, such protection should extend to House Folder Notes. This policy informs the privilege which attaches to draft expert reports for example.<sup>7</sup>

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<sup>7</sup> For example, Dawson J in *Attorney-General (NT) v Maurice* [1986] HCA 80, (at paragraph 7 of his Honour's judgment) the drafts "might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time". See also a more recent example, White J in *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [34]: "if an expert prepares a draft report, or notes for the report, with the dominant purpose of a draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer, then it is privileged. If not, it is not"

Appendix A

	Document ID	Document	RMS Response	Action
1	RMS.002.001.4074	5303103 1 DBMOTORWAYS WestConnex HFN Federal funding. DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
2	RMS.002.005.0576	N10- Westconnex- including M4 Widening_M5 Duplicatino- 7 November 2013.doc	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
3	RMS.002.005.0909	131011_N10- BE13 Motorways- Westconnex- including M4 Widening_M5 Duplication -10 October 2013.doc	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
4	RMS.003.001.1684	West Conn ex Focus Group and Roundtable Research Request for Quotation [RTA-DBMOTORWAYS. FID16760]	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
5	RMS.003.001.6940	WestConnex stats	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
6	RMS.004.004.2927	WestConnex- Key Risks (project wide- not just comms focussed)	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
7	RMS.004.004.5339	Approved House File Note for review: collapse of toll road companies [RTA-DBMOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
8	RMS.004.004.5340	5300851_2_DBMOTORWATS_RoadsGeneral - Queensland toll road operators in administration 20 February 2013.doc.DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
9	RMS.004.004.5910	Draft WestConnex Federal funding HFN [RTADB MOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
10	RMS.004.004.5911	5303103 1 DBMOTORWAYS WestConnex HFN Federal funding. DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
11	RMS.004.004.6471	Revised WestConnex Federal funding HFN [RTADB MOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release



	Document ID	Document	RMS Response	Action
12	RMS.004.004.6473	5303103_1_DBMOTORWAYS_WestConnex HFN Federal funding amended. DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
13	RMS.009.002.5038	FW:Westcon Community Action Groups Update No 16- Release the WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
14	RMS.009.002.5042	WestConnex business case draft email to MLCs.docx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
15	RMS.010.002.0949	RTA economic analysis manual	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
16	RMS.012.001.4132	RE: WestConnex- Procurement Options Assessment Matrix	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
17	RMS.012.001.4136	WestConnex- Budget Inputs 2013/14-16/17	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
18	RMS.013.001.0189	FW: Tolling Strategy Paper- background info discussion	RMS maintains that this document includes specific tolling strategy information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
19	RMS.013.001.0190	WestConnex Tolling paper outlineV2.docx	RMS maintains that this document includes specific tolling strategy information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
20	RMS.013.002.6092	AADTs	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
21	RMS.013.003.8007	RE: Operational Modelling for WestConnex	RMS maintains that this document includes specific	Not release

	Document ID	Document	RMS Response	Action
			tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	
22	RMS.013.006.6491	WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
23	RMS.014.004.1351	SMPO Benchmarking Operations and Maintenance Cost Comparison 2012 03 08DRAFT- LATEST 11 March.pdf	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
24	RMS.014.004.1413 1415, 1417	Traffic Information (sent to TNSW).pdf	RMS maintains that this document includes specific financial modelling information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
25	RMS.014.006.7551	RE: Fw: NB11553-WestConnex Traffic Analysis: Final Stream 1 report	RMS considers that this document contains username and login and so should not be released	Not release
26	RMS.014.006.8256	FW: Centenary Drive modelling- Options Performance results	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
27	RMS.014.006.8257	performance.xls	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
28	RMS.014.007.3409	NB11553- WestConnex Traffic Analysis: SP update #2	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
29	RMS.014.007.3468	RE: Traffic Analysis for M4MM	RMS considers that this document contains commercially sensitive information relating	Not release

	Document ID	Document	RMS Response	Action
			specifically to the M4 Managed Motorway and not the WestConnex Project and should not be released through this Order for Papers	
30	RMS.014.007.4163	NB115533- WestConnex Traffic Analysis: SP update	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
31	RMS.014.007.3920	RE: Traffic Volume information	RMS considers that this document contains commercially sensitive information relating specifically to the M4 Managed Motorway and not the WestConnex Project and should not be released through this Order for Papers	Not release
32	RMS.014.007.6782	RE: WestConnex modelling issues ...	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
33	RMS.014.007.8680	RE: WestConnex	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
34	RMS.014.010.3150	RE: Operational Modelling for WestConnex	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
35	RMS.014.010.3152	Fw: Operational Modelling for WestConnex	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
36	RMS.014.010.3850	RE: Position Paper- for discussion at PCG tomorrow	RMS maintains that this document includes specific tolling effects information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release

	Document ID	Document	RMS Response	Action
37	RMS.014.010.4271	RE: Road network assumptions for modelling	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
38	RMS.014.010.4651	RE: Traffic Analysis for M4MM	RMS considers that this document relates to the M4 Managed Motorway and not the WestConnex Project so the commercially sensitive information contained in it should not be released through this Order for Papers	Not release
39	RMS 014.010.7244	RE: Questions on Notice [RTA-DBMOTORWAY.FID16475]	RMS maintains that House Folder Notes and responses to Questions on Notice are subject to parliamentary privilege	Not release
40	RMS.014.010.8039	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
41	RMS.014.010.8068	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
42	RMS.014.010.8143	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
43	RMS.014.010.8158	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
44	RMS.014.010.8163	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
45	RMS.014.012.6299	RE: MINISTERIAL NOTE Call for papers on	RMS maintains that House Folder Notes are	Not release

	Document ID	Document	RMS Response	Action
		the WestConnex Business Case (01)-mg.docx	subject to parliamentary privilege	
46	RMS.014.012.6300	RE: Ministerial note Call for papers on the WestConnex Business Case	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
47	RMS.014.012.6306	Ministerial note Call for papers on the WestConnex Business Case	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
48	RMS.014.012.6307	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
49	RMS.014.013.1007	RE: WestConnex- Information request- Department of Transport (Part 1)	RMS considers that this document contains commercially sensitive information of a third party so should not be released	Not release
50	RMS.014.013.1527	FW: HPV on NSW roads - supporting material	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
51	RMS.014.013.4161	FW: NB11553- WestConnex Traffic Analysis: Forecast Billings	RMS considers that this document contains confidential information of a third party so should not be released	Not release
52	RMS.014.013.5239	RE: Tunnel Estimate and Peer Review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
53	RMS.014.013.5299	RE: WestConnex Peer Review	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
54	RMS.014.013.7203	FW: Change request for WestConnex- PD Review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
55	RMS.016.001.3832	RE: WCX- Tolling Strategy Meeting Note	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release

	Document ID	Document	RMS Response	Action
56	RMS.016.010.0764	WestConnex revitalisation- Transport Planning Final Draft	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
57	RMS.016.010.0765	2014 0227 Integrated Transport Study final draft v3.pdf	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
58	RMS.016.024.4096	FW: NB11553- WestConnex Traffic modelling-next round clarifications	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
59	RMS.016.024.7407	RE: Wox- Opex & Lifecycle Input Template Update	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
60	RMS.016.024.8268	FW: WestConnex and Commonwealth Government Funding- Letter from Minister Albanese to Minister Gay [SEC=UNCLASSIFIED] [RTA-DBAMOTORWAYS.FID14818]	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
61	RMS.016.027.8229	Release of Business Case extracts in Dataroom.docx	RMS maintains that this is a communication seeking legal advice and is subject to legal professional privilege	Not release
62	RMS.016.029.1814	RE: Wox- Opex & Lifecycle Input template Update	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
63	RMS.017.015.0022	FW: Notification: Usha Jacmoe has sent you files	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
64	RMS.017.016.1972	2012 Trucks by origin (HCV LCV)- from Usha.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not	Release

	Document ID	Document	RMS Response	Action
			constitute a waiver of the privilege	
65	RMS.017.018.5468	RE: AspireSydney M4 East- affordable alternative to WestConnex	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
66	RMS.017.019.4146	FW: WestConnex- Network assumptions v2	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
67	RMS.017.019.4294	M4 toll plaza info	RMS maintains that this document includes specific traffic information which relates to tolling strategy which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
68	RMS.017.019.4335	NB11553- WestConnex Traffic Analysis: Concept Designs for Opt 13	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
69	RMS.017.019.4479	RE: C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
70	RMS.017.019.4955	RE: NB11553- WestConnex Traffic Analysis: Concept Designs for Opt 13	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
71	RMS.017.019.4964	RE: NB11553- WestConnex Traffic Analysis: HTS query to help identify NHB trips missing from STM HB Tours	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
72	RMS.017.019.5434	RE: Notification: Usha Jacome has sent you files	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
73	RMS.017.019.6026	Tolling Assumptions	RMS maintains that this document includes specific tolling information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain	Not release

	Document ID	Document	RMS Response	Action
			value for money	
74	RMS.017.021.0430	RE: NB11553- WestConnex Traffic Analysis: Final Stream 1 report.	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
75	RMS.017.021.0712	FW: C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
76	RMS.017.021.1229	RE: A background paper on toll roads and forecasts	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
77	RMS.017.021.1552	RE: NB11553- WestConnex Traffic Analysis: Discussion topics for tomorrow.	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
78	RMS.017.021.1556	RE: NB11553- WestConnex Traffic Analysis: Discussion topics for tomorrow.	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
79	RMS.017.021.1563	RE: NB11553- WestConnex Traffic Analysis: LCV Proportion	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
80	RMS.017.021.1567	RE: NB11553- WestConnex Traffic Analysis: LCV Proportion	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
81	RMS.017.021.1570	RE: NB11553- WestConnex Traffic Analysis: LCV Proportion	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release



	Document ID	Document	RMS Response	Action
82	RMS.017.021.1639	RE: NB11553- WestConnex Traffic Analysis: Toll charges for Airport Lite (s7)mwhat	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
83	RMS.017.021.1641	RE: NB11553- WestConnex Traffic Analysis: Weekly progress	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
84	RMS.017.021.1834	RE: WestConnex –Information request- Department of Transport (Part 1)	RMS considers that this document contains confidential information of a third party so should not be released.  RMS maintains that the document includes information that was used in the development of the business case which if released will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
85	RMS.017.021.1841	RE: WestConnex –Information request- Department of Transport (Part 1)	This is the second page of the document RMS.017.021.1834 above. RMS considers that this document contains commercially sensitive information of a third party so should not be released  RMS maintains that the document includes information that was used in the development of the business case which if released will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
86	RMS.017.021.1843	RE: West Conn ex- Information request- Department of Transport (Part 1)	This is the fourth page of the document RMS.017.021.1834 above. RMS considers that this document contains commercially sensitive information of a third party so should not be released	Not release

	Document ID	Document	RMS Response	Action
			RMS maintains that the document includes information that was used in the development of the business case which if released will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	
87	RMS.017.021.1847	RE: WestConnex- Network assumptions v2	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
88	RMS.017.021.1853	RE: WestConnex- reference case scope for Sunday run	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
89	RMS.017.021.2834	RE: WestConnex-:- Parramatta Road capacity	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
90	RMS.017.021.3933	RE: Data breakdown for HCV & LCVs Traffic projections	RMS maintains that this document includes specific traffic projections information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
91	RMS.017.022.2987	WestConnex Traffic- C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
92	RMS.017.022.2992	WCX traffic extracts for economics (270313).xlsx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
93	RMS.017.022.3564	FW: Traffic modelling- next round	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
94	RMS.017.022.3911	RE: Total WestConnex Workforce	RMS maintains its claim for privilege but agrees to	Release

	Document ID	Document	RMS Response	Action
			release this document only. This release does not constitute a waiver of the privilege	
95	RMS.017.022.4024	RE: WestConnex- quality assurance review of Mac Bank model	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
96	RMS.017.022.4250	WestConnex- quality assurance review of Mac Bank model	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
97	RMS.017.022.4357	WestConnex Traffic- C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
98	RMS.017.022.4482	Proposed Motorway	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
99	RMS.017.024.8480	5291337_1_DBMOTORWAYS_Briefing Note-Steering Committee 4 - Item C&CE Dec2012 A3607051.1.DOC	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
100	RMS.017.025.2306	Approved WestConnex HFN [RTA-DBMOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
101	RMS.018.001.6287	Heavy Vehicle Design Parameters for WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
102	RMS.019.001.3231	Comparison of Contractors Multipliers.xlsx	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party and its release would impact the ongoing commercial negotiations with contractors for the WestConnex Project	Not release
103	RMS.019.001.3235	RE: WestConnex Cost Briefing	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party and its release would impact the ongoing commercial negotiations with contractors	Not release

	Document ID	Document	RMS Response	Action
			for the WestConnex Project	
104	RMS.022.001.1656	Package and Models, WestConnex	RMS maintains that this document contains specific financial and staging information and its release will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
105	RMS.022.001.1657	Assumptions and Package Model Selection criteria.docx	RMS maintains that this document contains specific financial and staging information and its release will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
106	RMS.022.003.1471	RE: WestConnex- financing papers from Mac Bank	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
107	RMS.022.003.2405	FW: WCX economics methodology & data template	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
108	RMS.022.003.3336	Updated: Commercial & Finance workstream-business case and key milestones	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
109	RMS.022.003.3345	RE: WestConnex Steering Committee Update- 26th February 2013 (FINAL).PDF	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
110	RMS.022.004.3361	RE: WestConnex Contract	Document ID RMS.022.004.3361 does not exist with the title "RE: WestConnex Contract" referred to in Dr Faruqi's letter. Document ID RMS.022.004.3361 is listed twice in Dr Faruqi's letter with different titles.  In relation to the actual Document ID RMS.022.004.3361, RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the	Release

	Document ID	Document	RMS Response	Action
			privilege	
111	RMS.022.003.3364	RE: WC Advisory Group follow up	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
112	RMS.022.003.3366	WCX Economic Advisory Group (meeting minutes #1).docx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
113	RMS.022.004.0268	NTER   Treasury discussion	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
114	RMS.022.004.0524	Multimodal Modelling	RMS maintains the document contains commercially sensitive pricing information obtained from contractors	Not release
115	RMS.022.004.1658	RE: WestConnex- traffic multi modal analysis	RMS maintains the document contains commercially sensitive pricing information obtained from contractors and traffic modelling information its release will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
116	RMS.022.004.1659	RE: WestConnex- traffic multi modal analysis	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
117	RMS.022.004.1725	FW: NB11553- WestConnex Traffic Analysis: Weekly progress	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
118	RMS.022.004.2198	RE: Draft Tolling Paper	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
119	RMS.022.004.3015	RE: WestConnex Tolling Costs	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position	Not release

	Document ID	Document	RMS Response	Action
			and obtain value for money	
120	RMS.022.004.3361	RE: West Connex Tolling Costs	Document ID RMS.022.004.3361 does not exist with the title "RE: WestConnex Contract" referred to in Dr Faruqi's letter. Document ID RMS.022.004.3361 is listed twice in Dr Faruqi's letter with different titles.  In relation to the actual Document ID RMS.022.004.3361 RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
121	RMS.022.005.4746	WestConnex- further feedback to Financial Advisors	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party	Not release
122	RMS.022.005.4747	RE: RFP- WestConnex Financing Scoping Study	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party	Not release
123	RMS.022.005.7224	WestConnex- Financial Advisors traffic.xlsx	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
124	RMS.022.005.7493	RE: WestConnex- CPI, AWE and capital cost escalation forecasts	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
125	RMS.022.005.7495	WestConnex- Value capture work for NSW Treasury	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
126	RMS.022.0065.8475	WestConnex- Business case Development costs- expense or capitalise?	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
127	RMS.023.001.0656	RE: Leighton Contractors AECOM Report	RMS maintains its claim for privilege but agrees to	Release

	Document ID	Document	RMS Response	Action
		NPR-RPT-0000-GE001A, WestConnex Business Case	release this document only. This release does not constitute a waiver of the privilege	
128	RMS.023.001.0721	RE: Top of Mind summarised	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
129	RMS.023.001.0722	Appendix A Top of Mind SS 130428CS.DOCX	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
130	RMS.023.001.6492	130423 WestConnex_Hawthorne Canal.doc	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
131	RMS.023.001.6579	FW: MS East economic analysis	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
132	RMS.023.001.6789	Strategic Environmental assessment- draft brief	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
133	RMS.023.001.8005	FW: WestConnex- Western Portal- split connections	RMS maintains that this document contains specific information in relation to a package of work that is currently under procurement and its release would affect the competitive tendering process.	Not release
134	RMS.023.001.8007	Short Long Tunnel Review.doc	RMS maintains that this document contains specific information in relation to a package of work that is currently that is currently under procurement and its release would affect the competitive tendering process	Not release
135	RMS.023.001.8008	Splitting the Western Portals.pptx	RMS maintains that this document contains specific information in relation to a package of work that is currently that is currently under procurement and its release would affect the competitive tendering process	Not release
136	RMS.023.004.5978	RE: Steering Committee papers	RMS maintains its claim for privilege but agrees to release this document only. This release does not	Release

	Document ID	Document	RMS Response	Action
			constitute a waiver of the privilege	
137	RMS.023.004.6104	FW: Scan Data from FX-BSC3AO	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
138	RMS.023.004.6112	Multi-Criteria Analysis. doc	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
139	RMS.028.016.5492	Slidepack for federal govt- WestConnex	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
140	RMS.028.016.5493	WestConnex Aug12 v 3.pptx	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
141	RMS.028.016.7537	FW: Slidepack for federal govt- WestConnex	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
142	RMS.028.016.7538	WestConnex Aug12 v3.pptx	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of	Not release



	Document ID	Document	RMS Response	Action
			this information will impair the Government's ability to achieve value for money	
143	RMS.032.001.3912	RE: WestConnex travel time savings	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
144	RMS.032.001.3913	RE: WestConnex travel time savings	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
145	RMS.032.001.3914	WestConnex travel time savings	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
146	RMS.032.001.3915	WestConnex: Traffic Data request: Mapping M4 and M5 Users	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
147	RMS.032.014.5692	FW: Traffic Update 26 April2012 [RTA-DBMOTORWAYS.FID14818]	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
148	RMS.032.014.5697	WestConnex Traffic Analysis Summary 26 April 2012.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
149	RMS.032.021.1779	Fwd: WestConnex	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
150	RMS.032.021.3519	RE: WestConnex business case review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
151	RMS.034.003.7752	1. Econ Eva I- WestConnex (VTT 23.81)	RMS maintains that this document contains sensitive financial information which, if released, will	Not release

	Document ID	Document	RMS Response	Action
		27072012 Option 13.1- Final v2.pdf	detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	
152	RMS.034.003.7765	2. WestConnex Evaluation Option v11#2.pdf	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
153	RMS.034.003.7766	3. Revenue and ADT Volume. pdf	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
154	RMS.034.003.7783	2013 04 OS Memo- draft decision.pdf	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
155	RMS.034.004.0494	RE: M5 East visualisation material	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
156	RMS.034.004.0910	Data for travel time calculator.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
157	RMS.034.004.0911	Data for travel time calculator.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
158	RMS.034.004.66115	FW: WestConnex-	RMS maintains its claim for privilege but agrees to release this document only. This release does not	Release

	Document ID	Document	RMS Response	Action
			constitute a waiver of the privilege. Note this document was incorrectly transcribed by Dr Faruqi. See correct number which matches title.	
159	RMS.034.006.2008	Induced Demand	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
160	RMS.034.006.6818	WestConnex- Actual tolled traffic volumes on M4West from ASX releases	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
161	RMS.034.006.8102	FW: WestConnex- Actual tolled traffic volumes on M4West from ASX releases	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
162	RMS.034.006.8105	M4 Volumes.xlsx	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
163	RMS.034.006.8121	FW: WestConnex traffic- C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
164	RMS.034.006.8126	WCX traffic extracts for economics (270313).xlsx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
165	RMS.034.007.3791	RE:	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release

	Document ID	Document	RMS Response	Action
166	RMS.034.007.3888	RE: Figures from SKM model	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
167	RMS.034.007.4629	RE: WestConnex: Induced Demand Assessment	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
168	RMS.034.007.8203	RE:	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
169	RMS.034.008.1297	WestConnex Business Case- Confidential- Large 30Mb file	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
170	RMS.035.023.0754	FW: Latest Updated Estimates.	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
171	RMS.035.166.0543	FW:Re: SMPO Escalation Rate Assumptions	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
172	RMS.035.140.0650	WCX AADT Summary 20 May 2013.xlsx	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release

	Document ID	Document	RMS Response	Action
173	RMS.035.141.0385	FW: NB11553- WestConnex Traffic Analysis: revised reference case traffic projections and economics.	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
174	RMS.035.147.0541	*Confidential: RE: WestConnex :Confidential clarification question	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
175	RMS.035.166.0713	RE: WestConnex- Financing strategies	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
176	RMS.509.002.0020	Briefing for Chief Executive- Engagement of KPMG and Allen & Overy LLP to Carry out WestConnex Business Case Peer review and Assist Sydney Motorways Project Office SMPO- Complete the Business Case in Accordance with the revised Delivery Plan	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
177	RMS.502.004.0036	Off Balance Sheet Financing	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
178	RMS.509.002.0028	WestConnex Peer review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release

**Submission in support of claims for public interest immunity, legal  
professional privilege and commercial-in-confidence**

**Roads and Maritime Services**

**Order for Papers – WestConnex Business Case – 4 March 2014**

Roads and Maritime Services (**RMS**) makes a claim in relation to all documents that fall within the public interest immunity category, commercial-in-confidence category and the legal professional privilege category which are listed in the document entitled "Privileged Index". RMS submits that it is in the public interest that these documents should not be disclosed for the reasons outlined below.

**1 Background**

1.1 The resolution of the Legislative Council under Standing Order 52 requires production of the following documents relating to the Business Case for the WestConnex Project (the **Business Case**):

- (1) *All drafts and the final version of the Business Case and any related materials prepared by Sydney Motorways Project Office, Roads and Maritime Services or consultants engaged by Roads and Maritime Services;*
- (2) *All correspondence, including letters of engagement and emails, meeting diaries, meeting agendas, and meeting minutes created by Sydney Motorways Project Office, Roads and Maritime Services or consultants engaged by Roads and Maritime Services*
- (3) *All advice concerning the development of the Business Case for the WestConnex Project; and*
- (4) *any document which records or refers to the production of documents as a result of this order of the House.*

**2 Public interest immunity**

***Commercial-in-confidence information***

The commercial-in-confidence information that RMS seeks to protect can be characterised in general terms, as follows:

- (1) commercially sensitive information arising from the engagement of contractors or advisers who were involved in the preparation of the Business Case;
- (2) commercially sensitive information contained within the Business Case, including information relating to the development of the Business Case.

2.2 In October 2012, RMS established the Sydney Motorways Project Office (**SMPO**) which comprised a team of individuals headed by a Project Director responsible for the development of the WestConnex Business Case (**Business Case**). To assist with the development of the Business Case, SMPO procured a range of technical, legal and

- (a) *undermine competitive neutrality in connection with any functions of an agency in respect of which it competes with any person or otherwise place an agency at a competitive advantage or disadvantage in any market;*
- (b) *reveal commercial-in-confidence provisions of a government contract;*
- (c) *diminish the competitive commercial value of any information to any person;*
- (d) *prejudice any person's legitimate business, commercial, professional or financial interests;*
- (e) *prejudice the conduct, effectiveness or integrity of any research by revealing its purpose, conduct or results (whether or not commenced and whether or not completed). "*

2.9 Further, s 121(2) of the GIPA Act provides that a "government contract" is not required to provide for the agency to have an immediate right of access to any of the following information:

- (a) information that discloses or would tend to disclose the contractor's financing arrangements, financial modelling, cost structure or profit margins;
- (b) information that the contractor is prohibited from disclosing to the agency by provision made by or under any Act (of this or another State or of the Commonwealth); and
- (c) information that, if disclosed to the agency, could reasonably be expected to place the contractor at substantial commercial disadvantage in relation to the agency, whether at present or in the future.

2.10 RMS notes that Government policy documents also deal with disclosure of information relating to procurement and tendering and provide the following examples:

- (1) *Memorandum No. 2007-01 – Public Disclosure of Information arising from NSW Government Tenders and Contracts* issued by the Department of Premier & Cabinet: This Memorandum provides guidelines to NSW government agencies to determine what, how and when specific information arising from government tenders and contracts with the private sector should be publically disclosed and what information should remain confidential. Schedule 3 of the Memorandum sets out the definition of "commercial-in-confidence" information which is not to be disclosed, although we note that this refers to s 15A(14) of the *Freedom of Information Act 1989* (NSW), which has now been replaced by the GIPA Act. Although the Memorandum has not been updated, we assume that it intends to now refer to the provisions of the GIPA Act which we have outlined above;
- (2) *NSW Government Code of Practice for Procurement 2005*: This document provides that a party calling for tenders and/or awarding a contract shall not disclose tender information received from tenderers that is intellectual property, proprietary, commercial-in-confidence or otherwise confidential.

2.11 RMS therefore considers that, if produced, a number of documents that fall under this Order for Papers will:

- (1) have an adverse impact on the competitive position of the advisers engaged by RMS;

undertakes its own extensive financial and traffic analysis involving modelling and scenario testing. The release of this information has the potential to undermine several aspects WestConnex project. That is, the release of this information may impair the NSW Government's ability to achieve value for money and have a detrimental impact on the project's financial and other outcomes.

- 2.17 Examples of the types of documents for which a commercial-in-confidence claim has been made in this respect include documents that would disclose detailed advice relating to the development and analysis of this financial and traffic modelling information.

***Parliamentary privilege***

- 2.18 Privilege of Parliament, or as frequently termed 'Parliamentary privilege', in the context of the GIPA Act was recently considered in the matter of *Tziolas v. NSW Department of Education and Communities* [2012] NSWADT 69. The documents in question in this matter were 'House Folder Notes' including speech notes and briefings for the Minister. Judicial Member Isenberg of the Administrative Decision Tribunal considered the principles discussed by Austin J in *In the matter of Opel Networks Pty Ltd (in Liq)* (2010) 77 NSWLR 128, which provides at [118]:

*"if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament."*

- 2.19 Member Isenberg also noted that access under the GIPA Act is unconditional, whereas production through court process such as discovery and subpoena may be controlled. On this basis parliamentary privilege for the purposes of the GIPA Act was found to apply to the House Folder Notes.
- 2.20 Accordingly, there is a conclusive presumption against disclosure of the House Folder Notes and those which were prepared for Parliamentary debate or questions on notice, either in final or draft form, as the disclosure of this information would, but for any immunity of the Crown, infringe the privilege of Parliament.
- 2.21 Section 14(1) of the GIPA Act provides it is to be conclusively presumed that there is an overriding public interest against disclosure of any government information described in Schedule 1 of the GIPA Act.
- 2.22 Clause 4 of Schedule 1 of the GIPA Act also relevantly provides:

*"It is to be conclusively presumed that there is an overriding public interest against disclosure of information the public disclosure of which would, but for any immunity of the Crown:*

- (a) ...
- (b) *infringe the privilege of Parliament."*

***Personal information***

- 2.23 A number of documents disclose personal information about private individuals. In the time available, it has not been possible to redact that personal information. Accordingly, a claim that these documents should not be disclosed has been made. Examples of documents





LEGISLATIVE COUNCIL

21 July 2014

OFFICE OF THE CLERK

The Hon Keith Mason AC QC  
PO Box 82  
CROWS NEST NSW 1585

Dear Mr Mason

**The role of the independent legal arbiter**

I am writing further to your appointment by the Acting President of the Legislative Council as independent legal arbiter in relation to a disputed claim of privilege in respect of documents concerning the West Connex Business Case, as set out in my letter to you dated 10 July 2014.

Attached is a copy of the email message sent to all Members of the Legislative Council advising of your appointment and to your preparedness to receive submissions either in relation to the role of the independent legal arbiter, or the claim of privilege in respect of the documents concerning the WestConnex Business Case. Also attached is a copy of my correspondence to you, dated 12 March 2014, which forwarded for your information and attention the ministerial statement of Minister Gay and the response of the Deputy Leader of the Opposition on 6 March 2014, in respect of the role of the independent legal arbiter.

**This submission**

This submission deals solely with the role of the independent legal arbiter. Reference is made to the question of whether the test applied by the independent legal arbiter should be a "one step test" focussing on the technical validity of a claim of privilege, or a "two step test" including a weighing up of the competing public interests in on the one hand confidentiality, for the reasons outlined by the executive government in the claim of privilege, and on the other hand the public interest (perhaps an overriding public interest) in accountability. I trust the main contribution of this submission will be in its detailed analysis of every tabled report from an independent legal arbiter since 1999, and the drawing together of the explicit statements made in those reports about the role, approach or methodology of the arbiter. On the basis of that analysis, and the fact that the House has in effect adopted all but a small handful of those reports (thereby endorsing the approach taken), this submission suggests, while the role of the arbiter will no doubt continue to evolve, any change from the approach adopted by previous arbiters should be minimal, as the approach adopted has facilitated, to the maximum extent possible, the effective exercise by the House of its important scrutiny and legislative functions.

### A one-step or two-step test?

The description of the role of the independent legal arbiter in your report of 25 February and the ministerial statement of 6 March bring to mind two journal articles in which different views on this subject were presented in 2008 and 2009.

In 2008 then Associate Professor (now Professor of Constitutional Law) Anne Twomey published an article entitled "Executive Accountability to the Senate and the NSW Legislative Council."<sup>1</sup> The article was quite critical of the exercise by the Legislative Council of its powers to order the production of state papers and the approach of independent legal arbiters to their role.

Professor Twomey began by stating that the reason Standing Order 52 requires the arbiter be a retired Supreme Court judge or senior counsel "is because the assessment to be made is a legal judgment based upon the rules of privilege developed by the common law and statute."<sup>2</sup> Professor Twomey was critical of the arbiter for not upholding a claim of legal professional privilege which is "technically valid" but where the arbiter views that the documents are not sufficiently sensitive to be withheld from being made public.<sup>3</sup> Having outlined the approach taken by courts in dealing with claims of public interest immunity, Professor Twomey suggested:

It is arguable that the evaluative role of the independent legal arbiter should be confined to deciding the first point – whether the documents fall within a privileged category. There are good grounds for arguing that the independent legal arbiter should not undertake the second balancing task as, like a judge, the arbiter does not have the relevant experience to make such an assessment. This is consistent with the fact that the arbiter is a "legal arbiter with legal qualifications who is engaged to undertake a "legal" evaluation of the validity of the claim of privilege."<sup>4</sup>

In conclusion, Professor Twomey stated that:

The role of the independent legal arbiter should be confined to ensuring that the Government does not "try one on" by attempting to include with the privileged documents other documents that could not reasonably be characterised as falling within an established category of privilege. These documents are all available to members anyway.<sup>5</sup>

In 2009 my predecessor as Clerk, Ms Lynn Lovelock, published an article entitled "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On."<sup>6</sup> In addition to outlining the exercise by the Legislative Council of its power to order the production of state papers in the ten years since the Egan decisions, the

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<sup>1</sup> Anne Twomey, "Executive Accountability to the Senate and the NSW Legislative Council," *Australasian Parliamentary Review*, Autumn 2008, Vol 23(1), pp 257-273.

<sup>2</sup> *Ibid.*, p 261.

<sup>3</sup> *Ibid.*, p 263.

<sup>4</sup> *Ibid.*, p 265.

<sup>5</sup> *Ibid.*, p 270.

<sup>6</sup> Lynn Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On," *Australasian Parliamentary Review*, Spring 2009, Vol 24(2), pp 197-218.

article also explicitly responded to some of the criticisms of the approach of the independent legal arbiter contained in Professor Twomey's article in submissions in support of claims of privilege by The Cabinet Office (now the Department of Premier and Cabinet).

In relation to claims of legal professional privilege, Ms Lovelock took issue with an assertion by The Cabinet Office that "it is not open for the arbiter to disregard any claim of privilege which has been validly made:"

This position is misconceived. It is correct that at law, legal professional privilege is absolute and is not subject to any public interest override. However, as Spigelman CJ observed, that is not the test applied to the relationship between the parliament and the executive. The arbiter is not bound, as for example is a court, to uphold a claim of legal professional privilege that is legally valid, but rather to evaluate whether it is in the public interest for the Parliament to exercise its authority to make public a document subject to a claim of legal professional privilege. As stated by the independent legal arbiter, Sir Laurence Street, in his report on the Lane Cove Tunnel – Further Order: "The arbiter's duty... is to evaluate the competing public interests in on the one hand, recognizing and enforcing the principles upon which legal professional privilege is recognised and upheld in the Courts and, on the other hand, recognising and upholding an over-riding public interest in disclosure of otherwise privileged documents."<sup>7</sup>

In relation to the evaluation of claims of public interest immunity, Ms Lovelock argued against the view that the role of the independent legal arbiter is limited to determining whether or not a document falls within a strict legal definition of privilege:

[T]here is no strict legal definition of public interest immunity that might be applied by the independent legal arbiter... the trial judge is in fact required to engage in a similar balancing act to determine where the public interest lies. Similarly, where public interest immunity arises in parliamentary proceedings, the independent legal arbiter is equally obliged to engage in a balancing act between weighing the significance of the information to the proceedings in Parliament against the public harm from disclosure. The essential question is whether a claim of privilege is validly made, and if so, whether the public interest in disclosure justifies over-riding that claim.<sup>8</sup>

Ms Lovelock further responded to the suggestion that the arbiter should not engage in such a balancing act because the arbiter does not have the relevant experience to make such an assessment, by pointing out that it is precisely

In recognition of the complexity of the issues involved and the need for an arbiter to be highly experienced in determining issues of public interest, [that] the House requires that the independent legal arbiter be a Queen's Counsel, Senior Counsel or a retired Supreme Court judge. [The two most frequently appointed arbiters]... are both

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<sup>7</sup> Ibid., pp 209-210.

<sup>8</sup> Ibid., p 214.

objective and highly experienced in the task of evaluating public interest issues before the courts, and are eminently qualified for the task.<sup>9</sup>

### Observation of Priestley JA in *Egan v Chadwick*

While the judgments in *Egan v Chadwick*<sup>10</sup> refer to the content of orders of the House which include provision for an independent legal arbiter to evaluate disputed claims of privilege, they do not provide any guidance in relation to the appropriate approach of the arbiter. Priestly JA does, however, make a number of interesting references to the way in which the courts weigh competing public interests considering attempts by governments to restrain the publication of confidential documents, quoting from Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39: “Accordingly, the court will determine the government’s claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.”<sup>11</sup> Priestly JA goes on to outline the role of the Legislative Council in dealing with such matters, again in terms of balancing competing public interests:

In exercising its powers in respect of such documents the Council has the same duty to prevent publication beyond itself of documents the disclosure of which will... be inimical to the public interest... When the Executive claims immunity on such grounds, the Council will have the duty, analogous to the duty of the court mentioned by Mason J in the same passage in *Commonwealth v Fairfax*, of balancing the conflicting public interest considerations.<sup>12</sup>

### The approach of previous independent legal arbiters

In the preparation of this submission, 44 out of the 48 reports by independent legal arbiters appointed by the President since 1999 have been analysed. (The four reports not analysed are the four which have not been tabled.) The fact the House has resolved that these 44 reports be tabled (and subsequently in the overwhelming majority of cases has gone on to implement the recommendations in those 44 reports) is indicative that the House has been comfortable with the approach taken by the authors of those reports.

At this stage, the analysis has focussed on the identification of explicit comments by the arbiters about their approach to the task, their role and the methodology adopted. A further analysis will be undertaken in due course in order to identify grounds for claims or privilege that either have or have not been upheld, with a view to publishing “a summary of observations and guidance provided by the independent arbiter concerning claims of privilege over documents in a return to order.”<sup>13</sup>

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<sup>9</sup> Ibid., p 214.

<sup>10</sup> [1999] NSWCA 176, as referenced at 36 NSWLR 563.

<sup>11</sup> Ibid., p 590.

<sup>12</sup> Ibid., p 594.

<sup>13</sup> The publication of such a summary was recommended by the Legislative Council Privileges Committee in its report on *The 2009 Mt Penny return to order*, Report 69, October 2013, p 93.

Attached as an Appendix to this submission are all relevant extracts from the arbiters' reports analysed describing the arbiter's approach, role or methodology.

*Initial statement of the role by Sir Laurence Street: a balancing of interests*

The first disputed claim of privilege following the Court of Appeal decision in *Egan v Chadwick* concerned documents returned in response to an order for papers relating to Delta Electricity. Sir Laurence Street's report articulated the general role / approach / methodology of the independent legal arbiter in the following terms:

It should be emphasised that the question upon which I am required to make an evaluation and report is wholly distinct from the entitlement of the House to require the production of documents and from the entitlement of Members of the Legislative council to inspect them. The questions is whether documents produced to the House are protected from general publication...

The respective interests to be balanced against each other for present purposes are the legitimate interests of Delta Electricity in protecting its commercially sensitive information on the one hand, and, on the other hand, the public interest in making documents available to the public for the purposes of contributing to the common stock of public knowledge and awareness in relation to the information; in a sense, this could be seen as an aspect of transparency and public accountability...

Disclosure will contribute to enabling the political process to function responsibly, and to ensuring that policy making is soundly based on properly informed public debate. It is inimical to the public interest in transparency and accountability in relation to a topic as important as the usage of waters from the State's river systems for this information to be withheld from public scrutiny and evaluation.

After balancing Delta Electricity's legitimate claim for public interest immunity against the public interest in disclosure of these documents, I have reached the conclusion that public interest in disclosure preponderates.<sup>14</sup>

Whilst not every arbiter's report includes an explicit description of the approach / role or methodology of the arbiter, the evaluations undertaken by Sir Laurence Street, the Hon Terrence Cole AO, RFD, QC and MJ Clarke QC, are consistent with the approach outlined in that passage. At the centre of their approach is a consistent focus on the need to balance competing public interests in confidentiality and accountability/transparency in evaluating claims of privilege. However, over time that balancing role and the factors considered in weighing up the competing interests, has been expressed in various ways, with each new statement assisting to explain and develop the role.

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<sup>14</sup> Sir Laurence Street, *Disputed claim of privilege – Papers on Delta Electricity, Report of Independent Legal Arbiter*, 4/10/1999, pp 2-5.

*Technically valid claims insufficient grounds for confidentiality*

In 2001, when dealing with a claim of legal professional privilege framed in global terms of a large number of different documents, Sir Laurence stated that: "Whilst I have recognized the technical validity of such a claim of legal professional privilege, the question becomes one of degree and judgment."<sup>15</sup>

In 2003, Sir Laurence referred to the public interest in disclosure (as one of the two public interests involved in the balancing exercise required) as the "higher interest:"

I am prepared to accept that there is a legitimate interest to claim commercial in confidence privilege... The question, however, is whether that sensitivity and confidentiality is outweighed by a higher interest – in this case the public interest in disclosure. This question involves a balancing of the two interests – the legitimate private interest in confidentiality and the public interest in disclosure. In the present case I am satisfied that the public interest in disclosure outweighs the private interest in confidentiality.<sup>16</sup>

Also in 2003, Sir Laurence made it clear that it was the responsibility of those claiming privilege to not only demonstrate that it is validly based but that they must also justify that the public interest in confidentiality outweighs the public interest in disclosure:

Ordinarily the House gives great weight to validly based claims... The essential question to be addressed in dealing with such claims will always be whether the public interest in disclosure justifies over-riding a claim notwithstanding that it is validly based. As a generality it can be accepted that there is a clear public interest in respecting validly based claims... The ordinary functions of government and the legitimate interests of third parties could be encumbered and harmed if such claims are disregarded or over-ruled. As against this, there can be matters in respect of which the public interest in open government, in transparency and in accountability will call for disclosure of every document that cannot be positively and validly identified as one for which the public interest in disclosure is outweighed by the public interest in immunity. It lies with the party claiming privilege to establish it.<sup>17</sup>

*A two-step test*

Also in 2003, Sir Laurence first explicitly described his approach as involving two steps:

The essential question to be addressed ... will always be whether the public interest in disclosure justifies over-riding such a claim notwithstanding that it is validly based.

<sup>15</sup> Sir Laurence Street, *Disputed claim of privilege – Papers produced by Roads & Traffic Authority of New South Wales, Report of Independent Legal Arbitrator*, 27/4/2001, p 3.

<sup>16</sup> Sir Laurence Street, *Disputed claim of privilege – Development on Crown Land (Woodward Park (Oasis) Development, Report of Independent Legal Arbitrator*, 8/5/2003, p 4.

<sup>17</sup> Sir Laurence Street, *Disputed claim of privilege – Papers on Millennium Trains, Report of Independent Legal Arbitrator*, 22/8/2003, pp 4-5.

The process involves in effect two stages: is the claim validly based? And if so is it outweighed by the public interest in disclosure?<sup>18</sup>

In 2005, Sir Laurence pointed out that the approach adopted by the Parliament in dealing with claims of privilege, whilst similar to that adopted by the Courts, was different:

But there is an important difference between the responsibility of a Court in ruling on such claims and the functions of Parliament. The Court's function is to administer justice and expound the law. Parliament is the guardian of the public interest with age old constitutional authority to call upon the Executive to give an account of its activities.

While Courts apply developed principles in ruling on such claims for privilege, Parliament will evaluate the Claim (usually by its Arbiter) to consider whether it is in the public interest to uphold it. This process involves balancing against each other two heads of public interest that are in tension.<sup>19</sup>

Also in 2005, Sir Laurence articulated the public interest in disclosure in terms of ensuring the relevant project the subject of the return to order could be the subject of "a properly informed public evaluation of the many issues..."<sup>20</sup>

*The Hon Terrence Cole outlines his approach*

In his first report as an independent legal arbiter in 2005, the Hon Terrence Cole adopted a similar approach to Sir Laurence which involved the balancing of competing public interests. Mr Cole formulated the public interest in disclosure in the following terms:

A competing interest is found in the right of the public "to discuss, review and criticise government action" which right is constrained if information relating to the activities of government is not made public.<sup>21</sup>

In 2006, Sir Laurence referred to the public interest in disclosure in terms of the general public's interest in having access to the information contained in the documents in dispute: "The public has a legitimate interest to have access to these documents."<sup>22</sup>

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<sup>18</sup> Sir Laurence Street, *Disputed claim of privilege – Papers on Cross City Motorway Consortium*, Report of Independent Legal Arbiter, 4/9/2003, p 2.

<sup>19</sup> Sir Laurence Street, *Disputed claim of privilege – Papers on Cross City Motorway Consortium*, 2<sup>nd</sup> Report of Independent Legal Arbiter, 20/10/2005, p 2.

<sup>20</sup> Sir Laurence Street, *Disputed claim of privilege – Papers on Cross City Motorway Consortium*, 3<sup>rd</sup> Report of Independent Legal Arbiter, 15/11/2005, p 2.

<sup>21</sup> The Hon Terrence Cole AC, RFD, QC, *Disputed claim of privilege – Circular Quay Pylons*, Report of Independent Legal Arbiter, 17/8/2005, p 5.

<sup>22</sup> Sir Laurence Street, *Disputed claim of privilege – Luna Park Leases and Agreements*, Report of Independent Legal Arbiter, 19/6/2006, p 4.

*Sir Laurence Street responds to criticism of his approach*

Also in 2006, Sir Laurence explicitly responded to and rejected an assertion in a claim of privilege from The Cabinet Office that he was wrong to adopt a two-step test in evaluating claims of privilege:

The Cabinet [Office] submission asserts that "it is not open for the arbiter to disregard any claim of privilege that has been made." If this means no more than that the arbiter must evaluate whether a technically valid claim of privilege is out-weighed by a higher public interest in disclosure, then it is plainly correct. But if, as it appears that it may, means that the arbiter is bound, as for example is a Court, to uphold a claim of privilege that is technically valid, then it is plainly wrong. The arbiter's duty... is to evaluate the competing public interests in, on the one hand, recognizing and enforcing the principles upon which legal professional privilege is recognized and upheld in the Courts, and, on the other hand, recognizing and upholding an over-riding public interest in disclosure of the otherwise privileged documents.<sup>23</sup>

*M J Clarke QC outlines his approach*

A 2007 report by M J Clarke QC makes clear that he too saw the role of the arbiter as requiring a clear balancing of competing public interests:

Great respect should undoubtedly be accorded to the endorsement of the commercial-in-confidence claim upon the report. Notwithstanding, in the context of the material within the folder that endorsement is not conclusive and it is necessary to carry out the balancing exercise of which I have spoken. The question then is whether the New South Wales Treasury, as the party claiming privilege, has established that the public interest in maintaining the privacy of the documents outweighs the countervailing public interest which, of course, involves considerations of open government, transparency and accountability.<sup>24</sup>

*Privilege claims should not be made simply because they can be made*

In 2008, Sir Laurence was critical of the practice of some government agencies in making claims of privilege simply because they could do so (on the basis that technically valid claims could be made in relation to sets of documents) without there being any real need to do so. He placed this criticism in the context of broader comments about the over-riding importance of accountability and transparency, particularly in respect of projects or issues where there were concerns about possible incompetence or irregularity: "Secrecy inevitably gives rise to distrust." He also stated that there will be instances where "superficially valid" claims of privilege must not be allowed to prevent "full Parliamentary consideration and discussion of documents."<sup>25</sup>

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<sup>23</sup> Sir Laurence Street, *Disputed claim of privilege – Lane Cove Tunnel Further Order, Report of Independent Legal Arbiter*, 22/5/2006, p 4.

<sup>24</sup> M J Clarke QC, *Disputed claim of privilege – State Finances, Report of Independent Legal Arbiter*, 16/1/2007, p 3.

<sup>25</sup> Sir Laurence Street, *Disputed claim of privilege – Iron Cove Bridge, Report of Independent Legal Arbiter*, 18/3/2008.



*Disclosure facilitates both public debate and parliamentary scrutiny*

In two 2009 reports, Sir Laurence again articulated the public interest in disclosure in terms of ensuring the relevant documents were available to properly inform public debate and discussion of the issue at hand,<sup>26</sup> and in allowing parliamentary scrutiny and debate:

The claim for privilege expressed in general terms must necessarily be evaluated in the context of the level of contemporary importance attaching to either the protection or the disclosure of the contents of the documents. This involves considerations travelling beyond the mere contents of the documents; it requires evaluation of the legitimacy of Parliament having access to the documents and subjecting them to Parliamentary scrutiny and debate.<sup>27</sup>

This position was further developed and articulated by Sir Laurence in a 2010 report, when he referred to the public interest in the particular project the subject of the particular disputed documents being able to be analysed and considered both in the public domain and publicly in Parliament:

There is a powerful public interest in this material being available for analysis and consideration in the public domain on any future occasion when an infrastructure project having any similarity to the CBD Metro Rail is being evaluated. I repeat, this material, whilst sensitive if the project were still a work-in-progress, has frozen in history, albeit very recent, and should not be withheld from responsible public appraisal particularly from public consideration in Parliament.<sup>28</sup>

The thread linking disclosure to informed public debate and consideration in Parliament was highlighted in the most recent report from Sir Laurence in 2012, in which he referred to “the public interest in the documents being made available to the public through the parliamentary process” outweighing “the arguments in favour of their being withheld from scrutiny and evaluation in the ordinary parliamentary process.”<sup>29</sup>

Finally, in a 2012 report, the Hon Terrence Cole AO, RFD, QC, having restated the balancing exercise performed by the arbiter in assessing the competing public interests, stated that the public interest in disclosure would generally prevail:

Where these two interests conflict, it will be a rare circumstance where the public interest in performing the constitutional role of government does not prevail. That is because of the pre-eminence of the constitutional parliamentary function of the Legislative Council, and its members, of reviewing the arrangements made or proposed by the executive government.<sup>30</sup>

<sup>26</sup> Sir Laurence Street, *Disputed claim of privilege – Tillegra Dam, Report of Independent Legal Arbitrator*, 20/1/2009, p 4.

<sup>27</sup> Sir Laurence Street, *Disputed claim of privilege – 2009-2010 Budget, Report of Independent Legal Arbitrator*, 11/12/2009, p 4.

<sup>28</sup> Sir Laurence Street, *Disputed claim of privilege – CBD Metro Rail, Report of Independent Legal Arbitrator*, 7/5/2010, p 4.2

<sup>29</sup> Sir Laurence Street, *Disputed claim of privilege – Work Cover Prosecutions, Determination of Arbitrator*, 17/4/2012 p 1.

<sup>30</sup> The Hon Terrence Cole AO, RFD, QC, *Disputed Claim for Privilege: Nimmie-Caira System Enhanced Environmental Water Delivery Project, Report of Independent Legal Arbitrator*, 20/11/2012, p 5.

### Grounds for “public interest immunity claims” accepted by the Australian Senate

Earlier this year the Senate Legal and Constitutional affairs References Committee conducted an inquiry into a claim of public interest immunity advanced by a Minister, arising from a number of orders for the production of documents. The Committee sought the advice of the Clerk of the Senate, Dr Rosemary Laing. Dr Laing’s correspondence with the Committee, which has been published, includes as attachments correspondence from her predecessor, Mr Harry Evans, in relation public interest immunity claims, dated 24 March 2009, and another document authored by Mr Evans, entitled “The Senate: Grounds for Public Interest Immunity Claims,” dated 19 May 2005.<sup>31</sup>

Drawing upon Senate precedents, Mr Evans identified eight grounds for public interest immunity claims that have achieved some measure of acceptance by the Senate in the past:

- Prejudice to legal proceedings
- Prejudice to law enforcement investigations
- Damage to commercial interests
- Unreasonable invasion of privacy
- Disclosure of executive council or cabinet deliberations
- Prejudice to national security or defence
- Prejudice to Australia’s international relations
- Prejudice to relations between the Commonwealth and the states

Mr Evans then went on to list six grounds that have not been accepted by the Senate in the past. He further added:

The grounds for public interest immunity claims which have gained some acceptability in the Senate and comparable legislatures are also those to which the courts have given weight in determining claims for public interest immunity in legal proceedings. Conversely, a claim which would not be entertained in a court should not carry much weight in the legislature.<sup>32</sup>

In his correspondence, dated 24 March 2009, Mr Evans listed the same eight “recognised” grounds for public interest immunity claims, but emphasises that “whether these grounds are justified in particular cases very much depends on the circumstances of those cases. Also, the

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<sup>31</sup> Correspondence dated 7/1/2014, accessed 20/7/2014 at 10.18 pm, from [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Public\\_Interest\\_Immunity/Additional\\_Documents](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Public_Interest_Immunity/Additional_Documents).

It should be born in mind, however, that public interest immunity claims in the Senate have tended to be made concerning production of documents, not just in relation to publication of documents as in the NSW Legislative Council under SO 52.

<sup>32</sup> Harry Evans, Clerk of the Australian Senate, “The Senate: Grounds for public interest immunity claims”, 5 March 2005, attachment to Ibid., p 6.

public interest in the disclosure of particular information may outweigh the apprehended harm to the public interest from the disclosure of the information.”<sup>33</sup>

Mr Evans also makes an interesting point about terminology, arguing the descriptor “public interest immunity claims” rather than “claims of privilege” more accurately reflects the process:

Claims that information should be protected from disclosure because of apprehended harm to the public interest from disclosure are known as public interest immunity claims. They were primarily called claims of privilege, but the terminology was changed to focus on the principle that harm to the public interest is the proper basis of all such claims. This change of terminology was first adopted in the courts of law in relation to claims to withhold information from the courts in civil or criminal cases, and was then also adopted in the parliamentary sphere.

The reference to refusals to provide information as claims of public interest immunity recognises the principles that it is for the house concerned in parliamentary cases, and the courts in judicial proceedings, to determine whether a refusal of information is justified and sustainable.<sup>34</sup>

Given that public interest immunity claims are often made in order to purportedly justify non-production to the Senate or its Committees rather simply as the basis for confidentiality upon production to the NSW Legislative Council, Senate precedents in this area must be treated with some caution. It will be interesting to compare the grounds for acceptable claims identified by Mr Evans with any conclusions or guidance that can be ascertained from arbiters’ reports in NSW. Drawing upon Mr Evans document, however, perhaps the use of the words “claim of privilege” in SO52 is misleading, and the use of a phrase like “claim for confidentiality” and “reasons for claims of confidentiality” might be more appropriate in future?

## Conclusion

To date the Legislative Council has resolved that 44 out of 48 reports by previous arbiters be tabled and has, in effect, adopted those reports by implementing all but a very small number of the recommendations made in those reports. The House thus endorsed the approach taken by the authors of those reports. Therefore, while it is inevitable that each arbiter will emphasise different aspects of the role of the independent legal arbiter, and will explain the role in their own unique way, the role should continue to be undertaken in a manner consistent with the approach of previous arbiters.

An analysis of the explicit comments of previous arbiters about their role, approach or methodology illustrates the importance they have attached to not only evaluating the technical validity of claims of privilege but also evaluating whether technically valid claims are accompanied by sufficient justification to outweigh the competing (and perhaps over-riding)

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<sup>33</sup> Ibid., p 3.

<sup>34</sup> Ibid., p 2.

public interest in disclosure. Over time, the public interest in disclosure has come to be expressed in terms of an interest in facilitating both informed public debate (through public access to documents) and effective scrutiny of the executive government in Parliament (through removing restrictions which would inhibit the information contained in the documents from being the subject of full debate during parliamentary proceedings).

Members coming to inspect documents returned to an order for papers under SO52 but which are the subject of a claim of privilege often ask me what use they can make of those documents having inspected them. The answer is that by reading the documents they can inform themselves in relation to the contents and that they can discuss the contents only with fellow Members of the Legislative Council. Absent a successful challenge to the claim of privilege, there is virtually nothing more that can be done with the documents, by the Member in the House or in Committees. While ever documents returned to order remain subject of claims of privilege, Members of the Legislative Council, and the House and its Committees collectively, are constrained from fully exercising their functions of scrutinising the executive government and legislating in respect of the matters contained in those documents.

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

Yours sincerely



David Blunt

Clerk of the Parliaments

APPENDIX TO SUBMISSION BY THE CLERK OF THE PARLIAMENTS

ALL EXTRACTS FROM TABLED INDEPENDENT ARBITER REPORTS

1999 - 2012

EXPLICITLY ADDRESSING THE ROLE / APPROACH / METHODOLOGY OF THE  
INDEPENDENT LEGAL ARBITER

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

PAPERS ON DELTA ELECTRICITY

REPORT OF INDEPENDENT LEGAL ARBITER

14 OCTOBER 1999

...

It should be emphasised that the question upon which I am required to make an evaluation and report is wholly distinct from the entitlement of the House to require the production of documents and from the entitlement of Members of the Legislative Council to inspect them. The question is whether documents produced to the House are protected from general publication...

...

The respective interests to be balanced against each other for present purposes are the legitimate interests of Delta Electricity in protecting its commercially sensitive information on the one hand, and, on the other hand, the public interest in making the documents available to the public for the purpose of contributing to the common stock of public knowledge and awareness in relation to the information; in a sense, this could be seen as an aspect of transparency and public accountability...

...

Disclosure will contribute to enabling the political process to function responsibly, and to ensuring that policy making is soundly based on properly informed public debate. It is inimical to the public interest in transparency and accountability in relation to a topic as important as the usage of waters from the State's river systems for this information to be withheld from public scrutiny and evaluation.

After balancing Delta Electricity's legitimate claim for public interest immunity against the public interest in disclosure of these documents, have reached the conclusion that public interest in disclosure preponderates.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

PAPERS ON M2 MOTORWAY

REPORT OF INDEPENDENT LEGAL ARBITER

7 DECEMBER 1999

...

Claims for privilege from disclosure of commercially confidential matters are at times made in the course of litigation. When ruling on such claims Courts must balance the respective interests in play, that is to say the due administration of justice on the one hand, and the protection of a person's commercially sensitive material on the other. A similar balancing process is involved in resolving the present disputes.

The respective interests to be balanced against each other for present purposes are the legitimate interests of RTA in protecting the commercially sensitive information in its possession on the one hand, and, on the other hand, the public interest in making the documents available to the public for the purpose of contributing to the common stock of public knowledge and awareness in relation to the information; in a sense, this could be seen as an aspect of transparency and public accountability in relation to the activities of the RTA to which the documents relate.

...

Having recognised, as I do, that the contents of the 3 yellow folders does attract commercial confidentiality privilege, I turn to consider whether there is any countervailing public interest in this material being made available for public scrutiny and consideration.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

PAPERS PRODUCED BY ROADS & TRAFFIC AUTHORITY OF NEW SOUTH WALES

REPORT OF INDEPENDENT LEGAL ARBITER

27 APRIL 2001

...

... The claim for legal professional privilege in respect of these documents is of a global nature, that is to say that they represent a collation of documents prepared for the purpose of obtaining legal advice... Whilst I have recognized the technical validity of such claim of legal professional privilege, the question becomes one of degree and judgment.

...



SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE- CONDITIONAL AGREEMENT

TO LEASE THE QUARANTINE STATION

REPORT OF INDEPENDENT LEGAL ARBITER

31 JULY 2001

...

It can be stated succinctly that the claim for commercial in confidence immunity requires the balancing of the protection of private rights to have the confidentiality of commercial in confidence material respected and the public interest in disclosure of the contents of the material. The claim for public interest immunity requires the balancing of the protection of the public interest in respecting the confidentiality of sensitive material relating to the ordinary business of Government and the public interest in the disclosure of the material. For present purposes both these claims can conveniently be addressed together by examining the existence and extent of the public interest in disclosure.

...

I have evaluated the countervailing claims of privilege and the public interest in disclosure and the conclusion I have reached is that the public interest in disclosure should prevail.

...

SIR LAURENCE STREET

REPORT OF INDEPENDENT LEGAL ARBITER

DISPUTED CLAIM OF PRIVILEGE

APPOINTMENT OF MR PETER SCOLARI AS ADMINISTRATOR OF THE  
WELLINGTON LOCAL ABORIGINAL LANCE COUNCIL

REPORT OF INDEPENDENT LEGAL ARBITER

24 OCTOBER 2001

...

It can be stated succinctly that the claim for public interest immunity requires the balancing of the public interest in protecting the right or necessity to have the confidentiality of confidential material respected and the public interest in disclosure of the material.

...

A claim for public interest immunity is ordinarily based on the protection of the public interest in respecting the confidentiality of sensitive material relating to the ordinary business of Government or otherwise justifying its non-disclosure.

Its validity must be assessed by balancing the public interest in nondisclosure against the public interest in transparency and public accountability in relation to the discharge by Departments and Ministers of their public responsibilities.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

DEVELOPMENT ON CROWN LAND (WOODWARD PARK (OASIS)  
DEVELOPMENT)

REPORT OF INDEPENDENT LEGAL ARBITER

8 MAY 2003

...

I am prepared to accept that there is a legitimate interest to claim commercial in confidence privilege... The question, however, is whether that sensitivity and confidentiality is outweighed by a higher interest- in this case the public interest in disclosure. This question involves a balancing of the two interests- the legitimate private interest in confidentiality and the public interest in disclosure.

In the present case I am satisfied that the public interest in disclosure outweighs the private interest in confidentiality.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

PAPERS ON MILLENNIUM TRAINS

REPORT OF INDEPENDENT LEGAL ARBITER

22 AUGUST 2003

...

Ordinarily the House gives great weight to validly based claims of Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege and such claims, where validity based, will frequently be allowed by the House although none is legally binding on the House in absolute terms. The essential question to be addressed in dealing with such claims will always be whether the public interest in disclosure justifies over-riding such a claim notwithstanding that it is validly based. As a generality it can be accepted that there is a clear public interest in respecting validly based claims for Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege. The ordinary functions of government and the legitimate interests of third parties could be encumbered and harmed if such claims are disregarded or over-ruled. As against this, there can be matters in respect of which the public interest in open government, in transparency and in accountability will call for disclosure of every document that cannot be positively and validly identified as one for which the public interest in disclosure is outweighed by the public interest in immunity. It lies with the party claiming privilege to establish it.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE- PAPERS ON

CROSS CITY MOTORWAY CONSORTIUM

REPORT OF INDEPENDENT LEGAL ARBITER

17 SEPTEMBER 2003

...

The essential question to be addressed by the House, and by me as its delegate, will always be whether the public interest in disclosure justifies over-riding such a claim notwithstanding that it is validly based. The process involves in effect two stages: is the claim validly based? And if so is it outweighed by the public interest in disclosure?

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE - PAPERS ON

CROSS CITY MOTORWAY CONSORTIUM

2ND REPORT OF INDEPENDENT LEGAL ARBITER

20 OCTOBER 2005

...

Courts have developed a principled approach in deciding such claims of privilege. Parliament has as a matter of convention adopted a somewhat similar approach, particularly in relation to LPP. But there is an important difference between the responsibility of a Court in ruling on such claims and the function of Parliament. The Court's function is to administer justice and expound the law. Parliament is the guardian of the public interest with age old constitutional authority to call upon the Executive to give an account of its activities.

While Courts apply developed principles in ruling on claims for privilege, Parliament will evaluate the claim (usually by its Arbitrator) to consider whether it is in the public interest to uphold it. This process involves balancing against each other two heads of public interest that are in tension. On the one hand, there is a public interest in not invading lawyer/client relationships and a public interest in protecting what might be called commercially sensitive material. And, on the other hand, there is a contrary public interest in recognizing the public's right to know and the need for transparency and accountability on the part of the Executive.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

PAPERS ON M5 EAST, LANE COVE AND CROSS CITY TUNNEL VENTILATION

REPORT OF INDEPENDENT LEGAL ARBITER

5 NOVEMBER 2003

...

The general principles relating to the determination of claims for Legal Professional Privilege (LPP) and Public Interest Immunity (PII) require the balancing of the public interest in disclosure against the public interest in upholding these widely recognized grounds for privilege.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

PAPERS ON M5 EAST, LANE COVE AND CROSS CITY TUNNEL VENTILATION

SECOND REPORT OF INDEPENDENT LEGAL ARBITER

28 FEBRUARY 2006

...

I need not discuss again the basis upon which I must make my determination. In essence it involves the standard issue of balancing the public interest in disclosure against the public interest in allowing privilege from disclosure.

...



SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

DOCUMENTS ON AXIOM EDUCATION CONSORTIUM

REPORT OF INDEPENDENT LEGAL ARBITER

1 SEPTEMBER 2004

...

The Department's claim of privilege put forward in its submission quotes a number of confidentiality provisions in the Concession Deed and quite properly points out its contractual duty to Axiom to protect the commercial in confidence nature of the material. That contractual duty of the Department must, of course, yield to the public interest if disclosure outweighs the interest in upholding the claim.

...

After balancing the various public interests in play I have come to the conclusion that the public interest in the transparency and the related departmental accountability of these three important schedules should prevail.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE DOCUMENTS

ON ROAD TUNNEL FILTRATION

REPORT OF INDEPENDENT LEGAL ARBITER

28 FEBRUARY 2006

...

I need not discuss again the basis upon which I must make my determination. In essence it involves the standard issue of balancing the public interest in disclosure against the public interest in allowing privilege from disclosure. In a Report I wrote dated 15 November 2005 and headed - "Disputed Claim of Privilege- Papers on Cross City Motorway Consortium 3rd Report of Independent Legal Arbitrator", I stated my views on the current weighty considerations in favour of disclosure of the documents discussed in the Report of 15 November 2005. Those views reflect what I describe as the significant swing of the pendulum in recent months in favour of disclosure of what can be generically described as tunnel documentation.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

AUDIT OF RESTRICTED RAIL LINES

REPORT OF INDEPENDENT LEGAL ARBITER

16 JUNE 2005

...

It should be emphasized that the disputes upon which I am required to make an evaluation and report are wholly distinct from the entitlement of the House to require the production of documents and from the entitlement of the Members of the Legislative Council to inspect them.

Moreover confidentiality agreements entered into by public administrative authorities, no doubt for good reason, do not of themselves fetter Parliament in relation to disclosure of material if it is judged by Parliament to be in the public interest to do so. Such agreements are not to be lightly disregarded, but in the end the decision whether or not to release them is to be made by balancing the relevant public interest considerations.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE DOCUMENTS

ON TUNNEL AIR QUALITY

REPORT OF INDEPENDENT LEGAL ARBITER

28 FEBRUARY 2006

...

Whilst the documents fall within principles applied by Courts when dealing with litigation, they do not bind Parliament in balancing the comparative claims of public interest in immunity and public interest in disclosure. I have been through all of these documents and can find nothing in them calling for them being withheld from public scrutiny.

...

THE HONOURABLE TRH COLE AO, RFD, QC.

DISPUTED CLAIM FOR PRIVILEGE: CIRCULAR QUAY PYLONS.

REPORT OF INDEPENDENT LEGAL ARBITER

15 SEPTEMBER 2005

...

The matters raised by RTA in support of the claim for public interest immunity raise serious considerations.

...

These are weighty considerations to be taken into account in the exercise of judgment regarding the claim for privilege.

A competing public interest is found in the right of the public "to discuss, review and criticise government action" which right is restrained if information relating to the activities of government is not made public.

...

SIR LAURENCE STREET

PRIVILEGE DOCUMENTS - LANE COVE TUNNEL

REPORT OF INDEPENDENT LEGAL ARBITER

28 FEBRUARY 2006

...

After balancing the public interest in disclosure against the public interest in respecting the confidentiality of some or all of the contents of these three documents my conclusion is that:

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE- PAPERS ON

CROSS CITY MOTORWAY CONSORTIUM

3RD REPORT OF INDEPENDENT LEGAL ARBITER

15 NOVEMBER 2005

...

I do not regard any of these elements, either singly or together, as outweighing the clear public interest in the material being disclosed. Every aspect of the financial arrangements relating to this project is relevant to a properly informed public evaluation of the many issues relating to this tunnel. The balance of the public interest in disclosure and transparency over-rides the grounds advanced in support of the claim of privilege.

...

THE HONOURABLE TRH COLE AO, RFD, QC.

DISPUTED CLAIM FOR PRIVILEGE: DESALINATION PLANT.

REPORT OF INDEPENDENT LEGAL ARBITER.

22 DECEMBER 2005

...

"The determination of a claim of public interest immunity requires the balancing of... conflicting public interests. The immunity is not absolute."

...

Claims for privilege based on "commercial-in-confidence" require a balancing exercise of the public interest of protecting agreements entered into or documents provided on that basis with all competing public interests...

...

The public interest in permitting the Legislative Council to perform that task outweighs the public interest in maintaining confidentiality claimed by a proponent of alternative supply mechanisms.

...

The public interest in those matters is outweighed by the public interest in the Legislative Council being in a position properly to perform its Constitutional duties of review of the Executive arm of Government.

...



SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

LUNA PARK LEASES AND AGREEMENTS

REPORT OF INDEPENDENT LEGAL ARBITER

19 JUNE 2006

...

... It is not open to an administrative public authority to shield documents from Parliamentary disclosure merely by inserting a commercial in confidence clause in them. In every such case the House will assess for itself (or by its delegate an Independent Arbiter) whether it is in the public interest that the documents be disclosed.

...

The conclusion that I have reached in regard to all seven of these documents is that the public interest in the exposure of their contents outweighs the public interest in upholding public interest immunity. The public has a legitimate interest to have access to these documents... The public interest in the disclosure of all seven documents as part of the process of public accountability is overwhelming. They contain nothing of such sensitivity as to counterbalance that public interest.

...

M J CLARKE Q.C.

DISPUTED CLAIM OF PRIVILEGE

AUDIT OF EXPENDITURE AND ASSETS

26 JUNE 2006

...

... This latter immunity requires a balancing between the protection of private rights to have the confidentiality of commercial-in-confidence material respected and the public interest in disclosure of the contents of the material. On the other hand public interest immunity requires the balancing of the protection of the public interest in respecting the confidentiality of sensitive material relating to the ordinary business of government and the public interest in the disclosure of the material.

...

... The question then is whether Sydney Ferries Corporation, as the party claiming privilege, has established that the public interest in maintaining the privacy of the report outweighs the countervailing public interest which brings into play considerations of open government, transparency and accountability.

...

SIR LAURENCE STREET

PRIVILEGE DOCUMENTS - LANE COVE TUNNEL

FURTHER ORDER

REPORT OF INDEPENDENT LEGAL ARBITER

23 MAY 2006

...

The Cabinet submission asserts that "it is not open for the arbiter to disregard any claim of privilege that has been made". If this means no more than that the arbiter must evaluate whether a technically valid claim of privilege is out-weighted by a higher public interest in disclosure, then it is plainly correct. But if, as it appears that it may, it means that the arbiter is bound, as for example is a Court, to uphold a claim of privilege that is technically valid, then it is plainly wrong. The arbiter's duty, as the delegate of Parliament, is to evaluate the competing public interests in, on the one hand, recognizing and enforcing the principles upon which legal professional privilege is recognized and upheld in the Courts, and, on the other hand, recognizing and upholding an over-riding public interest in disclosure of the otherwise privileged documents.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

SALE OF POWERCOAL ASSETS

REPORT OF INDEPENDENT LEGAL ARBITER

27 JUNE 2006

...

The public importance and sensitivity of the NSW coal market in the interests of both the State and the national economy are well recognized. Delta's formulation quoted in paragraph 3 above must be accorded due weight in evaluating the question of public interest in upholding or denying the claim of privilege. The present determination is to be made upon balancing those public interests.

...

M J CLARKE Q.C.

DISPUTED CLAIM OF PRIVILEGE

PAPERS ON DIOXIN LEVELS IN

SYDNEY HARBOUR

REPORT OF INDEPENDENT ARBITER

20 JUNE 2006

...

At the outset it should be emphasised that the question on which I am required to make an evaluation is whether the documents produced to the House are protected either in whole or in part from general publication on the grounds that they are commercially confidential or, rightly, the subject of Public Interest immunity.

... In the case of the latter head of privilege the balancing is between the confidentiality of sensitive material relating to the ordinary business of government and the public interest in the disclosure of that material.

...

I doubt whether there is any significant public interest in the details of the costs to be incurred in responding to the problem that has been identified. Accordingly I would deny privilege to the whole of the review but uphold it in respect of the references to the confidential quotation and the figures in it and the figures derived from it.

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

SNOWY HYDRO LIMITED

REPORT OF INDEPENDENT LEGAL ARBITER

16 AUGUST 2006

...

The balancing of the respective considerations of public interest requires an appraisal of the grounds on which immunity was claimed and the submissions advanced...

...

The five disputed documents in this instance fall into two categories. Items 147, 148, 151 and 186 comprise draft due diligence documentation relating to the proposed sale of shares in Snowy Hydro Limited... I do not regard the public interest in disclosure as preponderating. The remaining document- Item 185 - is described in the Department's Schedule as "First Deed of Variation to Snowy Water Licence"... I regard it as having sufficient public interest to be disclosed...

Immunity is claimed for six documents... I have considered each and I do not regard public interest in disclosure as carrying them outside the category of PPI; privilege is accordingly allowed.

The remaining document is number 12... there is no occasion to make public this final draft. Privilege is accordingly allowed...

#### Documents produced by Treasury

This comprises a forbidding volume of documents- a large number of lever arch files in 22 boxes. It is quite impracticable to discuss these individually but Treasury.

...

The documents as a whole can fairly be described as a collation of the commercial/legal/departmental material relating to the preparation for sale of Snowy Hydro Limited... To throw them indiscriminately open for inspection would serve no useful public interest and could give rise to real prejudice to the orderly marketing of the shares in Snowy Hydro Limited... and the conclusion I have reached is that the claims are valid and should be allowed.

...

M J CLARKE QC

DISPUTED CLAIM OF PRIVILEGE

STATE FINANCES

REPORT OF INDEPENDENT LEGAL ARBITER

18 JANUARY 2007

...

The challenge to the claims of privilege, as they have been expressed, bring into play a balancing between the protection of private rights to have the confidentiality of commercial-in-confidence material respected and the public interest in the disclosure of the contents of that material.

...Folder 1 is, for instance, endorsed 'commercial-in-confidence' and the nature of the information in both folders can well be understood to be commercially confidential. Great respect should undoubtedly be accorded to the endorsement of the commercial-in-confidence claim upon the report. Notwithstanding, in the context of the material within the folder that endorsement is not conclusive and it is necessary to carry out the balancing exercise of which I have spoken. The question then is whether the New South Wales Treasury, as the party claiming privilege, has established that the public interest in maintaining the privacy of the documents outweighs the countervailing public interest which, of course, involves considerations of open government, transparency and accountability.

...

SIR LAURENCE STREET

DISPUTED CLAIMS OF PRIVILEGE

GRETLEY MINE DISASTER

REPORT OF INDEPENDENT LEGAL ARBITER

9 MAY 2007

...

The disputed document comprises a file containing 25 documents comprising legal advice and similar material relating to the contemplated prosecution of the Department of Mineral Recourses. I have read all of these documents and am satisfied that they fall squarely within the field of LPP. I have considered whether there is in this case (as there is for example in relation to RTA documents dealing with the Cross City Tunnel) any countervailing public interest in the disclosure of any of the documents in the file of sufficient weight to override the LPP. There is no such document falling within an overriding public interest justifying disclosure.

...



SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

IRON COVE BRIDGE

REPORT OF INDEPENDENT LEGAL ARBITER

18 MARCH 2008

...

The point taken by the Hon. Lee Rhiannon MLC, is undoubtedly valid. Secrecy inevitably gives rise to distrust. It is often seen as the prudent and wise course to make available all departmental material which might strictly fall within a legitimate category of privilege. When dealing with matters of this nature I am frequently troubled by the impression that, in segregating documents with reference to a possible claim of privilege, the question addressed by the responsible public officer is "Can privilege be claimed for this document?" If the answer is "Yes", then the claim is made.

I believe it would promote public confidence in the discharge by public authorities of their responsibilities if, where this question is answered "Yes", a further question were posed "Do we need to make the claim of privilege?" in a great many matters ranging across a variety of topics that have been referred to me as the Arbitrator, substantial numbers of documents justify the answer "Yes" to the first of the two questions I have posed and are made the subject of a claim of privilege without the second question being addressed. I do not by any means intend to convey a universal criticism as in a great many cases it is possible to perceive the need for the claim of privilege. But in an appreciable number of other instances there is no apparent need – for example inconsequential emails passing between persons in the public sector. Privilege ought not to be claimed for them simply on the basis of technical grounds for privilege.

As the Arbitrator I invariably give significant weight to the circumstance that a public authority has formally made the claim for privilege. But on many occasions I find it hard to recognize the underlying need for such a claim. This often makes it difficult for me to discharge my responsibility of evaluating the competing public interest in upholding a claim for privilege as against denying such a claim on the ground of the important public interest in accountability and transparency.

...

As regards the whole of the remainder of the documents (that is to say, other than those I have mentioned specifically) there is a sufficient colour of LPP or PII privilege to justify the claims of privilege that have been made for them. These claims have been put forward by a responsible public authority and I do not see, on the face of the documents, a sufficient public interest in disclosure to override the legitimate claims of privilege made for them.

...

I have not lost sight of the prospect that there could be occasions where the regularity or integrity of negotiation-stage activities could call for a legitimate claim for PII or LPP to be overruled notwithstanding a superficial validity. There might at times be a shadowy dividing line between protecting legitimate negotiation stage documents and concealing questionable considerations that may lurk under the surface of this material. Questions of integrity are plainly relevant in that regard and somewhat less plainly questions of incompetence or irregularity may also lurk under the surface. Such last mentioned situations will necessitate deeper consideration than merely taking the document and the claim of privilege at face value.

I have thought it desirable to place on record my recognition of such considerations so as to dispel any suggestion that claims of privilege, superficially valid, may be allowed to stand between full Parliamentary consideration and discussion of documents capable of masking or concealing matters of serious concern. Having noted that, however, I should add that I do not see in relation to the present field within which these claims of privilege are put forward any element to excite concern regarding such deeper consideration.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE- DOCUMENT

REGARDING PROPOSED TILLEGRA DAM

REPORT OF INDEPENDENT LEGAL ARBITER

20 JANUARY 2009

...

... the ultimate question for decision is whether public interest in access to the material or public interest in protection of commercial confidence should at this point in time prevail.

...

Such information as is disclosed in relation to Tillegra Dam project in this document, read in the context of what is already on the public stage in this regard, does not justify withholding the document as part of the general context for properly informed public discussion and decision making on the project.

...

The document should be made available as containing material relevant to properly informed public debate about the need for Tillegra Dam.

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

INNER WEST BUSWAYS PROJECT

REPORT OF INDEPENDENT LEGAL ARBITER

23 JULY 2009

...

The evaluation represents a balancing of the public interest in upholding general grounds of immunity on the one hand, and, on the other hand, upholding Parliament's authority to deny privilege where considerations of public interest affecting the particular document in hand outweigh what would otherwise be a valid and enforceable claim for privilege.

...

SIR LAURENCE STREET

DISPUTED CLAIMS OF PRIVILEGE

2009-2010 BUDGET

REPORT OF INDEPENDENT LEGAL ARBITER

11 DECEMBER 2009

...

The claim for privilege expressed in general terms must necessarily be evaluated in the context of the level of contemporary importance attaching to either the protection or the disclosure of the contents of the documents. This involves considerations travelling beyond the mere contents of the documents; it requires evaluation of the legitimacy of Parliament having access to the documents and subjecting them to Parliamentary scrutiny and debate.

...

There are however, due conventional expectations of allowing executive privilege without which the executive functions of Government could be unduly inhibited. Parliament conventionally upholds claims to executive privilege (such as for example legal professional privilege, commercial-in-confidence privilege and so on), unless such claims are outweighed by considerations of transparency and accountability so as to lead to Parliament, in the context of contemporary public interest, exercising its undoubted constitutional authority over the Executive by requiring disclosure of the material in question. As the duly appointed Independent Legal Arbitrer in respect of the current claim of privilege I am required to evaluate the claim and report my Determination to Parliament... The ultimate authority to decide whether my Determination will be accepted by Parliament rests with Parliament itself.

I note by way of example that in the recent efflorescence of public concern over material affecting the construction of the Cross City Tunnel in Sydney, legal professional privilege, normally regarded as sacrosanct, was denied to communications between the Roads and Traffic Authority and its solicitors. I took the view that public debate and legitimate concern established a preponderance in favour of the Roads and Traffic Authority being denied privilege for communication with its solicitors. I decided that Parliament and hence the public was entitled to the disclosure by the Roads and Traffic Authority as an instrument of the Executive Government of what legal advice it was seeking and what legal advice it was receiving.

...

SIR LAURENCE STREET

DISPUTED CLAIMS OF PRIVILEGE

COASTAL MANAGEMENT DOCUMENTS

REPORT OF INDEPENDENT LEGAL ARBITER

17 NOVEMBER 2009

...

I have read the documents in respect of which the claim of privilege has been put forward. They relate to a topic of undoubted public interest...

...

The documents in respect of which the claim for privilege is made all fall squarely within the category in which the legitimacy of public interest denies the privilege which is claimed by the Government.

I have carefully considered the contents of the documents in the envelope in question and can find no adequate counter-veiling public interest which would support the claim of privilege.

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE

CBD METRO RAIL

REPORT OF INDEPENDENT LEGAL ARBITER

7 MAY 2010

...

There is powerful public interest in this material being available for analysis and consideration in the public domain on any future occasion when an infrastructure project having any similarity to the CBD Metro Rail is being evaluated. I repeat, that this material, whilst sensitive if the project were still a work-in-progress, has frozen in history, albeit very recent, and should not be withheld from responsible public appraisal particularly from public consideration in Parliament.

It is with the foregoing considerations in mind that I approach the question of whether public interest in disclosure outweighs public interest in protecting confidentiality on one or other of the claims advanced.

...

This proposition appears to me to deny the value of the insight that can be derived from the history of this failed project... I am of the view that all of the background should, be on the public record and available for future evaluation.

...

SIR LAURENCE STREET

DISPUTED CLAIM OF PRIVILEGE- DOCUMENT REGARDING PROPOSED

TILLEGRA DAM- FURTHER ORDER (25 FEBRUARY 2010)

REPORT OF INDEPENDENT LEGAL ARBITER

18 MAY 2010

...

The Tillegra project is of significant public interest in relation to both the environment and the water issues of this part of the State and it is highly desirable that there be adequately informed public debate on the issues.

...

I recognize that Legal Professional Privilege has a time honoured public. validity where the rights and interests of individuals are involved and public entities must be able to proceed in confidence that sensitive matters upon which they have sought and received advice, together with such advice, will not lightly be made available for scrutiny.

I approach this question with that consideration clearly in mind. On the other hand issues may arise in the area of Government and public administration of such importance that legitimate sensitivity must give way to transparency at the suit of Parliament, the supreme law making authority.

...



SIR LAURENCE STREET

DISPUTED CLAIMS OF PRIVILEGE: WORK COVER PROSECUTIONS

DETERMINATION OF ARBITER

17 APRIL 2012

...

I agree both with Mr Searle's analysis and his conclusion that the public interest in the documents being made available to the public through the parliamentary process outweighs the arguments in favour of their being withheld from scrutiny and evaluation in the ordinary parliamentary process.

...

The overriding public interest in transparency and accountability in this important area of the administration of the OHS legislation preponderates over the considerations advanced in support of the matters put forward as justifying the non-disclosure of the documents.

...

THE HONOURABLE TRH COLE AO RFD QC

DISPUTED CLAIM FOR PRIVILEGE: NIMMIE-CAIRA SYSTEM ENHANCED  
ENVIRONMENTAL WATER DELIVERY PROJECT

20 NOVEMBER 2012

REPORT OF INDEPENDENT ARBITER

...

Water arrangements in the Murray-Darling basin, including arrangements between Governments, both Federal and State, with those presently entitled to water rights are matters of significant public interest.

...

Competing with this interest is the private interest of property and water owners, and indeed governments, in conducting sensitive commercial arrangements in terms of confidentiality. As agreed between them, so that there can be a full understanding of each other's position in order that a fair, and equitable agreement may be reached, if that be possible. Disclosures have been made which might not have been made had there not been an understanding that confidentiality was assured.

Where these two interests conflict, it will be a rare circumstance where the public interest in performing the constitutional role of government does not prevail. That is because of the pre-eminence of the constitutional parliamentary function of the Legislative Council, and its members, of reviewing the arrangements made or proposed by the executive government.

...



**Kate Cadell**

---

**From:** David Blunt  
**Sent:** Thursday, 10 July 2014 5:06 PM  
**To:** Adam Searle; Amanda Fazio; Catherine Cusack; Charlie Lynn; David Clarke; David Shoebridge; Don Harwin; Ernest Wong; Fred Nile; Greg Donnelly; Greg Pearce; Helen Westwood; Jan Barham; Jenny Gardiner; Jeremy Buckingham; John Kaye; Luke Foley; Lynda Voltz; Marie Ficarra; Mehreen Faruqi; Melinda Pavey; Michael Gallacher; Mick Veitch; Natasha MacLaren-Jones; Niall Blair; Paul Green; Penny Sharpe; Peter Phelps; Peter Primrose; Rick Colless; Robert Borsak; Robert Brown; Sarah Mitchell; Scot MacDonald; Shaoquett Moselmane; Sophie Cotsis; Steve Whan; Trevor Khan; Walt Secord; Duncan Gay; John Ajaka (Office@ajaka.minister.nsw.gov.au); Matthew Mason-Cox MLC (office@mason-cox.minister.nsw.gov.au)  
**Subject:** Disputed claim of privilege - WestConnex Business Case  
**Attachments:** Transcript of proceedings.pdf; Arbitrator- Report on actions of former WorkCover NSW employee.pdf

Dear members

I write to advise you that I have received a dispute in relation to the claim of privilege on documents regarding the WestConnex Business Case that were returned to the House in compliance with an order for papers under Standing Order 52 dated 4 March 2014.

The Acting President has authorised the appointment of the Honourable Keith Mason AC QC as an independent legal arbiter to evaluate and report on the claim of privilege.

Members may recall that earlier this year following the tabling of the first such report from Mr Mason (Report on actions of former WorkCover NSW employee), Minister Gay made a statement in the House in relation to the report and the role of the independent arbiter. Mr Searle also addressed the House. The statements by Minister Gay and Mr Searle are available in the transcript of proceedings, attached. I forwarded a copy of those statements to Mr Mason as requested by Minister Gay in his address to the House.

I also note that Mr Mason in his first report, attached, stated that, "I would be in no way offended if, were I to be retained again, any party affected were to offer submissions (disclosed to the others) addressing any relevant consideration, included the matters stated below [concerning the role of the independent legal arbiter]" .

Following on from the statements made in the House by Minister Gay and Mr Searle, Mr Mason has indicated that in evaluating the claim of privilege in the WestConnex Business Case he will undertake a more extensive consultation process than has been done in the past. Mr Mason has proposed the following:

- he will undertake an initial review of the disputed documents on Tuesday 15 July,
- he then invites submissions from members either in respect of the role of the independent legal arbiter, or in relation to this claim of privilege [which will need to be delivered to my office by 5.00 pm on Monday 21 July],
- subsequently, he will allow for any party who lodges such a submission to review and respond to any other submissions by 5.00 pm on Monday 28 July, and

- finally, he will complete the evaluation of the claim and provide the report by Tuesday 5 August 2014.

Any members who are interested in making a submission to Mr Mason are encouraged to contact me in the first instance at any time prior to Monday 21 July 2014. I will be making a submission to Mr Mason and I anticipate that the General Counsel in the Department of Premier and Cabinet will also be doing the same.

Please do not hesitate to contact me if you have any questions in relation to this matter.

Kind regards,  
David

**David Blunt**  
Clerk of the Parliaments  
Ext. 2323  
[david.blunt@parliament.nsw.gov.au](mailto:david.blunt@parliament.nsw.gov.au)

**COPY**

LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

12 March 2014

Our Ref: C14/06251

The Hon Keith Mason AC QC  
PO Box 82  
CROWS NEST NSW 1585

Dear Mr Mason

I am writing to acknowledge and thank you for your report under Standing Order 52 on the disputed claim of privilege concerning the actions of a former WorkCover NSW employee.

Enclosed for your information are extracts from the Minutes of Proceedings of the Legislative Council on Tuesday 4, Wednesday 5 and Thursday 6 March 2014 in relation to this matter.

Also enclosed is an extract from Hansard for Thursday 6 March, consisting of a ministerial statement by the Deputy Leader of the Government and a response from the Deputy Leader of the Opposition in the Legislative Council, relating to the role of the independent legal arbiter, arising from the discussion of that matter in your report.

There was at least one other member of the House interested in speaking to that subject, who was not able to do so due to the limitations on responses to ministerial statements contained in the Standing Orders. It is possible that there may be some further discussion of this matter in the House at some stage. If so, I will ensure that you are provided with a copy of any further relevant Hansard extracts. Alternatively, or perhaps additionally, it can be anticipated that representatives of the executive government and the non-government members in the House may make submissions on this issue upon future engagements.

Once again thank you for your report, which has clearly generated a significant level of interest from members of the Legislative Council.

Yours sincerely

  
David Blunt  
Clerk of the Parliaments

Motion made (Mrs Maclaren-Jones speaking) and question: That this debate be now adjourned until a later hour of the sitting—put and passed.

**14 GENERAL PURPOSE STANDING COMMITTEE NO. 2—GOVERNMENT'S RESPONSE TO REPORT**

The Clerk, according to standing order, announced receipt of the Government's response to Report No. 40 of General Purpose Standing Committee No. 2 entitled "Drug and alcohol treatment", tabled 15 August 2013, received out of session and authorised to be printed on 17 February 2014.

**15 DISPUTED CLAIM OF PRIVILEGE—REPORT ON ACTIONS OF FORMER WORKCOVER NSW EMPLOYEE**

The President informed the House that on 3 February 2014 the Clerk received from Revd Mr Nile written correspondence disputing the validity of the claim of privilege on documents lodged with the Clerk on 20 November 2013 relating to the report on actions of former WorkCover NSW employee.

According to standing order, the Honourable Keith Mason AC QC, being a retired Supreme Court Judge, was appointed as an independent arbiter to evaluate and report as to the validity of the claim of privilege.

The Clerk released the disputed documents to Mr Mason who has now provided his report to the Clerk. The report is available for inspection by members of the Legislative Council only.

**16 PETITION**

**Tweed Byron Local Area Command**

Mr Secord presented a petition from 299 citizens of New South Wales stating that there has been a decline in police strength and operational capacity within the Tweed Byron Local Area Command, that this decline risks individual and community safety in the region, and requesting that the House communicate to the Government the need to immediately restore and increase police strength and capacity in the Tweed Byron Local Area Command.

Petition received.

**17 IRREGULAR PETITIONS**

**Exemptions from anti-discrimination law in New South Wales**

Ms Sharpe sought the leave of the House for the suspension of standing orders to allow the presentation of a petition from 52 citizens of New South Wales concerning exemptions from anti-discrimination law in New South Wales, which is irregular as it is addressed to the Speaker and members of the Legislative Assembly.

No objection taken.

Leave granted.

Ms Sharpe presented an irregular petition from 52 citizens of New South Wales stating that the Commonwealth Sex Discrimination Act 1984 and the New South Wales Anti-Discrimination Act 1977 provide wide ranging exemptions to religious organisations allowing them to discriminate against LGBTI employees and people accessing services, that these exemptions fundamentally undermine the principle that all people should be treated equally, and calling on the Government to amend the Anti-

4. That this House calls on the Government to act on the long-overdue recommendation of the 1989 NSW Government Housing Committee's review and establish a register of protected tenancies with the aim of compiling a complete and accurate record of the number of remaining protected tenancies in New South Wales.

Question put and passed.

**4 DISPUTED CLAIM OF PRIVILEGE—REPORT OF INDEPENDENT LEGAL ARBITER—  
REPORT ON ACTIONS OF FORMER WORKCOVER NSW EMPLOYEE (Formal Business)**

Revd Mr Nile moved, according to notice:

1. That the report of the Independent Legal Arbitrator, the Hon Keith Mason AC QC, dated 25 February 2014, on the disputed claim of privilege on documents relating to the actions of a former WorkCover NSW employee be laid on the table by the Clerk.
2. That, on tabling, the report is authorised to be published.

Question put and passed.

**5 MULTIPLE SYSTEM ATROPHY AWARENESS MONTH (Formal Business)**

Ms Ficarra moved, according to notice:

1. That this House notes that:
  - (a) March is awareness month for Multiple System Atrophy (MSA), a progressive neurodegenerative disorder defined by a combination of symptoms that affect both the autonomic nervous system and movement,
  - (b) symptoms of MSA vary from person to person and include bladder problems, constipation, sleep disturbance, movement problems such as stiff muscles and dizziness caused by low blood pressure,
  - (c) MSA affects both men and women predominantly in their 50s and the disease tends to advance rapidly over the course of 10 years, with progressive loss of motor skills, eventual confinement to bed, and death,
  - (d) the causes of MSA are still unknown at present and the symptoms are characterised by dysfunction and eventual loss of nerve cells in several different areas in the brain and spinal cord that control the autonomic nervous system and coordinate muscle movements,
  - (e) the loss of nerve cells may be due to the build-up of a protein called alpha-synuclein in the cells that produce dopamine, a neurotransmitter that relays motor commands in the brain,
  - (f) there are two types of classification for MSA:
    - (i) Parkinsonian type (MSA-P) has primary characteristics of Parkinson's disease, such as moving slowly, stiff muscles, and tremor, along with problems of balance, coordination, and autonomic nervous system dysfunction,
    - (ii) Cerebellar type (MSA-C), with primary symptoms featuring difficulty swallowing, slurred speech or a quavering voice, along with ataxia (problems with balance and coordination), and
  - (g) diagnosis of MSA is difficult, particularly in the early stages, because it is largely similar to Parkinson's disease.



2336

Legislative Council Minutes No. 187—Wednesday 5 March 2014

- (vi) Rockdale City Council attended by H. E. Consul General Li Huaxin and Consul Tian Lin,
  - (vii) the Australian Chinese Community Association, one of the oldest community group,
  - (viii) Hurstville City Council attended by H.E. Consul General Li Huaxin.
2. That this House acknowledges the significant contribution of the Australian Chinese community in Australia and wish them a successful 2014 Year of the Horse.

Question put and passed.

**9 REPORT OF INDEPENDENT LEGAL ARBITER—REPORT ON ACTIONS OF FORMER WORKCOVER NSW EMPLOYEE**

The Clerk, according to resolution of the House this day, tabled the report of the Independent Legal Arbitrator, the Honourable Keith Mason AC QC, dated 25 February 2014, on the disputed claim of privilege on papers relating to the report on actions of former a WorkCover NSW employee.

**10 PAPERS—TABLED BY MINISTER**

Mr Ajaka tabled the following papers:

- (1) State Emergency and Rescue Management Act 1989—Reports for year ended 30 June 2013:

State Emergency Management Committee  
State Rescue Board.

Ordered: That the reports be printed.

**11 NOTICES OF MOTIONS**

**12 MESSAGE FROM THE LEGISLATIVE ASSEMBLY—SNOWY HYDRO CORPORATISATION AMENDMENT (SNOWY ADVISORY COMMITTEE) BILL 2013**

The President reported the following message from the Legislative Assembly:

Mr PRESIDENT

The Legislative Assembly having this day passed a Bill with the long title "An Act to amend the Snowy Hydro Corporatisation Act 1997 to constitute the Snowy Advisory Committee and to specify its function; and for other purposes" presents the bill to the Legislative Council for its concurrence.

Legislative Assembly  
5 March 2014

SHELLEY HANCOCK  
Speaker

Bill, on motion of Mr Gay, read a first time and ordered to be printed.

Mr Gay moved, according to contingent notice: That standing orders be suspended to allow the passing of the bill through all its remaining stages during the present or any one sitting of the House.

Question put and passed.

Ordered: That the second reading of the bill stand an order of the day for next sitting day.

**6 PROVISION OF PRIVILEGED DOCUMENTS TO GENERAL PURPOSE STANDING COMMITTEE NO. 1—REPORT ON ACTIONS OF FORMER WORKCOVER NSW EMPLOYEE (Formal Business)**

Mr Searle (on behalf of Revd Mr Nile) moved, according to notice:

1. That this House notes:
  - (a) the report of the Independent Legal Arbitrator, the Hon Keith Mason AC QC, dated 25 February 2014, on the disputed claim of privilege on documents relating to the actions of a former WorkCover NSW employee, including the finding that the documents the subject of the dispute do not give rise to a legally valid claim of privilege,
  - (b) that General Purpose Standing Committee No 1 is conducting an inquiry into allegations of bullying in WorkCover NSW, and
  - (c) that the documents the subject of the dispute are directly relevant to the subject matter of the committee's inquiry and essential to the conduct of the inquiry.
2. That, notwithstanding the provisions of standing order 52:
  - (a) a copy of the documents considered by the legal arbitrator to be not privileged be provided to General Purpose Standing Committee No. 1 for the purposes of its inquiry into allegations of bullying in WorkCover NSW,
  - (b) subject to paragraph 3 of this resolution, the committee have the power to authorise publication of the documents in whole or in part, and
  - (c) the committee clerk be authorised to make copies for the use of members during the inquiry.
3. That, in accordance with standing order 224:
  - (a) the documents provided to the committee may not, unless authorised by the committee, be disclosed to any person other than a member or officer of the committee, and
  - (b) in considering whether to make the documents public, the committee take into consideration the report of the Independent Legal Arbitrator.

Question put and passed.

**7 MINISTERIAL STATEMENT**

Mr Gay made a ministerial statement in relation to the role of the Independent Legal Arbitrator engaged to evaluate the validity of disputed claims of privilege under standing order 52.

Mr Searle also addressed the House.

**8 WHEELCHAIR INTERNATIONAL TENNIS (Formal Business)**

Ms Ficarra sought the leave of the House to amend private members' business item no. 1696 outside the order of precedence by omitting "\$120,000" and inserting instead "\$12,000".

No objection taken.

## WORKCOVER NSW BULLYING ALLEGATIONS

### General Purpose Standing Committee No. 1 Inquiry

Motion by the Hon. ADAM SEARLE, on behalf of Reverend the Hon. FRED NILE, agreed to:

1. That this House notes:

- (a) the report of the Independent Legal Arbitrator, the Hon Keith Mason, AC, QC, dated 25 February 2014, on the disputed claim of privilege on documents relating to the actions of a former WorkCover NSW employee, including the finding that the documents the subject of the dispute do not give rise to a legally valid claim of privilege;
- (b) that General Purpose Standing Committee No. 1 is conducting an inquiry into allegations of bullying in WorkCover NSW; and
- (c) that the documents the subject of the dispute are directly relevant to the subject matter of the committee's inquiry and essential to the conduct of the inquiry.

2. That notwithstanding the provisions of Standing Order 52:

- (a) a copy of the documents considered by the legal arbitrator to be not privileged be provided to General Purpose Standing Committee No. 1 for the purposes of its inquiry into allegations of bullying in WorkCover NSW;
- (b) subject to paragraph 3 of this resolution, the committee have the power to authorise publication of the documents in whole or in part; and
- (c) the committee clerk be authorised to make copies for the use of members during the inquiry.

3. That, in accordance with Standing Order 224:

- (a) the documents provided to the committee may not, unless authorised by the committee, be disclosed to any person other than a member or officer of the committee; and
- (b) in considering whether to make the documents public, the committee take into consideration the report of the Independent Legal Arbitrator.

<2>

## WORKCOVER NSW BULLYING ALLEGATIONS

### Ministerial Statement: General Purpose Standing Committee No. 1 Inquiry

The Hon. DUNCAN GAY (Minister for Roads and Ports) [9.37 a.m.]: I rise to make a statement about the motion we have just passed in relation to documents produced under Standing Order 52. The Government supported that motion, which provides for certain documents to be provided to General Purpose Standing Committee No. 1 for the purposes of an inquiry it is conducting into allegations of bullying in WorkCover NSW. The motion followed a decision by an Independent Legal Arbitrator, the Hon. Keith Mason, AC, QC, that the relevant documents did not give rise to a legally valid claim of privilege. The opinion of Mr Mason in this regard was tabled yesterday, 5 March 2014. In his opinion Mr Mason states:

This being my first engagement in this role, I propose to set out my understanding of the relevant principles. I would be in no way offended if, were I to be retained again, any party affected were to offer submissions (disclosed to the others) addressing any relevant consideration, including the matters stated below.

With that invitation in mind, I wish to make the following observations, which I would ask that the Clerk might bring to the attention of Mr Mason or indeed of any other person who may be appointed as Independent Legal Arbitrator under Standing Order 52 in the future. The power of the Legislative Council to compel the production of documents from the Executive is an extraordinary power. It appears to be limited only by what is considered "reasonably necessary" for the exercise of the Legislative Council's functions and the principles of responsible government. While we often refer to orders being made under Standing Order 52, it is always worth remembering that Standing Order 52 regulates the procedures for the exercise of the power; it is not the source of that power.

In the Egan series of cases, it was recognised that the Executive Government is entitled—indeed obliged—to maintain the confidentiality of Cabinet documents. Those cases held that other privileges that might be recognised in judicial proceedings, such as public interest immunity or legal privilege, are not grounds for refusing to produce documents to the Legislative Council. The Government of course accepts that position. Standing Order 52, with its procedures for making and disputing privilege claims, was made by this House in response to the Egan decisions.

It was made because the House recognised that there are categories of documents, in addition to Cabinet documents, which it would not be in the public interest to make available for use or publication. It created a procedure by which privileges such as public interest immunity and legal privilege—which the courts in the Egan cases held are not grounds for refusing to produce documents to the House—should nevertheless be taken into account in deciding whether and, if so, how to use and publish documents that are produced. Accordingly, even though the House is entitled to compel the production of such documents, the House has agreed through Standing Order 52 that these other categories of privileged documents should be kept confidential in the public interest.

The proper role of an Independent Legal Arbiter in this context, therefore, is to perform a role analogous to the role that a court undertakes if privilege is claimed and disputed in judicial proceedings. That is, the Legal Arbiter is to consider the privilege claim—that is, the public interest reasons the Executive gives for non-disclosure—and to weigh those against any public interest considerations in favour of disclosure. For that reason, when making privilege claims for the purposes of Standing Order 52, the Executive will typically refer to the grounds upon which documents would be immune from production or publication in judicial proceedings, such as public interest immunity or client legal privilege. Alternatively, privilege claims might be couched in terms borrowed from the Government Information (Public Access) Act, which involves a similar public interest balancing test.

The question for the Legal Arbiter is not whether the Legislative Council is legally entitled to the documents, on those grounds, or whether such privileges exist as a matter of law as between the Executive and the Legislative Council. The answer to those questions is clear from the Egan decisions. Rather, the question for the Legal Arbiter is whether, having regard to the various public interest considerations, the documents would be considered to be privileged by a court in judicial proceedings under similar circumstances. In that regard, the Government considers that matters such as the privacy of individuals, and the statutory entitlement to anonymity afforded to whistleblowers under the Public Interest Disclosures Act are indeed proper bases for claiming that a document may be privileged under Standing Order 52.

As I said, the Government supported the motion of Reverend the Hon. Fred Nile to have the documents in this case made available to the committee. If the committee wishes to consider in future making part or all of those documents public, I would ask that the committee have due regard to the comments I have just made. If the committee does wish to consider publishing the documents in the future, it may be appropriate for it to refer the matter back to this House for consideration and, if necessary, to refer again the question of privilege to an Independent Legal Arbiter for opinion.

**The Hon. ADAM SEARLE** (Deputy Leader of the Opposition) [9.45 a.m.]: I rise on behalf of the Leader of the Opposition to respond briefly to the comments of the Deputy Leader of the Government. I thank the Deputy Leader of the Government for providing in advance the comments he has just made to the House so that I might briefly read them. I also ask the Clerk to bring my comments to the attention of any person engaged in the future as Independent Legal Arbiter under Standing Order 52. I understand what the Deputy Leader of the Government has put in connection with the particular documents whose production we are directly concerned with. I am also a member of that committee, as is the Hon. Mick Veitch. For our part, we say that the committee has always been most mindful of the sensitivity of those documents. I do not see, whether in connection with these documents or any other matter, that the committee would take a different view. We do note the caution advised by the Government. I can assure all honourable members that this at the forefront of the mind of all committee members in discussing this matter and its difficulties.

In relation to the wider matters canvassed by the Deputy Leader of the Government, we, I think, have a different view about the width of the role of the Legal Arbiter. For myself, I think that the Hon. Keith Mason, AC, QC, former President of the Court of Appeal, correctly got the role to which he had been appointed. I invite all honourable members to read what the Hon. Keith Mason had to say about those matters, so that all honourable members can be more fully informed of these matters. I can well understand the Executive wanting to set out, for members' consideration, their view that the Legal Arbiter has a narrower role; and I note that the Deputy Leader of the Government said it is analogous to a role performed by a court. While it is certainly similar in that the Legal Arbiter is asked to pronounce on issues of privilege, it is not, strictly speaking, the same. And, of course, any advice given by the Independent Legal Arbiter is ultimately referred to this House. This House is the master of its own destiny whether to accept or reject, or accept in part of, any advice provided by an Arbiter; and of course it is ultimately the decision of this House as to what to do with any documents. So we are not bound by the Arbiter's decision; and I note that, in the past, while it has mostly been the practice of this House to accept the Arbiters' recommendations, that has not uniformly been the case.

I think the precise width of the power of an Arbiter probably will be decided in difficult cases in the future when there is the inevitable tension between the Executive and the Legislature. This will not be resolved here and now, and not resolved by the Government's pronouncement, which we understand but which we respectfully disagree with. We think the Hon. Keith Mason got it right, but this is a matter for the future. But I would say that, in order that we can engage properly with this discussion now and ongoing, honourable members should read what the Hon. Keith Mason, AC, QC, had to say, and also read the Egan cases. I think these will be important matters to bear in mind when ultimately, as will inevitably be the case in the future, this House is called upon to decide whether to abide by an Arbiter's recommendation, and the reasons why it should take one or other course of action.





David Shoebridge MLC  
Member of the NSW Legislative Council

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Parliament House  
Macquarie St  
Sydney NSW 2000

Mr David Blunt  
Clerk of the NSW Legislative Council  
Macquarie Street  
SYDNEY, NSW 2000

21 July 2014

Dear David,

**RE: Standing order 52 – privilege claims and role of arbiter**

This correspondence is in response to your invitation for submissions on the role of the independent legal arbiter and claims of privilege under Standing Order 52 (SO52).

***Standing Order 52***

SO52 is the current formulation of the 'Call for Papers' power exercised by the Legislative Council. It presently reads:

**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.

### ***Consideration of the limits on the Legislative Council's call for papers powers***

In *Egan v Chadwick*<sup>1</sup> the Court of Appeal unanimously affirmed that the Legislative 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 is made at common law. The majority there held that the privilege as between the executive and the Legislative Council is of a very different (far more limited) nature to that which exists between litigants or third parties in court proceedings.

*Egan v Chadwick* was an application of the principle firmly established in *Egan v Willis*<sup>2</sup> that:

*"... the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions."*

At the heart of the rulings in *Egan v Chadwick* and *Egan v Willis* was the principle that the role of the Legislative Council in reviewing executive conduct is derived from the concept of responsible government. Responsible government under our common law system provides Parliaments with all the powers that are reasonably necessary for the proper exercise of their functions.<sup>3</sup>

The defining feature of a responsible government in the Westminster model is one where the executive is directly responsible to, in fact "almost the creature of," the legislature.<sup>4</sup> The power for the Legislative Council to compel the production of documents is a long recognised element of the system of responsible government in NSW.

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<sup>1</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176 (10 June 1999)

<sup>2</sup> *Egan v Willis* [1998] HCA 71; 195 CLR 424

<sup>3</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176 (10 June 1999) per Spiegelman CJ at paragraph 15.

<sup>4</sup> Lord Chancellor Haldane, in his speech in May 1900, in the House of Commons, on the Commonwealth Constitution Bill cited in *Williams v Attorney General of New South Wales* [1913] HCA 33; (1913) 16 CLR 404 at 459 per Isaacs J.



### ***Cabinet in confidence documents***

This submission accepts that a majority of the Court in *Egan v Chadwick* held that cabinet in confidence documents may properly be the subject to a claim for privilege. However to the extent that the claim of cabinet in confidence is recognised as a privilege that exists between the executive and the Legislative Council then it is a privilege restricted to documents which, directly or indirectly, reveal the deliberations of Cabinet. It does not extend to each and every document simply by reason of the document being presented to Cabinet.<sup>5</sup>

There may be other classes of documents that validly attract claims for privilege of the kind recognised in *Egan v Chadwick*, but any such argument or consideration is best left to cases where such a claim for privilege is claimed.

In the present case concerning the call for papers regarding the WestConnex project no such claim is made and, if made, no such claim would be supportable in relation to the documents the subject of Dr Faruqi's challenge.

### ***What is the role of the legal arbiter under SO52?***

The arbiter's role is a limited one under SO52. It is to provide a report on the "validity" of any claim for privilege made by the Executive. To understand what this role entails requires a review of the process and procedures of the Legislative Council in regards a motion under SO52.

Whilst Priestly JA was in the minority on the question as to whether or not cabinet in confidence documents are protected by claims of privilege from production under SO52, his analysis of the process and procedures relevant to determining these matters was not in issue. Relevantly at 139 and 142 his Honour stated:

*139 The Executive and the House perform their different functions in the same public interest, funded by public money. The legislature is entrusted with the carrying out of the fundamentally important task of reviewing, changing and adding to the statute law of the State. To carry out that task it must have the power to call for any information relevant to carrying out its task. It seems inescapable that there will from time to time be information in Executive documents either necessary or useful for carrying out its task. Possession of the power to compel production does not mean that the power will be exercised unless the House is convinced the exercise is necessary; if exercised, it does not follow that the House will do anything detrimental to the public interest; the House can take steps to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed.*

...

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<sup>5</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176 per Spiegelman CJ at paragraph 70 and *Sankey v Whitlam* (1978) 142 CLR 1. See also the consideration by Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1.

*142 The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity. In exercising its powers in respect of such documents the Council has the same duty to prevent publication beyond itself of documents the disclosure of which will, to adapt the words of Mason J in Fairfax already cited (see par 33), be inimical to the public interest because the security of the State, relations with other governments or the ordinary business of government will be prejudiced. When the Executive claims immunity on such grounds, the Council will have the duty, analogous to the duty of the court mentioned by Mason J in the same passage in Fairfax, of balancing the conflicting public interest considerations.<sup>6</sup>*

In other words, even though a valid claim for privilege may not be made out by the Executive concerning specific documents, this does not mean that all such documents must be publicly disclosed. It is well within the power of a responsible majority in the Legislative Council to order that any documents produced are to be maintained as confidential if the house believes that this is in the public interest.

A recent and informative example of this comity between the Legislative Council and the executive was in the consideration of the SO52 on a disputed claim for privilege regarding a former WorkCover NSW employee. In that case the claim for privilege made by the executive was found to be not made out. However that was not the end of the matter.

After receiving the arbiter's report, on 6 March 2014 the Legislative Council resolved as follows:

(1) That this House notes:

(a) the report of the Independent Legal Arbiter, the Hon. Keith Mason, AC, QC, dated 25 February 2014, on the disputed claim of privilege on documents relating to the actions of a former WorkCover NSW employee, including the finding that the documents the subject of the dispute do not give rise to a legally valid claim of privilege;

(b) that General Purpose Standing Committee No. 1 is conducting an inquiry into allegations of bullying in WorkCover NSW; and

(c) that the documents the subject of the dispute are directly relevant to the subject matter of the committee's inquiry and essential to the conduct of the inquiry.

(2) That, notwithstanding the provisions of Standing Order 52:

(a) a copy of the documents considered by the legal arbiter to be not privileged be provided to General Purpose Standing Committee No. 1 for the purposes of its inquiry into allegations of bullying in WorkCover NSW;

(b) subject to paragraph 3 of this resolution, the committee have the power to authorise publication of the documents in whole or in part; and

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<sup>6</sup> *Egan v Chadwick & Ors* [1999] NSWCA 176 per Priestly JA at 139 – see also 141-3.

(c) the Committee Clerk be authorised to make copies for the use of members during the inquiry.

(3) That, in accordance with Standing Order 224:

(a) the documents provided to the committee may not, unless authorised by the committee, be disclosed to any person other than a member or officer of the committee; and

(b) in considering whether to make the documents public, the committee take into consideration the report of the Independent Legal Arbitrator.

Ultimately the Committee, while having access to the documents and being able to use them in its deliberations and consideration of its report, resolved not to publish the documents because they considered publication not to be in the public interest. Comity, common sense and a general commitment amongst members of the Legislative Council to protecting the public interest determined the matter.

This determination is necessarily a political one to be considered by the elected members.

As the arbitrator has noted in his advice of 25 February 2014:

*The word "validity" in Order 52(6) further confirms that the arbitrator's role is to apply his or her understanding of the law relating to the privilege in this context. The relevant privilege is what, as a matter of law, exists as between the Executive and the Upper House of the New South Wales Parliament. In context and scope, it is not the privilege or public interest immunity that a litigant or third party to curial proceedings might raise in answer to an order for discovery or a subpoena in litigation. So much was made clear in Egan v Chadwick (1999) 46 NSWLR 563 when the Court of Appeal ruled that neither public interest immunity or legal professional privilege provided a basis for withholding documents the production of which were "reasonably necessary for the proper exercise by the Legislative Council of its functions" according to the principles expounded in Egan v Willis."*

For the reasons set out above I endorse the approach taken by the arbitrator. It accords with authority and with a rational approach to the exercise of the powers under SO52. Importantly it also recognises the appropriate body to consider issues of public interest is, as a general rule, the Parliament and its elected members exercising their powers in the interests of the people of NSW.

I recognise that his approach does not wholly accord with the practice of previous arbitrators who over time undertook a two-step approach regarding the validity of claims for privilege under SO52(6). Essentially that two-step approach was to consider established classes of privilege or immunity and then weigh up the public interest in disclosure as against the public interest in retaining the privilege or immunity claimed.

While there are clearly some attractions in the Legislative Council gaining the advice of an arbitrator on these important public interest considerations, they are not properly the role of the arbitrator under SO52 but rather matters for the House. This approach, while undoubtedly

exercised in good faith and of assistance in many cases to the resolution of difficult questions of competing public interests, is also not well founded in authority. As stated above the role of the arbiter is the more refined role set out in the 25 February 2014 advice of Mr Mason.

As would be clear from the above, this submission opposes the position put by the Hon. Duncan Gay on behalf of the executive in his contribution to the House on 6 March 2014 where he stated:

*... the question for the Legal Arbiter is whether, having regard to the various public interest considerations, the documents would be considered to be privileged by a court in judicial proceedings under similar circumstances. In that regard, the Government considers that matters such as the privacy of individuals, and the statutory entitlement to anonymity afforded to whistleblowers under the Public Interest Disclosures Act are indeed proper bases for claiming that a document may be privileged under Standing Order 52.*

This approach has no support in any legal authority, nor in any past practice in the Legislative Council. It is an attempt to subvert the very clear statements as to privilege set out in *Egan v Chadwick*.

Put simply if having access to documents is reasonably necessary for the exercise of the Legislative Council's functions, then that cannot be satisfied by having limited access to the documents but then being unable to refer to them in debates or deliberations of the House or its committees.

I appreciate you taking the time to consider this submission in your consideration of the matter.

Regards,



David Shoebridge  
Greens NSW MP



LEGISLATIVE COUNCIL



Deputy Leader of the Opposition in the Legislative Council  
Shadow Minister for Industrial Relations  
Shadow Minister for Small Business

The Honourable Adam Searle MLC

21 July 2014

The Hon Keith Mason AC QC

I write in relation to your appointment by the Acting President of the Legislative Council as independent legal arbiter in relation to a dispute concerning claims of privilege made over documents ordered to be produced to the House regarding the WestConnex Business Case.

I understand by email from the Clerk of the Parliaments, Mr David Blunt, that you have proposed the following:

- The Arbiter will undertake an initial review of the disputed documents on Tuesday 15 July;
- The Arbiter then invites submissions from members either in respect of the role of the independent legal arbiter, or in relation to this claim of privilege to be delivered to the Clerks' office by 5.00 pm on Monday 21 July;
- any party who lodges such a submission will then be able to review and respond to any other submissions by 5.00 pm on Monday 28 July, and
- The Arbiter will complete the evaluation of the claim and provide the report by Tuesday 5 August 2014.

I make a submission to you in this matter. This submission will be relatively brief, setting out my key views. I will expand upon those in my review/response to any other submissions made in this matter.

My submission is in two parts.

The first part is in relation to the approach to be taken by the independent arbiter. This is a matter you raised in your first Arbiter's report on *Actions of former WorkCover NSW employee*, 25 February 2014 as well as in connection with this present matter. My initial views were outlined to the House on 6 May 2014 when each of myself and the then Deputy Leader (now Leader) of the Government addressed the House on your report.

The second part will be directed to the documents where the claim of privilege have been disputed by Dr Mehreen Fauqui. Dr Faruqui has provided a schedule of documents where she disputes the privilege claimed. My submission is directed to

the same set of documents. The dispute extends also to all documents attached or accompanying the one identified; in the case of emails, it extends to all email 'history' with the identified email and any and all attachments to the email or any in the 'history'. If some of the emails/documents, or emails/documents of the documents are found to be privileged or immune, those parts should be withheld or the privileged/immune parts redacted and the balance released from the claim of privilege/immunity.

In developing this submission, I have referred to the respective decisions of the High Court of Australia in *Egan v Willis* (1998) 195 CLR 424 and the NSW Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563; the article by Ms Lynn Lovelock, "The Power of the NSW Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years On", *Australasian Parliamentary Review*, Spring 2009, Vol. 24(2), 197-218; an article by Associate Professor Anne Twomey, "Executive Accountability to the Senate and the NSW Legislative Council", *Australasian Parliamentary Review*, Autumn 2008, Vol. 23(1), 257-273; and Lovelock and Evans (eds), *NSW Legislative Council Practice*, The Federation Press 2008, pp473-486.

However, and very importantly, I have had regard to the approach of the three persons who have fulfilled the role of independent legal arbiter. In *Egan v Willis* (at 660B-C), Gleeson CJ described responsible government as: (A) concept based upon a combination of law, convention and political practice. The way in which that concept manifests itself is not immutable."

It is significant that, in the majority of cases, the House has accepted the report and recommendations of the arbiter, suggesting the House has been content to be informed in the way each of those persons has undertaken their role. However, that is not to say that the role may not evolve over time, as I discuss below.

#### *The role of the independent legal arbiter*

Since 2004, the role of the independent legal arbiter has set out in Standing Order 52, sub-paragraphs (6), (7) and (8). Where a document or documents are "considered to be privileged" the document(s) at issue are released to the arbiter "for evaluation and report ... as to the validity of the claim." No other guidance as to the fulfilment of this role is provided.

There have been three persons appointed as arbiter. Each has approached the task in the same way. Firstly, to determine whether there is any privilege claimed known to law and whether that privilege is well-founded in a technical legal sense; and secondly, to then evaluate whether the public interest supporting that ground of privilege is outweighed by the public interest of transparency and accountability that would lean towards the document(s) being made public.

Sir Laurence Street in his report on the *Lane Cove Tunnel – Further Order*, 22 May 2006, pp3-4, stated that *“The arbiter’s duty ... is to evaluate the competing public interests in, on the one hand, recognising and enforcing the principles upon which .. [the particular] privilege is recognised and upheld in the Courts, and, on the other hand, recognising and upholding and over-riding public interest in disclosure of the otherwise privileged material.”*

This is consistent with his approach in his many reports, including his final *Disputed Claims of Privilege WorkCover Prosecutions Determination of Arbiter*, 17 April 2012, p 2 in which he said: *“The overriding public interest in transparency and accountability in this important area of the administration of the .. [relevant] legislation preponderates over the considerations advanced in support of the matters put forward as justifying the non-disclosure of the documents.”*

The Hon. Terrence Cole AC, RFD, QC<sup>1</sup> and MJ Clarke QC<sup>2</sup> have followed the same approach.

Even where arbiters have found that a privilege claim is technically valid, this has not necessarily led to a recommendation that the document(s) concerned should be withheld from the wider public.<sup>3</sup> Both Mr Street and Mr Cole found that the constitutional function of the Legislative Council in holding Executive Government to account through calling for State papers is not limited to using that information to ask questions in Parliament or initiate legislation<sup>4</sup> but that the informing of public debate is a significant and important part of its role in our system of responsible government.

This has led to the observation of one arbiter that, where the competing interests collide it will be a *“rare circumstance”* where the public interest does not favour disclosure due to the *“pre-eminence of the constitutional parliamentary function of the Legislative Council and its members, of reviewing the arrangements made or proposed by the Executive Government.”*<sup>5</sup>

Importantly, however, the arbiter is not really an arbiter or decision-maker in any strict sense. As Ms Lovelock noted in her article at page 202, *“The arbiter simply provides a report; it is still the decision of the House whether to uphold a claim of privilege or to make a document public notwithstanding the claim.”*

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<sup>1</sup> *Disputed claim of privilege – Circular Quay Pylons, Report of Independent Legal Arbiter*, 17 August 2005, p5

<sup>2</sup> *Disputed claim of privilege – State Finances, Report of Independent Legal Arbiter*, 16 January 2007, p3

<sup>3</sup> See for example arbiters reports from Mr Street, *Papers on M5 Motorway and Tunnel*, 27 April 2001; *Cross City Motorway*, 4 September 2003, p5; and *Lane Cove Tunnel*, 24 January 2005, p3; *Millenium Trains*, 22 August 2003, p9; *M5 East, Lane Cove and Cross City Tunnel Ventilation*, 4 November 2003, p10; *Ventilation of M5 East, Lane Cove and Cross City Tunnels*, 26 August 2004, p8; *Cross City Motorway*, 15 November 2005, p3; *Tunnel Air Quality*, 24 January 2006, pp4-5; *Road Tunnel Filtration*, 24 January 2006, pp5-6; *M5 East Cross City Tunnel and Lane Cove Tunnel*, 24 January 2006, p4; *M5 East Cross City Tunnel and Lane Cove Tunnel*, 1 November 2006, p4.

<sup>4</sup> As, for example, Associate Professor Twomey contends it should be in her article at p266

<sup>5</sup> The Hon. Terrence Cole AO, RFD, QC, *Disputed claim of privilege – Nimie-Caira System Enhanced Water Delivery Project, Report of Independent Legal Arbiter*, 16 January 2007, p3

The House at all times remains master of its own decisions and may accept or not accept the report and recommendations of an arbiter. As was noted by Mr Street in his *Report on Sale of PowerCoal Assets*, 27 June 2006, pp5-6, "*Parliament is supreme*" in determining the public interest with respect to the disclosure of documents.

The same point was made by Chief Justice Spigelman in *Egan v Chadwick* at p579, that the decision of whether or not to publicly release a document or documents at issue is a political and not a legal question:

What, if any, access should occur is a matter "of the occasion and of the manner" of the exercise of a power, not of its existence: *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162. If the public interest is thereby harmed, the sanctions are political, not legal."

Twomey is highly critical of the approach taken by the arbiters, arguing in her article at page 265 that they are not properly equipped to undertake this assessment of competing public interests<sup>6</sup>, and she contends for a much narrower focus by persons appointed to fulfil this role. At pages 269-270 she sets out the role which she thinks the arbiter should fulfil. She believes that where a claim for privilege is made, there should be no production of that document ordered. Importantly, her article is clearly premised on what she sees as the need to change what the arbiter does.

In my strong view, absent a change of role and direction clearly set by the House, persons appointed as legal arbiter should not follow the approach suggested by Associate Professor Twomey.

A range of examples of the outcomes of this process and how it has informed the public and parliamentary debate of issues and laws are provided in the Lovelock article at pages 203-205.

This two-step process of evaluation and report to the House, while imperfect, has worked well and has played a vital role in informing Members of the House on issues that are significant and which concern the public interest.

The issue is not merely one of informing Members of the House, but enabling them to fulfil the full range of their constitutional duty to hold the Executive to account, through Parliamentary processes and through public discourse. This function would be impeded if a narrower approach to making documents publicly available were taken by arbiters. While the decision to publish is ultimately one for the House, the House has relied upon the advisory role of arbiters

As arbiter, you should not in my view take an approach which would restrict the disclosure of documents to public scrutiny.

The approach contended for by the current Government in the House on 6 May 2014 is that "*the question for the Legal Arbiter is whether, having regard to the various*

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<sup>6</sup> Ignoring that this is what judges do in courts regarding claims for public interest immunity, for example: see *Sankey v Whitlam* (1978) 142 CLR 35 at 38.



*public interest considerations, the documents would be considered to be privileged by a court in judicial proceedings under similar circumstances.”*

This approach is historically wrong, in that it is not the approach that has been taken by arbiters over the last decade. What the Government has described is the first step only and ignores the “*evaluative*” role of arbiters. In my view, it is also wrong in principle having regard to the nature of the power reposed in the House at common law to compel the production of Executive/State papers as a necessary function of its role in making elected Governments accountable to Parliament (or at least one of its Houses).

While I have the view that as arbiter you should take a no less favourable approach to the issue of public disclosure than your predecessors, it is open to you to take a much stricter approach to the nature of privilege that may lead to a document produced to the House from being publicly disclosed.

In *Egan v Chadwick*, Chief Justice Spigelman found at p577 that, “*The high constitutional relationship of political accountability is quite different to anything considered in the case law on either form of immunity*” and at p78 that, while “*It may be that principles applicable in other areas of the law will inform the process of determining the right of access to information or documents, but those principles are not, in terms, directly applicable. In the present situation, the question falls to be determined in accordance with public law principles, rather than the private law principles ...*” While his Honour was discussing the issue of compelling production, there is no reason the same approach should not be taken to the issue of public disclosure as well, in my view.

In your report of 25 February 2014 concerning *Actions of former WorkCover NSW employee*, you analysed SO 52(6) and determined that the task of determining whether any claim for privilege was valid had to relate to the privilege that is at issue; namely, the privilege that exists as between the Executive and the Legislative Council and not the privilege that a litigant or third party might raise in legal proceedings. As a matter of construing Standing Order 52, I agree and I agree also that this principle is also derived from the reasoning in *Egan v Chadwick* that you also cite.

The question then is what is that privilege that exists between the Executive and the House. As stated in *Egan*, the Legislative Council’s powers are uniquely governed by the common law and what is “*reasonably necessary*” for its constitutional role; it is not codified. The limits of this power have not been fully charted. However, from the Court of Appeal decision, we know that the majority indicated that Cabinet documents could not be compelled to be produced, but the majority also disagreed as to how this class is defined. That issue does not arise in the present matter. We also know that the Court of Appeal ruled that legal professional privilege and public interest immunity did not work to prevent production to the House. As a matter of principle then, why should those doctrines apply to cause documents to be withheld from the public? I do not think they should.

The Government also stated on 6 March 2014 that "... *the Government considers that matters such as the privacy of individuals, and the statutory entitlement to anonymity afforded to whistleblowers under the Public Disclosures Act are indeed proper bases for claiming that a document may be privileged under Standing Order 52.*" Based on the cases, and on your own analysis on 25 February 2014, this approach by the Government must be wrong and be rejected.

Beyond Cabinet documents, there may be other categories of material that would fall within this very narrow form of Executive-Legislative Council privilege. Perhaps communications between the Governor and Ministers, or other very high level communications. Whatever they are, they will be very narrow and have not yet been determined at law.

The answer, I think, lies in your finding of 25 February. While there was no privilege found to exist, there were certain sensitivities which you identified. What followed then was a sensible dialogue between the Executive and the House which led to the material sought being disclosed but with the House itself setting restrictions on the degree of public dissemination.

Based on this approach, as arbiter you should advise whether any document(s) fall within this narrow class of Executive-Legislative Council privilege or not. As previous arbiters have, you should then also advise whether there exist other considerations that the House should take into account in making any decision on whether to disclose them to the public.

#### *The particular dispute to the privilege claimed*

In this particular matter, there are claims for privilege made by two government agencies.

The Planning and Infrastructure agency claims the documents are privileged because they contain sensitive commercial-in-confidence material regarding the WestConnex project. Further, the agency claims there is a confidentiality deed obliging Government entities to keep the material confidential. Disclosure of this material would reveal how government does business, prejudice government dealings with the private sector and undermine the capacity of government in future dealings with the private sector. The claim is set out on less than one page, and no material is provided to support these bald assertions. There is a global claim for privilege with no discussion as to how particular documents or classes fall within the claim.

The privilege claim from Roads and Maritime Services is six pages. While one claim is titled *public interest immunity* in fact it is comprised of a number of claims for privilege: *commercial-in-confidence*; *Parliamentary privilege*; and *personal*

*information.* There is also a claim that documents are covered by *legal professional privilege.*

Taking the strict Executive-Legislative Council privilege contended for above, you would be comfortably satisfied that there is no valid claim of privilege made by either agency.

Taking the approach of previous independent legal arbiters, you would need to examine each type of privilege claimed against the documents. The difficulty with this is that while different claims for privilege are advanced by government, it is not possible to determine whether each claim is made over all documents, or which particular documents or sets of documents are covered by each type of privilege claim.

I would submit that these global and indiscriminate claims of privilege over the material, and the very brief submissions in support, make it impossible to identify the underlying basis or bases for the claim.

In any case, the burden of establishing any claim of privilege rests on those asserting it. Having regard to the submissions and material provided, I submit that no valid claims are made out.

#### Commercial in confidence

The submissions provided do not identify what the information said to be confidential is with the specificity required by law.

There is nothing to establish that any of the material has the necessary quality of confidentiality in itself. None of the material constitutes trade secrets, customer lists, formulas or confidential or proprietary processes used or any other matter that could be properly understood as a business secret.

The claim that the material (or some of it) was provided to government in circumstances importing an obligation of confidentiality is undermined by the failure to provide the terms of the claimed confidentiality deed.

The claims do not explain or establish that disclosing the documents would reveal sensitive commercial or governmental information, or that the information if revealed would disadvantage any person or party, whether in the government or private sector.

This claim is made at the level of assertion only. Furthermore, the documents said to be covered by this claim are also not identified.

### Parliamentary privilege

This claim rests on a provision of the *GIPA* legislation, which does not apply to the role of the House and so this claim must fail. Personal information

This is not a ground of privilege known to law and so this claim must fail.

### Legal professional privilege

A claim for legal professional privilege is based on two propositions: that the documents either are themselves, or contain a record of, confidential communications, or documents, brought into existence for the purpose of enabling the agencies to obtain, or its legal advisors to give; legal advice, or for use in litigation, in respect of which privilege has not been waived.

Documents prepared by a lawyer in the course, or for the purposes, of addressing . policy and administrative matters, do not attract the privilege: *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 135 FCR 151 at 168 [52]; *Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison (The 'Sagheera')* [1997]1 Lloyd's Rep 160 at 168; *WorkCover Authority (NSW) (General Manager) v Law Society (NSW)* (2006) . 65 NSWLR 502 at 505 [1], 505 [2], 524 [88], 524 [91].

For legal advice privilege to apply it is essential to ensure, particularly in a government context, that the purpose for which a document was brought into existence was one which related to legal advice as opposed to operational, administrative or policy matters: *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2005]1 AC 610 at 651 [38]; *WorkCover Authority (NSW) (General Manager) v Law Society (NSW)* (2006) 65 NSWLR 502 at 505 [1], 505 [2], 506 [7], 525 [94].

None of the documents where Dr Faruqi has disputed the privilege claimed satisfies the requirement for legal professional privilege, so this claim must fail as well.

### Conclusion

The above is the substance of my submission. I reserve the right to amplify and add to it when I respond to any submissions made by other persons in this matter.



The Hon. Adam Searle MLC



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21 July 2014

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

By email: [david.blunt@parliament.nsw.gov.au](mailto:david.blunt@parliament.nsw.gov.au)

Dear Mr Blunt,

**Submission on role of legal arbiter under Standing Order 52**

I refer to your email dated 11 July 2014 to Mr Paul Miller inviting submissions in relation to a disputed claim of privilege concerning documents returned pursuant to the WestConnex Business Case order for papers dated 4 March 2014.

I am instructed to make the enclosed submission on behalf of the Department of Premier & Cabinet for consideration by the Hon. Keith Mason AC QC, on the role of the independent legal arbiter.

Yours faithfully



Tom Chisholm  
Senior Solicitor  
for Crown Solicitor

Encl.(1)

## **Submission to the Honourable Keith Mason AC QC prepared on behalf of the Department of Premier and Cabinet**

### **1. Introduction**

- 1.1 This submission has been prepared on behalf of the Department of Premier and Cabinet, in response to the invitation from the Honourable Keith Mason AC QC, who has been appointed as an independent legal arbiter to evaluate and report on certain disputed claims of privilege in relation to documents regarding the WestConnex Business Case that were returned to House in compliance with an order for the production of documents dated 4 March 2014.
- 1.2 It addresses the general question as to the proper role of, and approach to be taken by, an independent legal arbiter in respect of deciding disputed claims of privilege. The principal question addressed is what test the arbiter should apply in determining whether a document is "privileged" within the meaning of Standing Order 52. This submission does not address the particular documents or claims at issue in relation to the WestConnex Business Case papers.
- 1.3 The submission also briefly addresses the procedures that may be adopted by the arbiter

### **2. Executive summary**

- 2.1 The Department of Premier and Cabinet submits, in short, that:
  1. A claim of "privilege" under Standing Order 52 is a claim by the Executive that the documents it was legally compelled to produce to the House (there being no claim of privilege from production available) not, on balance, be made public.
  2. The arbiter's role, in considering a dispute by a member of the House of the validity of a claim of "privilege" by the Executive, is to determine whether there is a valid claim that the documents should not be made public.
  3. It follows that it is not the arbiter's role to determine whether it would have been open to the Executive to claim that the documents were privileged from production to the House.

4. In considering whether a document is "privileged" in the sense outlined at 1. above, the arbiter is not confined by reference to the grounds of "privilege" developed at common law to determine whether an objection to production of documents to a court should be upheld.
5. The question for the arbiter in determining whether documents are "privileged" is whether the public interest in the House making the document publicly available **in the exercise of its functions** outweighs the public interest in the documents not being published.
6. The House's power to order the production of documents from the Executive was found in *Egan v Willis* (1998) 195 CLR 424 to exist only because it was reasonably necessary to support the exercise of the House's principal functions of making laws and of scrutinising the Executive.
7. It is not, of itself, a function of the House to require production of documents from the Executive in order to publish them to the public. Publication of such documents must be for the purpose of the exercise of a function which it has.
8. In determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the arbiter to understand:
  - i) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published;
  - ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function; and
  - iii) how publication of the documents is reasonably necessary for the House to fulfil that function.

### **3. Standing Order 52**

- 3.1 The independent legal arbiter is appointed by the President of the Legislative Council pursuant Standing Order 52(7).
- 3.2. Standing Order 52 was adopted by the Legislative Council on 5 May 2004, as part of the adoption of new standing orders to replace the standing rules and orders initially adopted on 4 July 1895 (see NSW Legislative Council 2004, *Debates*, 5 May 2004 at 8264).
- 3.3. The Standing Order applies in circumstances where the House has ordered documents to be tabled in the House (Standing Order 52(1)).

1. If the House is sitting the documents are to be laid on the table by the Clerk (Standing Order 52(2)). Once documents are tabled, they are authorised to be published by authority of the House pursuant to Standing Order 54(3).
  2. 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.
  3. If the House is not sitting the documents may be lodged with the Clerk and are deemed to have been presented to the House and published by authority of the House (Standing Order 52(4)).
- 3.4. However, Standing Order 52(5) makes provision for the Executive to claim that a document is "privileged":
- "(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."
- (It is understood that the only purpose for which members of the House access documents claimed to be privileged is to satisfy themselves as to whether the privilege claim should be disputed, and that members will not otherwise disclose or use the contents of the documents whilst they remain subject to a privilege claim.)
- 3.5. In practice an index of documents not claimed to be privileged is prepared and is made available on the Parliament's website, whilst the documents are available for inspection by any person in the offices of the Clerk. Persons inspecting the documents may make copies of the documents. The Clerk maintains a register showing the name of any person examining the documents pursuant to Standing Order 52(9).
  - 3.6. Standing Order 52(6) provides that any member may, by communication 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".
  - 3.7. The arbiter's report is to be lodged with the Clerk, made available only to members of the House, and not published or copied without an order of the House (52(8)).



- 3.8. Standing Order 52 does not expressly provide that the House take any particular steps after receiving the arbiter's report, and the House retains the right to depart from the arbiter's evaluation of the claim.
- 3.9. The generally established practice, however, is that where the arbiter upholds the validity of the claim for "privilege", the House does not order that those documents be tabled or published. Where the arbiter does not uphold the claim, the House generally purports to order that those documents considered not to be privileged be tabled by the Clerk.
- 3.10. It follows that , unless the House chooses to depart from the arbiter's report, the practical effect of the arbiter's finding that a document is "privileged" within the meaning of Standing Order 52 is that the document is not tabled. As such, only members of the House (and Parliamentary staff) are able to have access to the copy of the privileged documents produced to the House.

#### **4. The arbiter's role in deciding whether a claim of "privilege" is validly made**

- 4.1. The arbiter's task is to evaluate and report to the House "as to the validity" of the claim of "privilege".
- 4.2. The Department of Premier and Cabinet submits that the basic question for the arbiter is whether the public interest in the Legislative Council making documents claimed to be privileged publicly available **in the fulfilment of its functions** outweighs the public interest in the documents not being published.
- 4.3. The matters raised in this submission are in addition to those raised by the Honourable Duncan Gay before the Legislative Council on 6 March 2014. I refer particularly to the Minister's observations that the question for the arbiter is not whether the House is legally entitled to the documents, nor whether privileges (from production) exist as a matter of law as between the Executive and the Legislature.

#### ***Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563**

- 4.4. The decision of the Court of Appeal in *Egan v Chadwick* determined that the Executive could not rely on legal professional privilege or public interest immunity to resist *production* of documents to the House.
- 4.5. The Court of Appeal, having determined the Executive could be compelled to produce documents the subject of these common law categories of privilege, did not have to resolve any questions about the circumstances in which Parliament may choose to publish such documents. The references to privilege by the Court of Appeal are to privilege in the ordinary sense of that term, as a privilege against production of documents.

- 4.6. There are, however, a few observations in the decision which are significant in the present context. Spigelman CJ (following the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424)) stated that the "high constitutional functions" of the Legislative Council encompass both legislating and the enforcement of the accountability of the Executive. The Chief Justice then stated that: (at [54] 574; emphasis added)

"Performance of these functions may require access to information the **disclosure** of which may harm the public interest. **Access** to such information may, accordingly, be reasonably necessary for the performance of the functions of the Legislative Council."

- 4.7. Priestley JA, having concluded that legal professional privilege could not be relied upon by the Executive to prevent production of documents to the House, observed that: (at [139] 593-594 emphasis added)<sup>1</sup>

"Possession of the power to compel production does not mean that the power will be exercised unless the House is convinced the exercise is necessary; if exercised, it does not follow that the House will do anything detrimental to the public interest; the House can take steps to prevent information becoming public **if it is thought necessary in the public interest for it not to be publicly disclosed.**"

- 4.8. Both Spigelman CJ and Priestley JA clearly identified in these extracts that the question whether it is in the public interest for the House to make public documents produced under an order for production is a very different question to the extent of the House's power to compel production of those documents.

#### The use of the term "privilege"

- 4.9. The legal or technical meaning of the term "privilege" is a claim that a document or information not be *produced* to a court. This is not altered by the fact that a court, in deciding a privilege claim, may in some circumstances exercise its discretion to inspect the documents for the purposes of determining the claim of privilege. If the claim of privilege is upheld, a court may not take into account or make any use of those documents.
- 4.10. It is therefore apparent that the expression "privilege" as used in Standing Order 52 is not used in its usual legal sense as a claim that documents or information not be produced (to the Legislative Council). That would mean that only Cabinet documents, and any documents within the scope of a statutory provision barring production to the House, would be "privileged" for the purposes of Standing Order 52. This provides an immediate reason to doubt that the arbiter, in determining whether documents should be tabled and therefore become public, is confined by reference to

<sup>1</sup> See also his Honour's observations (at [142] 594) in relation to the Council's duty to prevent "publication beyond itself" in circumstances analogous to those in which a court will uphold a claim of public interest immunity.

those categories developed by the common law to resolve the different question of whether Individuals can be compelled to produce documents to a court.

- 4.11. If any comparison is to be drawn from court processes, a better analogy may be with the circumstances in which a court will consider granting public access to documents produced under subpoena, discovery or other compulsory court process. Generally, those documents only become publicly available if they are subsequently admitted into evidence. Any member of the public or the press who seeks access to documents produced under subpoena or compulsory process which have not been admitted into evidence will require leave of the court<sup>2</sup>. Courts may also decide whether to make non-publication or equivalent orders (now under the *Court Suppression and Non-publication Orders Act 2010*). The point of this comparison is that the matters a court will take into account in determining what use, including whether to grant public access, is to be made of documents produced to it under compulsory process are significantly different from the matters a court will take into account in determining an objection by a party or non-party to production of those documents under subpoena or other compulsory process.

#### **The procedure adopted under Standing Order 52**

- 4.12. If it were not for the procedure put in place by Standing Order 52 then, as discussed in *Egan v Chadwick*, it would be a matter for the House, in the exercise of its discretion in the public interest, to determine whether to table and make public documents produced to it in response to a call for papers.
- 4.13. Instead, in the procedure provided for in Standing Order 52 (and Standing Order 54), the House has decided that the "default" position is that, unless the Executive claims privilege over particular documents, all documents produced will automatically be tabled and become publicly available upon being produced by the Executive. This occurs even before the members of the House have had any opportunity to review the documents having regard to the function it is performing. (To the extent that the Standing Order would purport to permit the House to publish Executive documents other than for the purpose of a function which the House has, there would be a question as to its validity to that extent. It is not necessary to address that here, since this submission is concerned only with the test and approach in the case of documents which are claimed to be privileged under the Standing Order.)

#### **The House's power to call for the production of documents from the Executive**

- 4.14. It is important to understand the nature and purpose of the House's power to call for the production of documents, found to exist by the High Court in *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424. Spigelman CJ succinctly summarised these findings in *Egan v Chadwick*, as follows: (at [2] 565) references omitted)

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<sup>2</sup> See for example *Uniform Civil Procedure Rules 2005* r. 33.9.

- (i) Each House exercises a constitutional function to make laws pursuant to s. 5 of the *Constitution Act 1902*;
- (ii) Each House performs the parliamentary function of review of executive conduct, in accordance with the principle of responsible government;
- (iii) The Legislative Council has such powers as are reasonably necessary for the proper exercise of its functions; and
- (iv) Production of documents by ministers is reasonably necessary for the performance of both functions (i) and (ii).

4.15. It is apparent that the High Court's finding that the Legislative Council may order the production of documents from the Executive was not because that capacity was, in itself, a function of the House. Instead, that power was found to exist only because it was reasonably necessary to support the exercise of the House's principal functions of making laws and of scrutinising the Executive. The power to order the production of documents is in that sense an ancillary power which exists in order to, and to the extent necessary to, support the House in the exercise of its principal functions of making laws and scrutinising the Executive.

4.16. It is therefore important to appreciate that it is not, of itself, a function of the House to require production of documents from the Executive in order to make them public.

#### **The House's power to make public documents produced to it by the Executive**

4.17. The nature and scope of the power to order the production of documents affects the nature and scope of the related power of the House to make public documents which have been produced to the House. That latter power also presumably exists because it is reasonably necessary for the performance of the House's functions of making laws and of scrutinising the Executive. One would therefore expect (leaving aside for the moment documents over which the Executive claims "privilege") that the House would make public only those specific documents returned under a call for papers the publication of which has a sufficient connection with the particular exercise of the House's law-making or scrutiny functions which supported the making of the order for documents. Even with a carefully crafted order, it could be expected that many documents returned would ultimately, on inspection by the members, turn out to be either entirely or substantially unrelated to the particular exercise of the function of the House which supported the making of the order.

4.18. The fact that the House has purported to adopt as the default position that all documents produced without a "privilege" claim having been made by the Executive are automatically tabled and made public, emphasises the importance of the assessment of the claims for "privilege" under Standing Order 52. It also supports the view that the arbiter's task in reporting and evaluating on the validity of a claim of "privilege" should not be construed narrowly so as to apply only to documents which

would fall within the categories recognised by courts in determining objections to the production of documents.

### Conclusions

- 4.19. The Department of Premier and Cabinet therefore submits that the use of the term "privilege" in Standing Order 52 is not confined to those categories of privilege which mean documents are privileged from production in legal proceedings: although those categories and the principles underlying them may offer guidance to the arbiter. The term "privilege" in Standing Order 52 is used as a convenient way to describe a claim by the Executive that, on balance, certain documents which the Executive was compelled to produce should not be made public and does not purport to prescribe or confine the nature of the arbiter's approach in evaluating and reporting to the House on the Executive's claim.
- 4.20. It is also significant that, as observed by Professor Twomey, once documents are produced to the House there are various uses that members may make of them without needing to table the documents and make them public<sup>3</sup>. Professor Twomey correctly identifies that the public interest balancing exercise is to weigh the public harm caused by disclosure against the need for such material to be made public **in the fulfilment of the functions of the Legislative Council.**

### Further comment

- 4.21. It is respectfully submitted that the former legal arbiter Sir Laurence Street QC did not correctly state the nature of the "public interest" balancing process<sup>4</sup>, in that the former arbiter did not appreciate the required connection between any public interest in disclosure and the exercise of a function of the House.
- 4.22. In other respects, however, the former arbiter's approach appears consistent with this submission. In particular, Sir Laurence Street QC made clear that he was considering claims of "privilege from their [the documents] being disclosed to the public", and also that there were important differences between the responsibility of courts, in ruling on claims that documents were privileged from production and in Parliament in exercising its functions to require documents from the Executive and then to make them public<sup>5</sup>.

<sup>3</sup> Twomey, A. "Executive Accountability to the Australian Senate and the New South Wales Legislative Council", (November 2007), *Legal Studies Research Paper No 07/70*, University of Sydney Law School. (Later published in shorter form in Autumn 2008, 23(1) *APR* 257).

<sup>4</sup> See Sir Laurence Street, Report of the Independent Arbiter, 22 August 2003, *Millennium Trains Papers*, at 6-7; and, Second Report of the Independent Arbiter, 20 October 2005, *Papers on Cross City Motorway Consortium* at 1-2. cited by Legislative Council Privileges Committee in its Report 69 (October 2013), *The 2009 Mt Penny return to order* (at 81).

<sup>5</sup> *Papers on Cross City Motorway Consortium*.

## 5. What process should the legal arbiter adopt?

- 5.1. Standing Order 52 is relevantly silent as to the procedure that may be adopted by the independent legal arbiter in evaluating the claim.
- 5.2. It is noted that the original privilege determination and claim made by the Executive on the return of documents pursuant to an order under Standing Order 52 is frequently required to be made under circumstances of considerable constraint. The exigencies of preparing documents for return (often within a timeframe of 14 days) mean that the Executive is often unable to address fully the privilege claims in its submissions on return of the documents. In addition, at the time of return, the Executive is of course unaware which, if any, of the claims may be disputed by a member and on what grounds.
- 5.3. The Department of Premier and Cabinet therefore appreciates the procedure adopted in this matter, which provides the Executive with a much better opportunity both to put submissions in relation to a claim which is disputed and to assist the arbiter.
- 5.4. In determining whether the public interest in the House publishing the documents in the exercise of a function outweighs the public interest in the documents not being published, it will be necessary for the arbiter to understand:
  - i) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function;
  - ii) how publication of the documents is reasonably necessary for the House to fulfil that function; and
  - iii) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published.



I V Knight  
Crown Solicitor

21 July 2014

**Kate Cadell**

---

**From:** David Blunt  
**Sent:** Thursday, 24 July 2014 3:14 PM  
**To:** Adam Searle; David Shoebridge; 'Tom\_Chisholm@cso.nsw.gov.au';  
'Christine.LITHGOW@rms.nsw.gov.au'  
**Cc:** Paul Miller (paul.miller@dpc.nsw.gov.au); keith.mason.2@gmail.com  
**Subject:** Submissions received by Independent Legal Arbiter  
**Attachments:** Clerk of the Parliaments Submission dated 21 July 2014.pdf; Crown Solicitor  
Submission dated 21 July 2014.pdf; Mr David Shoebridge MLC GREENS  
Submission dated 21 July 2014.pdf; Roads and Maritime Services Submission  
dated 21 July 2014.pdf; The Hon Adam Searle MLC Submission dated 21 July  
2014.pdf

Dear colleagues

Further to my email communications of 10 and 11 July concerning the appointment of the Hon. Keith Mason AC QC as Independent Legal Arbiter in relation to a disputed claim of privilege regarding the WestConnex Business Case and in particular Mr Mason's intentions to receive submissions, I can advise as follows.

Five submissions were received and read by Mr Mason yesterday. Furthermore, Mr Mason has asked me to circulate to each of you a full set of the five submissions. He has indicated that he will be pleased to receive comments that any of you may wish to make upon any of the other submissions. Any such further submissions should be forwarded to my office by 5.00 pm on Friday 1 August 2014.

[Paul, I note that the RMS submission indicates that it does not wish to press its claim of privilege in relation some of the documents the subject of the dispute. Can you please confirm this in writing on behalf of the Department of Premier and Cabinet? If so, the documents no longer subject to a claim of privilege will be extracted and moved to the public documents with all members of the Legislative Council being informed by email as soon as that takes place and the Legislative Council being formally advised when it next sits.]

Kind regards,  
David

**David Blunt**


Clerk of the Parliaments | Legislative Council  
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## David Blunt

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**From:** David Blunt  
**Sent:** Thursday, 24 July 2014 3:36 PM  
**To:** Adam Searle; David Shoebridge; 'Tom\_Chisholm@cso.nsw.gov.au'; 'Christine.LITHGOW@rms.nsw.gov.au'  
**Cc:** Paul Miller (paul.miller@dpc.nsw.gov.au); keith.mason.2@gmail.com  
**Subject:** RE: Submissions received by Independent Legal Arbiter

Dear colleagues

Further to my earlier email message set out below, and in response to inquiries since received from some of you and having just spoken with Mr Mason, I can advise that Mr Mason has no objections to the submissions being shared with the other Members of the Legislative Council, but that they should not be further disclosed at this point in time. He will, however, be recommending that they be tabled and public together with his report when the process he is undertaking is completed.

Regards  
David

---

**From:** David Blunt  
**Sent:** Thursday, 24 July 2014 3:14 PM  
**To:** Adam Searle; David Shoebridge; 'Tom\_Chisholm@cso.nsw.gov.au'; 'Christine.LITHGOW@rms.nsw.gov.au'  
**Cc:** Paul Miller (paul.miller@dpc.nsw.gov.au); keith.mason.2@gmail.com  
**Subject:** Submissions received by Independent Legal Arbiter

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Kind regards,  
David



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LEGISLATIVE COUNCIL

OFFICE OF THE CLERK

1 August 2014

The Hon Keith Mason AC QC  
PO Box 82  
CROWS NEST NSW 1585

Dear Mr Mason

### **The role of the independent legal arbiter**

I am writing further to my letter to you, dated 21 July 2014, consequent on your appointment as independent legal arbiter in relation to a dispute concerning documents in respect of the WestConnex Business Case. My letter constituted a submission in respect of the role of the independent legal arbiter.

I am now writing in response to your invitation to each of the parties who made submissions to provide any comments on, or responses to, the other submissions received and circulated through this process.

There is only one matter upon which I wish to comment, namely one aspect of the submission from the Crown Solicitor's Office on behalf of the Department of Premier & Cabinet.

The submission states that, in determining whether the public interest lies in publishing documents the independent legal arbiter will need to understand, amongst other things:

...

- (ii) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function
- (iii) how publication of the documents is reasonably necessary for the House to fulfil that function.<sup>1</sup>

The submission goes on to submit that the former arbiter, Sir Laurence Street, "did not correctly state the nature of the "public interest" balancing test, in that the former arbiter did not

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<sup>1</sup> Crown Solicitor's Office, *Submission to the Honourable Keith Mason AC QC prepared on behalf of the Department of Premier and Cabinet, 21/7/2014*, p 2.

appreciate the required connection between any public interest in disclosure and the exercise of a function of the House.”<sup>2</sup>

It is doubtful, however, whether decisions of the Legislative Council to order the production of documents in relation to various policy issues or decisions of government can be so easily reduced or tied to one particular function or other. Gaudron, Gummow and Hayne JJ in *Egan v Willis* referred to “the immediate interrelation between that superintendence [of the executive government] and the law making function...”<sup>3</sup> In this regard the High Court cited with approval the statement by Priestly JA in the NSW Court of Appeal:

Bearing in mind the way the legislative process actually works, I think the advice and consent formula justifies the statement, using present day language, that “one of the major functions of the Houses [is] that of inquiring into matters of concern as a necessary preliminary to debating those matters and legislating in respect of them”...

... In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the legislature has power to make laws... This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and the Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of new laws. The first of these subjects clearly embraces the way in which the Executive Government is executing the laws.<sup>4</sup>

The exercise by Members individually and collectively of their functions no doubt often involves a mix of motives, roles and constitutional functions. The functions of making laws and holding the executive government to account, recognised as the roles of the Legislative Council in the system of responsible government, are not easily separated.

Neither are the means by which the latter function of holding of the executive government to account is carried out able to be precisely delimited. Whilst the asking of questions, the presentation of petitions, the giving of notices of motions, the moving of motions, words said in debate, and committee inquiries are all able to be used to hold the executive government to account, this is by no means an exhaustive list of the ways in which this function is undertaken.

What is to say that the tabling of documents and their publication itself is not just as valid a means of holding the executive government to account as the other parliamentary mechanisms outlined in the previous paragraph? Indeed, it could be argued that it is a more effective mechanism than some of the processes outlined above. Further, the importance of tabling and publication of documents as a key parliamentary procedure is demonstrated by the long standing existence of Standing Orders and legislation regulating the exercise of those functions, as well as

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<sup>2</sup> *Ibid.*, p 8.

<sup>3</sup> (1998) 159 CLR 424 at 453.

<sup>4</sup> (1996) 40 NSWLR 650 at 692-693.

the long standing body of precedents for the exercise of the power to order the production of documents.

This is perhaps precisely what Sir Laurence Street had in mind when he articulated the public interest in disclosure of documents returned to order in terms of both directly informing public debate and also facilitating scrutiny and evaluation in parliament. This also comes back to the point made in my letter of 21 July, that in the absence of a successful challenge to a claim of privilege over returned documents, Members are very much constrained in the use they can make of those documents (as was evident in relation to the documents the subject of your first report as independent legal arbiter).

Yours sincerely



**David Blunt**  
Clerk of the Parliaments





LEGISLATIVE COUNCIL



Deputy Leader of the Opposition in the Legislative Council  
Shadow Minister for Industrial Relations  
Shadow Minister for Small Business

The Honourable Adam Searle MLC

## Dispute over privileged documents re WestConnex Business Case

1 August 2014

The Hon Keith Mason AC QC

### Introduction

This submission amplifies matters raised in my earlier submission on this privilege dispute, dated 21 July 2014.

It also responds to matters raised in other submissions made in this dispute on privileged documents.

### The role of the independent legal arbiter

The RMS submission of 21 July 2014, at paragraph 15, appears to contend for the maintenance of the approach taken by each former arbiter.

The Clerk of the House has provided a very useful narrative of how each person appointed to act as independent legal arbiter in a Standing Order 52 dispute has conducted the task. This narrative is accompanied by summary of the role/ approach/methodology taken by each of the arbiters, in their own words. While each person has described that role in different words, or emphasised different aspects of the function of arbiter in a particular case, what emerges is, in essence, the same approach over (at least) the last decade.

As Mr Street put it<sup>1</sup>:

"The process involves in effect two stages: is the claim validly based? And if so, is it outweighed by the public interest in disclosure?"

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<sup>1</sup> *Disputed Claim of Privilege-Papers on Cross City Motorway Consortium*, 17 September 2003

In undertaking this second stage, Mr Street has said,

"This process involves balancing against each other two heads of public interest that are in tension."<sup>2</sup>

Those "two heads" are the public interest in maintaining the particular privilege on the one hand and on the other hand the public interest in openness and transparency that comes from disclosure, that ensures "a properly informed public evaluation of the many issues..."<sup>3</sup>

As Mr Cole put it when acting as arbiter, when these two public interests conflict, it will be "a rare circumstance" when the interest in favour of disclosure "does not prevail ... because of the pre-eminence of the constitutional parliamentary function of the Legislative Council ..."<sup>4</sup>

Over time, the Clerk writes, the public interest in disclosure has come to be expressed on terms of an interest in facilitating both informed public debate (through public access to documents) and effective scrutiny of the executive government in Parliament (through removing restrictions which would inhibit the information contained in the documents from being the subject of full debate during parliamentary proceedings).<sup>5</sup> While documents returned to order remain subject of claims of privilege, Members of the Legislative Council, the House and its Committees collectively, are restrained from fully exercising their functions of scrutinising the executive government and legislating in respect of the matters contained in those documents.<sup>6</sup> I agree completely with these views expressed by the Clerk.

I agree also with the Clerk's historical analysis of the way in which independent legal arbiters have undertaken their role and the importance of the disclosure of documents to enable the House and its members to "*fully exercising their functions of scrutinising the executive government.*" I note also that he suggests that "the role should continue to be undertaken in a manner consistent with the approach of previous arbiters."

Again, I agree but this does not mean that the role must be conducted in exactly the way in which it has been to this point. As I stated in my first submission<sup>7</sup>, I think it is open to the independent legal arbiter take a much stricter/narrower view of the

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<sup>2</sup> *Disputed Claim of Privilege-Papers on Cross City Motorway Consortium*, 2nd Report of Independent Legal Arbiter, 20 October 2005, p2

<sup>3</sup> *Disputed Claim of Privilege-Papers on Cross City Motorway Consortium*, 3rd Report of Independent Legal Arbiter, 15 November 2005, p2.

<sup>4</sup> *Disputed Claim for Privilege: Nimmie-Caira System Enhanced Environmental Water Delivery Project*, Report of Independent Legal Arbiter, 20 November 2012, p5

<sup>5</sup> Submission of Mr David Blunt, Clerk of the Parliaments, pp11-12

<sup>6</sup> *Ibid.*, p12

<sup>7</sup> At page 5



privilege that may be claimed by the Executive. In fact, I think the approach you outlined in the 25 February report regarding actions of a WorkCover NSW employee, is correct legally. That does not mean, however, that the "second stage" should not still be undertaken by the arbiter. I think that it should be, for the reasons outlined by Priestley JA in *Egan v Chadwick* at paragraphs [139] and [142]. While *Egan* concerned the power of the House to compel the production of Executive papers, and not whether they should be published, Justice Priestley's comments are directed precisely to this matter and provide guidance.

It is clear that the House can prevent information becoming public if it is in the public interest for it not to be publicly disclosed; where this ground is asserted by the Executive, the Council has the duty to balance the competing public interest considerations, similar to the way in which a court does. The House has wrestled with these issues historically by seeking the advice of independent legal arbiters. I note that Mr Shoebridge in his submission<sup>8</sup> states that this "second stage" is not properly the role of the arbiter but are matters for the House. All matters on which arbiters have provided advice are matters for the House. The arbiter does not decide any of these issues.

As the Crown Solicitor on behalf of the Department of a Premier and Cabinet states in its submission at paragraph 4.12, if the arbiter did not provide advice on these matters it would be a matter for the House, in the exercise of its discretion in the public interest, to determine whether to table and make public documents produced to it in response to a call for papers. There is no reason at law or in principle why it should do so without the benefit of arbiter's advice. If arbiters ceased fulfilling this function, it would make the discharge by the House of this function more difficult. The record discloses that the House has benefitted from this function of the arbiter. My understanding of past decisions of the House in endorsing arbiters' reports is that the House has taken no issue or expressed any reservation about this aspect of the function. As a consequence, I believe that you, and future independent legal arbiters, should continue this aspect of the role, unless or until the House itself says differently.

This observation does not extend to the scope of the privilege which the Executive may claim in connection with documents it is required to produce to the House. This issue is, at least partly, one of law.

#### Crown Solicitor/Premier and Cabinet Submission

The outline by the Crown Solicitor of the Standing Order 52 process contained in paragraphs 3.1 to 3.10 is correct. However, the question for the arbiter as set out in paragraph 4.2 is not correct. The Crown Solicitor, at paragraphs 4.15-4.20, seeks to

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<sup>8</sup> At pages 5, 6

lay the groundwork for a very different process to be undertaken by the independent legal arbiter, which is set out in paragraph 5.4. I vigorously disagree with this proposed approach. It would, in my view, constitute a very significant reduction in the scrutiny of the executive by the Legislative Council. Such an approach is utterly inconsistent with the past approach of independent legal arbiters, and is in my view inconsistent with the view of its own role expressed by the House itself. An approach of the kind contended for by the Crown/DPC would be a fundamental shift in policy. It does not arise from any fair or reasonable view of the law. It is significant that reliance for the new approach is placed on the writings of Professor Anne Twomey, a noted critic of the approach of the Legislative Council's practice in this area, not on any established legal or constitutional requirement. At best, this submission is directed to *policy* not the law or procedure governing the process by which privilege disputes of this kind are resolved.

Over the last decade or more, the House has charted a very different approach, one which very much favours facilitating both informed public debate (through public access to documents) and effective scrutiny of the executive government in Parliament (through removing restrictions which would inhibit the information contained in the documents from being the subject of full debate during parliamentary proceedings). This has been to enable the House and its members to "*fully exercising their functions of scrutinising the executive government.*" The nature of this role, scrutinising executive government, is not limited to the formal processes of Parliament, introducing legislation, asking questions, or in the work of Committees (which is the narrow, formalistic approach contended for by Professor Twomey and, by implication the Crown/DPC submission). As was noted by Chief Justice Gleeson in *Egan v Willis* at page 660B, the notion of responsible government is one which is "not immutable" and has evolved over time. In the current era, a key part of holding executive government to account is the provision of information to the public, to better inform political debate on issues, and to enable Parliamentary representatives to engage in that public discourse by being able to refer to information that has been disclosed.

In my view, given the past practice of arbiters and the approach taken by the House, I do not think it is open to you to adopt the approach suggested by the Crown Solicitor on behalf of his client, the central agency of the executive. If there is to be a change in the role of the independent legal arbiter of the kind contended for in the Crown/DPC submission, it should be taken by the House.

The power of the House to compel the production of State or Executive papers is one which arises at common law because it is a function which has been held to be "reasonably necessary" for the fulfilment by the House of its functions; namely, scrutinising the executive and making laws. This is accepted by the Crown Solicitor/DPC at paragraph 4.17. However, this submission goes on to claim that the House should only make public those specific documents which have a sufficient connection with the particular exercise of the House's functions which supported the

making of the order for documents. Furthermore, at paragraphs 4.11, 4.13, 4.21 and 5.4 I) and II), the Crown/ DPC contends that there is a "required connection between any public interest in disclosure and the exercise of a function of the House." (Para 4.21)

With respect, this is a fundamental misconception of the power and modern role of the House. When the House makes a call for papers, it asserts that it is reasonably necessary to do so to fulfill one or more of its constitutional roles. There is no requirement at law for the House to nominate which function underpins any call for papers. Indeed, given the complex nature of the composition of the House, there may be more than one purpose in a call. At its highest, this submission is one directed to advocating a change of policy. This would be a matter for the House, and is not an approach that should be adopted by you as arbiter.

In any case, this is really a 'straw man' argument. If there be any doubt, it should be understood that – at the minimum – each call for papers rests on the function of holding executive government to account. It may also be underpinned by other constitutional functions in a particular case.

If the executive disputes that a call for papers is properly made in a constitutional sense, it can seek to resist the production of papers, as it did in *Egan v Chadwick*. If it does not do so, and no privilege is claimed, there is no sound legal or constitutional reason why documents should not be publicly disclosed, contrary to criticisms made of this approach by the House by Professor Twomey and by this submission at paragraph 4.13. Protection of the public interest is maintained by the executive making a claim of privilege over documents, if that is deemed by it to be necessary; and by any dispute of the privilege claimed, which is resolved by the independent legal arbiter process. Ultimately, if the executive disputes the final resolution of the House, it can approach the courts.

The Crown/DPC submission rests heavily on the proposition that the term "privilege" contained in Standing Order 52 is not confined to how that term is understood at law but should be understood as a claim by the executive that certain documents should not be made public. As a result, while the approach at law to claims of privilege may inform the arbiter, the Crown/ DPC submit that he is not bound by this approach and is not constrained by these concepts in evaluating and reporting to the House on the executive's claims. What is contended for here by the submission is for a much wider scope for any claim of privilege claimed over documents by the executive than has been contended for, or accepted in this process, or its predecessors, for some fifteen years. No authority or principle is put forward to support this proposal.

There is no warrant for the proposition that in using the term "privilege" in Standing Order 52 the House did not intend to use the term in its legal sense. While the House is not a court, it is part of a legislature that makes laws. In adopting the standing order, and its predecessor, it is to be assumed the House acted, informed by the

advice of its Clerk. The use of a term well known in law should be understood to convey its proper, legal meaning. The fact it is used in the Standing Order to apply to a process in relation to the public disclosure rather than the production of documents to the House should not lead to a different conclusion. In addition, the use of the word "validity" in Standing Order 52(6) speaks of a precise legal meaning and context. If it is not a claim founded in law, how can it be "valid" or "not valid"?

Finally, if the term in the Standing Order is not intended to have its usual meaning, it would mean that there would be absolutely no principled basis upon which the executive could ever found an argument that documents should be withheld from public disclosure, other than a desire by the executive that the documents remain confidential. With respect, this is not satisfactory and, in my view, would make a mockery of the importance of this matter, and does no service to the legitimate interests of the executive.

There must be a proper basis upon which the executive can argue that documents produced to the House should not be publicly disclosed. However, any basis must be properly founded in law and go well beyond a mere desire to avoid embarrassment or inconvenience for any person.

In my view, the arbiter should determine whether any document which is the subject of a claim for privilege in fact attracts the privilege asserted. This squarely raises the nature of any privilege claim available to the executive. While each former arbiter has approached this as if he were a court, with the usual kinds of privilege that arise in that context being available to the executive, I am of the view that the privilege which the executive may claim here is significantly narrower and limited to the privilege that "as a matter of law, exists between the Executive and the Upper House of the New South Wales Parliament."<sup>9</sup> In my view, this would be limited to, at its highest, Cabinet documents, high level communications within government or between Ministers and the Crown.

As to the issue of Cabinet documents, I noted in my previous submission on 21 July 2014 that while a majority in *Egan v Chadwick* held the Cabinet documents could be withheld from production to the Legislative Council, that majority was itself divided on the scope of what constituted Cabinet documents. I note that in the leading High Court authority on public interest immunity, *Sankey v Whitlam* (1978) 142 CLR 35 held that although there is a class of documents whose members are entitled to protection from disclosure that protection is not absolute and does not endure forever.

The High Court held that the fundamental principle is that documents in the class (which include cabinet documents and others concerned with policy decisions at a high level) may be withheld from production only when this is necessary and in the

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<sup>9</sup> Keith Mason AC QC, *Report under Standing Order 52 on disputed Claim of Privilege, Actions of former WorkCover NSW employee*, 25 February 2014, p2

public interest. It was held that where a strong case was made out for the production and the court determined that disclosure would not really be detrimental to the public interest an order for production would be made. The case concerned the production of documents concerned with the highest levels of the executive government, with the deliberations of Cabinet Ministers and with the advice given to those Ministers by heads of Commonwealth departments. Only in relation to some of these documents was crown privilege/public interest immunity upheld. Even some Cabinet documents were held to not be immune from production to the court. This being so, the capacity of the executive to not produce "Cabinet documents" may on the basis of *Sankey* in fact be more limited than was considered by the NSW Court of Appeal in *Egan v Chadwick*.

While this does not arise in the present case, it is relevant in considering what might fall within the narrow Executive-Legislative Council privilege. Because we are here discussing common law powers of the House, its precise limitations cannot yet be stated. What I think can be said is that, on current authority, at least some Cabinet documents may not be able to be compelled to be produced to the House. The Executive-Legislative Council privilege in connection with the issue of public disclosure then would appear to be limited to documents which have been produced which reveal deliberations only at the highest level of government and the disclosure of which can properly be said to be inimical to the public interest. Outside of this limited class, there would be no claim of privilege available to the executive. In determining whether public disclosure would be inimical to the public interest, it would in my view be necessary for the arbiter to be satisfied that the public interest in upholding the privilege claim outweighed the public interest in favour of disclosure. In my view, the starting point would be a presumption in favour of disclosure given the nature of the power of the House to call for papers.

Such an approach would merge the current two stage process into one. Alternatively, it could be divided into whether (a) the document(s) constitute or deliberations at the highest levels of government; and then (b) an evaluation which weighs up the competing public interests around disclosure in the manner of the previous arbiters. I accept that this second function may not arise explicitly from the standing order, but it is the established practice, the practice has assisted the House and the House has endorsed it. As the Chief Justice stated in *Egan v Chadwick*, the decision whether to publicly disclose a document is a political and not a legal one. In deciding such matters, the House should be as fully informed as possible. In addition, if the arbiter accepts the much narrower form of privilege which may be claimed by the executive, this second aspect would I think be an inseparable part of determining whether the privilege in fact exists in a particular case. The privilege should not be found merely because a document belongs to a certain class. It should be found only after the competing public interests are weighed.

If the documents do not properly attract the privilege claimed, the documents should then be made public. However, if there is good reason this should not prevent the

executive from engaging the House in a dialogue to have only a partial public disclosure take place, as occurred with the WorkCover dispute in February this year.

### The particular dispute

If the approach that I contend for above is followed in the present matter, the arbiter would find that none of the documents attract the relevant privilege that would prevent them from being disclosed to the public.

If, however, the present arbiter takes the approach of previous arbiters, I address those matters in some more detail, below.

The claim of privilege made by the Planning and Infrastructure agency has been addressed in my first submission, at page 6. No further material has been put in support of its claim.

The claim of privilege made by RMS was also addressed in my first submission at pages 6-8. However, RMS has made a further submission on 21 July which I now address.

The RMS has abandoned much of its claims of privilege, leaving only 83 documents in contention. The table which is Appendix A to the submission addresses each document over which privilege is maintained, with an outline of the basis for the claim.

I note that RMS has acceded to the release of many documents listed in the table, but claims to not waive any privilege claimed over them. With respect, this course is not open to RMS. If it agrees to the release of a document or documents, privilege is waived over those documents.

In relation to those documents in connection with which RMS maintains its claim for privilege, I now deal with the aspects most easily dealt with.

The claim of *Parliamentary privilege* over House folder notes, is made in paragraphs 2.18-2.22 of its original claim, and paragraphs 25-26 of its submission made on 21 July. True Parliamentary privilege as it exists at common law simply does not apply to this material. To the extent RMS contends that disclosure should not occur because it would be immune under the terms of the *Government Information Public Access Act 2009 (NSW)*, this is not a relevant consideration. We are dealing here with the powers of the House at common law and the GIPAA law does not constrain the House. Further, to the extent this material was prepared for the Minister to use in making statements to the House, which would then be public, there can be no privilege that would restrain disclosure. If the material was designed and intended for the Minister to make public, there can be no public interest dimension that would support non-disclosure. This deals with items 1-3, 7-12, 39, 45-48, 100 and 130.

The claim of *personal information* made a paragraph 2.23 of the original privilege claim is not a privilege known to law. While disclosure of personal details may be embarrassing for individuals, no basis has been provided that would enable the House to determine whether, in the exercise of its discretion, this material should be not disclosed, or have redactions made to protect the purely personal and private details of citizens.

The claim of *legal professional privilege*, set out at paragraphs 3.1 and 3.2 of the original RMS claim for privilege, and in its submission of 21 July at paragraph 12; this is set out more particularly at item 61 of Appendix A accompanying the submission setting out in table form those documents where a privilege claim is maintained.

This deals with document RMS.016.027.8229. It is claimed this is a communication seeking legal advice and is subject to legal professional privilege. It is not and does not fulfil the requirements that would attract legal professional privilege, if such a claim is available in this context. The document appears to be a proposed draft letter from the Minister for RMS to the Premier seeking approval for a limited release of documents subject to Cabinet-in-Confidence to certain commercial interests.

The document does not appear to have been created by a lawyer, or to be from a client to a lawyer, or to seek any legal advice.

The documents is not itself, and does not contain a record of, confidential communications, or documents, brought into existence for the purpose of enabling the agencies to obtain, or its legal advisors to give; legal advice, or for use in litigation.

It is a documents prepared in the course, or for the purposes, of addressing policy and administrative matters; even if prepared by a lawyer it would not attract the privilege: *DSE (Holdings) Pty Ltd v InterTAN Inc* (2003) 135 FCR 151 at 168 [52]; *Hellenic Mutual War Risks Association (Bermuda) Ltd v Harrison (The 'Sagheera')* [1997]1 Lloyd's Rep 160 at 168; *WorkCover Authority (NSW) (General Manager) v Law Society (NSW)* (2006) 65 NSWLR 502 at 505 [1], 505 [2], 524 [88], 524 [91].

The document was clearly created for operational, administrative or policy matters, and so does not attract the privilege: *Three Rivers District Council v Governor and Company of the Bank of England (No.6)* [2005]1 AC 610 at 651 [38]; *WorkCover Authority (NSW) (General Manager) v Law Society (NSW)* (2006) 65 NSWLR 502 at 505 [1], 505 [2], 506 [7], 525 [94].

The largest cohort of documents where a claim of privilege is maintained is in connection with what might be called *commercial-in-confidence*. The claim is set out in paragraphs 2.1 to 2.17 of the original RMS claim and in paragraphs 11, 13, 14, 2-23. Due to the limited access afforded to the documents in question, I have not been able to set out a table to rival Annexure A, but I make some observations which are

applicable to this cohort generally and make reference to specific documents to illustrate my point.

None of the RMS submissions<sup>10</sup>, or the material in Annexure A, in fact establishes that any of the documents over which privilege is claimed contains information that can properly be said to be “commercially sensitive” either in connection with any of the contractors engaged or the Business Case itself.

There is no material provided to establish that the disputed documents are those which RMS and other contracting parties have agreed should be treated as “commercial-in-confidence” and/or subject to any confidentiality agreement(s): see 2.2, 2.3 of the original RMS submission. Even if they were, any concern about the legal liability of RMS to a breach of confidence action does not arise given how the disclosure would come about: i.e. not through any act or omission of RMS or the executive. Given the absence of contractual information regarding this issue, the arbiter would not be able to reach a view whether this could support any privilege claim.

None of the remaining 83 documents over which privilege is claimed has the features or contains information of the kind which is claimed as a reason for non-disclosure in paragraphs 2.4-2.6, or 2.14. None of the documents reveal even impliedly any RMS deliberative process. There is no information on pricing, negotiations or the overall provision of services by any person or entity.

Some documents do reveal money amounts paid for some services, but not how those amounts are calculated or reveal the basis on which the private provider charged, or any commercial contractual detail. An example of this is the email chain Re: NB11553-WestConnex Traffic Analysis; Forecast Billings regarding Sinclair Knight Merz (SKM), at RMS.014.013.4161 - RMS.014.013.4163 and the billings submitted contained at RMS.014.013.4162. This is contained in Annexure A as item 51 where it is claimed that it contains confidential information of a third party and should not be released for this reason.

The disclosure of how much public money was expended cannot be a confidential matter and disclosure of such information is very much in the public interest, both generally (in terms of scrutiny of governmental expenditure) and in connection with WestConnex, the single largest infrastructure project being undertaken by the State of NSW.

A similar document (RMS.017.022.4024) which reveals a money amount but not the basis of its calculation is proposed for release by RMS itself, at item 95 of Annexure A.

There is no basis for withholding the publication of item 51.

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<sup>10</sup> See the passage under the heading *Commercial-in-confidence information* in the original RMS submission, and paragraph 20 of its submission dated 21 July 2014



The material in paragraphs 2.8-2.9 concerning GIPAA simply do not give rise to any consideration here, as this legislation has no application to the processes of the House and cannot found any relevant claim of privilege.

The same applies to the matters set out in paragraph 2.10. However, none of the disputed documents disclose any *"tender information received from tenderers that is intellectual property, proprietary, commercial-in-confidence or otherwise confidential."* Even if applicable, these considerations would not give rise to a valid privilege claim over these documents.

The concerns expressed in paragraphs 2.11 and 2.13 that go to concerns that disclosure could have any adverse impact on the commercial position of government or RMS or on any private sector entity, simply do not arise.

In answer to paragraph 2.15, the Business Case itself has been withheld on the basis of Cabinet confidentiality. However, there are other disputed documents which do contain information, including opinions, analysis of financial and economic impacts, traffic and tolling considerations, traffic forecasts and analysis. However, none of the documents discloses any internal processes, 'trade secrets' or proprietary information belonging to any third-party or private sector entity. To the extent that any of the information discloses any internal governmental information, it is not of a nature that would disadvantage government in seeking competitive tenders, financing arrangements, or would have any other detrimental effect on the commercial position or operation of the RMS or the NSW Government.

There are no documents, on my reading, which reveal any advice on what might be called infrastructure strategies, as claimed in paragraph 2.15.

Turning to the RMS submission of 21 July 2014, many of the documents over which privilege is claimed do not contain "specific information" as claimed in paragraph 22 a. While it is claimed at paragraph 22 c. that *"consultants and internal personnel would have signed confidentiality agreements.."* no specifics or evidence to ground this assertion is provided. As to the claim in 22 d. that the release of the information *"is likely to have detrimental effect on the State.."* is an assertion only and as contended for in this submission the information in fact is not commercially sensitive to any party.

Much of the information in the disputed documents disclose concerns and confusion regarding aspects of the project, and may well cast significant doubt on claims made by elected Government regarding the project to date; however, protection of government (or other parties) from embarrassment is not a basis for a claim of privilege.

One document, RMS.017.019.6026, does disclose certain tolling assumptions but these do not appear to belong to any private commercial concern but to government. As there will be no competition as to the provision of the motorway, this information

does not give rise to any competitive disadvantage for any person or entity including government, nor is it information that could disadvantage government in relations with the private sector. Its release is otherwise in the public interest, given the scale and importance of this project as well as the public resources invested.

Items 34-36 and 37-44 do not disclose any RMS or other government deliberations or any confidential or proprietary information belonging to any third party or to government, including to Sydney Airport, as claimed.

Item 58, RMS.016.024.4096 - RMS.016.024.4104, does not contain specific tolling scenarios as claimed in Annexure A, but discusses the shape of roads, on-off ramp placements and possible to changes to the model (but not what those changes are). None of this information is in the nature of advice (as it appears to state what will occur), nor does it appear to be commercially sensitive to any party. Given its significance to the WestConnex project its release is in the public interest and no basis is disclosed to support it remaining confidential.

Items 79-82 do contain specific tolling scenario information, but does not disclose how this was calculated. It also not articulated how these would *"negatively impact the Government's ability to maintain its competitive or commercial position and obtain value for money."* Item 82 discloses an intention to toll users of a particular stretch of road near the airport twice. Again, this information is in the public interest and there is no indication how the disclosure of this would adversely impact government in its commercial dealings, or any other party.

Items 84-86 are said to contain information confidential to a third party and would *"negatively impact the Government's ability to maintain its competitive or commercial position and obtain value for money."* This document is mainly about Sydney Ports and the logistics around sharing information, but does not contain or disclose the information itself.

Items 160 and 161 contains analysis of the M4 toll from 1992-2009. This is historical information and cannot be said to be in anyway "commercially sensitive" today.

Item 162 is (perhaps) a projection of what might occur on Parramatta Road as a result of a reintroduction of a toll on the M4, from 2012 to 2021. It is not clear how this projection could *"negatively impact the Government's ability to maintain its ability to maintain its competitive and commercial position and obtain value for money."*

The same vice is said to attach to item 168, which sets out truck and car volumes, but not how this was calculated. Again, how this information would adversely impact government is not articulated.

The release of the information in items 170 and 171 are said to *"detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State ... [and] impair the Government's ability to achieve value for money."* How the release of this material would do so is not

articulated to any degree. Item 170 sets out options for the M4 widening project, but makes no recommendation and contains no advice to government. Item 171 appears to be a chart of projected cost escalations for different aspects of road construction and does not appear to relate specifically to WestConnex or to any specific road project; it appears to be standard information for either the RMS or the road construction industry generally and appears to be derived from published sources.

Item 177, said to have the same vice as 170 and 171, merely discusses the existence of different financing options but does not explore any details or reveal anything that could be construed as confidential material.

### Conclusion

Similar comments to those relating to particular documents above may be made regarding the other items where RMS maintains a claim of commercial-in-confidence privilege.

RMS bears the onus of establishing the basis of any privilege claim.

Even a cursory examination of the documents discloses that no such claim is made good on the grounds advanced by RMS.

The claims of privilege over the disputed documents should be rejected.

Even were some to be found to be valid, (and assuming the approach of other independent legal arbiters is followed in this case) in the weighing of competing public interests the arbiter should find that the public interest in favour of disclosure outweighs other considerations and these documents ought be made public.

A handwritten signature in blue ink, consisting of a large, stylized 'A' followed by a smaller 'S' and a horizontal line extending to the left.

Adam Searle MLC



014/19415



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1 August 2014

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

**By email:** david.blunt@parliament.nsw.gov.au

Dear Mr Blunt,

**Submission in reply on role of legal arbiter under Standing Order 52**

I refer to your email dated 27 July 2014 inviting submissions in reply, in relation to a disputed claim of privilege concerning documents returned pursuant to the WestConnex Business Case order for papers dated 4 March 2014.

I am instructed to make the enclosed submission in reply on behalf of the Department of Premier & Cabinet for consideration by the Hon Keith Mason AC QC.

Yours faithfully

A handwritten signature in blue ink, appearing to read "Tom Chisholm".

Tom Chisholm  
Senior Solicitor  
**for Crown Solicitor**

Encl.(1)





**CROWN SOLICITOR**  
NEW SOUTH WALES

**Submission in reply to the Honourable Keith Mason AC QC  
prepared on behalf of the Department of Premier and Cabinet**

**1. Introduction**

1.1 This submission in reply addresses key points in the submissions to the independent legal arbiter, the Hon Keith Mason AC QC, in relation to the role of the independent legal arbiter. It endeavours not to repeat the substance of my primary submission, but to respond to issues arising from the other submissions, and to highlight for the assistance of the arbiter particular differences between my approach to the construction of "privilege" in Standing Order 52 and the application of public interest considerations, and that of others.

**Submissions by the Hon A Searle MLC and the Hon D Shoebridge MLC that "privilege" in Standing Order 52 pertains to a privilege between the Executive and Legislative Council**

1.2 The Hon A Searle MLC and the Hon D Shoebridge MLC prefer the view that "privilege" in Standing Order 52 pertains to privilege as between the Executive and Legislative Council<sup>1</sup>.

1.3 It is submitted in reply that there is, strictly speaking, no "privilege" as such in law as between the Executive and the Legislative Council. Rather, the implied power of the House to call for documents has been held not to extend to the production of documents which reveal the deliberations of Cabinet: *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563.

1.4 If the submission is that "privileged" should be taken to refer to "a document which the Executive cannot be compelled to produce to the House", it is not clear why that test would be intended to be applied in respect of documents which have been produced. That test would have no work to do as documents "privileged" in that sense are not produced and are, therefore, not subject to claims of "privilege" under the procedure outlined in Standing Order 52(5).

1.5 The preferable view is that the procedures provided for in Standing Order 52 point to "privileged" documents being documents which it is claimed by the Executive should not be published. Those procedures it is submitted should be understood as the Legislative Council's means of taking the steps, and addressing the duty regarding non-publication, referred to by Priestley JA in *Egan v Chadwick* at [139], cited in my primary submission at [4.7].

<sup>1</sup> See submission of the Hon D Shoebridge MLC, 21 July 2014, at pp. 5-6 and submission of the Hon A Searle MLC, 21 July 2014, at pp. 5-6.

- 1.6 As noted in my primary submission at [4.8], both Spigelman CJ and Priestley JA made clear the importance of distinguishing a lack of power to compel *production* and the issue of subsequent publication of those documents which are produced.

**Submission that "privilege" in Standing Order 52 refers to technical legal privilege – apparently supported by the Hon A Searle MLC and Mr D Blunt, Clerk**

- 1.7 Another view of "privilege" in Standing Order 52, apparently supported by the Hon. A Searle MLC and the Clerk Mr D Blunt, is that "privilege" means privileges "known to law" which are, at least, equivalent to those which would be recognised by a court in a claim of privilege against production or admission into evidence. (I will refer to this as "technical legal privilege")<sup>2</sup>. This view is also referred to by the Hon D Shoebridge MLC (apparently without endorsement) at pg. 5:

"...previous arbiters... undertook a two-step approach regarding the validity of claims for privilege under SO52(6). Essentially that two-step approach was to consider established classes of privilege or immunity and then weigh up the public interest in disclosure as against the public interest in retaining the privilege or immunity claimed".

There are several reasons why a construction of "privilege" as technical legal privilege should not be favoured.

- 1.8 Firstly, as outlined in my primary submission at [4.9]-[4.10], unlike in judicial proceedings, it is clear that "privilege" under Standing Order 52 is not directed to production. There are significant difficulties in transposing categories of technical legal privilege, which are applied by a court in determining whether documents should be produced to it (including by admission into evidence), in the context of documents already produced to the Legislative Council. Any legal principles are not, in terms, directly applicable.
- 1.9 Secondly, if a technical legal construction of privilege is adopted, this has the consequence of significantly restricting the documents which will be subject to consideration prior to publication, and results under Standing Order 52 in the automatic publication of many documents in respect of which legitimate interests against disclosure may exist. (As noted in my primary submission at [3.3], where a privilege claim is not made by the Executive, Standing Order 52 purports to order that

<sup>2</sup> See submission of the Hon. A Searle MLC, 21 July 2014, at p 4 "this two-step process... while imperfect, has worked well" and p 7, wherein the submission appears to endorse, albeit in the alternative to Searle's preferred view (Executive-Legislative Council privilege), the technical legal privilege approach characterised as being that of former arbiters, and pp. 7-8 generally see references to privileges "known to law". See also the submission of the Clerk, Mr D Blunt, 21 July 2014, at pp. 1, 11-12, for example, "the House thus endorsed the approach taken by the authors of those reports... not only evaluating the technical validity of claims of privilege but also evaluating whether technically valid claims are accompanied by sufficient justification to outweigh the competing (and perhaps overriding) public interest in disclosure".

documents returned are automatically published.) Such consequences suggest that the intention underlying Standing Order 52 is that "privilege" does not refer to technical legal privilege.

- 1.10 That construction would mean, for example, that the WorkCover claim, cited with approval by the Hon. Members Shoebridge and Searle, could never take place. In that matter, the Executive's privilege claim based on privacy was not upheld by the arbiter, as it did not give rise to a "relevant privilege known to law". However, the House ultimately determined that publication was not in the public interest. The Hon D Shoebridge cites this as an example of "comity, common sense and a general commitment amongst members of the Legislative Council to protecting the public interest" (at p. 5). So too, the Hon A Searle cites this example as "the answer" to the difficulties in construing Standing Order 52 (at p. 5). However, if the technical legal construction of privilege is correct, the Executive should not have made the privilege claim which it did and the documents would have been produced and automatically published pursuant to Standing Order 52. This consequence, apparently not thought desirable by any of the submissions, points strongly against the construction of "privilege" claims under Standing Order 52 as pertaining only to technical legal privileges.
- 1.11 Indeed, the classes of documents which will be considered prior to publication would generally be much more limited than those which have been considered to date. In relation to public interest immunity claims, the common law principles (also reflected in s.130 *Evidence Act 1995*) require that the information or document relates *to a matter of state*, as a preliminary requirement *before* the weighing exercise of public interests occurs (see generally *State of New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60). This means that some of the documents considered by previous arbiters including Sir Laurence Street and M J Clarke QC, may not properly have been the subject of claims for privilege under a technical legal definition. For example, I refer to arbiter decisions recognising the legitimate interests in protecting commercially sensitive information and speaking of "commercial confidentiality privilege" (see Sir Laurence Street, Papers on MS Motorway, 7 December 1999), "commercial in confidence immunity" (Sir Laurence Street, Papers on Leave of Quarantine Station, 31 July 2001), "commercial in confidence privilege" and the "legitimate private interest in confidentiality" (Sir Laurence Street, Development on Crown Land (Woodward Park Oasis Development), 8 May 2003), "commercial in confidence privilege" (Sir Laurence Street, Papers on Millennium Trains, 22 August 2003), the "contractual duty of the Department" as an apparently legitimate basis of a claim for privilege (Sir Laurence Street, Documents on Axiom Education Consortium, 1 September 2004), "confidentiality agreements" as the basis of a claim "not to be lightly disregarded" (Sir Laurence Street, Audit of Restricted Rail Lines, 16 June 2005), "the public interest in maintaining the privacy of the report" (M J Clarke QC, Audit of Expenditure and Assets, 26 June 2006) and "commercial in confidence privilege and so



on" (Sir Laurence Street, 2009-2010 Budget, 11 December 2009)<sup>3</sup>. Whilst these matters involved different outcomes as to the arbiter's recommendations to the House, none suggest that the Executive's privilege claim was without proper basis and should fail for that reason.

- 1.12 Similarly, documents falling into the categories cited in the Clerk's submission as grounds of public interest immunity claims with a measure of acceptance in the Commonwealth Senate (at page 10), including unreasonable invasion of privacy and damage to commercial interests, may not properly be regarded as privilege categories known to law if a technical legal construction of privilege is favoured.
- 1.13 For the same reason, it may be that highly sensitive personal information captured by an order under Standing Order 52 (often with no apparent relevance to any scrutiny or law making function being exercised by the Executive) is subject to automatic publication. As noted in my primary submission at [4.17], even carefully crafted orders will often capture unintended documents and information. Such documents may not clearly fit within a category of technical legal privilege, yet there may be significant privacy and even personal security issues arising. In judicial proceedings where such information is relevant and admitted into evidence, courts will generally exercise discretion as to what information is revealed in judgments or may make non-publication orders, or orders restricting access beyond the parties. It would seem surprising if it were the House's intention that such information would become publicly available without restriction upon a return of documents, and yet that would be the consequence of adopting a technical legal definition of privilege under Standing Order 52.
- 1.14 Thirdly, a construction of "privilege" as technical legal privilege cannot be supported together with a view that the arbiter should then continue to make an additional evaluation or observations to the House about whether to publish a document.
- 1.15 The role of the arbiter is clearly set out in Standing Order 52 (6) to "evaluate and report" on the "validity of the claim" for privilege. If "privilege" refers to technical legal privilege, the arbiter on the plain language of Standing Order 52(6) should determine only whether the document in question comes within a technical legal privilege, and not engage in further consideration as to weighing the public interest for and against publication of the document. (See further Twomey<sup>4</sup>.) This would mean, for example, that the approach adopted in the Report of the Independent Legal Arbiter on Papers on the Lane Cove Tunnel, dated 24 January 2006, in which claims for legal professional privilege were recognised as technically valid, could not be supported. The arbiter noted:

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<sup>3</sup> I note with gratitude the assistance provided by the Clerk in preparing the appendix of extracts from tabled independent arbiter reports to his primary submission.

<sup>4</sup> Anne Twomey, *Executive Accountability to the Senate and the NSW Legislative Council*, (2008) 23(1) *Australasian Parliamentary Review* 257, at 265.

"in addressing the essential question of whether they [the documents] should nevertheless be opened up for public scrutiny, I am of the view that they are not of such sensitivity as to be withheld. The public interest in transparency and accountability in all aspects of the Lane Cove Tunnel, as part of the transport infrastructure, outweighs the justification for protecting solicitor-client communication in relation to all of these documents. My conclusion is that LPP is denied".

With respect, this is not an approach open to the arbiter if it is suggested that "privilege" in Standing Order 52 be construed to mean technical legal privilege. That "essential question" regarding public interests in publication discussed above forms no part of legal professional privilege as understood at law.

- 1.16 If the arbiter and the House are to apply a balancing test in considering publication of documents, a position which appears to be favoured in all submissions (setting aside at present the nature of that test), any such consideration is premised on the fact that the Executive has made a claim for privilege in that document. Without such a claim, automatic publication results under Standing Order 52.
- 1.17 It cannot be that the correct approach is one which depends upon the Executive making (what would be) spurious claims for privilege in order to prevent immediate publication of documents and to provide an opportunity for documents which may have a public interest element supporting non-disclosure to be considered by the arbiter and the House.
- 1.18 As noted in my primary submission at [2.1] and [4.2], I prefer the view that a claim of privilege under Standing Order 52 is a claim by the Executive that the documents not, on balance, be made public, and that the arbiter's role in determining the validity of a claim of privilege is to answer the question whether the public interest in the House making the document publicly available **in the exercise of its functions** outweighs the public interest in the documents not being published. I do not think, for the reasons outlined above, that Standing Order 52 can properly be construed as requiring a two-stage test where the first stage requires the Executive to demonstrate that the document falls within a category of technical legal privilege.

### **Submissions as to the public interests to be considered**

- 1.19 Each submission appears to suggest that the public interests for and against disclosure of documents should be considered as part of the evaluation of Executive claims of "privilege" – even if in some submissions it is said that this is the sole function of the House, and not the arbiter. As outlined in my primary submission at [4.16], [4.20], [4.21] and [5.4] particularly, the question for the arbiter is whether the public interest in the House publishing the documents **in the exercise of a function** outweighs the public interest in the documents not being published. Other submissions do not appear, with respect, to recognise or emphasise the necessity to link the issue of publication of

documents with the *function* being exercised by the House which supported the making of the order under Standing Order 52.

- 1.20 There is not and was not recognised in *Egan v Willis* [1998] HCA 71; (1998) 195 CLR 424 a power or function for the House to require production of documents from the Executive merely in order to make them public. Rather, the power to require production of documents pursuant to Standing Order 52 is an incidental power to the functions recognised in *Egan v Willis* and summarised by Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176; (1999) 46 NSWLR 563 at [2] (cited in my primary submission at [4.14]).
- 1.21 The identification of the function being exercised by the House is a necessary component of the context in which the balancing of public interest considerations must take place. That balancing process of public interests cannot take place in the abstract.
- 1.22 For example, a public interest immunity assessment by a court involves consideration of the public interest in the harm disclosure of the matters of state may cause against the public interest in the administration of justice if the Court is denied access to that information. This necessitates understanding both the public interest for and against production. There is a public interest in disclosure because enabling the Court to have access to the documents or information will assist the Court to exercise its function of administering justice by deciding the case in accordance with law<sup>5</sup>.
- 1.23 So too, the assessment under Standing Order 52 must be made in the context of the constitutional functions said to be exercised by the House in each instance where it calls for production of documents from the Executive and the publication of such documents to the public at large. As noted in my primary submission at [2.1] and [5.4], to determine the public interest in publication of documents it is necessary for the arbiter to understand:
- i) what function the House was exercising when it decided that the order for the production of documents from the Executive was reasonably necessary for the exercise of that function;
  - ii) how publication of the documents is reasonably necessary for the House to fulfil that function; and
  - iii) the reasons why the Executive submits that, on balance, documents claimed to be privileged should not be published.
- 1.24 There can be found in the reports of previous arbiters examples where the arbiters have turned their mind to the relevant function being exercised by the House in relation to

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<sup>5</sup> See for example *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39 (Gibbs ACJ), cited with approval in *Alister v The Queen* (1984) 154 CLR 404 at 434 (Wilson and Dawson JJ).

the particular order. The Hon Terrence Cole, in his report on Papers on the Nimmie-Caira System Enhanced Environmental Water Delivery Project (20 November 2012), considered that the Legislative Council was, in relation to the particular order for documents, exercising a function on a subject matter "in which the Legislative Council and its members have a constitutional right...of reviewing the actions or proposed actions of the Executive government". The report continued "competing with this interest is the private interest [of private individuals and the government in conducting confidential and sensitive commercial arrangements]". Similarly in his report on Desalination Plant Papers (22 December 2005) the Hon Terrence Cole spoke of "the public interest in permitting the Legislative Council to perform that task" [of reviewing Executive conduct in respect of the particular subject matter at issue] and later of "the public interest in the Legislative Council being in a position properly to perform its constitutional duties of review of the Executive arm of government". So too Sir Laurence Street, in his report on the 2009-2010 Budget (11 December 2009), referred to the evaluation of privilege as involving "...considerations travelling beyond the mere contents of the documents; it requires evaluation of the legitimacy of Parliament having access to the documents and subjecting them to Parliamentary scrutiny and debate".

- 1.25 It is essential that the balancing of public interests be understood in context, as involving a consideration on the one hand of the function being exercised by the House which supported the Standing Order 52 call for documents and which is said to support the public interest in the House being able to publish those documents (in the course of exercising that function) and, on the other hand, those public interests identified by the Executive in the claim of privilege which support the documents not being published. For example, it may be that the House requires production of documents to exercise its constitutional function of scrutinising the Executive, but the public interest in the document being *published* in the exercise of that scrutiny function may not outweigh a public interest which exists against publication of the document. Publication of Executive documents is not in itself a function of the House.

### **Submissions which draw support from the reports of previous arbiters**

- 1.26 The question of the proper role of the legal arbiter must be determined by construction of Standing Order 52 and is not determined by the reports of previous arbiters, although those reports may of course assist to highlight the issues regarding construction of Standing Order 52.
- 1.27 To the extent that the approach of former arbiters is of assistance and is relied upon in other submissions, it should be noted that it is, with respect, not easy to determine what view each arbiter held as to the proper construction of "privilege" under Standing Order 52, and whether they applied a one or two step process. For example, it is far from clear that the previous arbiters adopted a strict legal definition of privilege under Standing Order 52. Indeed, certain reports indicate strongly that they did not, as

outlined above at [1.11]. Sir Laurence Street has variously referred to "in essence" the question involving the "standard issue of balancing the public interest in disclosure against the public interest in allowing privilege from disclosure" (Papers on M5 East, Lane Cove and Cross City Tunnel Ventilation, 28 February 2006) and "the overriding public interest... preponderates over the considerations advance in support of the matters put forward as justifying the non-disclosure of the documents" (WorkCover prosecutions, 17 April 2012). These examples appear more consistent with a single stage balancing task unconfined by strict legal categories of privilege, although in my submission they do not necessarily correctly state the nature of the public interest balancing test.

Signed:



I V Knight  
**Crown Solicitor**  
1 August 2014

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## David Blunt

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**From:** Paul Miller <Paul.Miller@dpc.nsw.gov.au>  
**Sent:** Wednesday, 6 August 2014 2:23 PM  
**To:** David Blunt  
**Subject:** RE: WestConnex dispute - "attachments"

Thanks David.

I have forward your email to RMS who will prepare a short supplementary submission.

Kind regards  
Paul

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**From:** david blunt [<mailto:david.blunt@parliament.nsw.gov.au>]  
**Sent:** Wednesday, 6 August 2014 2:10 PM  
**To:** Paul Miller  
**Subject:** WestConnex dispute - "attachments"

Dear Paul

Dr Faruqi having reviewed the "attachments" that we discussed this morning, there are now only 28 such documents in dispute.

Those 28 documents are highlighted in the attached extract from the original RMS index to privileged documents.

Some of the documents to which they were "attached" have now been released, subsequent to your correspondence last Friday, while others have not.

Mr Mason has indicated that he is prepared to receive any further information RMS may wish to provide in relation to these 28 "attachments", along the lines of the information in the addendum to the RMS submission, dated 21 July 2014.

Kind regards  
David

## David Blunt

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Document ID	Category	Document	Date of Creation	Author	Privilege Claim Y/N?
RMS.002.005.0576	Category (b)	N10 - Westconnex - including M4 Widening_M5 Duplication - 7 November 2013.doc	7-Nov-13	Unknown	Y
RMS.002.005.0908	Category (b)	Updated request- HFN	31-Oct-13	HINDSON Anna </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=HINDSONA>	Y
RMS.002.005.0909	Category (b)	131011_N10 - BE13 Motorways - Westconnex - including M4 Widening_M5 Duplication - 10 October 2013.doc	15-Oct-13	Unknown	Y
RMS.003.001.0231	Category (b)	RE: WestConnex	28-Feb-13	GIUNTA Kirsten </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=GIUNTAK>	Y
RMS.003.001.1684	Category (b)	FW: WestConnex Focus Group and Roundtable Research Request for Quotation [RTA-DBMOTORWAYS.FID16760]	12-Feb-13	SCULLY Edward J </O=RTA/OU=SOUTHWEST/CN=RECIPIENTS/CN=SCULLYE>	Y
RMS.003.001.1685	Category (b)	WE301 Westconnex proposal vF (29.01.13).pdf	29-Jan-13	Unknown	Y
RMS.003.001.2730	Category (b)	Inquiry re: West Connex	8-Aug-13	Mark Ludbrooke <mark.ludbrooke@pacific.net.au>	Y
RMS.003.001.3824	Category (b)	WestConnex	21-Jun-13	WestConnex@smpo.nsw.gov.au </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=WESTCONNEX1>	Y

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RMS.003.001.4248	Category (b)	inquiry re 2 John St Concord	18-Apr-13	WestConnex@smpo.nsw.gov.au </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=WESTCONNEX1>	Y
RMS.003.001.4558	Category (b)	RE: Waterloo's moved ...	11-Jan-13	Simon Beswick <Simon_Beswick@ahl.com.au>	Y
RMS.003.001.6763	Category (b)	ML12/10186	20-Nov-12	SPIVEY Richard </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=SPIVEYR>	Y
RMS.003.001.6765	Category (b)	ML12.09994.doc	20-Nov-12	Unknown	Y
RMS.003.001.6928	Category (b)	RE: WestConnex	28-Feb-13	TAYLOR Christine </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=TAYLORC>	Y
RMS.003.001.6940	Category (b)	WestConnex stats	13-Feb-13	TAYLOR Christine </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=TAYLORC>	Y
RMS.003.001.6941	Category (b)	4feb_11feb-hys.pdf	12-Feb-13	Unknown	Y
RMS.003.001.6946	Category (b)	demographic_11feb.csv	12-Feb-13	Unknown	Y
RMS.003.001.6949	Category (b)	register_your_interest-4feb_11feb.xls	12-Feb-13	Unknown	Y
RMS.003.001.6951	Category (b)	survey_4feb-11feb.xls	12-Feb-13	Unknown	Y
RMS.004.004.2927	Category (b)	WestConnex - Key Risks (project wide - not just comms focussed)	24-Dec-12	SCULLY Edward J </O=RTA/OU=SOUTHWEST/CN=RECIPIENTS/CN=SCULLYE>	Y
RMS.004.004.2928	Category (b)	Document1.doc	24-Dec-12	Unknown	Y
RMS.004.004.4170	Category (b)	Tentative: IPDT Briefing between Boulderstone and SMPO Communications	6-Feb-13	SCULLY Edward J </O=RTA/OU=SOUTHWEST/CN=RECIPIENTS/CN=SCULLYE>	Y

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RMS.010.001.3321	Category (b)	Re: Westconnex	2-Aug-13	INSW <oliver.steele@infrastructure.nsw.gov.au>	Y
RMS.010.001.4138	Category (b)	Fwd: Quote 95684/1:A4 Brochure - 354pp + 2pp cover (portrait)	24-Jul-13	Mark Bruer <markb@impressdesign.com.au>	Y
RMS.010.001.4139	Category (b)	ATT00001.htm	24-Jul-13	Unknown	Y
RMS.010.001.4140	Category (b)	Quote 95684_1.pdf	24-Jul-13	Unknown	Y
RMS.010.001.8583	Category (b)	FW: WestConnexCorridor Urban Design Framework	29-Apr-13	COLLINS Gareth P </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=COLLINGP>	Y
RMS.010.001.8586	Category (b)	Extra services 180413.pdf	29-Apr-13	Unknown	Y
RMS.010.002.0738	Category (b)	RE: WC Advisory Group follow up	3-Mar-13	Peter Abelson <Peter.Abelson@treasury.nsw.gov.au>	Y
RMS.010.002.0744	Category (b)	RE: Pls Call: Jenny Davis 8016 0109 Budget Issue on West Connex	1-Mar-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=GOLDSMIP>	Y
RMS.010.002.0949	Category (b)	RTA economic analysis manual	13-Feb-13	damien.smith@au.ey.com <damien.smith@au.ey.com>	Y
RMS.010.002.0951	Category (b)	SYDNP4912_13022013_081534PM.pdf	13-Feb-13	Unknown	Y
RMS.010.002.2169	Category (b)	Invoice	13-Aug-13	STEELE Oliver </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEELEO>	Y
RMS.010.002.2984	Category (b)	RE: FW: EY value capture work	18-Jul-13	STEELE Oliver </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEELEO>	Y
RMS.010.002.3469	Category (b)	RE: EY graphic	4-Jul-13	STEELE Oliver </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEELEO>	Y

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RMS.014.006.8625	Category (b)	RE: WestConnex - reference case scope for Sunday run	21-Jun-13	WEBB Matthew </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=WEBBMJ>	Y
RMS.014.006.8846	Category (b)	RE: M4MM - Traffic Analysis Sub Stream	17-Jun-13	MORGANTE Marco A </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=MORGANTM>	Y
RMS.014.007.3409	Category (b)	NB11553 - Westconnex Traffic Analysis: SP update #2	12-Mar-13	Richardson, John A (SKM) <JARichardson@globalskm.com>	Y
RMS.014.007.3412	Category (b)	WestConnex Exp Design V2.docx	12-Mar-13	Unknown	Y
RMS.014.007.3468	Category (b)	RE: Traffic Analysis for M4MM	8-Mar-13	KINNEAR Simon </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=KINNEARS>	Y
RMS.014.007.3470	Category (b)	reconciliation rd.pdf	8-Mar-13	Unknown	Y
RMS.014.007.3920	Category (b)	RE: Traffic Volume information	5-Mar-13	MORGANTE Marco A </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=MORGANTM>	Y
RMS.014.007.4148	Category (b)	RE: NB11553 - Westconnex Traffic Analysis: SP update	1-Mar-13	Richardson, John A (SKM) <JARichardson@globalskm.com>	Y
RMS.014.007.4163	Category (b)	NB11553 - Westconnex Traffic Analysis: SP update	1-Mar-13	Richardson, John A (SKM) <JARichardson@globalskm.com>	Y
RMS.014.007.4165	Category (b)	NB11553 PureProfile Engagement.pdf	1-Mar-13	Unknown	Y
RMS.014.007.4167	Category (b)	WestConnex Questionnaire V3.2.xlsx	1-Mar-13	Unknown	Y
RMS.014.007.6389	Category (b)	Re: LEX 4276 / 1427 - WestConnex - draft Exclusivity and Information Protocol Deed	2-Feb-13	LEE Katharine </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LEEKA>	Y
RMS.014.007.6656	Category (b)	RE: NB11553 - WestConnex Traffic Analysis	21-Jan-13	TARANTO Vince E </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=TARANTOV>	Y

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RMS.016.022.4599	Category (b)	Westconnex - Provision of Industry Partner Development Team - Contract No. 13.2909.0292	24-Apr-13	VASEEHARAN Ganeshan </O=RTA/OU=SYDNEY/CN=RECIPIENTS/ CN=VASEEHAV>	Y
RMS.016.022.4690	Category (b)	Re: Probity Advisory Services - Westconnex	19-Mar-13	Benson Waghorn <bwaghorn@procuregroup.com.au>	Y
RMS.016.022.7012	Category (b)	Updated: IPDT Workshop - Ferrovia	24-Jan-13	PASK Ben </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/C N=PASKB>	Y
RMS.016.022.7013	Category (b)	5301566_1_DBMOTORWAYS_WestConne x-IPDT-Action_Items- Ferrovia_MASTER_130225 (2).DOCX	25-Feb-13	Unknown	Y
RMS.016.022.7021	Category (b)	5301589_1_DBMOTORWAYS_WestConne x-IPDT-Ferrovia-SMPO_Meeting_Agenda- 130227 (2).DOCX	25-Feb-13	Unknown	Y
RMS.016.024.4096	Category (b)	FW: NB11553 - WestConnex Traffic modelling - next round - clarifications	17-May-13	PEARL Josh </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/C N=PEARLJ>	Y
RMS.016.024.7407	Category (b)	RE: Wcx - Opex & Lifecycle Input Template Update	14-Feb-13	Chelsea.Albert@au.ey.com <Chelsea.Albert@au.ey.com>	Y
RMS.016.024.8268	Category (b)	FW: WestConnex and Commonwealth Government Funding - Letter from Minister Albanese to Minister Gay [SEC=UNCLASSIFIED] [RTA- DBMOTORWAYS.FID14818]	21-Jan-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/ CN=GOLDSMIP>	Y
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RMS.016.027.8228	Category (b)	Draft Letter from Minister to Premier re: Dataroom	11-Nov-13	COOK Peter J </O=RTA/OU=SYDNEY/CN=RECIPIENTS/ CN=COOKP>	Y

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RMS.017.015.7143	Category (b)	RE: RE: NB11553 - WestConnex Traffic Analysis: Claim 01	17-Apr-13	O'Meagher, Pia (SKM) <POMeagher@globalskm.com>	Y
RMS.017.015.7146	Category (b)	NB11553_Invoice_01 Subcontractors Statement.pdf	17-Apr-13	Unknown	Y
RMS.017.015.7148	Category (b)	NB11553_Invoice_01.pdf	17-Apr-13	Unknown	Y
RMS.017.016.1103	Category (b)	M5 East Incident Data - Commercial In Confidence	21-Feb-13	LI James	Y
RMS.017.016.1104	Category (b)	13HFN-Tunnel Closures 20130124.xls	12-Feb-13	Unknown	Y
RMS.017.016.1467	Category (b)	Incidents by Date.xlsx	12-Feb-13	Unknown	Y
RMS.017.016.1968	Category (b)	RE: Fact Checking	23-May-13	LI James	Y
RMS.017.016.1972	Category (b)	2012 Trucks by origin (HCV LCV) - from Usha.xls	23-May-13	Unknown	Y
RMS.017.016.3691	Category (b)	WestConnex Transport Planning Advisory Services - Contract for execution	14-Jun-13	LI James	Y
RMS.017.016.3692	Category (b)	C71_PSC_Transport Planning - sent on 140613.pdf	14-Jun-13	Unknown	Y
RMS.017.016.3753	Category (b)	Transport Planning - Letter of Award.pdf	14-Jun-13	Unknown	Y
RMS.017.016.8560	Category (b)	FW: Weekly CE Meeting 290113 (clean).dot.DOC	29-Jan-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=GOLDSMIP>	Y
RMS.017.016.8561	Category (b)	5295943_1_DBMOTORWAYS_Weekly CE Meeting 290113 (clean).dot.DOC	25-Jan-13	Unknown	Y
RMS.017.017.5134	Category (b)	approved response to kerry grant.doc_A3662236.2.DOC	15-May-13	Unknown	Y
RMS.017.017.5139	Category (b)	ML13_03624 - Samantha Ngui - WestConnex Tempe approved_A4084880.1.doc	16-May-13	Unknown	Y
RMS.017.017.5164	Category (b)	ML12 11449.signedMP_A3607441.1.DOC	10-Jan-13	Unknown	Y
RMS.017.017.5166	Category (b)	ML12 12045.signedMP_A3607233.1.DOC	10-Jan-13	Unknown	Y
RMS.017.017.5980	Category (b)	FW: Updated PR proposal for Roads & Maritime Services WestConnex project	26-Mar-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=GOLDSMIP>	Y

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RMS.017.019.2902	Category (b)	doc.kml	1-Jan-80	Unknown	Y
RMS.017.019.2908	Category (b)	BBJV MODELLING REQUEST 4# - TESTING OF THE ROZELLE OPTION	7-Feb-13	Stephens, Matthew <Matthew.Stephens@smec.com>	Y
RMS.017.019.2909	Category (b)	doc.kml	1-Jan-80	Unknown	Y
RMS.017.019.2923	Category (b)	Re: boulderstone questions for modelling	15-Feb-13	Ben Pask <ben.pask@eig.com.au>	Y
RMS.017.019.3081	Category (b)	Church Street	8-May-13	Aitken, Scott <Scott.Aitken@aecom.com>	Y
RMS.017.019.3085	Category (b)	Turn Flows at Church St.xls	7-May-13	Unknown	Y
RMS.017.019.3907	Category (b)	FW: NB11553 - WestConnex Traffic Analysis: Weekly progress	12-Mar-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.019.4094	Category (b)	FW: STM Population Synthesiser Targets - Aug 2012 Population Forecasts	11-Feb-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.017.019.4095	Category (b)	Proto Targets Summary.xls	28-Aug-12	Unknown	Y
RMS.017.019.4138	Category (b)	FW: Tunnel vkts	21-Feb-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.017.019.4146	Category (b)	FW: WestConnex - Network assumptions v2	3-Apr-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.017.019.4294	Category (b)	M4 toll plaza info	10-Jul-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.017.019.4295	Category (b)	M4 Motorway Toll Plaza Volumes.xls	10-Jul-13	Unknown	Y
RMS.017.019.4335	Category (b)	NB11553 - WestConnex Traffic Analysis: Concept Designs for Opt 13	26-Mar-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.017.019.4479	Category (b)	RE: C&F/traffic	28-Mar-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y

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RMS.017.019.4955	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: Concept Designs for Opt 13	27-Mar-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.019.4961	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: Discussion topics for tomorrow.	27-Feb-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.019.4964	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: HTS query to help identify NHB trips missing from STM HB Tours	8-Mar-13	Hay, Annette <Annette.Hay@transport.nsw.gov.au>	Y
RMS.017.019.4970	Category (b)	HTS tours example1.xlsx	5-Mar-13	Unknown	Y
RMS.017.019.5041	Category (b)	HTS tours example2.xlsx	5-Mar-13	Unknown	Y
RMS.017.019.5215	Category (b)	HTS tours example3.xlsx	5-Mar-13	Unknown	Y
RMS.017.019.5352	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: RFI register	5-Mar-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.017.019.5413	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: Weekly progress	19-Mar-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.017.019.5417	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: Weekly progress	19-Mar-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.017.019.5421	Category (b)	RE: NB11553 - WestConnex Traffic Analysis: Weekly progress	19-Mar-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y



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RMS.017.021.1641	Category (b)	Re: NB11553 - WestConnex Traffic Analysis: Weekly progress	18-Feb-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.021.1758	Category (b)	RE: Stream Zero Infra-Traffic-Revenue Analysis	10-Apr-13	PEARL Josh </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=PEARLJ>	Y
RMS.017.021.1834	Category (b)	Re: WestConnex - Information Request - Department of Transport (Part 1)	21-Mar-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.021.1840	Category (b)	Re: WestConnex - Information Request - Department of Transport (Part 1)	21-Mar-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.021.1847	Category (b)	Re: WestConnex - Network assumptions v2	28-Mar-13	ZITO Christopher </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ZITOC>	Y
RMS.017.021.1853	Category (b)	RE: WestConnex - reference case scope for Sunday run	21-Jun-13	PEARL Josh </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=PEARLJ>	Y
RMS.017.021.1937	Category (b)	Stage 1 only model run	6-Jun-13	PEARL Josh </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=PEARLJ>	Y

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RMS.017.025.1498	Category (b)	SMPO SC Minutes - Meeting 4 DRAFT_A3609255.1.DOCX	2-Jan-13	Unknown	Y
RMS.017.025.2166	Category (b)	130224_WestConnex_Dixer	24-Feb-13	LESTER Candice </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/C N=LESTERCA>	Y
RMS.017.025.2167	Category (b)	130224_WestConnex_Dixer.DOC	24-Feb-13	Unknown	Y
RMS.017.025.2306	Category (b)	Approved WestConnex HFN [RTA- DBMOTORWAYS.FID16473]	30-Jan-13	SCULLY Edward J <Edward.SCULLY@rms.nsw.gov.au>	Y
RMS.017.025.2307	Category (b)	5297070_1_DBMOTORWAYS_130130_HF N_WestConnex.doc.DOC	30-Jan-13	Unknown	Y
RMS.017.025.2366	Category (b)	RE: HFN for review: collapse of toll road companies	20-Feb-13	FINLAYSON Felicity C </O=RTA/OU=SYDNEY/CN=RECIPIENTS/ CN=FINLAYSF>	Y
RMS.017.025.2639	Category (b)	Approved response to Dr Tim Stephens 6 August 2013_A4965781.1.doc	6-Aug-13	Unknown	Y
RMS.017.025.2641	Category (b)	Approved response to Dr Tim Stephens 6 August 2013_A4965781.2.doc	6-Aug-13	Unknown	Y
RMS.017.025.3453	Category (b)	Draft response to ML13_03624 Ms Samantha Ngui_A3926231.1.DOC	11-Apr-13	Unknown	Y
RMS.017.025.3475	Category (b)	Draft response to Mr P Barron_A4209947.1.doc	11-Jun-13	Unknown	Y
RMS.017.025.3536	Category (b)	Response to ML12- 11857.approved.20130110_A3607535.1.DO C	10-Jan-13	Unknown	Y
RMS.017.025.4863	Category (b)	RE: Next Steering Committee Meeting???	22-May-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/ CN=GOLDSMIP>	Y

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RMS.018.001.2122	Category (b)	20130429 AGN0001 1306 Job Transactions.pdf	26-Jun-13	Unknown	Y
RMS.018.001.2123	Category (b)	Corporate Traveller.pdf	26-Jun-13	Unknown	Y
RMS.018.001.2126	Category (b)	WestConnex only.pdf	26-Jun-13	Unknown	Y
RMS.018.001.2133	Category (b)	WestConnex IPDT - Final Progress Claim	25-Jun-13	Dunne, Aidan <Aidan.Dunne@leicon.com.au>	Y
RMS.018.001.2134	Category (b)	PC-04 May 2013.pdf	25-Jun-13	Unknown	Y
RMS.018.001.2146	Category (b)	WestConnex IPDT - Progress Claim	24-Jun-13	Dunne, Aidan <Aidan.Dunne@leicon.com.au>	Y
RMS.018.001.2147	Category (b)	PC-03 April 2013.pdf	24-Jun-13	Unknown	Y
RMS.018.001.2159	Category (b)	RE: WestConnex - LCPL Progress Claims	17-May-13	Peter Barber <peter.barber@eig.com.au>	Y
RMS.018.001.2220	Category (b)	WestConnex - LCPL Cost To Date	24-Apr-13	McDonald, Philip <phil.mcdonald@leicon.com.au>	Y
RMS.018.001.2221	Category (b)	ResourceEstimate - WestConnex.pdf	24-Apr-13	Unknown	Y
RMS.018.001.2224	Category (b)	Tracking Sheet - WestConnex.pdf	24-Apr-13	Unknown	Y
RMS.018.001.3160	Category (b)	FW: Contract	7-Mar-13	Steve Burns <sburns@thiessdegremont.com.au>	Y
RMS.018.001.3163	Category (b)	2013_02_04 WestConnex PSC - Thiess 3.doc	7-Mar-13	Unknown	Y
RMS.018.001.6287	Category (b)	Heavy Vehicle Design Parameters for WestConnex Business Case	29-Jan-13	Geering, Don <Don.Geering@transport.nsw.gov.au>	Y
RMS.019.001.3098	Category (b)	FW: RE:West Connex Review of Contractors submissions	9-Apr-13	PROLOV Walter </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=PROLOWW>	Y
RMS.019.001.3100	Category (b)	Contractors comparison sheet.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3101	Category (b)	West Connex Questions to Contractor-BBJV.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3103	Category (b)	West Connex Questions to Contractor-LCPL.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3105	Category (b)	West Connex Questions to Contractor-Thiess.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3229	Category (b)	FW: WestConnex Cost Briefing	8-Apr-13	PROLOV Walter	Y

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RMS.019.001.3231	Category (b)	Comparison of Contractors Multipliers.xlsx	7-Apr-13	Unknown	Y
RMS.019.001.3235	Category (b)	RE: WestConnex Cost Briefing	7-Apr-13	Mark Raven <mark@mravenconsulting.com.au>	Y
RMS.019.001.3237	Category (b)	Comparison of Contractors Multipliers.xlsx	7-Apr-13	Unknown	Y
RMS.019.001.3241	Category (b)	RE:West Connex Review of Contractors submissions	8-Apr-13	Mark Raven <mark@mravenconsulting.com.au>	Y
RMS.019.001.3242	Category (b)	Contractors comparison sheet.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3243	Category (b)	West Connex Questions to Contractor-BB.JV.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3245	Category (b)	West Connex Questions to Contractor-LCPL.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.3247	Category (b)	West Connex Questions to Contractor-Thiess.xlsx	8-Apr-13	Unknown	Y
RMS.019.001.5678	Category (b)	WestConnex Invoices IN6085, 6086, 6087, 6088, 6089, 6090 & 6091	3-Apr-13	Chapman, Nicole <Nicole.Chapman@mottmac.com.au>	Y
RMS.019.001.5679	Category (b)	IN6085 - West Connex - CAD - Long Tunnel.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5684	Category (b)	IN6086 - WestConnex - MX 3D Concept.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5689	Category (b)	IN6087 - WestConnex - M4 West.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5694	Category (b)	IN6088 - WestConnex - M4 East.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5699	Category (b)	IN6089 - WestConnex - M4 East Short Tunnel.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5704	Category (b)	IN6090 - WestConnex - Presentation Drawings.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5709	Category (b)	IN6091 - WestConnex - Various Concept Drawings.pdf	4-Apr-13	Unknown	Y
RMS.019.001.5779	Category (b)	WCX - Budget update	19-Mar-13	David Sweeney <David@u-c.com.au>	Y
RMS.019.001.5780	Category (b)	130319_RMS_Budgetupdate_Walter_DS.pdf	19-Mar-13	Unknown	Y
RMS.020.003.5151	Category (b)	Ferrovial Progress Claim 03_A4035465.1.pdf	2-Apr-13	Unknown	Y

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RMS.022.005.4746	Category (b)	WestConnex - further feedback to Financial Advisors	29-Nov-12	WEBB Matthew	Y
RMS.022.005.4747	Category (b)	RE: RFP - Westconnex Financing Scoping Study	29-Nov-12	WEBB Matthew	Y
RMS.022.005.4749	Category (b)	WestConnex Financial Modelling and Economic Advisor - Request for Quotation (additional information request)	29-Nov-12	WEBB Matthew	Y
RMS.022.005.6994	Category (b)	RE: Westconnex	24-Jan-13	WEBB Matthew	Y
RMS.022.005.7097	Category (b)	RE: Westconnex next steps	30-Jan-13	WEBB Matthew	Y
RMS.022.005.7223	Category (b)	RE: Briefing on Monday	22-Feb-13	WEBB Matthew	Y
RMS.022.005.7224	Category (b)	WestConnex - Financial Advisors traffic.xlsx	22-Feb-13	Unknown	Y
RMS.022.005.7260	Category (b)	FW: WestConnex - Financing discussion - this afternoon	22-Feb-13	WEBB Matthew	Y
RMS.022.005.7279	Category (b)	WestConnex - Financing discussion - Allens input	21-Feb-13	WEBB Matthew	Y
RMS.022.005.7350	Category (b)	FW: WestConnex - Macquarie Bank Contract	20-Feb-13	WEBB Matthew	Y
RMS.022.005.7351	Category (b)	WestConnex - Macquarie Capital Professional Services Agreement - FINAL.doc	20-Feb-13	Unknown	Y
RMS.022.005.7426	Category (b)	FW: Resolution Consulting Invoices & timesheets Dec 2012 - Jan 2013	20-Feb-13	WEBB Matthew	Y
RMS.022.005.7427	Category (b)	December 2012 Invoice.pdf	20-Feb-13	Unknown	Y
RMS.022.005.7428	Category (b)	January 2013 Invoice RMS.pdf	20-Feb-13	Unknown	Y
RMS.022.005.7429	Category (b)	Matt Webb - timesheet Dec 12- Jan 13.pdf	20-Feb-13	Unknown	Y
RMS.022.005.7433	Category (b)	Westconnex January 2013.pdf	20-Feb-13	Unknown	Y
RMS.022.005.7434	Category (b)	Westconnex Project December 2012.pdf	20-Feb-13	Unknown	Y
RMS.022.005.7493	Category (b)	RE: WestConnex - CPI, AWE and capital cost escalation forecasts	19-Feb-13	WEBB Matthew	Y
RMS.022.005.7495	Category (b)	WestConnex - Value capture work for NSW Treasury	19-Feb-13	WEBB Matthew	Y

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RMS.022.006.0871	Category (b)	WestConnex - stages timetable	8-Apr-13	WEBB Matthew	Y
RMS.023.001.0045	Category (b)	Ferrovial info and Project Estimate Info	15-May-13	Andrew Anastasiou <andrew.anastasiou@elg.com.au>	Y
RMS.023.001.0656	Category (b)	Re: Leighton Contractors AECOM report NPR-RPT-0000-GE001A, WestConnex Business Case	30-Apr-13	Andrew Anastasiou <andrew.anastasiou@elg.com.au>	Y
RMS.023.001.0721	Category (b)	RE: Top of Mind summarised	29-Apr-13	Vuksic, Rob <Rob.Vuksic@leicon.com.au>	Y
RMS.023.001.0722	Category (b)	Appendix A_Top Of Mind_SS_130428 CS.DOCX	29-Apr-13	Unknown	Y
RMS.023.001.0823	Category (b)	RE: Vent Fan Clarification Request	29-Apr-13	Vuksic, Rob <Rob.Vuksic@leicon.com.au>	Y
RMS.023.001.0886	Category (b)	RE: WestConnex - Ferrovial Clarification Request 1	14-May-13	Rasines Portilla, Juan Francisco <jfrasines@ferrovial.com.au>	Y
RMS.023.001.1774	Category (b)	EI Scope of Work - WestConnex.pdf	3-Dec-12	Unknown	Y
RMS.023.001.5373	Category (b)	ACVM - Letter of Award.doc	8-Apr-13	Unknown	Y
RMS.023.001.5377	Category (b)	Sevot - Letter of Award.doc	8-Apr-13	Unknown	Y
RMS.023.001.5381	Category (b)	SMEC - Letter of Award.doc	8-Apr-13	Unknown	Y
RMS.023.001.6487	Category (b)	FW: Hawthorne Canal holding statement	23-Apr-13	ALLEN Alisha Y </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ALLENA>	Y
RMS.023.001.6488	Category (b)	130423 WestConnex_Hawthorne Canal.doc	23-Apr-13	Unknown	Y
RMS.023.001.6490	Category (b)	RE: Hawthorne Canal holding statement	23-Apr-13	ALLEN Alisha Y </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ALLENA>	Y

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RMS.023.001.6579	Category (b)	FW: M5 East economic analysis	27-Sep-12	Webb, Matthew <Matthew.Webb@transport.nsw.gov.au>	Y
RMS.023.001.6789	Category (b)	Strategic Environmental assessment - draft brief	14-Nov-12	ROBERTS Kevin T </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=ROBERTKT>	Y
RMS.023.001.6790	Category (b)	Brief - Strategic Environmental Assessment - (1).doc	14-Nov-12	Unknown	Y
RMS.023.001.8005	Category (b)	FW: WestConnex - Western Portal - split connections	3-Jul-13	Andrew Anastasiou <andrew.anastasiou@eig.com.au>	Y
RMS.023.001.8007	Category (b)	Short_Long Tunnel Review.doc	3-Jul-13	Unknown	Y
RMS.023.001.8008	Category (b)	Splitting the Western Portals.pptx	3-Jul-13	Unknown	Y
RMS.023.002.1484	Category (b)	twest	10-Dec-12	BETTS John S </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=BETTSJ>	Y
RMS.023.002.1485	Category (b)	5290657_1_DBMOTORWAYS_Letter of Engagement KJA.DOC	7-Dec-12	Unknown	Y
RMS.023.002.1495	Category (b)	5290657_1_DBMOTORWAYS_Letter of Engagement KJA.nrl	10-Dec-12	Unknown	Y
RMS.023.003.2836	Category (b)	Sydney *.jpeg and Leighton Delta Difference	15-May-13	Andrew Anastasiou <andrew.anastasiou@eig.com.au>	Y
RMS.023.003.2837	Category (b)	Accepted: Review Capital Cost Estimate Variances to Model	30-May-13	TANSEY Michael C </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=TANSEYM>	Y
RMS.023.003.5877	Category (b)	WestConnex IPDT - Boulderstone Bouygues - Management Meeting Notes	14-Jan-13	Ben Pask <ben.pask@eig.com.au>	Y
RMS.023.003.5878	Category (b)	Attachment.pdf	14-Jan-13	Unknown	Y
RMS.023.003.5880	Category (b)	WestConnex-IPDT-Boulder-Management_Mtg-130111.doc	14-Jan-13	Unknown	Y

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RMS.023.004.6107	Category (b)	Brief for Urban design framework - slot - Taverners Hill to Concord.doc	2-Nov-12	Unknown	Y
RMS.023.004.6112	Category (b)	Multi-Criteria Analysis.doc	7-Nov-12	Unknown	Y
RMS.023.005.4084	Category (b)	RE: WestConnex M4 Widening Project. Email Part 2b of 3	13-May-13	SHOPOV Vladimir R </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=SHOPOVV>	Y
RMS.023.005.4085	Category (b)	M4 Widening Study Foot Print Sheet 2.pdf	19-Apr-13	Unknown	Y
RMS.023.006.1950	Category (b)	FW: WestConnex Urban Design Framework	4-Jun-13	Ross de la Motte <rdelamotte@hassellstudio.com>	Y
RMS.023.006.1952	Category (b)	130529_Urban_Design_Framework_WestConnex_Proposal_Letter.pdf	29-May-13	Unknown	Y
RMS.023.006.1953	Category (b)	Proposal 29 May 2013.pdf	29-May-13	Unknown	Y
RMS.023.006.2048	Category (b)	WestConnex Urban Design Report - M5E doc received	6-Aug-13	Sophie Spinks <sspinks@hassellstudio.com>	Y
RMS.023.006.3323	Category (b)	RE: WestConnex - Financial Advisors Appointment	18-Dec-12	LESTER Candice </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LESTERCA>	Y
RMS.023.006.4168	Category (b)	Re: WestConnex graphic design and digi comms - score sheets for evaluation panel members to use	25-Jan-13	Benson Waghorn <bwaghorn@procuregroup.com.au>	Y
RMS.023.006.4169	Category (b)	ATT00001.htm	25-Jan-13	Unknown	Y
RMS.023.006.4170	Category (b)	ATT00002.htm	25-Jan-13	Unknown	Y
RMS.023.006.4171	Category (b)	ATT00003.htm	25-Jan-13	Unknown	Y
RMS.023.006.4172	Category (b)	image002.jpg	25-Jan-13	Unknown	Y
RMS.023.006.4173	Category (b)	WestConnex - Evaluation panel meeting 1 minutes - graphic design and digi comms DRAFT.docx	25-Jan-13	Unknown	Y
RMS.023.006.4176	Category (b)	WestConnex - statement of associations - digi comms graphic design.docx	25-Jan-13	Unknown	Y



## ROADS &amp; MARITIME SERVICES

## ORDER FOR PAPERS - WESTCONNEX BUSINESS CASE - 5 MARCH 2014

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Document ID	Category	Document	Date of Creation	Author	Privilege Claim Y/N?
RMS.032.133.7274	Category (b)	FW: WestConnex Proposal for Project Management Assistance	14-Jun-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=GOLDSMIP>	Y
RMS.032.133.7275	Category (b)	WestConnex Proposal for PM Assistance.docx	14-Jun-13	Unknown	Y
RMS.034.001.5157	Category (b)	RE: Communications strategy for Westconnex	7-May-13	Lance Northey <Lance.Northey@minister.nsw.gov.au>	Y
RMS.034.003.5515	Category (b)	RE: M5 East visualisation material	28-Feb-13	ALLEN Alisha Y </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ALLENA>	Y
RMS.034.003.7750	Category (b)	FW: GIPA 1213-31 WestConnex	4-Sep-13	ALLEN Alisha Y </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ALLENA>	Y
RMS.034.003.7752	Category (b)	1. Econ Eval- WestConnex (VTT 23.81) 27072012 Option 13.1 - Final v2.pdf	28-Mar-13	Unknown	Y
RMS.034.003.7765	Category (b)	2. Westconnex Evaluation Option v1 1#2.pdf	12-Mar-13	Unknown	Y
RMS.034.003.7766	Category (b)	3. Revenue and ADT Volume.pdf	12-Mar-13	Unknown	Y
RMS.034.003.7777	Category (b)	2013 02 27 Decision - partial.docx	3-Apr-13	Unknown	Y
RMS.034.003.7783	Category (b)	2013 04 05 Memo - draft decision.pdf	8-Apr-13	Unknown	Y
RMS.034.004.0494	Category (b)	RE: M5 East visualisation material	28-Feb-13	SHOPOV Vladimir R </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=SHOPOV>	Y
RMS.034.004.0910	Category (b)	Data for travel time calculator.xls	5-Jun-13	ALLEN Alisha Y </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=ALLENA>	Y

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Document ID	Category	Document	Date of Creation	Author	Privilege Claim Y/N?
RMS.034.004.0911	Category (b)	Data for travel time calculator.xls	5-Jun-13	Unknown	Y
RMS.034.004.6115	Category (b)	FW: WestConnex -	26-Jun-13	Humble-Crofts, Verity <vhumble-crofts@pb.com.au>	Y
RMS.034.005.2575	Category (b)	RE: G4314, Schofields Rd Upgrade, Stage 3. Site investigation for Landfill on South Street side.	30-May-13	ZAMBOLT Andrea	Y
RMS.034.006.2008	Category (b)	Induced Demand	22-May-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.034.006.2009	Category (b)	21DM_AM.out	22-May-13	Unknown	Y
RMS.034.006.2110	Category (b)	21WCX_AM.out	22-May-13	Unknown	Y
RMS.034.006.4737	Category (b)	RE: Figures	29-May-13	Wilson, Andrew M (Sydney) <Andrew.Wilson2@aecom.com>	Y
RMS.034.006.4740	Category (b)	ME_Screenlines_.bmp	29-May-13	Unknown	Y
RMS.034.006.6818	Category (b)	WestConnex - Actual tolled traffic volumes on M4West from ASX releases	28-May-13	WEBB Matthew </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=WEBBMJ>	Y
RMS.034.006.6819	Category (b)	img-528114143-0001.pdf	28-May-13	Unknown	Y
RMS.034.006.7139	Category (b)	Ken Willett	12-Nov-12	STEELE Oliver </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=STEELEO>	Y
RMS.034.006.7619	Category (b)	How did it go with the N7 N6 discussion?	23-May-13	Aitken, Scott <Scott.Aitken@aecom.com>	Y
RMS.034.006.7839	Category (b)	WCX - Stage Runs N7S4T5	20-May-13	Aitken, Scott <Scott.Aitken@aecom.com>	Y
RMS.034.006.7891	Category (b)	Figure 4-1 converted	28-May-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.034.006.7892	Category (b)	Figure 4.1.bmp	28-May-13	Unknown	Y
RMS.034.006.7893	Category (b)	Figure 4.1.jpg	28-May-13	Unknown	Y
RMS.034.006.7894	Category (b)	Figure 4.1.pdf	28-May-13	Unknown	Y
RMS.034.006.8102	Category (b)	FW: WestConnex - Actual tolled traffic volumes on M4West from ASX releases	28-May-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y

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Document ID	Category	Document	Date of Creation	Author	Privilege Claim Y/N?
RMS.034.006.8104	Category (b)	irng-528114143-0001.pdf	28-May-13	Unknown	Y
RMS.034.006.8105	Category (b)	M4_Volumes.xlsx	28-May-13	Unknown	Y
RMS.034.006.8121	Category (b)	FW: WestConnex Traffic - C&F/traffic	27-Mar-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.034.006.8125	Category (b)	pic21901.gif	27-Mar-13	Unknown	Y
RMS.034.006.8126	Category (b)	WCX traffic extracts for economics (270313).xlsx	27-Mar-13	Unknown	Y
RMS.034.006.8171	Category (b)	NB11553 - Coding of N8 for revised reference case runs.	10-Jun-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.034.006.8173	Category (b)	Shaftsbury_Ramps.jpg	10-Jun-13	Unknown	Y
RMS.034.006.8174	Category (b)	Wattle_Stage1_Ramps.JPG	10-Jun-13	Unknown	Y
RMS.034.007.1830	Category (b)	RE: Airport DTA modelling	19-Feb-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.034.007.1903	Category (b)	RE: Figures	28-May-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.034.007.1943	Category (b)	RE: Infrastructure Scope changes	7-Jun-13	Wilkinson, Scott G (SKM) <SWilkinson@globalskm.com>	Y
RMS.034.007.2911	Category (b)	BTS Status	17-May-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.034.007.3434	Category (b)	Memo	9-Nov-12	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y
RMS.034.007.3435	Category (b)	WestConnex Memo.doc	9-Nov-12	Unknown	Y
RMS.034.007.3693	Category (b)	RE:	24-May-13	JACOME Usha </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JACOMEU>	Y

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Document ID	Category	Document	Date of Creation	Author	Privilege Claim Y/N?
RMS.035.023.0758	Category (b)	Short Tunnel - Concord Interchange Rev B.xls	19-Jun-13	Unknown	Y
RMS.035.024.0627	Category (b)	RE: Latest Updated Estimates.	25-Jun-13	Mark Raven <mark.raven@mravennorth.com.au>	Y
RMS.035.024.0629	Category (b)	West Connex M4 Widening Church St to Concord Rd Rev E June 2013.xls	25-Jun-13	Unknown	Y
RMS.035.140.0344	Category (b)	N8 Adjustments	12-Jun-13	Chelsea.Albert@au.ey.com <Chelsea.Albert@au.ey.com>	Y
RMS.035.140.0345	Category (b)	Distance and IC Configuration_v5_2_new distances 2013.06.06.xls	7-Jun-13	Unknown	Y
RMS.035.140.0648	Category (b)	WCX AADT	21-May-13	james.lee-warner@au.ey.com <james.lee-warner@au.ey.com>	Y
RMS.035.140.0649	Category (b)	ATT00001.gif	21-May-13	Unknown	Y
RMS.035.140.0650	Category (b)	WCX AADT Summary 20 May 2013.xlsx	21-May-13	Unknown	Y
RMS.035.140.0725	Category (b)	Agenda	24-Apr-13	PEARL Josh	Y
RMS.035.141.0385	Category (b)	FW: NB11553 - WestConnex Traffic Analysis: Revised reference case traffic projections and economics.	12-Jun-13	PEARL Josh	Y
RMS.035.147.0541	Category (b)	*Confidential: RE: WestConnex: Confidential clarification question	26-Nov-12	Neal.Johnston@au.ey.com <Neal.Johnston@au.ey.com>	Y
RMS.035.156.0202	Category (b)	Re: presentation to RMc on WestConnex delivery structures [RTA-DBLEGAL.FID30273]	8-Apr-13	LITHGOW Christine </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LITHGOWC>	Y
RMS.035.156.0204	Category (b)	RE: presentation to RMc on WestConnex delivery structures [RTA-DBLEGAL.FID30273]	8-Apr-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=GOLDSMIP>	Y

## ROADS &amp; MARITIME SERVICES

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Document ID	Category	Document	Date of Creation	Author	Privilege Claim Y/N?
RMS.035.156.0206	Category (b)	RE: presentation to RMc on WestConnex delivery structures [RTA-DBLEGAL.FID30273]	8-Apr-13	LITHGOW Christine </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LITHGOWC>	Y
RMS.035.156.0220	Category (b)	RE: presentation to RMc on WestConnex delivery structures [RTA-DBLEGAL.FID30273]	8-Apr-13	LITHGOW Christine </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LITHGOWC>	Y
RMS.035.156.0224	Category (b)	RE: presentation to RMc on WestConnex delivery structures [RTA-DBLEGAL.FID30273]	8-Apr-13	GOLDSMITH Paul </O=RTA/OU=SYDNEY/CN=RECIPIENTS/CN=GOLDSMIP>	Y
RMS.035.156.0868	Category (b)	Controlling interest [RTA-DBLEGAL.FID29693]	10-May-13	LITHGOW Christine </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=LITHGOWC>	Y
RMS.035.158.0302	Category (b)	RE: Information for Tomorrow's Meeting	7-Jun-13	Dougal McOmish (MacCap) <Dougal.McOmish@macquarie.com>	Y
RMS.035.158.0744	Category (b)	RE: Data points	18-Jun-13	PEARL Josh </O=RTA/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=PEARLJ>	Y
RMS.035.166.0543	Category (b)	FW: Re: SMPO Escalation Rate Assumptions	27-May-13	WEBB Matthew	Y
RMS.035.166.0546	Category (b)	December 2012 RPI publication paper.pdf	15-Apr-13	Unknown	Y
RMS.035.166.0550	Category (b)	March 2013 RCI publication paper.pdf	20-Mar-13	Unknown	Y
RMS.035.166.0713	Category (b)	RE: WestConnex - Financing Strategies	3-Jun-13	WEBB Matthew	Y
RMS.035.191.0399	Category (b)	WestConnex NW & NE Sectors_Variation No 1.doc	5-Dec-12	Unknown	Y
RMS.500.001.0193	Category (b)	Tax invoice 22025487	31-May-13	Ashurst Australia	Y

Case Name	Case No.	Date	Outcome
Case 1	1234	2023-01-15	Settled
Case 2	5678	2023-02-20	Dismissed
Case 3	9012	2023-03-10	Settled
Case 4	3456	2023-04-05	Dismissed
Case 5	7890	2023-05-18	Settled
Case 6	2345	2023-06-01	Dismissed
Case 7	6789	2023-07-12	Settled
Case 8	1011	2023-08-03	Dismissed
Case 9	4567	2023-09-14	Settled
Case 10	8901	2023-10-05	Dismissed
Case 11	2345	2023-11-16	Settled
Case 12	6789	2023-12-07	Dismissed
Case 13	1011	2024-01-18	Settled
Case 14	4567	2024-02-09	Dismissed
Case 15	8901	2024-03-20	Settled
Case 16	2345	2024-04-11	Dismissed
Case 17	6789	2024-05-22	Settled
Case 18	1011	2024-06-13	Dismissed
Case 19	4567	2024-07-24	Settled
Case 20	8901	2024-08-15	Dismissed

## David Blunt

---

**From:** Paul Miller <Paul.Miller@dpc.nsw.gov.au>  
**Sent:** Thursday, 7 August 2014 4:35 PM  
**To:** David Blunt  
**Cc:** Rachel McCallum; Karen Smith  
**Subject:** Fwd: Supplementary objection to the claim for privilege  
**Attachments:** Appendix A with supplementary documents challenged by Dr Faruqi.pdf; ATT00001.htm

Hi David

Please see below the further submission from RMS for the legal arbiter's consideration, as discussed.

Kind regards  
Paul

Sent from my iPhone

Begin forwarded message:

**From:** "RENKO Jenny" <Jenny.Renko@westconnex.nsw.gov.au>  
**To:** "Karen Smith" <Karen.Smith@dpc.nsw.gov.au>, "Rachel McCallum" <Rachel.McCallum@dpc.nsw.gov.au>, "Paul Miller" <Paul.Miller@dpc.nsw.gov.au>  
**Cc:** "LITHGOW Christine" <Christine.LITHGOW@rms.nsw.gov.au>, "SIRIANNI Luisa" <Luisa.SIRIANNI@rms.nsw.gov.au>  
**Subject:** Supplementary objection to the claim for privilege

Dear Paul

I refer to your email dated 6 August 2014 informing Roads and Maritime Services (RMS) of a further objection made by Dr Faruqi, to RMS' claim for privilege.

RMS presses its claim for privilege over the 28 additional documents identified by Dr Faruqi. RMS seeks to rely on its previous submissions in support of its claim for privilege.

I have attached an updated Appendix A which identifies the additional 28 documents along with RMS' response in respect of each of those documents. This document is intended to be read along with the original Appendix A to our submissions dated 21 July 2014.

Regards  
Jenny Renko  
Legal Counsel - WestConnex Delivery Authority  
T 02 8588 5392 M 0414 713 819  
[www.westconnex.nsw.gov.au](http://www.westconnex.nsw.gov.au) <<http://www.westconnex.nsw.gov.au/>>

WestConnex Delivery Authority  
Level 18 101 Miller Street North Sydney NSW 2000

[Logo]

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Appendix A – Updated 6 August 2014 to incorporate supplementary “attachments” challenged by Dr Faruqi

**KEY:** White – Documents subject to original objection where RMS maintains its claim for Privilege  
 Green – Documents subject to original objection where RMS does not press its claim that the documents should not be released  
 Yellow – Documents subject to the supplementary objection by Dr Faruqi

	Document ID	Document	RMS Response	Action
1	RMS.002.001.4074	5303103 1 DBMOTORWAYS WestConnex HFN Federal funding. DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
2	RMS.002.005.0576	N10- Westconnex- including M4 Widening_M5 Duplicatio- 7 November 2013.doc	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
3	RMS.002.005.0909	131011_N10- BE13 Motorways- Westconnex- including M4 Widening_M5 Duplication -10 October 2013.doc	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
4	RMS.003.001.1684	West Conn ex Focus Group and Roundtable Research Request for Quotation [RTA-DBMOTORWAYS. FID16760]	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
	RMS.003.001.1685	WE301 Westconnex proposal vF (29.01.13).pdf	<i>Attachment to RMS.003.001.1684</i>	Not release RMS maintains its claim for privilege over this document and relies on its previous submissions.
5	RMS.003.001.6940	WestConnex stats	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
	RMS.003.001.6941	4feb_11feb-hys.pdf	<i>Attachment to RMS.003.001.6940</i>	Not release RMS maintains its claim for privilege over this document and relies on its previous

	Document ID	Document	RMS Response	Action
				<i>submissions.</i>
6	RMS.004.004.2927	WestConnex- Key Risks (project wide- not just comms focussed)	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
	RMS.004.004.2928	Document1.doc	<i>Attachment to RMS.004.004.2927</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
7	RMS.004.004.5339	Approved House File Note for review: collapse of toll road companies [RTA-DBMOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
8	RMS.004.004.5340	5300851_2_DBMOTORWATS_RoadsGeneral - Queensland toll road operators in administration 20 February 2013.doc.DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
9	RMS.004.004.5910	Draft WestConnex Federal funding HFN [RTADBMOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
10	RMS.004.004.5911	5303103 1 DBMOTORWAYS WestConnex HFN Federal funding. DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
11	RMS.004.004.6471	Revised WestConnex Federal funding HFN [RTADBMOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
12	RMS.004.004.6473	5303103_1_DBMOTORWAYS_WestConnex HFN Federal funding amended. DOC	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
13	RMS.009.002.5038	FW:Westcon Community Action Groups Update No 16- Release the WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
14	RMS.009.002.5042	WestConnex business case draft email to MLCs.docx	RMS maintains its claim for privilege but agrees to release this document only. This release does not	Release

	Document ID	Document	RMS Response	Action
			constitute a waiver of the privilege.	
15	RMS.010.002.0949	RTA economic analysis manual	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.010.002.0951	SYDNP4912_13022013_081534PM.pdf	Attachment to RMS.010.002.0949	Not release RMS maintains its claim for privilege over this document and relies on its previous submissions.
16	RMS.012.001.4132	RE: WestConnex- Procurement Options Assessment Matrix	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
17	RMS.012.001.4136	WestConnex- Budget Inputs 2013/14-16/17	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
18	RMS.013.001.0189 .	FW: Tolling Strategy Paper- background info discussion	RMS maintains that this document includes specific tolling strategy information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
19	RMS.013.001.0190	WestConnex Tolling paper outlineV2.docx	RMS maintains that this document includes specific tolling strategy information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
20	RMS.013.002.6092	AADTs	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
21	RMS.013.003.8007	RE: Operational Modelling for WestConnex	RMS maintains that this document includes specific tolling scenario information which, if released, will	Not release

	Document ID	Document	RMS Response	Action
			negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	
22	RMS.013.005.6491	WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
23	RMS.014.004.1351	SMPO Benchmarking Operations and Maintenance Cost Comparison 2012 03 06DRAFT- LATEST 11 March.pdf	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
24	RMS.014.004.1413 1415, 1417	Traffic Information (sent to TNSW).pdf	RMS maintains that this document includes specific financial modelling information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
25	RMS.014.006.7551	RE: Fw: NB11553-WestConnex Traffic Analysis: Final Stream 1 report	RMS considers that this document contains username and login and so should not be released	Not release
26	RMS.014.006.8256	FW: Centenary Drive modelling- Options Performance results	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
27	RMS.014.006.8257	performance.xls	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
28	RMS.014.007.3409	NB11553- WestConnex Traffic Analysis: SP update #2	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.014.007.3412	WestConnex Exp Design V2.docx	Attachment to RMS.014.007.3409	Not release RMS maintains its claim for privilege

	Document ID	Document	RMS Response	Action
				<i>over this document and relies on its previous submissions.</i>
29	RMS.014.007.3468	RE: Traffic Analysis for M4MM	RMS considers that this document contains commercially sensitive information relating specifically to the M4 Managed Motorway and not the WestConnex Project and should not be released through this Order for Papers	Not release
30	RMS.014.007.4163	NB115533- WestConnex Traffic Analysis: SP update	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.014.007.4165	NB11553 PureProfile Engagement.pdf	<i>Attachment to RMS.014.007.4163</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
31	RMS.014.007.3920	RE: Traffic Volume information	RMS considers that this document contains commercially sensitive information relating specifically to the M4 Managed Motorway and not the WestConnex Project and should not be released through this Order for Papers	Not release
32	RMS.014.007.6782	RE: WestConnex modelling issues ...	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
33	RMS.014.007.8680	RE: WestConnex	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
34	RMS.014.010.3150	RE: Operational Modelling for WestConnex	RMS maintains that this document includes specific tolling scenario information which, if released, will	Not release

	Document ID	Document	RMS Response	Action
			negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	
35	RMS.014.010.3152	Fw: Operational Modelling for WestConnex	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
36	RMS.014.010.3850	RE: Position Paper- for discussion at PCG tomorrow	RMS maintains that this document includes specific tolling effects information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
37	RMS.014.010.4271	RE: Road network assumptions for modelling	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
38	RMS.014.010.4651	RE: Traffic Analysis for M4MM	RMS considers that this document relates to the M4 Managed Motorway and not the WestConnex Project so the commercially sensitive information contained in it should not be released through this Order for Papers	Not release
39	RMS 014.010.7244	RE: Questions on Notice [RTA-DBMOTORWAY.FID16475]	RMS maintains that House Folder Notes and responses to Questions on Notice are subject to parliamentary privilege	Not release
40	RMS.014.010.8039	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
41	RMS.014.010.8068	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release

	Document ID	Document	RMS Response	Action
42	RMS.014.010.8143	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
43	RMS.014.010.8158	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
44	RMS.014.010.8163	RE: Data from RMS Modelling	RMS considers that this document contains commercially sensitive information relating specifically to the Sydney Airport so should not be released through this Order for Papers	Not release
45	RMS.014.012.6299	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
46	RMS.014.012.6300	RE: Ministerial note Call for papers on the WestConnex Business Case	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
47	RMS.014.012.6306	Ministerial note Call for papers on the WestConnex Business Case	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
48	RMS.014.012.6307	RE: MINISTERIAL NOTE Call for papers on the WestConnex Business Case (01)-mg.docx	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
49	RMS.014.013.1007	RE: WestConnex- Information request- Department of Transport (Part 1)	RMS considers that this document contains commercially sensitive information of a third party so should not be released	Not release
50	RMS.014.013.1527	FW: HPV on NSW roads - supporting material	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
51	RMS.014.013.4161	FW: NB11553- WestConnex Traffic Analysis: Forecast Billings	RMS considers that this document contains confidential information of a third party so should not be released	Not release
52	RMS.014.013.5239	RE: Tunnel Estimate and Peer Review	RMS maintains its claim for privilege but agrees to release this document only. This release does not	Release

	Document ID	Document	RMS Response	Action
			constitute a waiver of the privilege	
53	RMS.014.013.5299	RE: WestConnex Peer Review	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
54	RMS.014.013.7203	FW: Change request for WestConnex- PD Review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
55	RMS.016.001.3832	RE: WCX- Tolling Strategy Meeting Note	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
56	RMS.016.010.0764	WestConnex revitalisation- Transport Planning Final Draft	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
57	RMS.016.010.0765	2014 0227 Integrated Transport Study final draft v3.pdf	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
58	RMS.016.024.4096	FW: NB11553- WestConnex Traffic modelling- next round clarifications	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
59	RMS.016.024.7407	RE: Wcx- Opex & Lifecycle Input Template Update	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
60	RMS.016.024.8268	FW: WestConnex and Commonwealth Government Funding- Letter from Minister Albanese to Minister Gay [SEC=UNCLASSIFIED] [RTA-	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release



	Document ID	Document	RMS Response	Action
		DBAMOTORWAYS.FID14818]		
	RMS.016.024.8270	tpl323633143.pdf		Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
61	RMS.016.027.8229	Release of Business Case extracts in Dataroom.docx	RMS maintains that this is a communication seeking legal advice and is subject to legal professional privilege	Not release
62	RMS.016.029.1814	RE: Wcx- Opex & Lifecycle Input template Update	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
63	RMS.017.015.0022	FW: Notification: Usha Jacmoe has sent you files	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
64	RMS.017.016.1972	2012 Trucks by origin (HCV LCV)- from Usha.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.017.016.1968	RE: Fact Checking	<i>Email to RMS.017.016.1972</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
65	RMS.017.018.5468	RE: AspireSydney M4 East- affordable alternative to WestConnex	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
66	RMS.017.019.4146	FW: WestConnex- Network assumptions v2	RMS maintains its claim for privilege but agrees to release this document only. This release does not	Release

	Document ID	Document	RMS Response	Action
			constitute a waiver of the privilege	
67	RMS.017.019.4294	M4 toll plaza info	RMS maintains that this document includes specific traffic information which relates to tolling strategy which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
	RMS.017.019.4295	M4 Motorway Toll Plaza Volumes.xls	<i>Attachment to RMS.017.019.4294</i>	Not release RMS maintains its claim for privilege over this document and relies on its previous submissions.
68	RMS.017.019.4335	NB11553- WestConnex Traffic Analysis: Concept Designs for Opt 13	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
69	RMS.017.019.4479	RE: C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
70	RMS.017.019.4955	RE: NB11553- WestConnex Traffic Analysis: Concept Designs for Opt 13	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
71	RMS.017.019.4964	RE: NB11553- WestConnex Traffic Analysis: HTS query to help identify NHB trips missing from STM HB Tours	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.017.019.4970	HTS tours example1.xlsx	<i>Attachment to RMS.017.019.4964</i>	Not release RMS maintains its claim for privilege over this document and relies on its previous submissions.

	Document ID	Document	RMS Response	Action
	RMS.017.019.5041	HTS tours example2.xlsx	Attachment to RMS.017.019.4964	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
	RMS.017.019.5215	HTS tours example3.xlsx	Attachment to RMS.017.019.4964	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
72	RMS.017.019.5434	RE: Notification: Usha Jacome has sent you files	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
73	RMS.017.019.6026	Tolling Assumptions	RMS maintains that this document includes specific tolling information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
74	RMS.017.021.0430	RE: NB11553- WestConnex Traffic Analysis: Final Stream 1 report	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
75	RMS.017.021.0712	FW: C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
76	RMS.017.021.1229	RE: A background paper on toll roads and forecasts	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
77	RMS.017.021.1552	RE: NB11553- WestConnex Traffic Analysis:	RMS maintains its claim for privilege but agrees to	Release

	Document ID	Document	RMS Response	Action
		Discussion topics for tomorrow.	release this document only. This release does not constitute a waiver of the privilege.	
78	RMS.017.021.1556	RE: NB11553- WestConnex Traffic Analysis: Discussion topics for tomorrow.	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
79	RMS.017.021.1563	RE: NB11553- WestConnex Traffic Analysis: LCV Proportion	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money.	Not release
80	RMS.017.021.1567	RE: NB11553- WestConnex Traffic Analysis: LCV Proportion	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money.	Not release
81	RMS.017.021.1570	RE: NB11553- WestConnex Traffic Analysis: LCV Proportion	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money.	Not release
82	RMS.017.021.1639	RE: NB11553- WestConnex Traffic Analysis: Toll charges for Airport Lite (s7)mwhat	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money.	Not release
83	RMS.017.021.1641	RE: NB11553- WestConnex Traffic Analysis: Weekly progress	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.	Release
84	RMS.017.021.1834	RE: WestConnex –Information request- Department of Transport (Part 1)	RMS considers that this document contains confidential information of a third party so should not be released. RMS maintains that the document includes	Not release

	Document ID	Document	RMS Response	Action
			information that was used in the development of the business case which if released will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	
	RMS.017.021.1840	Re: WestConnex – Information Request – Department of Transport (Part 1)	<i>Attachment to RMS.017.021.1834</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
85	RMS.017.021.1841	RE: WestConnex –Information request- Department of Transport (Part 1)	This is the second page of the document RMS.017.021.1834 above. RMS considers that this document contains commercially sensitive information of a third party so should not be released  RMS maintains that the document includes information that was used in the development of the business case which if released will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
86	RMS.017.021.1843	RE: West Conn ex- Information request- Department of Transport (Part 1)	This is the fourth page of the document RMS.017.021.1834 above. RMS considers that this document contains commercially sensitive information of a third party so should not be released  RMS maintains that the document includes information that was used in the development of the business case which if released will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release

	Document ID	Document	RMS Response	Action
87	RMS.017.021.1847	RE: WestConnex- Network assumptions v2	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
88	RMS.017.021.1853	RE: WestConnex- reference case scope for Sunday run	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
89	RMS.017.021.2834	RE: WestConnex-- Parramatta Road capacity	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
90	RMS.017.021.3933	RE: Data breakdown for HCV & LCVs Traffic projections	RMS maintains that this document includes specific traffic projections information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
91	RMS.017.022.2987	WestConnex Traffic- C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
92	RMS.017.022.2992	WCX traffic extracts for economics (270313).xlsx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
93	RMS.017.022.3564	FW: Traffic modelling- next round	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
94	RMS.017.022.3911	RE: Total WestConnex Workforce	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
95	RMS.017.022.4024	RE: WestConnex- quality assurance review of Mac Bank model	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release

	Document ID	Document	RMS Response	Action
96	RMS.017.022.4250	WestConnex- quality assurance review of Mac Bank model	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
97	RMS.017.022.4357	WestConnex Traffic- C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
98	RMS.017.022.4482	Proposed Motorway	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
99	RMS.017.024.8480	5291337_1_DBMOTORWAYS_Briefing Note-Steering Committee 4 - Item C&CE Dec2012 A3607051_1.DOC	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
100	RMS.017.025.2306	Approved WestConnex HFN [RTA-DBMOTORWAYS.FID16473]	RMS maintains that House Folder Notes are subject to parliamentary privilege	Not release
	RMS.017.025.2307	5297070_1_DBMOTORWAYS_130130_HFN_WestConnex.doc.DOC	Attachment to RMS.017.025.2306	Not release RMS maintains its claim for privilege over this document and relies on its previous submissions.
101	RMS.018.001.6287	Heavy Vehicle Design Parameters for WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
102	RMS.019.001.3231	Comparison of Contractors Multipliers.xlsx	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party and its release would impact the ongoing commercial negotiations with contractors for the WestConnex Project	Not release
	RMS.019.001.3229	FW: WestConnex Cost Briefing	Email to RMS.019.001.3231	Not release RMS maintains its

	Document ID	Document	RMS Response	Action
				<i>claim for privilege over this document and relies on its previous submissions.</i>
103	RMS.019.001.3235	RE: WestConnex Cost Briefing	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party and its release would impact the ongoing commercial negotiations with contractors for the WestConnex Project	Not release
	RMS.019.001.3237	Comparison of Contractors Multipliers.xlsx	<i>Attachment to RMS.019.001.3235</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
104	RMS.022.001.1656	Package and Models, WestConnex	RMS maintains that this document contains specific financial and staging information and its release will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
105	RMS.022.001.1657	Assumptions and Package Model Selection criteria.docx	RMS maintains that this document contains specific financial and staging information and its release will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
106	RMS.022.003.1471	RE: WestConnex- financing papers from Mac Bank	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
107	RMS.022.003.2405	FW: WCX economics methodology & data template	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release



	Document ID	Document	RMS Response	Action
108	RMS.022.003.3336	Updated: Commercial & Finance workstream-business case and key milestones	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
109	RMS.022.003.3345	RE: WestConnex Steering Committee Update-26th February 2013 (FINAL).PDF	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
110	RMS.022.004.3361	RE: WestConnex Contract	Document ID RMS.022.004.3361 does not exist with the title "RE: WestConnex Contract" referred to in Dr Faruqi's letter. Document ID RMS.022.004.3361 is listed twice in Dr Faruqi's letter with different titles.  In relation to the actual Document ID RMS.022.004.3361, RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
111	RMS.022.003.3364	RE: WC Advisory Group follow up	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
112	RMS.022.003.3366	WCX Economic Advisory Group (meeting minutes #1).docx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
113	RMS.022.004.0268	NTER   Treasury discussion	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
114	RMS.022.004.0524	Multimodal Modelling	RMS maintains the document contains commercially sensitive pricing information obtained from contractors	Not release
115	RMS.022.004.1658	RE: WestConnex- traffic multi modal analysis	RMS maintains the document contains commercially sensitive pricing information obtained from contractors and traffic modelling information its release will negatively impact the Government's	Not release

	Document ID	Document	RMS Response	Action
			ability to maintain its competitive and commercial position and obtain value for money	
116	RMS.022.004.1659	RE: WestConnex- traffic multi modal analysis	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
117	RMS.022.004.1725	FW: NB11553- WestConnex Traffic Analysis: Weekly progress	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
118	RMS.022.004.2198	RE: Draft Tolling Paper	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
119	RMS.022.004.3015	RE: WestConnex Tolling Costs	RMS maintains that this document includes specific tolling scenario information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
120	RMS.022.004.3361	RE: West Connex Tolling Costs	Document ID RMS.022.004.3361 does not exist with the title "RE: WestConnex Contract" referred to in Dr Faruqi's letter. Document ID RMS.022.004.3361 is listed twice in Dr Faruqi's letter with different titles.  In relation to the actual Document ID RMS.022.004.3361 RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
121	RMS.022.005.4746	WestConnex- further feedback to Financial Advisors	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party	Not release
122	RMS.022.005.4747	RE: RFP- WestConnex Financing Scoping Study	RMS maintains that this document contains specific confidential and commercially sensitive information from a third party	Not release

	Document ID	Document	RMS Response	Action
123	RMS.022.005.7224	WestConnex- Financial Advisors traffic.xlsx	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
	RMS.022.005.7223	RE: Briefing on Monday	<i>Email to RMS.022.005.7224</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
124	RMS.022.005.7493	RE: WestConnex- CPI, AWE and capital cost escalation forecasts	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
125	RMS.022.005.7495	WestConnex- Value capture work for NSW Treasury	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
126	RMS.022.005.8475	WestConnex- Business case Development costs- expense or capitalise?	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
127	RMS.023.001.0656	RE: Leighton Contractors AECOM Report NPR-RPT-0000-GE001A, WestConnex Business Case	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
128	RMS.023.001.0721	RE: Top of Mind summarised	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
129	RMS.023.001.0722	Appendix A Top of Mind SS 130428CS.DOCX	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
130	RMS.023.001.6492	130423 WestConnex_Hawthorne Canal.doc	RMS maintains that House Folder Notes are	Not release

	Document ID	Document	RMS Response	Action
			subject to parliamentary privilege	
	RMS.023.001.6490	RE: Hawthorne Canal holding statement	<i>Email to RMS.023.001.6492</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
131	RMS.023.001.6579	FW: MS East economic analysis	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
132	RMS.023.001.6789	Strategic Environmental assessment- draft brief	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.023.001.6790	Brief – Strategic Environmental Assessment – (1).doc	<i>Attachment to RMS.023.001.6789</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
133	RMS.023.001.8005	FW: WestConnex- Western Portal- split connections	RMS maintains that this document contains specific information in relation to a package of work that is currently under procurement and its release would affect the competitive tendering process.	Not release
134	RMS.023.001.8007	Short Long Tunnel Review.doc	RMS maintains that this document contains specific information in relation to a package of work that is currently that is currently under procurement and its release would affect the competitive tendering process	Not release
135	RMS.023.001.8008	Splitting the Western Portals.pptx	RMS maintains that this document contains specific information in relation to a package of work that is	Not release

	Document ID	Document	RMS Response	Action
			currently that is currently under procurement and its release would affect the competitive tendering process	
136	RMS.023.004.5978	RE: Steering Committee papers	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
137	RMS.023.004.6104	FW: Scan Data from FX-BSC3AO	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
138	RMS.023.004.6112	Multi-Criteria Analysis.doc	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
	RMS.023.004.6107	Brief for Urban design framework – slot – Taverers Hill to Concord.doc	<i>Attachment to same email as RMS.023.004.6112</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
139	RMS.028.016.5492	Slidepack for federal govt- WestConnex	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
140	RMS.028.016.5493	WestConnex Aug12 v 3.pptx	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release

	Document ID	Document	RMS Response	Action
141	RMS.028.016.7537	FW: Slidepack for federal govt- WestConnex	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
142	RMS.028.016.7538	WestConnex Aug12 v3.pptx	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
143	RMS.032.001.3912	RE: WestConnex travel time savings	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
144	RMS.032.001.3913	RE: WestConnex travel time savings	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
145	RMS.032.001.3914	WestConnex travel time savings	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
146	RMS.032.001.3915	WestConnex: Traffic Data request: Mapping M4 and M5 Users	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
147	RMS.032.014.5692	FW: Traffic Update 26 April2012 [RTA-DBMOTORWAYS.FID14818]	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release

	Document ID	Document	RMS Response	Action
148	RMS.032.014.5697	WestConnex Traffic Analysis Summary 26 April 2012.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
149	RMS.032.021.1779	Fwd: WestConnex	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
150	RMS.032.021.3519	RE: WestConnex business case review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
151	RMS.034.003.7752	1. Econ Eva I- WestConnex (VTT 23.81) 27072012 Option 13.1- Final v2.pdf	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
	RMS.034.003.7750	FW: GIPA 1213-31 WestConnex	<i>Email to RMS.034.003.7752, RMS.034.003.7765 and RMS.034.003.7766</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
	RMS.034.003.7777	2013 02 27 Decision – partial.docx	<i>Attachment to RMS.034.003.7750</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
152	RMS.034.003.7765	2. WestConnex Evaluation Option v11#2.pdf	RMS maintains that this document contains sensitive financial information which, if released, will	Not release

	Document ID	Document	RMS Response	Action
			detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	
153	RMS.034.003.7766	3. Revenue and ADT Volume. pdf	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
154	RMS.034.003.7783	2013 04 OS Memo- draft decision.pdf	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
155	RMS.034.004.0494	RE: M5 East visualisation material	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
156	RMS.034.004.0910	Data for travel time calculator.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
157	RMS.034.004.0911	Data for travel time calculator.xls	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
158	RMS.034.004.66115	FW: WestConnex-	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege.  Note this document was incorrectly transcribed by Dr Faruqi. See correct number which matches title.	Release
159	RMS.034.006.2008	Induced Demand	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release



	Document ID	Document	RMS Response	Action
160	RMS.034.006.6818	WestConnex- Actual tolled traffic volumes on M4West from ASX releases	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
	RMS.034.006.6819	img-528114143-0001.pdf	<i>Attachment to RMS.034.006.6818</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
161	RMS.034.006.8102	FW: WestConnex- Actual tolled traffic volumes on M4West from ASX releases	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
	RMS.034.006.8104	img-528114143-0001.pdf	<i>Attachment to RMS.034.006.8102</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
162	RMS.034.006.8105	M4 Volumes.xlsx	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
163	RMS.034.006.8121	FW: WestConnex traffic- C&F/traffic	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release

	Document ID	Document	RMS Response	Action
164	RMS.034.006.8126	WCX traffic extracts for economics (270313).xlsx	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
165	RMS.034.007.3791	RE:	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
166	RMS.034.007.3888	RE: Figures from SKM model	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
167	RMS.034.007.4629	RE: WestConnex: Induced Demand Assessment	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
168	RMS.034.007.8203	RE:	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
169	RMS.034.008.1297	WestConnex Business Case- Confidential- Large 30Mb file	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
170	RMS.035.023.0754	FW: Latest Updated Estimates.	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
	RMS.035.023.0758	Short Tunnel – Concord Interchange Rev B.xls	<i>Attachment to RMS.035.023.0754</i>	Not release <i>RMS maintains its claim for privilege</i>

	Document ID	Document	RMS Response	Action
				<i>over this document and relies on its previous submissions.</i>
171	RMS.035.166.0543	FW:Re: SMPO Escalation Rate Assumptions	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
	RMS.035.166.0546	December 2012 RPI publication paper.pdf	<i>Attachment to RMS.035.166.0543</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
	RMS.035.166.0550	March 2013 RCI publication paper.pdf	<i>Attachment to RMS.035.166.0543</i>	Not release <i>RMS maintains its claim for privilege over this document and relies on its previous submissions.</i>
172	RMS.035.140.0650	WCX AADT Summary 20 May 2013.xlsx	RMS maintains that this document includes specific traffic information which, if released, will negatively impact the Government's ability to maintain its competitive and commercial position and obtain value for money	Not release
	RMS.035.140.0648	WCX AADT	<i>Email to RMS.035.140.0650</i>	Not release
173	RMS.035.141.0385	FW: NB11553- WestConnex Traffic Analysis: revised reference case traffic projections and	RMS maintains that this document includes specific traffic information which, if released, will negatively	Not release

	Document ID	Document	RMS Response	Action
		economics.	impact the Government's ability to maintain its competitive and commercial position and obtain value for money	
174	RMS.035.147.0541	*Confidential: RE: WestConnex :Confidential clarification question	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
175	RMS.035.166.0713	RE: WestConnex- Financing strategies	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
176	RMS.509.002.0020	Briefing for Chief Executive- Engagement of KPMG and Allen & Overy LLP to Carry out WestConnex Business Case Peer review and Assist Sydney Motorways Project Office SMPO- Complete the Business Case in Accordance with the revised Delivery Plan	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release
177	RMS.502.004.0036	Off Balance Sheet Financing	RMS maintains that this document contains sensitive financial information which, if released, will detrimentally impact upon the Government's ability to enter into financing arrangements to achieve optimal risk outcomes for the State. The release of this information will impair the Government's ability to achieve value for money	Not release
178	RMS.509.002.0028	WestConnex Peer review	RMS maintains its claim for privilege but agrees to release this document only. This release does not constitute a waiver of the privilege	Release